

## Kenya 'Olkaria IV' Case Study Report: Human Rights Analysis of the Resettlement Process

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Jeanette Schade\*

# Kenya 'Olkaria IV' Case Study Report

## Human Rights Analysis of the Resettlement Process

This paper is based on research conducted in the context of the project 'ClimAccount - Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and their possible Effects on Migration' funded by the Austrian Climate and Energy Fund and implemented under the lead of the Ludwig Boltzmann Institute for Human Rights (Vienna) in cooperation with Bielefeld University and the Wuppertal Institute for Climate, Environment and Energy between March 2014 and June 2016.

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## Editorial

In 2010 the Center on Migration, Citizenship and Development of Bielefeld University started a new conference series on “Environmental Degradation, Conflict and Forced Migration” in cooperation with the European Science Foundation and the University’s Center for Interdisciplinary Research. The new series gave opportunity to conference participants to share their research with a broader audience. The engagement of the editors in the COST Action IS 1101 on Climate Change and Migration created additional opportunities to facilitate scientific exchange and cooperation on matters environmentally induced migration from various perspectives. Amongst others this included approaching it from a human rights angle, from an adaptation to climate change perspective, or to look at it as a state-led response including planned relocation.

The scientific exchange culminated in various activities and projects including joint publications with other experts in the field such as the conference proceedings of the ESF-Bielefeld University conference series, innovative consultation processes on planned relocation in the context of climate change and climate policies, and new research projects such as “Migration, Environment and Climate Change: Evidence for Policy” (MECLEP, [www.uni-bielefeld.de/\(en\)/tdrc/ag\\_comcad/research/MECLEP.html](http://www.uni-bielefeld.de/(en)/tdrc/ag_comcad/research/MECLEP.html)) and ClimAccount on the human rights accountability of the EU for climate policies in third countries ([www.uni-bielefeld.de/\(en\)/tdrc/ag\\_comcad/research/ClimAccount.html](http://www.uni-bielefeld.de/(en)/tdrc/ag_comcad/research/ClimAccount.html)). The editors take the opportunity to present some of the research outcomes within the COMCAD working paper series on environmental degradation and migration.

Bielefeld, July 2016

Jeanette Schade and Thomas Faist

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## Abstract

This case study considers the involuntary resettlement of about 950 people in August 2014 as part of the Olkaria IV project. Olkaria IV is a 140 MW geothermal power plant in Kenya, constructed with the financial support of European and other international finance institutions (IFIs). The Olkaria area by now has four plants and another four are being planned. In addition to Olkaria, geothermal exploration has been undertaken elsewhere in the Rift Valley. All Kenyan geothermal power plants, in Olkaria and elsewhere, are already or are expected to be registered as Clean Development Mechanism (CDM) projects. Geothermal power also accommodates international donors' and development banks' official commitments to support climate mitigation. In this context the Olkaria IV resettlement may serve as a showcase of the socioeconomic challenges and human rights infringements project affected people are exposed to. The case study discusses the alleged human rights violations and disentangles the complex web of responsibilities. It provides for local background information, discusses the national and international legal frameworks, and puts its focus on the extraterritorial obligations of the financiers, in particular of the European Investment Bank and its shareholders: the EU and the EU member states. Emphasis of the human rights analysis rests on the situation of procedural rights, which arguably contributed to the infringement of substantive rights.

## Acknowledgements

The analysis of this report draws from the various Work Package reports generated by the ClimAccount project, in particular WP report 1.1 on extraterritorial state obligations by Jane Hofbauer and WP report 1.3 on EU climate policy by Wolfgang Obergassel and his colleagues. The author is extremely grateful for the helpful comments of Jane Hofbauer, Florian Mersmann, and Margit Ammer, as well as for Monika Mayrhofer and her coordination of this challenging interdisciplinary research project. The author expresses her thanks to all those who shared their time and knowledge by agreeing to engage in interviews and focus group discussions.

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## Acronyms and Abbreviations

| <b>Acronym</b> | <b>Meaning</b>                                                                  |
|----------------|---------------------------------------------------------------------------------|
| AAP            | Africa Adaptation Programme                                                     |
| ACCNNR         | African Convention on the Conservation of Nature and Natural Resources          |
| ACHPR          | African Commission on Human and Peoples' Rights                                 |
| ACtHPR         | African Court for Human and Peoples' Rights                                     |
| ACP            | African-Caribbean-Pacific                                                       |
| AFC            | Agricultural Finance Corporation                                                |
| AFD            | Agence Française de Développement                                               |
| AGIL           | Africa Geothermal International Limited                                         |
| ARGeo          | African Rift Geothermal                                                         |
| AU             | African Union                                                                   |
| BGR            | Bundesanstalt für Geowissenschaften und Rohstoffe                               |
| BPGDevbED      | Basic Principles and Guidelines on Development-Based Evictions and Displacement |
| CAC            | Community Advisory Council                                                      |
| CCPR           | Covenant on Civil and Political Rights                                          |
| CDM            | Clean Development Mechanism                                                     |
| CDKN           | Climate and Development Knowledge Network                                       |
| CEMIRIDE       | Centre for Minority Rights Development                                          |
| CER            | Certified Emission Reduction                                                    |
| CESCR          | Committee on Economic, Social and Cultural Rights                               |
| CFR            | Charter of Fundamental Rights                                                   |
| CFS            | Committee on World Food Security                                                |
| CIF            | Climate Investment Fund                                                         |
| CoE            | Council of Elders                                                               |
| CPP            | Consultation and Public Participation                                           |
| DNA            | Designated National Authority                                                   |
| DOE            | Designated Operational Entity                                                   |
| ECtHR          | European Court for Human Rights                                                 |
| EIAA           | Environmental Impact Assessment and Audit                                       |

|          |                                                   |
|----------|---------------------------------------------------|
| EIB      | European Investment Bank                          |
| EIB-CM   | European Investment Bank Complaint Mechanism      |
| EO       | European Ombudsman                                |
| EP       | European Parliament                               |
| ERP Bill | Eviction and Resettlement Procedures Bill         |
| ESIA     | Environmental and Social Impact Assessment        |
| ESPS     | Environmental and Social Principles and Standards |
| ETS      | Emission Trading System                           |
| EU       | European Union                                    |
| EUR      | Euro (currency of the Euro-zone)                  |
| FAO      | Food and Agriculture Organization                 |
| FGD      | Focus Group Discussion                            |
| FPIC     | Free, Prior, and Informed Consent                 |
| GC       | General Comment                                   |
| GCHM     | Grievance and Complaints Handling Mechanism       |
| GDC      | Geothermal Development Company                    |
| GEF      | Global Environmental Facility                     |
| GPBHR    | Guiding Principles for Business and Human Rights  |
| HRC      | Human Rights Council                              |
| IACHR    | Inter-American Commission of Human Rights         |
| IACtHR   | Inter-American Court of Human Rights              |
| IAEA     | International Atomic Energy Agency                |
| ICEIDA   | Icelandic International Development Agency        |
| IEP      | Innovation Empowerment Programme                  |
| IFI      | International Finance Institution                 |
| ILO      | International Labour Organization                 |
| IPP      | Independent Power Producer                        |
| IPPF     | Indigenous Peoples' Planning Framework            |
| JICA     | Japan International Cooperation Agency            |
| KEEP     | Kenya Electricity Expansion Project               |
| KenGen   | Kenya Electricity Generating Company              |
| KfW      | Kreditanstalt für Wiederaufbau                    |
| KIGI     | Key Informant Group Interview                     |
| KNCHR    | Kenya National Commission on Human Rights         |

|                   |                                                                                                                                      |
|-------------------|--------------------------------------------------------------------------------------------------------------------------------------|
| KPLC              | Kenya Power and Lighting Company                                                                                                     |
| LandGRA           | Land Group Representatives Act                                                                                                       |
| MEMR              | Ministry of Environment and Mineral Resources                                                                                        |
| MoE               | Ministry of Environment                                                                                                              |
| MoU               | Memorandum of Understanding                                                                                                          |
| MPIDO             | Mainyoto Pastoralist Integrated Development Organization                                                                             |
| MRI               | Mutual Reliance Initiative                                                                                                           |
| MW                | Megawatt                                                                                                                             |
| NAMA              | Nationally Appropriate Mitigation Actions                                                                                            |
| NEMA              | National Environmental Management Authority                                                                                          |
| NFCS              | Ngati Farmer Cooperative Society                                                                                                     |
| NGO               | Non-Governmental Organization                                                                                                        |
| NLC               | National Land Commission                                                                                                             |
| NLP               | National Land Policy                                                                                                                 |
| OECD              | Organization for Economic Cooperation and Development                                                                                |
| OJ                | Official Journal (of the European Union)                                                                                             |
| OP                | Operational Policy                                                                                                                   |
| PAP               | Project Affected Persons                                                                                                             |
| PDD               | Project Design Document                                                                                                              |
| RAD               | Regulatory Affairs Director                                                                                                          |
| RAP               | Resettlement Action Plan                                                                                                             |
| RAPIC             | Resettlement Action Plan Implementation Committee                                                                                    |
| SCC               | Stakeholder Coordination Committee                                                                                                   |
| SEA               | Strategic Environmental Assessment                                                                                                   |
| SGR               | Standard Gauge Railway                                                                                                               |
| SREP              | Scaling-up Renewable Energy Program                                                                                                  |
| Tenure Guidelines | Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security |
| TEU               | Treaty of the European Union                                                                                                         |
| TJRC              | Truth, Justice and Reconciliation Commission                                                                                         |
| UNDRIP            | United Nations Declaration of the Rights of Indigenous Peoples                                                                       |
| UNEP              | United Nations Environment Programme                                                                                                 |
| UNFCCC            | United Nations Framework Convention on Climate Change                                                                                |
| UNPFII            | UN Permanent Forum on Indigenous Issues                                                                                              |
| UNPGRR            | United Nations Principles and Guidelines on the Right to a Remedy and                                                                |

Reparation (for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law)

UNU-GTP United Nations University - Geothermal Training Programme

USD United States Dollar

WB World Bank

# 1 Introduction

This case study considers the involuntary resettlement of about 950 people in August 2014 as part of the Olkaria IV project. Olkaria IV is a 140 MW geothermal power plant in Kenya, constructed with the financial support of European and other international finance institutions (IFIs). Olkaria IV and the resettlement site are located in the Olkaria geothermal block in Kenya's Rift Valley (African Rift) close to Lake Naivasha, which has experienced a boom in geothermal exploration. Existing plants (Olkaria I to III) have been expanded and new plants (Olkaria IV to VI) are being constructed in this area. In addition to Olkaria, geothermal exploration has been undertaken elsewhere in the Rift Valley. Development projects have been initiated in the Bogoria-Silali block for a 800 MW plant, in the Menengai geothermal field for a 400 MW plant (with a potential of 1,600 MW) (Ministry of Energy, 2011), and in Longonot (Akira I) adjacent to the Olkaria block. All Kenyan geothermal power plants, in Olkaria and elsewhere, are already or are expected to be registered as Clean Development Mechanism (CDM) projects. In fact, generating revenue from participation in carbon markets is an explicit objective of Kenya's climate policy.

Olkaria IV was registered as CDM Project no. 8646 on 17.06.2013. When no complaints were received during the stakeholder consultation process, registration was antedated to 28.12.2012, the date of submission. This had the positive effect of generating CO<sub>2</sub> certificates that could still be sold on the EU's Emission Trading System (ETS). Olkaria I (units 4 & 5) and Olkaria IV were part of the Kenya Electricity Expansion Project (KEEP), component A, of the World Bank, which was co-funded by the European Investment Bank (EIB), the Agence Française de Développement (AFD), the German Kreditanstalt für Wiederaufbau (KfW), and the Japan International Cooperation Agency (JICA). Financial support by the EIB for Olkaria IV contributed to both (a) EU commitments to combat climate change under the ACP Partnership Agreement, 2nd Amendment, Art. 32(a) (OJ, 2010), and (b) EU commitments to emission reduction under the United Nations Framework Convention on Climate Change (UNFCCC), because generated Certified Emission Reductions (CERs) are eligible for the EU carbon trade system. The European development banks cooperated under the Mutual Reliance Initiative (MRI) which permitted the delegation of due diligence responsibilities to a lead financier. In the case of Olkaria IV, this was the AFD.

The task of supervising the resettlement process fell mainly to the World Bank, whose safeguards for involuntary resettlement were applied. The resettlement process was investigated by the World Bank's Inspection Panel and the EIB's Complaint Mechanism (EIB-CM). A mediation process facilitated by EIB-CM was agreed on in May 2015 and started in August 2015. For the human rights impact assessment (HRIA) report, the different levels of delegation of responsibility complicated the case from a legal perspective. Similar to two other case studies in the ClimAccount project, CDM approval happened without regard to the events that resulted in the investigation of the projects by the institutional control mechanisms of the lenders.

The objectives of this report are to investigate the alleged human rights breaches in the context of the resettlement, and to assess the human rights performance of international financial institutions and their shareholders, particularly the EIB, the EU, and its member states. The report focuses on procedural rights and issues, which have a considerable impact on core substantive rights, and the lives and livelihoods of project affected people. The report does not look at the physical relocation, the move itself, but on the phases prior to and after the relocation. It considers the broader context and the ancillary issues such as the background of historical land disputes and other conflicts in the project area. Of particular concern was the forceful eviction in the immediate vicinity of the project. The narrow project-level legal perspective is only loosely related to the focus of this report, but it is certainly related to the investment context in which Olkaria IV was embedded. Such background information, in addition to the key data of the Olkaria IV project and the related resettlement, is provided in chapter 2.1.

An analysis of human rights performance requires fundamental knowledge of the particular case, the alleged violations, and the legal duties of the actors involved. The latter includes, apart from the IFIs and their shareholders, the operator, and the Kenyan government. Considering the legal context of the project thus involves national (i.e., Kenyan), international, and European legal and normative frameworks. Chapter 2.2 looks at those frameworks and the legislation related to land and environmental management relevant to the case. Inquiring into the legal frameworks presented a moving target for the case study. First, revisions to Kenya's constitution were (and still are) just being enacted into statutory law. The constitution specifically addresses land and land-related legislation such as provisions for resettlement and evictions, benefit sharing in the context of natural resource exploitation, legal frameworks for community land, environmental provisions, and so forth. The implementation of the constitution was fraught with

tensions and power struggles. Second, on the international level, the Guiding Principles on Business and Human Rights (GPBHR) (adopted in 2011) are relevant to the investment activities of IFIs, both private and state-owned. And third, at the European level once the Lisbon Treaty was adopted, it made the EIB (and all other EU bodies) subject to the Charter of Fundamental Rights (CFR) of the European Union (EU). Both the GPBHR and the Lisbon Treaty triggered an EIB internal review of the bank's environmental and social safeguards to adapt them accordingly. These three processes, though not of direct legal relevance to this specific operation which had to adhere only to the laws and regulations in place at the time of approval, provided a dynamic legal and regulatory environment that nevertheless influenced the behaviour of the actors involved. Following-up on these processes, particularly the one in Kenya, was labour intensive.

Chapter 2.3 on stakeholder positions gives an overview of the main human rights allegations and considers findings from desk studies as well as field visits that took place in March and September 2015. The chapter starts with the substantive claims, but the main emphasis is on procedural issues. Chapter 3 provides a human rights analysis of these allegations. Section 3.1 on overall accountability is structured along the main themes that emerged as relevant. These include the rights of indigenous peoples, the right to security of tenure and adequate compensation of land, the right to participation and consultation, and the right to access justice and redress. Each subsection of chapter 3 starts with the relevant human rights framework, links it to the pertinent national (Kenyan) frameworks and to the institutional frameworks of the involved IFIs (safeguard policies), before concluding with the analysis and the assignment of accountability with respect to all involved actors. Chapter 3.2 then elaborates on the specific duties and responsibilities of the EIB and its shareholders (the EIB member states) in the context of the Olkaria IV resettlement process. Main points discussed are the delegation of responsibilities under the EIB-AFD-KfW MRI and its impact on due diligence performance during project appraisal and project implementation. It concludes that from a human rights perspective, co-funding initiatives require detailed agreements (Memorandums of Understanding (MoUs)) of the responsibilities and duties of each party, and the mechanisms in place to mitigate and redress mismanagement. Many of the problems and recommendations described and developed in chapter 3 are applicable to other large-scale infrastructure projects and are not specific to CDM or other climate mitigation projects. Chapter 4 seeks to link these findings to the CDM and UNFCCC process.

The analysis of this report is primarily based on publicly available project documents, and interviews and focus group discussions (FGDs) with key informants and stakeholders. Desk research as well as interviews and FGDs generated a rich pool of information which was supplemented by the investigation reports of the Inspection Panel and the EIB-CM (produced in 2015). However, not all documentation (e.g., minutes of RAPIC meetings) was obtained, screened, and considered. FGDs with project affected persons (PAP) did not always work out as planned. On the first field trip in March 2015, the majority of the PAP who participated were from the Cultural Centre management. This allowed us to learn a lot about their claims but did not yield information about other PAP or those who allegedly had close relationships with KenGen. In contrast, the FGD with PAP during the second field trip in September 2015 was dominated by the chairman of the village at the new resettlement site (i.e., someone with a close relationship with KenGen). This created a less open atmosphere and restricted the willingness of others in attendance to share their views openly. The meeting even resulted in a hostile atmosphere between him and a chairman of the Cultural Centre. Another challenge was gaining access to the responsible decision-makers at the ministerial level of the Kenyan government. All attempts were ultimately unsuccessful. The absence of their response hampered our ability to ascribe human rights failures to them. However even with this limitation, the administrative level in Kenya was covered fairly. In contrast, lending institutions were very responsive to our requests for interviews and our questions. The only exception was the AFD. The lead financier under the MRI for Olkaria became silent shortly after the investigations by the Inspection Panel and the EIB-CM started.

This report is comprehensive and the reader may wish to focus on specific aspects. For example, readers mainly interested in a human rights issue (e.g., participation) may first read about stakeholder positions on that issue (subsection 2.3.4) and then directly proceed to the analysis of the findings from a human rights perspective (subsection 3.1.3). Short summaries of crucial claims and alleged human rights failures are provided at the beginning of each subsection. Readers mainly interested in the analysis of the human rights obligations of the EU and the EIB may start with section 3.2 if they already have sufficient background information on the project (offered in section 2.1). Subsection 3.2.4 (due diligence assessment) summarizes the relevant issues raised earlier in the chapter. There is extensive cross-referencing between subsections to help readers find missing information as needed.

## 2 Background

### 2.1 Olkaria case

Kenya currently has five geothermal projects under the CDM. Four are located in Olkaria (all registered) and one is in the immediate vicinity in Longonot (in the process of being validated) (UNEP DTU Partnership, 2016).<sup>1</sup> At this time, the Olkaria block is the only geothermal field in operation in Kenya. The block consists of four power plants (Olkaria I to IV) and their extensions.<sup>2</sup> Additional plants are being planned and implemented, and include Olkaria V and VI (Interview, GDC, 25.03.2015). This case study is about the resettlement process associated with Olkaria IV. It does not look closely at the forced evictions associated with other geothermal drillings that occurred in the vicinity and which affected about 2000 people, some of whom were actually entitled to relocation under the Olkaria IV resettlement scheme. However, some details of this eviction are explored because they shed light on the broader context of historical land conflicts in this region.

Olkaria IV is part of the KEEP project, which involves several other relocation activities mainly for the construction of transmission lines. At project start it was assumed that a total of more than 6,000 people needed to be relocated for the implementation of KEEP (World Bank, 2010, p. 3).

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<sup>1</sup> Olkaria II Geothermal Extension Project (+35MW), CDM Project no. 3773; Olkaria III Phase 2 Geothermal Expansion Project (+42MW), CDM Project no. 2975; Olkaria I Units 4&5 Geothermal Project (+140MW), CDM Project no. 8643; Olkaria IV Geothermal Project (+140MW), CDM Project no. 8646; Longonot Phase I Geothermal Power Project (+140MW), CDM Project no. 1766 (pending).

<sup>2</sup> Drilling in the Olkaria Block started in 1955, but the first power plant, Olkaria I (Olkaria East, 45 MW), only started to function in the early 1980s (sources differ: according to government of Kenya, operation started in 1985; according GIBB, it started in 1981). Olkaria II (Olkaria Northeast, 105 MW) has operated since 2003 and Olkaria III (Olkaria West, 100 MW) since 2009. The new drillings for Olkaria IV (Olkaria Domes, 140 MW) and Olkaria I extension unit 4 and 5 (140 MW) began at the end of the 1990s. The new installations have effectively operated since autumn 2014 (Ventures Africa, 2014). Together they comprise 280 MW (GoK/Ministry of Energy, 2011; Koross, 2013; Mwangi-Gachau, 2011b).

### **2.1.1 Local context: conflicts and geothermal exploration in the Olkaria area**

#### *2.1.1.1 Background information on historical land conflicts*

Olkaria is home to about 20,000 pastoralists – semi-nomadic Maasai of various Maasai clans. The Olkaria Maasai have been forcibly evicted several times from their ancestral lands, during colonialism as well as after independence (Young & Sing'Oei, 2011, p. 18). Today the region frequently endures conflicts that have their roots in historical and ethnic land disputes. Geothermal development simply feeds into these long-standing conflicts. Historical land conflicts have been investigated in detail by the Truth, Justice and Reconciliation Commission (TJRC). In a nutshell: during colonial times, based on the Anglo-Maasai Treaties of 1904 and 1911, more than 11,000 Maasai and two million cattle had to move from the Naivasha region to the United Maasai Reserve to pave the way for 48 Europeans (TJRC, 2013a). Early (1913) Maasai attempts to legally overturn the treaties were unsuccessful (TJRC, 2013b, pp. 182-184). In 1932 other Africans, particularly from those in the Kikuyu reserve, were resettled to “help relieve overcrowding” (Mwangi 2005, p. 35; quoted by the ACHPR-WG, 2012, p. 45f.). During the transition to independence, the transfer of land from white settlers to Africans was undertaken by the first Kenyatta government. However, it was done in a way that benefitted the privileged Kikuyu (TJRC, 2013b, 297f). Similarly, the Land (Group Representatives) Act of 1968, adopted under the Moi presidency, that was supposed to benefit pastoralist groups such as the Maasai, was high-jacked by Kenyan elites and led to the further alienation of large sections of land from the Maasai (ibid).

Two particular historical land conflicts have had negative impacts on current geothermal explorations, both related to Kikuyu-owned enterprises. First, the land-buying company Ngati Farmer Cooperative Society (NFCS) acquired 16,000 acres from Maiella Limited in 1965 (TJRC, 2013b, p. 297). The Maiella Maasai clan, living on Maiella Ranch, took the NFCS to court in 1996. In 2000, the protracted court proceedings found in favour of the Maasai and returned 4,000 of the 16,000 acres of the Ngati Farm to them (Mwangi-Gachau, 2011b; Wairimu, 2013). The judgement, which was upheld in 2009, led to violent upheavals and 100 deaths (Young & Sing'Oei, 2011, p. 18). Amongst others, Maiella Maasais living on the 12,000 acres that the court assigned to NFCS refused to vacate the land on the grounds that their families had been living there for generations whereas the official proprietors (NFCS) did not reside in the area (Njoroge, 2013). The 2,000 Maiella Maasais, who resided on the 3,000 acres NFCS was about to sell to KenGen, were forcibly evicted in 2013. Amongst them were 14 households of the

Olomanyia Ndogo hamlet who were actually covered by the Olkaria IV resettlement scheme (see figure 2). The majority of the evictees, however, were from Narasha and the greater Olomayiana Kubwa villages (Ndonga, 2013).

The second historical conflict which was exacerbated by geothermal exploration involved the Kedong Ranch, managed by Kedong Ranch Ltd. This company took over 74,000 acres of ancestral Maasai land. This land is now privately owned although some remains available for Maasai use. There is inconsistent information about the ownership history of Kedong Ranch. One version says it was initially registered under the Land (Group Representatives) Act (LandGRA) around 1969/70 (CEMIRIDE, n.d.). Another version says it has been privately owned since 1955 (GIBB Africa, 2012, p. viii).<sup>3</sup> According to information from interviewees in FGDs held during the case study, Suswai Maasai living on Kedong Ranch went to court at the end of 2010. These were not from the same Maasai as those who were resettled under the Olkaria IV scheme. In 2011 the case file of the Suswai Maasai claim disappeared from the court registry and when found, crucial documents supporting the land claim were allegedly missing. A court order (which was largely ignored) was made prohibiting Kedong Ranch management from carrying out any activities on the land (Kedong Ranch case, 2011, Kedong Ranch saga, 2011). In February 2015, the High Court in Nakuru ruled that the Maasai were not legally occupying the land, arguing that “since the Maasai are nomadic pastoralists, it is impossible for them to have been in one place for such a period as twelve years continuously” (from the ruling as quoted in Koissaba, 2015a), the minimum period of time according to Kenyan law to establish a right to residence of illegal occupants on private land. According to the Mainyoito Pastoralist Integrated Development Organization (MPIDO) and PAP, the case is currently pending at the Court of Appeals in Nairobi (Interview, MPIDO, 11.09.2015). The operator KenGen holds that no appeal was submitted.

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<sup>3</sup> The term “ranch” in the name points to it having been founded under the LandGRA. However, the source of the other information is the official Resettlement Action Plan for Olkaria IV, whose author (GIBB Africa) is more likely to have accessed/witnessed original documents. Both versions may be possible, i.e., some form of private ownership which was later transformed into land ownership under the LandGRA for unknown reasons. In any case, the registration cannot have been in accordance with the objectives of the LandGRA, the aim of which was to develop livestock keeping by group ranches jointly managed by groups of pastoralists. These ranches were an attempt to solve problems of sharing land and water resources, of controlling livestock numbers and over-grazing, and of integrating pastoralists into the market economy. To a certain extent this was also to counter-balance the process of land consolidation and adjudication of individual titles, which so far had favoured farmers, by providing a form of security of tenure to pastoralist groups (Ng’ethe, 1993). Kedong Ranch, however, is Kikuyu owned and they are not a pastoralist ethnic group.

In addition to the above cases of “historical land injustice,”<sup>4</sup> the government of Kenya diverted (public/trust) land inhabited by the Maasai during the 1980s. In 1981 this was done for geothermal explorations by the predecessor of KenGen, the Kenya Power and Lightning Company, and again in 1984 to establish the Hell’s Gate National Park (CEMIRIDE, n.d.). The alienation of the Maasai from the land is not disputed. However, the related evictions of the Maasai usually happened without any or only token compensation and resulted in many Maasai becoming illegal squatters, which contributed to their vulnerability (BwObuya, 2002, p. 33).

#### *2.1.1.2 Background information on socio-economic conflicts other than land*

The Maasai repeatedly complained that they had not benefited from the creation of local jobs (only 1.4 percent of KenGen employees are Maasai), from the generated electricity, or from the investments in community infrastructure such as water pipes, schools, or hospitals. In fact, they had increasingly suffered from health problems, in particular skin, respiratory, and gastric disorders. They also saw increased problems with their livestock such as unexplained death and premature birthing (BwObuya, 2002; CEMIRIDE, n.d.; Njoroge, 2003, pp. 22, 31-34). It can be assumed that since 2003, foreign investors have been aware of these health impacts on the local population. In 2003, an environmental expert confirmed at a “high ranking UNEP meeting in Nairobi” that the health problems in the area were related to the geothermal plants’ emissions (CEMIRIDE, n.d.).<sup>5</sup> The initial Resettlement Action Plan (RAP) in 2009 for Olkaria IV confirmed that geothermal power stations are sources of hydrogen sulphide gas (H<sub>2</sub>S) emissions, trace metals such as boron, arsenic, and mercury, and noise, all of which can impair health and quality of life (GIBB Africa, 2009b, p. 1-3). In particular, H<sub>2</sub>S can cause ophthalmic damage, olfactory paralysis, pulmonary oedema, nervous system hyper-stimulation, and spontaneous death due to respiratory failure (ibid, p. 1-4). H<sub>2</sub>S and noise emission were given as the main reasons for the resettlement of people for Okaria IV.<sup>6</sup>

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<sup>4</sup> The term “historical land injustice” is used in the new Kenyan constitution and the government established the National Land Commission to investigate such matters (Constitution of Kenya, para. 67(2)(e)). Noteworthy outcomes of this process include the Inquiry into the Illegal/Irregular Allocation of Public Land by the Ndung’u Commission (report by 2002), the creation of the Truth, Justice and Reconciliation Commission in 2008 (report by 2013), the drafting of the new National Land Policy (2009), and the adoption of the new constitution in 2010 which lead to the establishment of the National Land Commission in 2012 mandated to inquire into current and past land injustice.

<sup>5</sup> The high-ranking UNEP meeting was presumably the first East African Geothermal Market Acceleration Conference in Nairobi 2003. This is, however, not clearly stated in the CEMIRIDE document.

<sup>6</sup> The ESIA for Olkaria IV does not elaborate on the mentioned trace metals. Only H<sub>2</sub>S and noise are assumed to have “significant effects on the human environment” (GIBB Africa, 2009a, p. 1-3).

The impairment of Maasai well-being, human rights, and land claims created a complicated political atmosphere. An analysis of news reports in the pre-study revealed that there had been violent conflicts related to the Olkaria geothermal explorations since 2001, when the Maasai took plant workers hostage (The Daily Nation on the Web, 2001). The Maasai also repeatedly mounted peaceful protests against the geothermal explorations. They tried to reach out to participants of the 2003 East African Geothermal Market Acceleration Conference, sponsored by KenGen, UNEP, GEF, and US trade and development agencies. They also planned to confront conference participants during their visit of the Olkaria project sites, where 500 Maasai would be demonstrating against the geothermal operations (The Daily Nation on the Web, 2006). Neither attempt was successful and, according to local media, they were foiled by the police (Njoroge 2003). More recently, the Maasai protested the injustices they suffered in the aftermath of the Narasha evictions in 2013 (Koissaba, 07.07.2014). There has been increased armed police presence since the 2009 violent outbreaks on Maiella Farm and increased police vigilance of Maasai communities has also been reported (Musinguzi, 2011).

### **2.1.2 Olkaria IV (CDM Project no. 8646) and the relocation process**

Virtually all Olkaria plants prior to Olkaria IV have undergone expansions and all are registered as CDM projects. Given the enormous funding currently available for geothermal exploration, it can be argued that the Olkaria CDM projects would likely have gone ahead even without the CDM. However, the CDM provides additional revenue for the plant operators and complies with the national climate and development policies of Kenya. Except for Olkaria III, all Olkaria power plants are operated by the parastatal Kenya Electricity Generating Company (KenGen).<sup>7</sup> The Olkaria I extension (units 4 and 5) and Olkaria IV are the government's most prestigious geothermal CDM projects and were officially commissioned by Kenya's former President Mwai Kibaki in July 2012 (Kamadi, 2012). They are part of the World Bank's Kenya Electricity Expansion Project (KEEP) and are expected to serve as models for policy development for the exploration of the even larger Menengai geothermal fields that have a potential of 1,600 MW (Ministry of Energy, 2011). The Menengai fields will be developed as part of the Scaling-up Renewable Energy Program (SREP) of the Climate Investment Fund (CIF) (CIF, 2013).

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<sup>7</sup> Olkaria III is owned and operated by the privately owned U.S. company OrPower 4, a subsidiary of Ormat Technologies Inc.

### 2.1.2.1 Financing and lender coordination

From the lenders' perspective, Olkaria IV and the Olkaria I extensions are part of the larger KEEP of the World Bank (component A). Together they will have a capacity of 280 MW. In addition to the geothermal power plants, KEEP also involves the transmission lines and several substations. KEEP is funded by five main lending institutions and amounts to roughly 1.4 billion USD or 1 billion EUR. Of that, the EIB committed 119 million EUR plus an interest rate subsidy grant of 29 million EUR; AFD committed 150 million EUR plus a 34 million EUR interest rate subsidy (EIB, 2010c); KfW development bank provided a loan of 60 million EUR (EIB, 2010a); and the International Development Association (IDA) provided a loan of 120 million USD (World Bank, 2014a, p. 2). With support of KfW and the Deutsche Investitions-und Entwicklungsgesellschaft (DEG), some private investors also became involved (Ad-Hoc-News, 2011). The European financiers cooperated under the Mutual Reliance Initiative, as they tried to create synergy between lenders and project management in line with expectations of the Paris Declaration.

**Table 1: Financial commitments to KEEP as planned at the time of World Bank board presentation**

| FINANCIER                                            | Commitments to KEEP in USD millions in 2010 <sup>8</sup> | % of overall KEEP <sup>9</sup> | Commitments to Component A in EUR millions <sup>10</sup> |
|------------------------------------------------------|----------------------------------------------------------|--------------------------------|----------------------------------------------------------|
| EU: European Investment Bank (EIB)                   | 168,000,000.00                                           | 12                             | 148,000,000.00                                           |
| France: Agence Française de Développement (AFD)      | 220,000,000.00                                           | 15                             | 184,000,000.00                                           |
| International Development Association (IDA)          | 330,000,000.00                                           | 7                              | 90,000,000.00                                            |
| Germany: Kreditanstalt Für Wiederaufbau (KfW)        | 84,000,000.00                                            | 7                              | 60,000,000.00                                            |
| Local Sources of Borrowing Country                   | 90,950,000.00                                            | 22                             | n.a.                                                     |
| Japan: Japan International Cooperation Agency (JICA) | 323,000,000.00                                           | 23                             | n.a.                                                     |
| Borrower                                             | 169,700,000.00                                           | 14                             | n.a.                                                     |
| Global Partnership on Output-Based Aid               | 5,000,000.00                                             | n.a.                           | n.a.                                                     |
| Total                                                | 1,390,650,000.00                                         | 100                            | 482,000,000.00                                           |

The table shows that it was mainly the European financiers who were engaged in the geothermal production component (component A) of the KEEP project. Whereas the other

<sup>8</sup> World Bank, 2015c.

<sup>9</sup> EIB-CM, 2015b.

<sup>10</sup> Ad-Hoc-News, 2011; EIB, 2010a, 2010c; World Bank, 2014a, p. 2; World Bank data was converted from USD to EUR based on 2010 exchange rates.

financiers, including Kenyan sources, were focused on the other components such as transmission and distribution lines, and substations.

The EIB has been involved in the financing of Olkaria power plants since the 1980s (EIB, 2010c) – the very beginning of geothermal exploration in Kenya (see subsection 2.1.1). The European involvement in Olkaria IV took place under the MRI of EIB, AFD, and KfW. The MRI is “a mechanism to broaden and deepen their cooperation and coordination, particularly focusing on the co-financing of development projects” (OECD, 2011). It was initiated in 2009 to develop an effective division of labour in the context of commitments under the Paris Declaration on Aid Effectiveness and the pertinent Accra Agenda for Action. Olkaria was one of 14 projects in the pilot phase of the MRI with the declared objective to draft joint operational guidelines (ibid). There is confusion about when this objective was achieved and its relevance. According to a press statement, MRI Operational Guidelines were developed and accepted by all institutions in January 2013 (EIB, 2013c). According to EIB staff, no such guidelines exist (Interview, EIB, 07.12.2015). And, no guidelines were found on any of the websites of the financiers involved (as of 08.03.2016). In response to an inquiry submitted on 12.01.2016, the EIB Infodesk provided an Executive Summary of the MRI Operational Guidelines via email on 16.02.2016. It appears that the full operational guidelines “cannot be disclosed on the basis of the exceptions for disclosure laid down by the EIB Transparency Policy” (EIB Infodesk, 16.02.2016).

The MRI Operational Guidelines outline the delegation of tasks and responsibilities. The AFD was the assigned lead financier for Olkaria IV and was responsible for the environmental and social safeguards, and project procurement. Thus, AFD defined the scope of due diligence for the involved European development banks, but did so in consultation with EIB and KfW. EIB was responsible for technical due diligence. For the resettlement, the lead was with AFD and the World Bank.

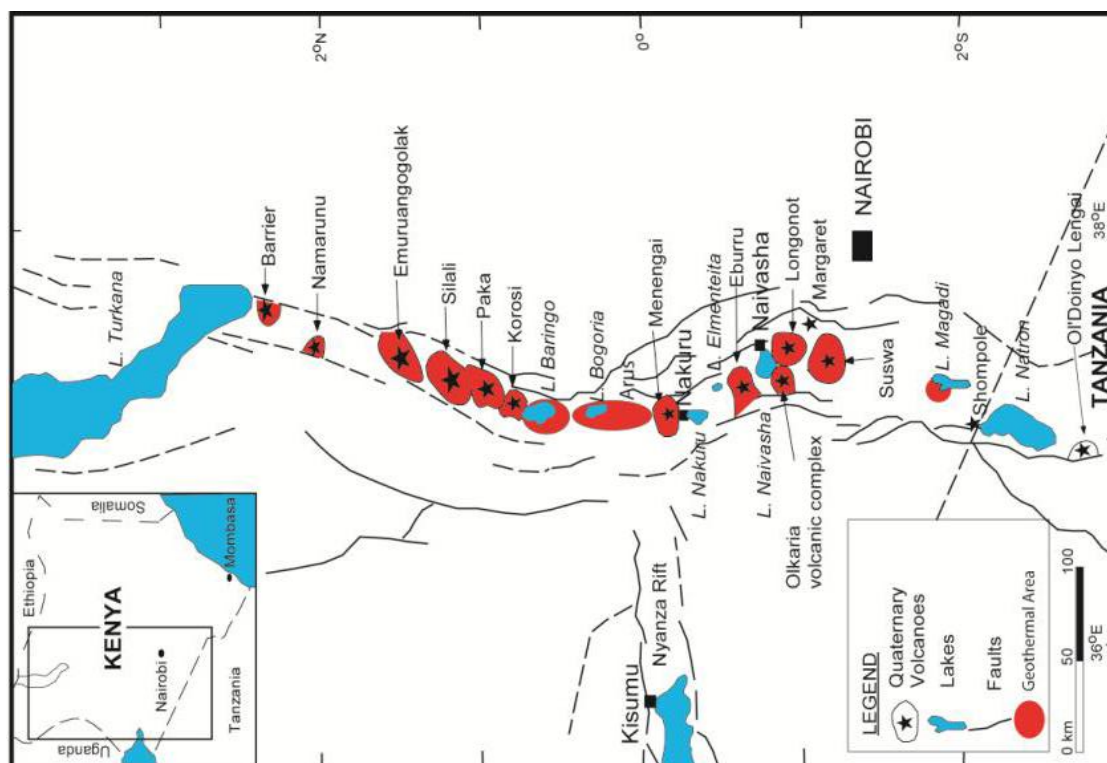
#### *2.1.2.2 Location of the RAP settlement*

Figure 1 shows the locations of the geothermal fields in the Kenyan territory of the African Rift. The Olkaria area is located in the Naivasha District of Nakuru County (Rift Valley Province) close to Lake Naivasha. Figure 2 shows the locations of Olkaria power plants, the previously existing settlements, and the resettlement site.

The development area of Olkaria IV is situated in Kedong Ranch, specifically the Akira Ranch part, and is adjacent to the Hell’s Gate National Park. The Environmental and Social Impact

Assessment (ESIA) of Olkaria IV mentions land-ownership disputes between the Maasai and the Kikuyu-owned Kedong Ranch Ltd. Of this ranch land, 75,769 acres (land registry number L.R. No. 8396) was registered in May 1950 as a leasehold title with a term of 999 years (GIBB Africa, 2009a, p. viii).<sup>11</sup> Because the environmental impact assessment (EIA) is a precondition for project approval by lending institutions, it can be concluded that the financiers were aware of the land conflict during the project appraisal phase. This does not necessarily mean that they were also aware of the 2010 civil case 21 concerning land ownership of Kedong Ranch, which might have been filed after project appraisal and approval in May (World Bank) and September 2010 (EIB).<sup>12</sup>

Figure 1: Simplified geological map of the Kenyan Rift showing locations of geothermal fields

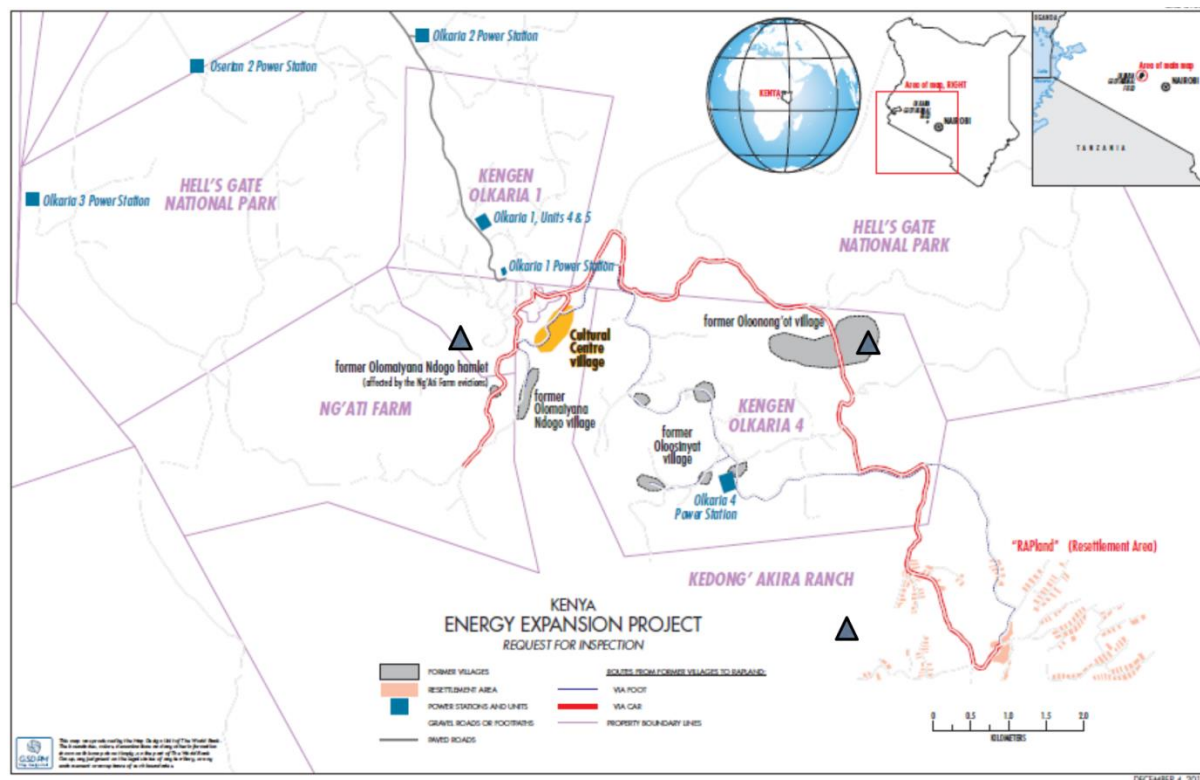


Source: Omenda, 2012

<sup>11</sup> The 2010 Constitution converted all 999-year leaseholds held by non-citizens to 99-year leaseholds (Art. 65). However, as the land is held by Kenyan citizens this does not apply here.

<sup>12</sup> The author was not able to access a copy of the case file or to identify the date of registration at Nakuru High Court.

Figure 2: Olkaria map: Locations of plants, resettled villages, and new settlement site



Source: Modified map based on chart produced by the Map Design Unit of The World Bank (World Bank, 2014a, p. 52). The triangles signify the approximate locations of Olkaria V and VI and Akira I.

Three villages had to be resettled for Olkaria IV to proceed (GIBB Africa 2009, p. ix). A fourth one, partly located on neighbouring Maiella Ranch, had to be resettled because of the anticipated air pollution (Mwangi-Gachau, 2011a). KenGen contracted a consultant firm, GIBB Africa, to develop a RAP. It is noteworthy that all four villages were inhabited by Maasai. The Maasai are an indigenous people and acknowledged as such by the African Commission's Working Group on Indigenous Populations (ACHPR-WG, 2006, p. 10). The four villages were

- Cultural Centre
- OloNongot
- OloSinyat
- OloMayana Ndogo (partly situated on Maiella Ranch; see figure 2)

The community members of the four villages were resettled as a single group. It was agreed that the settlement site would have modern houses, modern infrastructure (roads, electricity, and water pipes), social services (school and health centre), and sufficient land for pasturing of

the cattle. The total area for compensation of land was agreed to be 1,700 acres, for which the so-called project affected persons (PAP) were supposed to get their own title deeds. The prospect of title deeds was a major incentive to accept relocation. It would be the first time that the PAP became formal land owners. It should be noted that the group of Maasai (Suswa Maasai) who filed a case against Kedong Ltd. regarding land ownership were not the same as those who were resettled on the disputed land.

### **2.1.3 Management structures for the relocation process**

The main actors involved in the relocation process were KenGen, the project operator and lead; GIBB Africa, the consultant firm hired by KenGen to conduct the census to determine compensation and to draft the RAP; World Bank Nairobi to supervise the relocation process with the agreement of all other lenders; EIB, AFD, KfW, and the Japan Bank for International Cooperation, who were to be updated periodically by KenGen and the World Bank, and occasionally make monitoring visits; and the delegates from the Resettlement Action Plan Implementation Committee (RAPIC). KenGen is a parastatal company, 70 percent owned by the Kenyan state. Hence, the government of Kenya was directly involved.

On behalf of the Kenyan government, the Ministry of Energy (MoE) was “in charge of all aspects of the energy sector” and was also “briefed on all aspects of Olkaria RAP implementation process.” The briefing occurred through KenGen as well as through an Independent Evaluation Panel (IEP), which was “a professional independent body” contracted by the MoE “to monitor, evaluate and make appropriate recommendations” (Tacitus, 2012, pp. 40, 43). The IEP supervised and monitored all four resettlements related to the KEEP programme, and was said to be composed of two members with “extensive expertise and experience” in social analysis, institutional analysis, and stakeholder participation (GIBB Africa, 2012, p. 10-4). In the course of the IP/EIB-CM inspections, the IEP was assessed as ineffective and replaced (Interview, EIB, 07.12.2015).

For KenGen, the Regulatory Affairs Director (RAD) was the person in charge. He had an “interface and coordination role” between the RAP implementation process and the MoE, and KenGen’s executive committee (top decision-making organ) and the lenders. The RAD was supported by other KenGen offices and departments. The Environment and CDM manager’s office was responsible for the day-to-day supervision of the implementation of the social safeguard policies and for reporting to the financiers on the RAP implementation. With respect

to issues concerning the land transfer to the PAP, this office cooperated closely with the Property Manager and the Legal Manager's office. The Project Execution Office was responsible for the technical/infrastructural aspects of the RAP implementation. All mentioned offices were located at KenGen's headquarters in Nairobi.

In Olkaria, KenGen staff were responsible for actually implementing the RAP. The Geothermal Development Office was responsible for all administrative aspects of all geothermal projects. With regards to the RAP, it was assisted by the Environment, Safety, and Liaison Office and the community liaison officer, who did the field work. The Environment, Safety, and Liaison Office was "designated as the focal point for RAP implementation and the operational-level Grievance and Complaints Handling Mechanism" (GCHM) (Tacitus, 2012, p. 41). The corresponding Project Execution Office at the local level was in charge of the technical/infrastructure aspects of the RAP, including site layout and tendering, and supervision of contractors doing construction. To organize the necessary involvement of the PAP in the technical planning aspects, it cooperated with the Social Safeguards Office managed by the community liaison officer, who was responsible for day-to-day implementation of OP 4.12 and coordination of all local stakeholders (PAP, RAPIC, local administration). The Social Safeguards Office compiled monthly progress reports to share with KenGen, IEP, and the county administration. It also acted as RAPIC secretary and focal point for the GCHM.

The RAPIC was the key forum where decisions/agreements on the RAP implementation were made in consultation with the PAP representatives. RAPIC members included the Naivasha District Commissioner (changed to Naivasha Deputy County Commissioner in 2012 with the introduction of the devolved government),<sup>13</sup> the KenGen implementation team, district/county-level heads of the line ministries, (prior to decentralization) one provincial-level administrative representative, and 24 representatives from the PAP. The latter was comprised of five representatives from each community (three men, two women) plus one representative for each of the youth, vulnerable groups, council of elders, and Cultural Centre management (GIBB Africa, 2012, Annex 2). A concerning question is ... when exactly and in what form did the RAPIC come into existence (see subsections 2.3.4 and 3.1.3)?

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<sup>13</sup> The 2010 constitution stipulated a reform of government from a centralized to a decentralized system which is called the 'devolved government'. The Transition to Devolved Government Act was adopted in March 2012.

The Community Advisory Council (CAC) was comprised of two elders from each village, who had been elected from amongst their peers. It was the first level of the operational-level grievance mechanism, i.e., the first level to which PAP could turn in case of complaints related to the resettlement. The CAC was supposed to function similarly to the traditional council of elders of Maasai villages (see below). It was to give advice and guidance to the operator on how to handle such things as land registration and culturally sensitive sites (e.g., relocation of graves). However, their ‘terms of reference’, compiled by KenGen’s social safeguard adviser, included a “policy to guide ... the process for removing a member from office in case there is a need to do so” (Tacitus, 2012, p. 43). However, impeachment is traditionally not possible for members of councils of elders. CAC members were supposed to automatically become members of the land-holding institution.

The financiers were updated on the RAP implementation by KenGen on a quarterly basis. They could also attend RAPIC meetings and do autonomous monitoring visits to meet directly with the PAP. Because financiers agreed that resettlement was to be carried out according to the World Bank’s OP 4.12 on involuntary resettlement, the World Bank had the greatest institutional influence at the local level. The World Bank in practice had a crucial role in guiding and monitoring the resettlement process. It should be noted that the financiers were aware that the World Bank’s social safeguard consultant and KenGen’s social safeguard adviser, who were jointly in charge of the resettlement, were siblings. This was a circumstance that created major problems (see subsections 2.3.4 and 3.1.3).

#### **2.1.4 Description of affected communities**

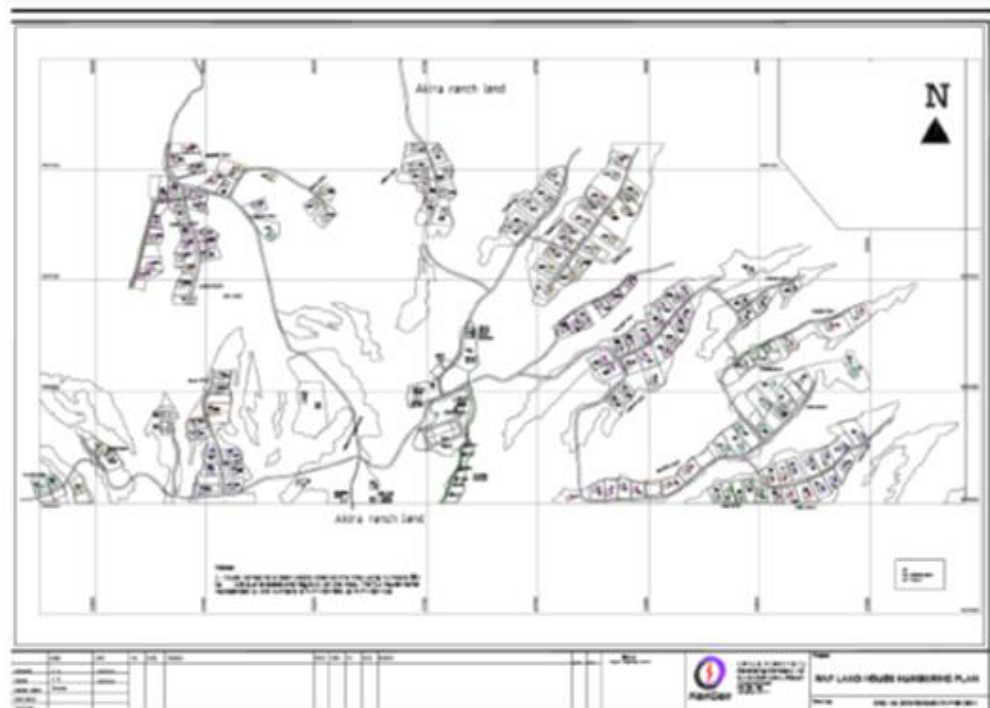
A total of four communities were resettled: Cultural Centre, OloNongot, OloSinyat, and OloMayiana. The main source of livelihood of the Cultural Centre was tourism. It was both a business centre as well as a permanent village. The main source of livelihood of the other villages was pastoralism and livestock trading. Additional sources of livelihood for all villages included employment (of men) with one of the various companies operating in Olkaria (e.g., KenGen, flower farms, KenGen contractors, geothermal prospecting companies), selling pumice stones, and petty trading by women (Tacitus, 2012, p. 16). Charcoal burning was another activity pursued by women but done illegally, i.e., without the required license (GIBB Africa, 2012, p. 5-6).

Within and between the communities, wealth disparities existed. Those considered rich had more than 100 head of livestock (cattle, sheep, goats), whereas those with fewer than 100 were considered poor (GIBB Africa, 2012, p. 5-8). Because livestock numbers were not reliably tracked, it was difficult to determine how wealth was distributed between and within the communities. The technical assistance report by Tacitus remarked that “KenGen is encouraged to quickly identify them [the poor and vulnerable] and their needs in order to determine the type and level of support to be offered to them” (Tacitus, 2012, p. 59). Generally, the level of prosperity was low as confirmed by the 2009 GIBB Africa survey. In 61.8 percent of the PAP households, water was fetched from some distance (predominantly by women and girls). Previously, only the Cultural Centre had a public water tap, built with support of a French NGO. Further, 45 percent of PAP were assumed to have no access to sanitation facilities and none of the households had electricity (GIBB Africa, 2012, pp. 5-10f). The RAPvillage had several water kiosks as well as cisterns for rainwater for each housing unit, a toilet for each house, and an electricity grid to which households could connect at their own cost. In addition, for the purpose of livelihood improvement, a cattle dip, cattle watering troughs, and two fish ponds were installed (Tacitus, 2012, p. 64f)

Traditionally, the Maasai were semi-nomadic pastoralists (the majority still are). They have permanent residential sites (Embarnat) but during a drought or the dry seasons, they move their temporary nomadic residences (Ilgochori or Emuate) depending on the availability of pasture (GIBB Africa, 2009a, p. vi). Their traditional houses are timber poles interwoven with a lattice of branches, plastered with a mix of mud, sticks, grass, cow dung and human urine, and ash (GIBB Africa, 2012, p. 8-9). The former PAP settlements were each organized differently (GIBB Africa, 2012, p. 5-1). The Cultural Centre consisted of one manyatta (housing units/clusters) constructed in a circle with a space in the middle to practice traditional dances and rites. The Cultural Centre was founded about 30 years previously at a place of spiritual meaning to the Maasai to preserve their culture and transfer it from one generation to another. A few members of the Cultural Centre lived outside this manyatta close to the Olkaria Primary School. In contrast, in OloNongot and OloSyniat, each (larger) family was clustered in distinct manyattas. In OloNongot, manyattas were as much as a five-minute walk from each other. And in OloSinyat, a vehicle was sometimes needed to reach the next manyatta. In OloMayana Ndogo, most of the settlement was arranged in a linear fashion, parallel to the gorge, with some clusters as well.

The settlement at the RAPland is most similar to the way OloNongot and OloSyniat had been organized (see fig. 3) with family groups kept together with former village community members.

Figure 3: Map of family clusters at the RAPvillage



Source: World Bank, 2014a

The distance from the RAPvillage to the original home settlements was about 14 km for the Cultural Centre and OloMayana Ndogo, and about 6 km for OloNongot and OloSinyat. The distance to Naivasha, where most of the income from additional sources was generated, increased for all villages by an average of 2.4 km (Tacitus, 2012, p. 49). The challenge of mobility was aggravated by the fact that the RAPvillage had no direct access to established roads and transport services. It was built on newly developed land that was connected by entirely new roads that were not served by public or private transport. The Cultural Centre was maintained as a business structure at the original location, although people were not allowed to stay overnight. As such, Cultural Centre members were affected more by the distances than others because they had to commute 14 km on a daily basis. In fact, during our field visit, the site appeared untended and abandoned despite the fact that a few people seemed to still be living there.

Comparing this photograph from March 2015 (fig. 4) with one of the Cultural Centre village taken in November 2011 (fig. 5), it is evident that the village used to be much cleaner and (though more difficult to detect) there were two circles of houses, not just the one.

**Figure 4: Vacated Cultural Centre at the time of field visit in March 2015**



Source: Jeanette Schade

**Figure 5: Cultural Centre in November 2011 prior to the relocation**



Source: Ambassade de France au Kenya; Album, Visit to Lake Naivasha

<https://www.facebook.com/media/set/?set=a.314462655234223.99111.175192205827936&type=3>

According to the revised version of the 2009 census, 1,209 people were eligible for compensation, of whom 948 were eligible for resettlement (PAP category 1: landowners with assets/houses). In total 284 persons (including dependent household members) from OloNongot, 139 persons from OloSinyat, 299 persons from Cultural Centre, and 226 persons from OloMayana were assessed as eligible for housing at RAPland. Some of the Maasai were polygamous, which meant that each spouse of a one-male household head and respective children had their own house. The husband of these wives circulated amongst them and was responsible for providing for them and their dependent children. Based on this, the total number of housing units to be built was calculated at between 161 (Tacitus, 2012, p. 21) and 164 (GIBB Africa, 2012, p. 8-4). This was a considerable increase over the estimate of the first RAP, which calculated that only 150 housing units were needed (ibid).<sup>14</sup>

Access to primary school services was available to all villages either provided by a school belonging to their own village (the OloNongot school also served OloSinyat and the Cultural Centre school (early childhood only) also served OloMayana), or by the primary school in Narasha (Cultural Centre and OloMayana for grades 3–8). Generally, the level of education amongst the PAP was low. According to data gathered for the ESIA of Olkaria IV, 51 percent of household heads and spouses had no education, 22 percent had some primary education, 12 percent had some secondary education, 8 percent had some technical training at a technical institute, and 3 percent had attended university (EIB-CM, 2015a, p. 29, fn. 83).<sup>15</sup> Impressions from the field visit were that older people who only spoke Maa were illiterate, whereas some of the younger ones spoke both national languages, Kiswahili and English, and had literacy skills. At the RAPland, communities were provided with a primary and early childhood school for 320 pupils (Tacitus, 2012, p. 64). They were further provided with a health facility, including a pharmacy (ibid), to which none of the communities had access beforehand. All public facilities, the schools, and the dispensary were connected to the newly installed electricity grid.

Community members adhered to several different religions. According to local key informants, the majority were Christian, some were Muslim, and others espoused traditional Maasai spiritual beliefs. The 2009 census report did not collect data on religious affiliations (GIBB Africa 2009; see table H on socio-cultural assets). The assessment of affected institutions mentioned one

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<sup>14</sup> A table displaying the number of spouses per household head, single parent households, and non-family households for each village lists 43 houses for OloNongot, 20 for OloSinyat, 46 for the Cultural Centre, and 47 for OloManyana (Tacitus, 2012, p. 18), totalling 156 units.

<sup>15</sup> An additional 4 percent did not provide any information (ibid p. 29, fn. 83).

Christian church for the Cultural Centre and one each for OloNongot and OloSinyat.<sup>16</sup> The 2009 census and 2012 RAP provided for three churches on the RAPland. At a later stage, claims were made that at least one mosque should have been provided (Chairman of Oloorkarian Maasai Muslims, 2012, 2013).

The traditional form of self-governance of Maasai communities is the council of elders (CoE). The CoE is a group of elderly men “who are considered to be intelligent in the society” and “able to solve cases in a mature way ... that benefit the society as a whole” (GIBB Africa, 2012, p. 5-12). Leaders with good (family) reputations are selected. The national-level Maasai council of elders (Olkira Orok Maasai Council of Elders in Narok) registers elected members of CoE by their Board of Trustees after conducting verification missions (ibid). Community involvement in decision-making is provided through community meetings. The priests are important actors in community mobilization (GIBB Africa, 2012).

The local governance system in Kenya involves chairpersons who are not necessarily elders. Chairmen are elected and act as the interface between the district administration and the villages. Chairmen or chiefs are a common and long-standing institution in Kenya, but are not ‘traditional’ in the sense of being an indigenous form of governance. They were first introduced by the colonial administration in 1902 to manage the village (Institute of Economic Affairs, 2009, p. 8). Chairmen are formally elected by villagers and then confirmed by the local administration. However according to one interviewee, the election of chairmen was organized by the administration of KenGen with the purpose of organizing for village representation in the RAPIC (Interview, Narasha teacher, 19.03.2015). According to another interviewee, the national government had organized the appointment of village chairmen via elections and KenGen, then used these structures to convene the first public meeting for the ESIA in late 2008 (Interview, KenGen, 26.03.2015). In addition, the GIBB ESIA stated that an election of chairmen was held exclusively for the RAPIC through elections in all four villages in spring 2012 (GIBB Africa, 2012). During our field trip, the role of chairmen was perceived as an ongoing bone of contention.

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<sup>16</sup> The GIBB Africa census often treated OloNongot and OloSinyat as one settlement (see e.g., GIBB Africa 2012, table 5–3). According to an interviewee from Narasha (Narasha teacher, 19.03.2015), the two villages had previously been one and were only treated as separate entities for the purpose of the chairmen elections preceding the Olkaria IV project.

### 2.1.5 Timeline of the resettlement process

The table below provides a chronology of the planning and implementation of the resettlement, and the evolution of the various disputes related to it.

**Table 2: Timeline of the resettlement and pertaining conflicts**

| Year / date | Resettlement process and issues                                                                                                                                                                                                                                                                                                                             |
|-------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| <b>2008</b> |                                                                                                                                                                                                                                                                                                                                                             |
| End 2008    | <p>“Stakeholder engagement meetings” organized to make decisions about the resettlement.</p> <p>These meetings took place after the government had orchestrated the appointment of village chairmen via elections, a structure used by KenGen to engage with communities (Interview, KenGen, 26.03.2015).</p>                                               |
| End 2008    | <p>Financiers agree on World Bank OP 4.12 as the contractual standard to be used by KenGen for planning and implementing the resettlement.</p> <p>Throughout the project implementation, financiers relied heavily on the presence of the World Bank to ensure the operator’s compliance (Interview, KenGen, 26.03.2015; EIB-CM, 2015a, pp. 37 and 43).</p> |
| <b>2009</b> |                                                                                                                                                                                                                                                                                                                                                             |
| 14.09.2009  | KenGen informs PAP representatives of the need to relocate (Mwangi-Gachau, 2011b).                                                                                                                                                                                                                                                                          |
| 16.09.2009  | GIBB Africa initiates the Census and Social Survey. This is also the cut-off date to determine eligibility for and type of compensation (Mwangi-Gachau, 2011b).                                                                                                                                                                                             |
| 16.10.2009  | GIBB Africa starts the Land and Asset Survey (Mwangi-Gachau, 2011b).                                                                                                                                                                                                                                                                                        |
| 05.11.2009  | Agreement reached on compensation for PAP and that “the resettlement site will have all infrastructure such as residential houses, school, health centre, Cultural Centre, social hall, churches, water and roads” (KenGen, 2011).                                                                                                                          |
| 01.12.2009  | Resettlement Action Plan (RAP) disclosed (World Bank, 2014a).                                                                                                                                                                                                                                                                                               |
| <b>2010</b> |                                                                                                                                                                                                                                                                                                                                                             |
| 22.02.2010  | Letter from World Bank Nairobi to Ethno-Savannah (French NGO supporting the Cultural Centre) stating that the resettlement will follow OP 4.01 and 4.12, which requires consultation with affected communities (World Bank Nairobi, 2010).                                                                                                                  |

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|-----------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 27.05.2010                  | Approval of the KEEP project by the World Bank board (World Bank, 2014a) According to GIBB Africa, the Resettlement Action Plan Implementation Committee (RAPIC) had been meeting since 2010 (GIBB Africa, 2012, Annex 5).                                                                                                                                                                                                                                                                                                                                                                                                           |
| 11.06.2010                  | KenGen consults with community leaders on the Suswa Triangle as resettlement site at a meeting held at the La Belle Inn. Time was requested to consult with communities, and a letter confirming consent and signed by all elected leaders was sent to KenGen on 13.07.2010 (summary of events as recalled in KenGen, 2011).                                                                                                                                                                                                                                                                                                         |
| 2010                        | Census update conducted in the context of land acquisition by KETRACO for the transmission lines from the Olkaria Domes to the Suswa substation (GIBB Africa, 2012, p. 1-2).                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| September 2010              | GIBB Africa submits lists of eligible PAP to be included in the RAP for Olkaria IV Power Station to Pius Kolikho, KenGen (GIBB Africa, Ref: K1384/EAN/L22123). The original lists are dated June 2010 but carry handwritten notes on specific names and the years 2013 and 2009. The original lists are signed by Chairman Mwangi Sururu for Small OloMayana, by Chairman Maenga Kisotu for OloNongot and OloSinyat, and by Chairman Olkoskos Parsampula for the Cultural Centre. The lists distinguish between tenants and land owners with and without structures, and asset owners who are not permanent residents, and teachers. |
| 12.12.2010                  | A financial contract is negotiated between the government of Kenya and EIB that “establishes as one of the conditions precedent of disbursement of the first tranche: ‘(h) the finalized 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” (EIB-CM, 2015b, p. 11).                                        |
| <b>2011</b>                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| Early 2011                  | PAP do not unanimously support a letter given by some community leaders to KenGen confirming their agreement to move to the Suswa Triangle (Kimani, 2011). This was not an amicable process. Some PAP were outraged and threatened a cabinet minister, who was not regarded by the PAP as neutral (see below), when he tried to mediate.                                                                                                                                                                                                                                                                                             |
| Mid-January to mid-February | Conflicts emerge between PAP and the then cabinet minister and Maasai MP, William Ole Ntimama, who wanted to initiate new elections of community representatives in                                                                                                                                                                                                                                                                                                                                                                                                                                                                  |

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|---------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 2011                                                                                                                                                                                                                                                                      | <p>charge of the RAP, allegedly in the name of the then Prime Minister (Kimani, 2011; Sigei, 2011; The Daily Nation on the Web, 2011, 16 January, 22 January, and 12 February).</p> <p>As a result, representatives of Maasai living in the area, who were not entitled to compensation, were accommodated in the Stakeholder Coordinating Committee (SCC) (World Bank, 2014a).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 21.02.2011                                                                                                                                                                                                                                                                | Stakeholder meeting held to decide establishment of the SCC (formed 14.03. 2012) (World Bank, 2014a, p. 5; see also GIBB Africa 2012, Appendix 5).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                               |
| 28.04.2011                                                                                                                                                                                                                                                                | Site visit by Catherine Kieffer, mayor of Alénia (France), with 87 members of the Cultural Centre and five KenGen liaison office representatives to discuss complaints (Cultural Centre, 2011a).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <p>04.05.2011</p> <p>Letter sent cc to:</p> <p>French ambassador,<br/>French major,<br/>WB president,<br/>Naivasha DC and DO, Rift Valley PC, Chief Hell's Gate Location, Ass. Chief Olkaria Sub-location, Tagesspiegel, Handelsblatt, KfW Bankengruppe, and WB Paris</p> | <p>Letter of complaint from Cultural Centre sent to KenGen managing director mentioning meeting of 28.04.2011 (Cultural Centre, 2011a)</p> <p>Concerns included:</p> <ul style="list-style-type: none"> <li>• Illiterate community representatives signed letter of consent to move to Suswa Triangle without knowing what they signed "which could be through undue influence."</li> <li>• Suswa Triangle is an inappropriate resettlement site because of existing land disputes (suit case), semi-arid land unsuitable for cultivation, and ongoing court case involving "other Maasai brothers," who already graze at the triangle and who are prepared to resist "any external intruders" presumably by violent means/war.</li> <li>• Confirmation that they want to resettle because the exploration activities and pending resettlement have caused collective development projects to become stalled (primary school and museum with NGO funding, improvement of houses, crop farming).</li> <li>• Census by GIBB Africa was done without informing the community in advance. This resulted in the exclusion of some community members and the inclusion of temporary family visitors and labour migrants.</li> <li>• Noise and smell, as well as cases of epilepsy, respiratory disorders, and ophthalmic problems are mentioned, and reference is made to NEMA ESIA stressing urgency for solutions.</li> <li>• Questions raised: (1) Where is the suitable land equivalent in acreage? (2) How can KenGen proceed if there is no solution to the land question? (3) Because the Masaai community time concept is cyclic, they have to move</li> </ul> |

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|-------------------------------------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|                                                             | <p>northwards if they leave the place of the Cultural Centre (Olonana/Oloibon).</p> <ul style="list-style-type: none"> <li>• Reminder that the Cultural Centre has identified 20 acres of land at Moi Dabi legally owned by Mr. Pius Langat, a willing seller, as compensation to the Cultural Centre project and its income generating activities. This is requested in addition to individual compensation of Centre's members. At the meeting on 28.04.2011, they opted (allegedly confirmed by KenGen representatives) that individual compensation should be monetary because no land for resettlement has been found so far. Call for expeditious compensation.</li> <li>• The spiritual meaning of the Ol'Njorowa Gorge and the need to remain close to it is reiterated.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 28.05.2011                                                  | <p>Selected PAP from the Cultural Centre visit a site near Crater Lake which they deem adequate for re-establishing the Cultural Centre: 20 acres (Nakuru/Moindabi, L.R. 1275; see above) and 300 acres (Nakuru/Moindabi, L.R. 1258). A report on their field visit is prepared (Cultural Centre, 2011b).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 30.06.2011<br>Letter cc'd to all above-mentioned addressees | <p>KenGen answers the letter from the Cultural Centre dated 04.05.2011, signed by managing director and CEO (KenGen, 2011).</p> <p>The letter</p> <ul style="list-style-type: none"> <li>• apologizes for the late reply due to its late delivery by third party.</li> <li>• advises Cultural Centre to send complaints directly to the RAD or the Environment and CDM manager.</li> <li>• provides an appraisal of the process so far.</li> <li>• explains that a Technical Committee (TC) (with a representative member of the Cultural Centre) has been formed consisting of a committee on employment and economic opportunities, on health, safety and environment, and on resettlement and compensation.</li> <li>• explains that the RAPIC will be part of the TC and that they await the launch of the TC by the Prime Minister's office.</li> <li>• states that consultation proceedings of public barazas, stakeholder meetings, and household surveys were shared with the community in Swahili and where necessary Maa translators were involved.</li> <li>• indicates that a stakeholder meeting took place before the survey was conducted.</li> <li>• confirms that all RAP consultation meetings had English/Swahili to Maa translation available.</li> <li>• confirms that the RAP will be updated to cover gaps identified during its</li> </ul> |

|             |                                                                                                                                                                                                                                                                                                                                                                                        |
|-------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|             | <p>review (including sustainability of livelihoods and pending compensations).</p> <ul style="list-style-type: none"> <li>• confirms that KenGen wants to engage in search for other land that “may be available near the Creater Lake on Moi North Lake Road.”</li> <li>• invites PAP to a future meeting with leaders.</li> </ul>                                                    |
| 2-4.11.2011 | <p>Joint EIB-AFD-KfW supervision mission, accompanied by the World Bank representative, conducts a visit to the proposed Suswa Triangle site with PAP (World Bank, 2014a, p. 8).</p> <p>Final response to the Inspection Panel mentions a “multi-donor supervision mission of November 2011” (World Bank, 2015a, p. 9).</p> <p>Proposed site (Suswa Triangle) is dropped/rejected.</p> |
| 07.11.2011  | French Ambassador and mayor of Alénia (France) visit Cultural Centre to discuss resettlement issues (Poncins, 2011).                                                                                                                                                                                                                                                                   |
| 11.11.2011  | Letter from French Ambassador to Cultural Centre assuring them that he will initiate a dialogue with AFD and KenGen (Poncins, 2011).                                                                                                                                                                                                                                                   |
| 01.12.2011  | Joint AFD-KfW-EIB Social Risk Supervision Mission Aide Memoire is sent to KenGen (GIBB Africa, 2012, p. a (executive summary)).                                                                                                                                                                                                                                                        |
| 16.12.2011  | Public meeting held with PAP to confirm purchase of the (current) site and reaffirmed “a number of other RAPIC meetings” (Tacitus, 2012, p. 73).                                                                                                                                                                                                                                       |
| 2011        | Census updated according to the findings of the joint social supervision mission of EIB, AfD and KfW of November 2011 (GIBB Africa, 2012, p. 1-2).                                                                                                                                                                                                                                     |
| <b>2012</b> |                                                                                                                                                                                                                                                                                                                                                                                        |
| 08.03.2012  | Local stakeholder consultation for the CDM accreditation meeting held (CDM Executive Board, 2012).                                                                                                                                                                                                                                                                                     |
| 11.03.2012  | Letter of complaint from Cultural Centre sent to World Bank Nairobi (World Bank Nairobi, 2012).                                                                                                                                                                                                                                                                                        |
| 13.03.2012  | <p>Stakeholder Coordination Committee (SCC) is launched.</p> <p>According to KenGen, the RAPIC, a sub-group of the SCC, became functional at the beginning of 2012 – when PAP accepted it (Interview, KenGen, 26.03.2015).</p>                                                                                                                                                         |
| 26.03.2012  | <p>Letter from World Bank Nairobi sent to Cultural Centre in response to the letter dated 11.03.2012, stating that KenGen has indicated that the RAPIC is considering including additional members of the Cultural Centre.</p> <p>Fingerprints used for the census (World Bank Nairobi, 2012).</p>                                                                                     |

|                               |                                                                                                                                                                                                                                                                                                                                |
|-------------------------------|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 30.04.2012                    | Elected RAPIC Members are presented to Navaisha DC (GIBB Africa, 2012, p. 10-2).                                                                                                                                                                                                                                               |
| 16.05.2012                    | Elected RAPIC Members are presented to the PAP (GIBB Africa, 2012, p. 10-2).                                                                                                                                                                                                                                                   |
| 16.05.2012                    | The operational-level grievance mechanism, the Grievance and Complaint Handling Mechanism (GCHM), is initiated as a result of the Joint AFD-KfW-EIB Social Risk Supervision Mission of November 2011 (GIBB Africa, 2012, pp. a (executive summary) and 9-1).                                                                   |
| 24.05.2012                    | Public meeting held to present and disclose beneficiary list according to the 2012 census update (undertaken as a response to lender recommendations) (World Bank, 2015a, p. 9).                                                                                                                                               |
| 11.06.2012                    | RAPIC is formally launched (EIB-CM, 2015a, p. 29).                                                                                                                                                                                                                                                                             |
| Late spring/early summer 2012 | Complaint letter from Cultural Centre sent to the president of the World Bank on the matter of land (mainly evolving from insecurity about the land deal KenGen is negotiating/concluding with Kedong Ranch Ltd.) (KenGen, 2012, p. 125).                                                                                      |
| 01.07.2012                    | 2012 update of the RAP (mainly to address natural growth cases) is disclosed (World Bank, 2014a, p. 2).<br><br>Update was done after the Suswa Triangle option was “put under the table” which was also “when it was decided that a RAPIC committee ... is necessary” (FGD, PAP, 19.03.2015).                                  |
| 09.07.2012                    | RAPIC meeting held at which Cultural Centre is strongly criticized for writing a letter to the president of the World Bank “without knowledge and approval” of the RAPIC.<br><br>Subsequent request made to Cultural Centre representatives to show a video of the resettlement land was turned down (KenGen, 2012, p. 128f.). |
| 23-24.08.2012                 | A transect walk-through was conducted of the resettlement land by RAPIC (Tacitus, 2012, p. 73).                                                                                                                                                                                                                                |
| 05.08.2012                    | Letter from the Chairman of Olorkarian Maasai Muslims was sent asking KenGen to approve a mosque (Chairman of Oloorkarian Maasai Muslims, 2012).                                                                                                                                                                               |
| 20.09.2012                    | CAC formally launched as the lowest-level community institution in the GCHM (World Bank, 2014a, p. 33).                                                                                                                                                                                                                        |
| 22.09.2012                    | KenGen reaches an agreement with Kedong Ranch Ltd. on the land deal for the resettlement site (Murage, 2012).                                                                                                                                                                                                                  |
| 18.10.2012                    | AFD commissions Tacitus Ltd. with a short-term consultancy contract to assist KenGen with finalization of six key tasks in the RAP implementation process (Tacitus,                                                                                                                                                            |

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|                                                                                                                                                                                                                                                                                                        | <p>2012, p. 92).</p> <p>* The consultant is the same one contracted by the World Bank Nairobi as social safeguard consultant for the project.</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 07.11.2012                                                                                                                                                                                                                                                                                             | Olkaria field visit conducted by World Bank team from Washington (World Bank, 2012, p. 24).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                       |
| 08.11.2012                                                                                                                                                                                                                                                                                             | ESIA study for the Olkaria IV resettlement submitted to NEMA by KenGen (World Bank, 2012, p. 13).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| 08-09.11.2012                                                                                                                                                                                                                                                                                          | Workshop at Mvuke Hall held to advise PAP representatives of the legal options for registration of the 1,700-acre resettlement site and the Cultural Centre land in their name (World Bank, 2012, p. 26).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| <p>12-26.11.2012</p> <p>Team:</p> <p>Kyran O'Sullivan (Mission Leader), Paul Baringanire (Power Engineer), Mitsunori Motohashi (Financial Specialist), Josphine Ngigi (Financial Management Specialist), Noreen Beg (Sr. Environmental Specialist), Margaret Ombai (Consultant Social Safeguards),</p> | <p>World Bank Washington sends support mission for KEEP.</p> <p>The Aide Memoire for the mission requests a revised RAP by 25.01.2013 (World Bank, 2012, p. 3).</p> <p>The Aide Memoire includes the report on above mentioned mission on 07.11.2012 (Annex 4) and on the subsequent workshop at Mvuke Hall (Annex 5) addressing land tenure issues.</p> <p>Aide Memoire is shared with lenders and the Ministry of Energy on 14.12.2015 (ibid, p. 1). Contents include:</p> <ol style="list-style-type: none"> <li>1. Social safeguards (p. 3)</li> </ol> <p>WB expects a revised RAP by KenGen by 25.01.2013, to address the following:</p> <ul style="list-style-type: none"> <li>• demarcation of the 1,700 acres in addition to the beacons, and that “the land will not be fenced off”</li> <li>• site layout plan for residential houses that reflects the PAP wish to be resettled in a way similar to their current settlements “where there are distances between one family and the neighbouring family, while allowing blood relatives to be neighbours”</li> <li>• issue of the Cultural Centre land acreage which “needs expeditious resolution”</li> <li>• sustainability of the provided facilities</li> <li>• final census of the PAP</li> <li>• grievance resolution mechanism</li> </ul> <ol style="list-style-type: none"> <li>2. Environmental safeguards (p. 13)</li> </ol> |

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| <p>Efrem Fitwi<br/>(Procurement Specialist),<br/>Vonjy Rakotondramana<br/>(Power Engineer), and<br/>Lucy Kang'arua<br/>(Program Assistant)</p> <p>08-09.11. 2012</p> | <p>Mission reviewed EIA study for the Olkaria IV resettlement “and found it to be of acceptable quality to meet World Bank compliance standards.”</p> <p>NEMA requests a full EIA study to be submitted by KenGen on 08.11.2012 (updated project report).</p> <p>3. Pending actions/next steps (p. 16)</p> <p>Submission of revised RAP for Olkaria IV prepared by KenGen by 25.01.2013. (Author's note: No such revised RAP is available at the World Bank's or KenGen's website.)</p> <p>4. Annex 4: Olkaria (II and IV) road field visit (07.11.2012) (p. 25)</p> <p>“8. The mission requested that an urgent report should be prepared by the Supervision Consultant documenting the re-assessment and re-design of drainage structures along the road with estimated costs and submitted to the Employer and World Bank for review. The report should also include the treatment and protection of steep gullies by the side of the road in light of excessive erosion that was observed in several locations.</p> <p>9. Overall, the mission was satisfied with the progress of road construction but concerned about the inadequate provision of drainage structures at major water crossings which should be urgently remedied to avoid serious delay in project completion.”</p> <p>5. Annex 5: Social Safeguards Olkaria IV Enhanced Safeguards Implementation Support for KEEP/Olkaria IV: Sensitizing workshop for PAP representatives on legal options for registration of the 1,700 acres and the Cultural Centre land in their name (pp. 26-28)</p> <p>Information was given by an independent lawyer on available legal options:</p> <ul style="list-style-type: none"> <li>• reference to constitutional provisions in Arts. 60 (principles of land policy), 61 (new classification of land), and 63 (community land)</li> <li>• because the Community Land Bill is still pending, the only available options to transfer the title and register the land under group ownership are those provided by the Land Registration Act of 2012. The six options are: <ul style="list-style-type: none"> <li>a) public limited liability company</li> <li>b) company limited by guarantee</li> <li>c) society</li> </ul> </li> </ul> |
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|            | <ul style="list-style-type: none"> <li>d) cooperative society</li> <li>e) trusts</li> <li>f) other forms of organization either as NGO or as Self-Help Group / Community-based</li> </ul> <ul style="list-style-type: none"> <li>• registration as Group Ranch not currently possible because the Land Registration Act does not provide for it</li> <li>• there is interest in individual titles but the lawyer suggests that this is something they can do after the land has been transferred to them as a group (as agreed in the MoU). He further reminds them that some form of communal ownership is better suited to the pastoralist livelihood “which would be destroyed if the land was to be sub-divided into individual parcels.”</li> </ul> <p>World Bank consultant informs the PAP that “lenders were keen that the transfer of the land title from KenGen to the PAP should be completed expeditiously” (milestone of the RAP).</p> <p>KenGen advises that Kedong agreed to transfer the title by December 2012. Other pending issues identified as those with “potential to derail or delay the RAP implementation process” include:</p> <ul style="list-style-type: none"> <li>• fencing (see above)</li> <li>• site layout plan for residential houses (see above); it seems that to date PAP have not been included in layout planning “while the tendering for the construction of residential houses is ongoing”</li> <li>• resolution of the Cultural Centre land acreage (see above) – KenGen offers 14 acres whereas the PAP insist on 20 acres</li> </ul> |
| 01.12.2012 | <p>Report completed on short-term technical assistance to KenGen for the implementation of Olkaria IV RAP by Tacitus Ltd. and commissioned by AFD.</p> <p>The tasks AFD wants accomplished by the consultant are (p. 11):</p> <ul style="list-style-type: none"> <li>• preparation of an institutional framework</li> <li>• finalization of the PAP census</li> <li>• plan for transfer of land ownership</li> <li>• clear and concise compensation measures document</li> <li>• infrastructure sustainability</li> <li>• final RAP implementation schedule</li> </ul> <p>The report</p> <ul style="list-style-type: none"> <li>• summarizes the shortcomings of the GIBB Africa census and provides for a revised version.</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |

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|               | <ul style="list-style-type: none"> <li>states that “it has been decided that only PAP who were taken account of by the cut-off date of 16.09.2009 would be compensated,” without stating who made this decision or how it was made.</li> <li>does not mention a 2012 update of the census but instead recommends “opening the census up for confirmation of information might be unwise at this point in time.”</li> <li>recommends the following options (p. 15f) to deal with GIBB Africa census shortcomings: <ol style="list-style-type: none"> <li>19 families from Oloomayana who are listed as “landowners with assets” but without the assets being specified (necessary for compensation), be kept in this category of compensation matrix (subject to confirmation by KenGen and RAPIC).</li> <li>“KenGen to verify [these] claims prior to starting construction of houses” (mainly on land, six claims on houses) of the 37 PAP added to the census list after the cut-off date, a process which was qualified as “did not appear credible” because they had not been verified by the respective villages.</li> <li>clarification of status of people listed as business owners in the Cultural Centre, who were not residents of the Cultural Centre but Maasais doing business there during the day and paying fees to the “founding owners.”</li> </ol> </li> </ul> <p>*The Tacitus report interprets OP 4.12 as not requiring compensating for these PAP. The report states that according to OP 4.12 “claims that cannot be quantified, such as loss of business, would only be considered if there is a physical relocation of the business, which is not the case with the Cultural Centre” (p. 93). The same accordingly applies to claims of the Cultural Centre management for income losses incurred due to the (pro)long(ed) duration of the RAP implementation (ibid).<sup>17</sup></p> |
| 15-16.12.2012 | RAPIC representatives visit the proposed RAPland site to assess its adequacy (World Bank, 2015a, p. 38).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                         |
| 21.12.2012    | Public barazas at Cultural Centre and OloNongot held with PAP to discuss the new site, resulting in the signing of an acceptance form (World Bank, 2015a, p. 38).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                |

<sup>17</sup> This interpretation of OP 4.12 is very strict. OP 4.12, para 3 states that “This policy covers *direct* economic and social impacts that ... are caused by (a) the involuntary taking of land resulting in ... (iii) loss of income sources or means of livelihood, whether or not the affected persons must move to another location;”. As the Cultural Centre business space is not moved the Tacitus report doesn’t regard the traders to be eligible for compensation. However, a footnote to OP 4.12, para 3 explains “Where there are adverse *indirect* social or economic impacts, it is good practice for the borrower to undertake a social assessment and implement measures to minimize and mitigate adverse economic and social impacts, particularly upon poor and vulnerable groups.” (emphasis by the author).

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| 26.12.2012  | Letter from WB Nairobi Director, Mr. Zutt, allegedly confirms that the issue of the pending court case will be resolved before physical relocation (Cultural Centre, 2014b).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                 |
| <b>2013</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 13.05.2013  | Letter signed by 14 Muslim PAP sent to the managing director/Regulatory Affairs Director of KenGen, asking for inclusion of a mosque in the social amenities plan (Chairman of Oloorkarian Maasai Muslims, 2013).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 14.05.2013  | <p>Final validation exercise for the census commissioned by KenGen to identify inconsistencies in the previous census (World Bank, 2015a, p. 9).</p> <p>According to the Inspection Panel report, the validation exercise was done in June 2013 (World Bank Inspection Panel, 2015b, p. 6), which is in all likelihood the same public meeting where, according to EIB-CM, the generated list of eligible households was presented to PAP for confirmation (Interview, EIB-CM, 06.06.2015).</p>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| 31.05.2013  | <p>Response letter from KenGen managing director sent to Muslim PAP families refusing to provide for a mosque on the following grounds (KenGen, 2013):</p> <ul style="list-style-type: none"> <li>• OP 4.12 only provides for the compensation of structures that previously existed, which was not the case for a mosque at census/cut-off date. This was communicated to the Muslim chairman several times (RAPIC meeting 10.08.2012 at KenGen Social Hall; consultative meeting 22.08.2012 at Simba Lodge in Naivasha with representatives of Cultural Centre, WB Nairobi, DC Naivasha (RAPIC chairman), KenGen officers including the RAD; and RAPIC meeting 11.01.2013 attended by the RAD and WB Nairobi).</li> </ul> <p>Quotes from the 22.08.2012 RAPIC meeting state that:</p> <ul style="list-style-type: none"> <li>• GIBB Africa inventory has not found a mosque structure but only three church structures</li> <li>• the previously non-existent but now-provided cattle dips are part of the livelihood enhancement measures agreed on by the community as a whole (hence not comparable to houses of prayer)</li> <li>• KenGen as a public agency is constrained in funding religious entities outside of the RAP compensation scheme</li> </ul> <p>They learn for the first time that Muslim PAP (only increasing in numbers recently) conduct regular prayers in Jamiah Mosque in Naivasha, which now would be too far away and the reason they ask for compensation.</p> |
| 05.06.2013  | Handwritten letter from Cultural Centre sent to KenGen managing director                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                     |

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|             | complaining that they were informed at RAPIC meetings dated 07 and 12.06.2013, that the 2009 census will be the baseline for compensation and not the one carried out in 2012 which included taking finger prints. The latter, it is stated, was done “due to us (PAP) claiming for our members were left out and our claims of our members were eliminated from the list and please refer to our letter date 4 <sup>th</sup> May 2011 to the President of Worldbank” (on oppression of vulnerable people such as orphans and widows) (Cultural Centre, 2013). <sup>18</sup>                                                       |
| 01.07.2013  | MoU signed by KenGen and PAP on the resettlement (MoU, 2013).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                      |
| 26.07.2013  | Forced eviction from Narasha settlements in the neighbourhood of the PAP takes place, affecting approximately 2,000 people. Fourteen households under the World Bank resettlement scheme for Olkaria IV (village OloMayana Ndogo) are affected as well (Murage, 2013; Umash, 2013).                                                                                                                                                                                                                                                                                                                                                |
| 26.09.2013  | Joint EIB-AFD-KfW supervision mission sent (World Bank, 2014a, p. 8).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                              |
| <b>2014</b> |                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| 27.06.2014  | Meeting of RAPIC and (allegedly) CAC held to discuss and determine an appropriate date to physically relocate, which was set for 21.08.2014.<br><br>Total relocation process takes five days (RAPIC and CAC, 2014).                                                                                                                                                                                                                                                                                                                                                                                                                |
| 16.07.2014  | EIB-CM receives and registers the first complaint letter about the unprocedural relocation of the people of Narasha by KenGen.<br><br>On request, the letter was afterwards anonymized (EIB-CM, 2014a).                                                                                                                                                                                                                                                                                                                                                                                                                            |
| 24.07.2014  | Complaint letter from Cultural Centre sent to KenGen, RAD, about RAPIC and lack of security of tenure, titled ‘Re: Untrusted Process of RAPIC’. The residents refused to move before 17 questions are answered (Cultural Centre, 2014a).<br><br>The questions raise the following concerns: <ul style="list-style-type: none"> <li>• moving before everything is done</li> <li>• status of the pending land case and its meaning for their title deeds (official land documents)</li> <li>• lack of 14 houses</li> <li>• definition of a ‘bon fide’ member</li> <li>• permanent or temporary status of the resettlement</li> </ul> |

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<sup>18</sup> Probably referring to the letter of complaint from Cultural Centre to KenGen managing director that was sent to the WB President in cc.

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|                           | <ul style="list-style-type: none"> <li>• Cultural Centre land becoming community/RAPland</li> <li>• absence of consideration of orphans and widows during the census</li> <li>• dominance of the RAPIC and lack of barazas at the Cultural Centre (in contrast to 'previously')</li> <li>• use of the 2009 census instead of considering complaints and recommendations from 2012</li> <li>• inadequacy of 35,000 KES to restart lives</li> </ul> <p>On 12.09.2014, the EIB services transferred the letter to EIB-CM.</p> |
| 01.08.2014                | <p>EIB-CM directly receives and registers the second complaint letter about failure to adequately implement the RAP and request for inspection submitted by the council of elders.</p> <p>Letter sent to WB and AFD (EIB-CM, 2014b).</p>                                                                                                                                                                                                                                                                                   |
| 08.08.2014                | <p>Meeting of KenGen social officer and WB Nairobi safeguard consultant held with PAP to announce decisions and work plans on the resettlement (Cultural Centre, 2014b).</p>                                                                                                                                                                                                                                                                                                                                               |
| 11.08.2014                | <p>Meeting of RAPIC and (allegedly) CAC held at the Geothermal Club to discuss access to electricity.</p> <p>According to a draft letter by RAPIC and CAC (allegedly drafted by KenGen and addressed to all funders), the two committees confirm that PAPs had two public meetings on the electricity issue. All but the leading complainant agreed that KenGen should use the 35,000.00 KES movement allowance per household to pay Kenya Power to connect their houses to electricity (RAPIC and CAC, 2014).</p>         |
| 13.08.2014                | <p>PAP sign Amendment No. 1 to the MoU with KenGen, extending the timespan for transferring the land titles for six months after relocation (MoU, 2013).</p>                                                                                                                                                                                                                                                                                                                                                               |
| 21.08.2014 to 02.09. 2014 | <p>Process of physical relocation of 150 households (126 household heads and about 1,200 people) takes place (World Bank, 2014a, p. 13).</p> <p>According to World Bank management, in August/September this was followed by an immediate post-relocation assessment observed by the World Bank (ibid, p. 15).</p>                                                                                                                                                                                                         |
| 21.08.2014                | <p>Cultural Centre letter of complaint sent to WB, KfW, EIB, AFD, and Minority Human Rights Group International complaining about comportment of KenGen social officer and WB Nairobi safeguard consultant at a meeting on 08.08.2014. At this meeting they announced decisions and work plans without listening to concerns of Cultural Centre and Olomayiana Ndogo village, and did not answer the questions asked of them.</p> <p>Concerns included:</p>                                                                |

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|            | <ul style="list-style-type: none"> <li>• diversion of the 35,000 KES transport allowance into payment for electricity connection</li> <li>• connection to electricity three months after relocation</li> <li>• land official document only available after six months due to pending case No. 21 of 2010 at Nakuru High Court</li> <li>• social safeguard adviser accused of being pro-KenGen</li> <li>• lack of acknowledgement that the livelihoods of members of the Cultural Centre is not pastoralism but tourism (Cultural Centre, 2014b)</li> </ul>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 01.09.2014 | Response from World Bank Nairobi to Cultural Centre's letter dated 21.08.2014 sent, stating that their staff will continue to closely monitor the implementation of the RAP and to consult with KenGen (no mention of complaints about own staff/consultants). (World Bank Nairobi, 2014).                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                        |
| 12.09.2014 | Olkaria IV plant is taken over by KenGen from the contractor and officially commissioned on 17.10.2014.                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                           |
| 23.10.2014 | <p>Draft letter from RAPIC and Community Advisory Council of Elders (CAC/Olkaria) sent to World Bank Country Director, AFD, DfW, EIB, and JICA, titled 'Re: Setting the Record Straight: Response to Various Complaints Raised By Individual PAP Concerning the Olkaria IV RAP Implementation Process' (RAPIC and CAC, 2014).</p> <p>The unsigned draft letter elaborates on the following points:</p> <ul style="list-style-type: none"> <li>• disqualifies the complaint letters to financiers as the action of individuals, being against the spirit of the agreed GCHM, and assuring that the two committees (RAPIC and CAC) "have done our best for the community that we have represented"</li> <li>• explains the GCHM procedures: lowest-level CAC to listen and arbitrate complaints and to suggest solutions; next level County Administration and RAPIC; then professional arbitration by registered arbitrators, and finally the Kenyan courts if no solution could be found within 37 days</li> <li>• responds to complaints raised by complainants towards the funders that includes: <ul style="list-style-type: none"> <li>- lack of implementation of the MoU: at the time of relocation three key items had been not fully implemented (title deed, electricity, road network), but RAPIC and CAC agreed with KenGen to amend the MoU for an extended timeframe. Some of the issues have partially been resolved.</li> <li>- complaints by five women from Cultural Centre about lack of</li> </ul> </li> </ul> |

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|  | <p>compensation: three have been duly compensated, the other two were not bone fide PAP and “did not qualify to raise complaints on behalf of the PAPs”</p> <ul style="list-style-type: none"> <li>- explains community representation in the RAPIC (open elections of two village representatives per village “witnessed by the County Administrators”) and the CAC (“mutually selected elders,” two per village), plus representation of all social groups (women, youth, vulnerable groups ...), of which none participates in RAPIC as a chairperson. RAPIC chairman is the Deputy County Commissioner for Naivasha (at this time Abraham Kemboi).</li> <li>- Management Committee of the Cultural Centre and overnight visitors: calls ‘Cultural Centre’ a key community project that “draws members from all the four PAP villages.” It is the responsibility of the Cultural Centre committee to hold meetings and come-up with proposals for overnight stays. (Note that the first paragraph of the letter describes the original Cultural Centre management committee as being “now defunct.”)</li> <li>- ownership of the bus: it is confirmed that the bus is owned by all PAP (not individuals or a specific group) and registered in the name of Ewangan Sinyati Welfare Society (new association to which all PAP are members). The bus committee comprised of members of the welfare society of which “none of them is in the committee in his/her capacity as a village chairman.”</li> <li>- agreed on date for physical relocation and that KenGen refrain from using force</li> <li>- agreed on procedures to connect PAP houses to electricity</li> <li>- rejects invitation of the WB Inspection Panel, EIB, and the Anti-Corruption Department to investigate the RAP implementation process because it was not participatory or inclusive</li> </ul> <p>Handwritten notes at the head of the draft letter in possession of the Cultural Centre state: “This is the letter KenGen tried to convince the RAPIC members to sign trying to find way of blocking the World Bank Inspection Panel and EIB complaint mechanism from coming,” and at its end “The RAPIC informed KenGen that if you want us to sign, then ... [name of a chairman of the Cultural Centre] ... must be present in the meeting, who will give us the authority to or not sign. KenGen said we’ll leave this letter because we will look for the next alternative.”</p> <p>KenGen later gives a different explanation to the EIB-CM that RAPIC refused to sign the draft letter because of the persistent intermittent water supply situation on the</p> |
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|                             | <p>RAPland” (EIB-CM, 2015a, p. 31).<sup>19</sup></p> <p>The draft letter was apparently discussed at a RAPIC meeting on 23.10.2015 (World Bank Inspection Panel, 2014).</p>                                                                                                                                                                                                                                                                                        |
| 26.10.2014                  | Anonymized request for inspection submitted to the Inspection Panel of the World Bank by another group of PAP (date received by Inspection Panel; World Bank Inspection Panel, 2014).                                                                                                                                                                                                                                                                              |
| End of 2014                 | <p>PAP form six committees to implement livelihood enhancement strategies at RAPland.</p> <p>Committees include the environment, roads, water, cattle dip, bus/welfare committee, and Cultural Centre committee (World Bank Inspection Panel, 2015c, p. 15).</p>                                                                                                                                                                                                   |
| <b>2015</b>                 |                                                                                                                                                                                                                                                                                                                                                                                                                                                                    |
| January 2015                | First field visit of the Inspection Panel and the EIB Complaint Mechanism (EIB-CM) conducted (World Bank Inspection Panel, 2015a, p. 1).                                                                                                                                                                                                                                                                                                                           |
| 31.01.2015                  | Hearing held before Nakuru High Court on case no. 21 of 2010 of Maasai plaintiffs against Kedong Ranch Ltd. over title deed on Kedong Ranch (World Bank Inspection Panel, 2015a, p. 28).                                                                                                                                                                                                                                                                           |
| 05.02.2015                  | <p>Court decrees in favour of Kegong Ranch Ltd. (World Bank Inspection Panel, 2015a, p. 28).</p> <p>Decree is criticized by some as characterized by ignorance and manipulated by the government (Koissaba, 2015a).</p> <p>According to an NGO, the case is now pending at the Court of Appeals as is case no. 57 (2014) on the same land (MPIDO). According to KenGen, no appeal was issued within the deadline (Interview, KenGen, 26.03.2015).<sup>20</sup></p> |
| 16.03.2015                  | Letter from PAP sent to NEMA complaining about not having been informed or consulted on Akira I, and lack of inclusion in its EIA (provided it was done yet) (Maasai Community RAPland, 2015).                                                                                                                                                                                                                                                                     |
| 27.03.2015 to<br>03.04.2015 | Second field visit conducted by the Inspection Panel in coordination with EIB-CM.                                                                                                                                                                                                                                                                                                                                                                                  |

<sup>19</sup> The copy of the letter EIB-CM received did not have handwritten notes (Comment of EIB-CM received 06.04.2016).

<sup>20</sup> According to media news the case was dismissed with the Court of Appeals upholding the High Court’s decision. Maasai protest against this decision (Wesangula, 2016).

|               |                                                                                                                                                                                                                                                                                                                                                                                                                                                                |
|---------------|----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 15.05.2015    | Mediation process under supervision of the EIB-CM agreed ( <a href="http://www.eib.org/about/accountability/complaints/cases/olkaria-js.htm">www.eib.org/about/accountability/complaints/cases/olkaria-js.htm</a> ). The process officially began in August 2015 (World Bank, 2016, p. 4).                                                                                                                                                                     |
| 15.06.2015    | Land title for RAPland is transferred from Kedong Ranch Ltd. to KenGen (World Bank, 2014a, p. 13).                                                                                                                                                                                                                                                                                                                                                             |
| 02.07.2015    | Investigation report of the Inspection Panel is finalized (World Bank Inspection Panel, 2015c).                                                                                                                                                                                                                                                                                                                                                                |
| 17.09.2015    | World Bank management response to investigation report of the Inspection Panel is released, announcing that project follow-up will include (World Bank, 2014a, p. 16): <ul style="list-style-type: none"> <li>• independent post-relocation survey to determine post-relocation impacts on PAP with focus on vulnerable people</li> <li>• development of tailor-made programs to ensure livelihood activities for identified vulnerable/poor people</li> </ul> |
| 20.10.2015    | Discussion takes place of Inspection Panel's findings and World Bank management's response by the World Bank board.<br><br>Board approves World Bank participation in the mediation facilitated by EIB-CM.<br><br>Within one year, results of the mediation are to be presented to the board (World Bank, 2015b).                                                                                                                                              |
| February 2016 | Completion of construction of all-weather roads on RAPland is anticipated (World Bank, 2014a, p. 13).                                                                                                                                                                                                                                                                                                                                                          |
| May 2016      | Finalization of land transfer, which allegedly commenced in January 2015, is anticipated (EIB-CM, 2015a, p. 15).                                                                                                                                                                                                                                                                                                                                               |
| 28.05.2016    | Agreement reached between KenGen and PAP as a result of the mediation process (World Bank, 2016, annex).                                                                                                                                                                                                                                                                                                                                                       |
| 24.01.2017    | PAP send a letter to the NGO CEE Bankwatch Network, JICA, and several Kenyan government agencies expressing concern about the failure to implement the terms of the mediation agreement and the 2013 MoU (Bank Information Center et al., 2017).                                                                                                                                                                                                               |
| 08.02.2017    | PAP demonstrate at the Nairobi offices of JICA and KenGen. They are protesting because they are not represented in the stakeholder committee for Olkaria V, which is built on the area of the resettled OloNongot village that is still used by PAP for livestock grazing (ibid).                                                                                                                                                                              |
| 15.02.2017    | KenGen files a law suit with the High Court of Kenya in Nakuru against specific                                                                                                                                                                                                                                                                                                                                                                                |

|            |                                                                                                                                                                                                                                                                                                                                                                                                                                         |
|------------|-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
|            | members of the PAP community who had signed a handwritten petition stating that community members would move back to their lands. Although the PAP communities had not done so, “KenGen asked the court for an injunction preventing the community members from dispossessing, alienating, or interfering with the company’s quiet enjoyment of two parcels of land: the site of Olkaria V and the site of Cultural Centre ...” (ibid). |
| 16.02.2017 | World Bank’s Board of Executive Directors approves the action plan prepared by bank management in response to the Inspection Panel investigation of KEEP (World Bank, 2017).                                                                                                                                                                                                                                                            |
| 03.03.2017 | Letter from CEE Bankwatch Network and other NGOs is sent to the financiers (Bank Information Center et al., 2017), stating that KenGen is only offering a leasehold to the PAP whereas PAP insist on a freehold, based on the Community Land Act adopted in August 2016.                                                                                                                                                                |
| 09.03.2017 | Financiers successfully pressure KenGen to withdraw the law suit, as requested by the concerned NGOs (communication with freelance journalist).                                                                                                                                                                                                                                                                                         |

### 2.1.6 CDM accreditation process of Olkaria IV

As explained in WP 1.3 report and in Schade and Obergassel (2014), the CDM is an international mechanism to stimulate climate-friendly investments. The CDM is based on Art. 12 of the Kyoto Protocol. Art. 12.2 sets out two equally important objectives: to assist developing countries in achieving sustainable development and to assist industrialized countries in achieving compliance with their emission reduction commitments. Once a CDM project has completed its project cycle, project participants receive emission reduction credits, certified emission reductions (CERs), which industrialized countries can purchase and count towards their Kyoto commitments. Some jurisdictions such as the EU have also established a domestic Emission Trading System (ETS) where companies may use CERs to comply with domestic obligations.

The project cycle includes the following:

- Project proponents prepare a project design document (PDD) according to a prescribed format developed by the CDM board.

- The PDD is validated to ensure it meets all CDM requirements by an independent certification company accredited by the CDM board and called the designated operational entity (DOE).
- Project must be approved by the countries involved – the host country and the buyer country or countries.
- When all requirements are met, the project is formally registered by the CDM board and may subsequently be issued CERs, subject to adequate monitoring of the achieved reductions by the project participants and verification by another DOE.

The CDM modalities and procedures deal almost exclusively with questions of how to quantify emission reductions. There is no mention of human rights, though there is a requirement that projects contribute to sustainable development and a requirement to invite and duly take into account stakeholder comments. All these items form part of the PDD. The stakeholder consultation has two levels: local and global. For the local stakeholder consultations, comments are solicited, and the promoter must provide a summary of the comments and a report on how they will be addressed. There is no specification of who exactly to consult or how to consult them. For the global stakeholder consultation, the DOE needs to make the PDD publicly available for 30 days for comments from state parties, stakeholders, and UNFCCC-accredited NGOs, and must make the comments received publicly available. To assess a CDM project's contributions to sustainable development, no internationally agreed on procedure exists and the procedures of the host country are applied. It is therefore up to host countries to define criteria and procedures for the assessment of sustainable development and for the local stakeholder consultation, which in many instances is weak and flawed.

In the case of Olkaria IV, the relocation and its obstacles played a minor role in the CDM registration process. Indeed, the CDM board seemed largely unaware of the struggles and hold-ups with that project. The PDD for Olkaria IV mentions the land dispute between the Maasai and Kedong Ranch Ltd., the claim of the Maasai to be largely overlooked for job offerings, and the claims for compensation. KenGen's response in the PDD was that relocations would be organized according to standards, that funds were provided for community projects, and that Maasai applications for jobs would be considered in cases of appropriate skills ... but it does not include job training (CDM Executive Board, 2012).

The local stakeholder consultation for the CDM project was carried out on 08.03.2012 (CDM Executive Board, 2012). This was after KenGen had bought the land for Olkaria IV and the new

settlement site. It was, however, before the people actually moved and before the forceful evictions took place in 2013. The DOE concluded in his summary of the consultation process, which took place at the KenGen Social Hall, that “[a] good number (99%) of the respondents admitted that they were aware of the project [...]” (CDM Executive Board, 2012). This was not surprising given the struggles going on since early 2011. Unfortunately, the documentation of the local stakeholder consultation process was not included in the PPD, but Cultural Centre PAP confirmed they had attended the meeting (FGD PAP, 21.03.2015). It seems, nevertheless, that they were unaware of what the CDM was about or the political implications of their participation in the consultation.

No comments were received during the 30 days (21.04.2012 to 20.05.2012) of global stakeholder consultation for CDM approval. This again might have been due to the fact that local NGOs, though familiar with the project as such, were unaware of the CDM dimension of the Olkaria expansions, or at least not of the procedures of CDM registration and its budgetary implications.<sup>21</sup> Because the DOE received no major objections to the project, the consultation process yielded no obstacle to the CDM project registration.

The CDM project received the letter of approval from NEMA, the Designated National Authority (DNA), soon after the global stakeholder consultation was concluded on 03.07.2012 (NEMA, 2012). As such, the project was already approved by the DNA before the validation report was completed. The application for Olkaria IV to be registered as a CDM project was then submitted to the CDM board on 28.12.2012, and the registration was enacted on 17.06.2013 (registration action) (UNFCCC). However, as no further review was requested by the CDM board, the date of registration – in line with CDM approval procedures – was antedated to the date of application, 28.12.2012. This detail is important because on 01.01.2013 regulations to access the European carbon market changed (Directive 2009/29/EC). Projects registered by the CDM board after 31.12.2012 were only “eligible for compliance purposes in the European Union Emissions Trading Scheme (EU ETS) if it comes from a least developed country, which Kenya is not” (Government of Kenya, 2013). In sum, there was considerable time pressure for Olkaria IV to be CDM-registered if access to the EU carbon market was to be secured.

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<sup>21</sup> It wasn't until February 2013 that there was any media attention to the environmental organisation opposing Olkaria IV (Koross, 2013).

## 2.2 International and regional/local policies

### 2.2.1 Climate policies

In November 2015 the government of Kenya submitted its second national communication to the UNFCCC (the first was submitted over ten years previously in 2002)<sup>22</sup>. However, concise climate change policy-making on the national level started with the 2008 Draft National Environmental Policy, which outlined core issues of Kenya's climate policy. Amongst other things, it stipulated the development of a National Climate Change Response Strategy (NCCRS), which was published in 2010 (Ministry of Environment and Mineral Resources, 2010).

In the follow-up to the NCCRS, the government of Kenya developed its National Climate Change Action Plan (2013-2017) (NCCAP). Kenya's climate action planning was supported by influential donors and alliances such as DANIDA, UKaid, UNDP, Agricultural Finance Corporation (AFC), Climate & Development Knowledge Network (CDKN), and the Africa Adaptation Programme (AAP). It was expected that the government of Kenya's NCCAP would serve as a flagship model for Africa (CDKN, n.d.) because of its efforts to mainstream climate policy planning across national and county-level development programming (GOK, 2013, p. 28). Kenya wanted to assume a global leadership role in implementing a low-carbon development pathway (GOK, 2013, p. 63) and was chosen as a priority country for selected funding schemes. It serves, for example, as a pilot country under the SREP of the Climate Investment Fund (CIF) (CIF, 2011; Ministry of Energy, 2011, p. 11). It was also part of the African Rift Geothermal Development Facility (ARGeo) of the Global Environmental Facility (GEF), which was launched in 2010 to finance geothermal explorations in six of 15 countries along the African Rift (UNEP News Centre, 2011). As the focus of this case study is on mitigation, and more precisely on geothermal energy, the following will concentrate on sub-component 4 (mitigation actions) of the NCCAP and other related policies.<sup>23</sup>

The NCCRS framework for mitigation outlined the following activities (Ministry of Environment and Mineral Resources, 2010):

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<sup>22</sup> See the table on “submitted National Communications from non-Annex I Parties” at [http://unfccc.int/nationalreports/nonannexi\\_natcom/submittednatcom/items/653.php](http://unfccc.int/nationalreports/nonannexi_natcom/submittednatcom/items/653.php). Of the 2015 national communication only an executive summary is available online.

<sup>23</sup> Details of subcomponent 4 are available at [http://www.kccap.info/index.php?option=com\\_phocadownload&view=category&id=36](http://www.kccap.info/index.php?option=com_phocadownload&view=category&id=36).

- growing 7.6 billion trees over the next 20 years and the promotion of agroforestry, in particular tree-based intercropping
- establishing a green energy development programme for renewable resources such as geothermal, solar, wind, and bio-gas
- participating in carbon trading under the CDM and in Voluntary Carbon Markets (VCM)

The NCCAP translated this into nine elements for mitigation action planning (GOK, 2012b):

- restoration of forests and degraded lands
- geothermal development
- reforestation of degraded forests
- improved cookstoves and LPG cookstoves
- agroforestry development
- bus rapid transit and light rail corridors
- development of a GHG inventory and improvement of emission data
- measuring, reporting on, and monitoring forestry emissions and sinks
- mainstreaming of low-carbon development options into county and sectoral planning processes

These actions are largely related to the forestry/agriculture, energy, and transport sectors, and aimed at accelerating Kenya's participation in international climate finance and carbon trading. Energy development, generally, seemed to be the cornerstone of Kenya's mitigation actions. Compared to other sectors, it received the largest share of national (176.5 of 438.2m USD) and international funding (921.8 of 2,291.1m USD) for mitigation. This funding was complemented by 2.8bn USD of private investment into renewable energy (GOK, 2013, p. 88).

The institutional organization for formulating and implementing climate policies is as follows:

- The lead ministry is the Ministry of Environment and Mineral Resources (MEMR), which hosts the National Climate Change Secretariat (NCCS).
- The NCCS spearheads all national efforts for developing and implementing climate policies, and serves as focal point to the UNFCCC.
- Other ministry departments involved in climate policy include the Directorate of the Environment, the Kenya Meteorological Department, the Mines and Geology Department, the Department of Resource Surveys and Remote Sensing, and NEMA.

- In matters of climate policy, NEMA serves as the DNA for the CDM and as the National Implementing Entity for the Adaptation Fund.
- The Ministry of Planning and National Development, together with the MEMR, is in charge of mainstreaming climate policy into other national development plans under Vision 2030.
- The Office of the Prime Minister established the Climate Change Unit to participate in policy development and implementation.
- The Ministry of Energy has a department of renewable energy and associated institutions such as the Geothermal Development Company (GDC), the Kenya Electricity Generation Company (KenGen), Kenya Power, and the Kenya Electricity Transmission Company Ltd. (KETRACO), which are all parastatal (GOK, 2013). Hence, this Ministry plays an important role in mitigation policies.

The GDC was incorporated in 2008 as a government Special Purpose Vehicle. It was to undertake surface exploration of geothermal fields, carry out exploratory, appraisal and production drilling, develop and manage proven steam fields, and enter into steam sales or joint development agreements with investors in the geothermal sector. KenGen is the main generator of electricity in Kenya with an installed capacity of about 1,180MW (about 72% of the national capacity in 2012). The company's expansion plan aimed to have an installed capacity of 1,600MW by 2014. In accordance with the Ministry of Energy, KenGen identified geothermal as the most promising for development in the medium range (Omenda, 2012). In 2014 installed geothermal capacity reached 573 MW, of which 463 MW were provided by KenGen (Omenda et al., 2014).

Development of national geothermal sources is a high priority for Kenya's national development plan, Vision 2030. The shift from the reliance on hydropower to geothermal power and other energy sources improves Kenya's energy resilience, as it's recognized that hydropower is vulnerable to the expected decreases in precipitation (GOK, 2013, p. 67). In 2005 hydropower accounted for close to 59 percent of national energy production (UNEP, 2006, p. 11). In 2010 this declined to about 50 percent (GOK, 2014, p. 21), and in 2014 to 44.5 percent. Other sources of energy in 2010 included oil-thermal (31.14%), geothermal (22.71%), imports (0.96%), off-grid (0.37%), and wind (0.20%) (KPLC, 2014, p. 5). The declining share of hydropower was clearly related to the increased production of geothermal energy, which in 2005

accounted for only 11 percent of the energy portfolio whereas the share of oil-thermal energy barely changed (still 30% in 2014).<sup>24</sup> This shift to geothermal energy production also decreases Kenya's exposure to price fluctuations of imported fuel, which was an explicit objective of Olkaria IV (GIBB Africa, 2009b, p. 1-4; World Bank, 2014a, p. 2). Achieving energy security is a primary policy objective of the government of Kenya, of which the expansion of renewable energy resources is only one component. Others components include the exploration of the oil fields in northern Kenya and investment in nuclear energy power plants (Omenda, 2012).

In 2012 only about 29 per cent of the Kenyan population enjoyed electricity supply (GOK, 2012a, p. 3). However, Vision 2030 "...aims to transform [Kenya] into a newly industrializing, middle income country" (Ministry of Energy, 2008, p. 30). The government of Kenya thus expects the electricity demand to increase from 1,191 MW in 2011 to 2,500 MW in 2015 and to 15,000 MW in 2030, and plans to expand supply accordingly. The exploration of geothermal power sources is crucial to this objective, because the country's Rift Valley is considered to have "an estimated, mostly untapped potential of 7,000 MW to 10,000 MW spread over 14 prospective sites" (Ministry of Energy, 2011, p. 4). Before the commissioning of Olkaria I (Units 4 and 5) and Olkaria IV, the operating geothermal plants in Kenya only had a capacity of 198 MW. The national capacity is anticipated to be increase to 5,530 MW by 2031 (Ministry of Energy, 2008, p. 176). The government estimated that developing an additional 2,275 MW of capacity by 2013 would cost between 877 and 1115bn USD (GOK, 2013, p. 80).

Being a renewable energy source, geothermal power was identified as a means to take advantage of the CDM and carbon trading (Ministry of Environment and Mineral Resources, 2010). It was estimated that the three major geothermal projects, expansion of Olkaria I and Olkaria IV and exploration of the Menengai fields for an additional 400 MW of capacity, could generate 213m USD in the initial seven year period (30m USD per year) (Mutia, 2012). As of October 2015, Kenya had a total of 30 registered CDM projects and another nine in the process of being validated. Of the registered projects, five are geothermal power plants in the Rift Valley (UNEP DTU Partnership, 2016). Other major mitigation activities include five wind farms, most of them also in the Rift Valley, and seven reforestation projects, most of them in Central Province. In fact, the Rift Valley and Central provinces are where most CDM projects in Kenya

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<sup>24</sup> Author's comparison of UNDP 2006 and KPLC 2014 data.

are located (UNEP DTU Partnership, 2015). It is not known how many people in total have been affected or are threatened with displacement due to CDM projects.

International programmes and investors exploring Kenya's geothermal potential include:

- World Bank financed KEEP,<sup>25</sup> which supported the expansion of the existing geothermal plants in Olkaria (two extensions of 140 MW each)
- EIB, which is seeking to be involved in Olkaria V (140 MW), for which planning has already started (Interview, EIB, 07.12.15; ESIA report 2014);
- International investors from the US, Japan, India and China, with whom KenGen is discussing Olkaria VI, VII, and VIII (Njini 2015)
- CIF financed SREP, which supports the exploration of the as yet untapped potential of the Menengai fields (200 MW plant)<sup>26</sup>
- The independent power producer Africa Geothermal International Limited (AGIL) with which KenGen is cooperating for the exploration of the also untapped Longonot fields (140 MW plant Akira I) (GOK, 2012a, p. 16; Ministry of Energy, 2011, p. 60)
- KfW, which is financing explorative drilling in the Baringo-Silal fields (Interview, GDC, 26.03.2015; see also Omenda et al., 2014; Richter 2016)

According to GDC (ibid) most geothermal projects take place on community land and not on private land as in Olkaria. Attracting private investment is one of the major approaches for geothermal development, and plans for future power plants are far-reaching (Omenda, 2012). Investment costs for geothermal expansion until 2030 are estimated at 10.3 to 13.1bn USD (GOK, 2013, p. 78).

The above mentioned ARGeo programme, implemented by UNEP, has a crucial role in facilitating a knowledge and finance network. The initiative is co-funded by the Icelandic International Development Agency (ICEIDA), the German Institute of Geosciences and Natural Resources (Bundesanstalt für Geowissenschaften und Rohstoffe, BGR), the United Nations University Geothermal Training Programme (UNU-GTP), and the International Atomic Energy Agency (IAEA) (UNEP News Centre, 2011). Moreover, in autumn 2012 the German KfW Development Bank set up an insurance programme, the Geothermal Risk Mitigation Facility, to

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<sup>25</sup> KEEP has a broad reach beyond the expansion of geothermal power plants and targets other energy sources including transmission lines.

<sup>26</sup> Other sources mention a 400 MW plant for Menengai (Ministry of Energy, 2011, p. 56; Mutia, 2012).

reduce investors' risk of unsuccessful exploration to as little as 20 percent of the total investment costs (Gichane, 2012). Meanwhile, the African Union (AU) Commission and its Regional Geothermal Programme as well as USAID have become major partners of ARGeo (ARGeo, n.d.).

Additional resources for geothermal development are offered by the World Bank. The Bank prepared a Global Geothermal Development Plan and currently supports geothermal exploration under its Sustainable Energy for All Initiative and its Clean Energy Programmes. Its financial support of geothermal energy projects has increased from 73m USD in 2007 to 336m USD in 2012 (World Bank, 11 January 2013). By means of its Clean Technology Fund, it further allocated 235m USD for early-stage explorations in mid-2014. The Bank reports that “over its history, the World Bank Group has provided 2.2bn USD in financing for geothermal energy projects” (World Bank, 2014b). In summer 2015 the government of Kenya submitted a Nationally Appropriate Mitigation Actions (NAMA) for accelerated geothermal electricity development to the UNFCCC to be eligible for funding by the GCF, and to apply to the African Carbon Support Programme of the African Development Bank and/or the Climate Initiative for Development of the World Bank (GOK, 2012a, pp. 19, 91; GOK, 2015).

With regards to Olkaria, it is described as part of AFD's policy to take “into consideration the increasing climate change concerns, the energy demand and the ‘green’ potential of Kenya, [for which] the AFD office in Nairobi launched a new country strategy focusing on two objectives: protecting biodiversity and promoting an economy with low-carbon content” (AFD, 2010, p. 6). Equally, it fits into EIB's mandate to promote renewable energy and energy security for the EU (EIB Steering Committee, 2010, p. 11).

### **2.2.2 Relevant legal framework and institutions**

In principle, the legal and regulatory frameworks in place at the time of project approval (2010) are applicable. However, because resettlement planning officially started in 2012 when the second RAP was released, the RAP refers to the regulatory frameworks in place in 2012. Hence, the RAP 2012 lists some of the national land laws adopted in 2012 as applicable. Interestingly, the document states that “implications of the 2010 Constitution on involuntary resettlement are yet to be put into legislation” (GIBB Africa, 2012, p. 4-13). This and the fact that Kenyan policies provided little guidance on compensation were given as reasons why the World Bank OP 4.12 on involuntary resettlement, which has “wider criteria for eligibility” including

those “who have no recognizable legal right or claim to the land they are occupying,” were applied instead (ibid). On the other hand, it was consciously decided by the financiers not to insist on applying OP 4.10 on indigenous people. They did this despite the PAP being Maasais and national policies on indigenous people being non-existent. OP 4.10 would have stipulated higher standards for relocation, particularly with respect to land, benefit sharing, and procedural requirements (for more information see subsection 3.1.1.4).

Indeed, the Kenyan legal environment throughout the period of Olkaria project planning and implementation was complicated. This was due to the introduction of the new National Land Policy (NLP) in 2009, the adoption of a new constitution in 2010, and the many legal reforms, including land legislation, stipulated by these ground-breaking documents, particularly by the new constitution.<sup>27</sup> The following subsections address laws and policies which have been adopted or were already in place and that have been or should have been of relevance to the project. The analysis is based on what was in place as of December 2015. Information on later legal and regulatory developments have also been added.

#### *2.2.2.1 National legal frameworks, policies and institutions*

##### *2.2.2.1.1 Bill of Rights and other human rights related provisions of the Constitution*

The new constitution, adopted on 10.08.2010, enshrines a Bill of Rights (Chap. IV) which was meant to serve as a framework for the social, economic, and cultural policies of Kenya and to seek social justice and fulfilment of all the rights. The right bearer in most cases is ‘each individual’ (Art. 19), which thus ascribes to the individual universal human rights independent of citizenship. Core economic and social rights were firmly entrenched in the constitution under Art. 43 and comprised amongst others the right to the “highest attainable standard of health,” the right to “accessible and adequate housing,” the right to “adequate food of acceptable quality,” and the right to “clean and safe water.” The fulfilment of these social rights depends to a large extent on a healthy environment.

The constitution explicitly stipulates a “right to a clean and healthy environment,” and even extends this right to “future generations.” This is complemented by “obligations related to the environment” (Art. 42), which are further elaborated in Chapter V on Land and Environment. Chapter V part 2 (Environment and Natural Resources) is concerned with the protection and

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<sup>27</sup> For more information on the land reform process, see Schade (2016).

exploitation of environmental resources and indicates that the state shall “ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits” (Art. 69(1)(a)). The state is obliged to “eliminate processes and activities” that are likely to endanger the environment (Art. 69(1)(g)). The constitution requires that the forest cover of Kenya must be at least 10 percent of the land mass (Art. 69(1)(b)). It also explicitly seeks to “protect and enhance intellectual property in, and indigenous knowledge of, biodiversity and the genetic resources of the communities” (Art. 69(1)(c)) and encourages public participation in environmental management, protection, and conservation (Art. 69(1)(d)). Art. 70, moreover, establishes provisions for enforcement. It allows for application to the courts if the right to a healthy environment is violated, obligates authorities to act on such violations, and provides for compensation in such matters.

Finally, the constitution enshrines in Art. 60 the “security of land right” as a principle for Kenyan land policy and mandates a reform of Kenyan land legislation. The process of operationalizing the constitution into statutory law is not yet complete despite some scheduled deadlines having passed. Therefore, the following section looks at laws in progress, as well as legislation and policies already enacted and applicable to the Olkaria project. Knowing about the constitution and its provisions enhances the awareness of the political environment in which the Olkaria project was implemented, and provides insight into what shaped the behaviour and decisions of the actors involved.

#### 2.2.2.1.2 Land rights and regulations in Kenya

Chapter V of the new constitution replaced the previous categories of government, trust, and private land with the new categories of public, community, and private land. Land reform in Kenya is a tricky and ongoing process. Of the core land laws spelled out in the constitution, all but the Community Land Bill have been passed, the latter due 27.08.2015. The others three acts, the Land Act 2012, the Land Registration Act 2012, and the National Land Commission Act 2012, were enacted six weeks after their scheduled date. The Land Act regulates the administration and management of public and private land. The Land Registration Act 2012 introduced a cadastral system for all types of land. However, its community land register, which even considered registration of (secondary) users of community land (sec. 8), was of limited practical use as long as no community land act was in place. The Community Land Bill of 2015 (Republic of Kenya, 2015a) recognizes four classes of community land: communal land, family or clan land, reserve land, and “any other category of land recognized under this Act ...” (Sec. 12) such as land under the Land (Group Representatives) Act (LandGRA). Such land may be

held under customary tenure, freehold, leasehold, or any other tenure system recognized by written law (sec. 4(3)).<sup>28</sup> The Bill was finally enacted (Act No. 27 of 2016) in August 2016. The constitution further states that community land includes former trust land and unregistered community land held in trust by county governments, all land “registered in the name of group representatives” (LandGRA), “land managed or used by specific communities,” “ancestral lands and lands traditionally occupied by hunter-gatherer communities,” and land “lawfully transferred to a specific community by a process of law” or declared as such by an “act of parliament” (Constitution, Art. 63(2)). There is a high potential for pitfalls in the interpretation of those provisions including the absence of an unequivocal definition of community.<sup>29</sup> Most importantly, however, the state always maintains the power to “regulate the use of any land ... in the interest of ... public safety ... public health, or land use planning” (Art. 66) if needed, may it be owned privately or collectively.

Most geothermal explorations in Kenya take place on community land (former trust land) with the exception of Olkaria block. In Olkaria, all explorations took place on privately owned land though the land ownership was challenged by some Maasai, for whom the Olkaria area had been their ancestral lands (see subsection 2.1.1). Legislation about land held in community is relevant to the extent that the RAPland is supposed to be held and owned by the PAP as a community. However, at the time of the transfer of the RAPland, the Community Land Bill was pending (and still is). Hence, the PAP were advised that they had to register the land according to the provisions of the Land Registration Act of 2012. These provisions included mainly

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<sup>28</sup> Customary tenure refers to land rights under African customary law. Freehold and particularly leasehold are common forms of tenure under the LandGRA. The difference to private land is that the group holding the land complies with the definition of community given in the constitution.

<sup>29</sup> Art. 63(1) of the Constitution on community land regards communities to be “identified on the basis of ethnicity, culture or similar community of interest.” Based on this the NLC Act defines community as a “clearly defined group of users of land identified on the basis of ethnicity, culture or similar community of interest as provided under Article 63(1) of the Constitution, which holds a set of clearly defined rights and obligations over land and land-based resources” (Art. 2(1)). The Community Land Bill, 2015, sec. 2, defined community as “an organized group of users of community land who are citizens of Kenya and share any of the following attributes- (a) common ancestry; (b) similar culture; (c) socio-economic or other common interest; (d) geographical space; or (e) ecological space. The final version of the Act added the attribute of “(f) ethnicity” (Art. 2). The Mining Bill 2014, in contrast, defined community as “a group of individuals or families who share a common heritage, interest or stake in identifiable land, land based resources or benefits that may be derived from the land based resources” (sec. 4) (Republic of Kenya, 2014c). The final version of the Mining Act (Act No. 12. of 2016) took an entirely different approach. It defined “community” as “(a) a group of people living around an exploration and mining operations area; or (b) a group of people who may be displaced from land intended for exploration and mining operations” (Mining Act, Art. 4). This is not that different from the Geothermal Resource Act of 1982, which only distinguishes between land owners on the one hand and occupiers of land on the other, as the two groups being eligible for compensation (Art. 19).

business and NGO-oriented forms of common ownership, more specifically (a) public limited liability company; (b) company limited by guarantee; (c) society; (d) cooperative society; (e) trusts; and (f) other forms of organizations either NGO or self-help group/community-based. The difference between these forms of joint land holding and land categorized as community land under the then not yet existing Community Land Act is that the latter sets stricter legal hurdles for individualizing land ownership and hence the selling of such land. Under the Community Land Act each registered community must form a community assembly, consisting of all adult members, of whom at least two thirds have to vote in favour of alienating (parts of) their land (Art. 15).

#### 2.2.2.1.3 Regulations on benefit sharing

If land is set aside for an overriding public interest, the constitution stipulates that the state shall ensure sustainable resource use and exploitation, and “the equitable sharing of the accruing benefits” (Art. 69(1)(a)). Benefit sharing with communities can be an important precondition for economic survival and for improving living conditions despite the absence of community resources. At the time of writing, there were several pieces of legislation pending that addressed this constitutional provision. These include the Mining Bill, the Natural Resource (Benefit-Sharing) Bill, and the Community Land Bill. Because the Olkaria explorations took place on private land, it was particularly the Mining Bill and the Natural Resource (Benefit-Sharing) Bill that would have been most relevant to the project. The latter, if enacted, would support benefit-sharing claims from geothermal exploitation because it refers to natural resource exploitation generally and not to the extraction of specific substances as does the Mining Bill (now Act). The Geothermal Resource Act (1982) does not cover benefit-sharing objectives.

The Natural Resource (Benefit-Sharing) Bill (Republic of Kenya, 2014b) speaks to the exploitation of a broad range of resources including natural gas, forest, and water resources (Sec. 3(1)), all of which play a role in climate mitigation activities. If passed, it has the potential to make people, including pastoralists, less vulnerable to development-related environmental changes. The Bill stipulates procedures and institutions for benefit sharing from natural resource exploitation with its high potential for infringement of the well-being of local populations. It seeks to establish a Benefit-Sharing Authority that determines payable royalties (Sec. 6(c)), determines appeals arising from the violation of benefit-sharing agreements (Sec. 6(h)), and monitors the implementation of such agreements (Sec. 6(e)). The county thereby negotiates/enters into an agreement with the operator (Sec. 29), whereas affected communities negotiate/enter into an agreement with the county (Sec. 31(3)). The bill also defines revenue-

sharing ratios. Of the distributable funds, 40 per cent are designated to involved counties, of which again 40 per cent are supposed to be allocated to directly affected local populations (Sec. 26(1) and (3)).

The Mining Bill covers “substances[s] formed by, or subject to, a geological process whether in solid, liquid or gaseous form ...” (Republic of Kenya, 2014a, sec. 4). The Mining Bill (2013), like the Natural Resource (Benefit-Sharing) Bill, specified how royalties were to be shared amongst the federal government (75%), the county government (20%), and the affected communities (5%), and further made royalty payments to communities conditional on the provision of programmes (Mining Bill 2013, Third Schedule). The Mining Bill (2014), in contrast, reserved all royalties for the state (Mining Bill 2014, sec. 159) and focused on the maintenance of grazing and cultivation rights (sec. 126), and compensation rights if maintenance cannot be achieved (sec. 127). The revised Mining Act (2016) now stipulates that the State must distribute 20 percent and 10 percent of these royalties to the county government and to the affected communities respectively – without making these payments conditional upon the provision of development plans (Art. 183(5)).

Finally, if the Maasai’s case against Kendong Ranch Ltd. before the Court of Appeal were decided in favour of the Maasai, even the provisions for benefit sharing under the Community Land Bill (2015) could become relevant. These provisions speak to participatory decision mechanisms and benefit sharing for communities affected by development projects that take place on community land (sec. 37). It stipulates benefit-sharing agreements with communities made on the basis of a “free, open consultative process.” Such agreements are supposed to specify provisions for “consultation and involvement,” “continuous monitoring and evaluation of the impact,” and “payment of compensation and royalties” (ibid).

Investigations of the Olkaria IV resettlement by the financiers’ complaint bodies took place before the adoption of the Community Land Act and the Mining Act in 2016. As the World Bank management response to the findings of the Inspection Panel notes, “a number of relevant draft laws are under consideration, but there are widely differing views amongst various stakeholders on key aspects of benefit sharing” such as the natural resources covered, the amount and the levels of benefit sharing, who is negotiating benefit-sharing agreements, and last but not least the definition of ‘community’ (World Bank, 2015a, p. 8). Statutory legislation in place at that time did not provide for benefit sharing with communities. Prior to the new constitution, national legislation denied benefit sharing. For example, the former district councils had the power to set

apart areas of trust land “[...] for the [...] extraction of minerals and mineral oils [...]” (Trust Land Act, Sec. 117(1)). In such cases “any rights, interests or other benefits in respect of that land that were previously vested in a tribe, group, family or individual under African customary law shall be extinguished” (Trust Land Act, Sec. 117(2)). Until the Community Land Act was adopted, the Trust Land Act was in force. The Community Land Act repealed both the Trust Land Act (Cap 288) and the Land (Group Representatives) Act (Cap 287) (Community Land Act, Art. 45).

The constitution calls for benefit sharing in Art. 69(1). If this provision had been implemented by the Natural Resource (Benefit-Sharing) Bill, this would have benefitted the affected communities. The effect would have even been greater if (a) the case before the Court of Appeals had been decided in favour of the Maasai...but the case is still pending, and (b) if the Community Land Bill had been proclaimed. In 2013, KenGen rejected the Maasai claim for a five percent permanent share of the accruing benefits, on the grounds that such a claim lacked legal basis (Kariuki, 2013). This was correct with respect to statutory law, but wrong with respect to the constitution. That the Republic of Kenya by the time of project implementation has so far failed to enact accompanying legislation on benefit sharing violates the provision of the constitution that the state shall “ensure sustainable exploitation, utilization, management and conservation of the environment and natural resources, and ensure the equitable sharing of the accruing benefits” (Art. 69(1)(a)). Unfortunately, with regard to benefit sharing, the constitution does not explicitly stipulate a schedule or “to enact legislation to give full effect” (Art. 71) as it does, for example, for the transaction of licenses for the exploitation of natural resources (Art. 71 on “agreements relating to natural resources.”) To complicate matters, it is not clear whether the Mining Act now in force applies to geothermal exploitation. Finally, the transaction of concessions, though subject to parliamentary ratification (Art. 71(1)), does not require parliamentary involvement in negotiations with investors, a fact which is strongly criticized by a legal review published by the World Bank (Bochway & Rukuba-Ngaiza, 2015, p. 160).

#### 2.2.2.1.4 Regulations on compensation

The right to property is protected under the constitution. Art. 40 states that adequate compensation should be considered if other than public land is taken away to serve public interest purposes. This would include land set aside for larger development and infrastructure measures, including climate change mitigation and adaptation actions. The constitution thereby encourages (though does not explicitly provide for) compensation even for “occupants in good faith ... who may not hold title to the land” (Art. 40(4)). This provision is addressed by Part VIII of

the Land Act (2012), which stipulates that compulsory land acquisition has to be grounded in public interest; that all persons whose interest in that land has been determined shall receive full and prompt compensation; and formulates guidance on the steps of such determination and subsequent compensation (paras. 111-117). Para. 155(4) further specifies in detail the procedures how to determine “unlawful occupation,” which includes considering whether a “person has reasonable belief” that the occupation is lawful, the length of occupation, the use made of the land, the number of dependents and distance to source of livelihood, the type of the environment, and potential conflicts with public interests. In addition, para. 155 prescribes at length procedures of redress. Though the Act does not specify compensation entitlements, it generally takes the view on landless persons that aims to reconcile past land injustice and the threat of repeated evictions with sustainable livelihoods and tenure security.

In the past, the right to compensation was limited. If the government entered land licensed for lease, sale, or occupation for any public purpose related to “improving water flow” (e.g., maintenance of dams), compensation was usually limited to estates, trees, and harvests on the land – not to the land itself (Government Lands Act, Art. 87; repealed). Compensation for investments in land were even denied completely in cases where leases were not renewed (Government Lands Act, Art. 71; repealed). In the case of trust land, those affected by expropriation were entitled to “prompt payment of full compensation” (Constitution, rev. ed. 2008 (2001), sec. 117(4) and 118(4)(b)). In practice, however, compensation was considerably more difficult. Appeals against compensation assessments could be filed with the Provincial Agricultural Board, but were rarely successful. Indeed by 2002, no such case was known (Benschop, 2002, footnote 540).

Compared to past practices, the current practice of compensation is an improvement. Budgets were increased for compensation for large-scale infrastructure projects such as the expansion of the Standard Gauge Railway (SGR). In that case, the National Land Commission (NLC), established by the constitution, is involved in determining eligibility for compensation of affected persons. However, media reports indicate that compensation of marginalized groups is still an unresolved issue (Nyassy, 2014).

The resettlement planning documents of the Olkaria relocation scheme all mentioned the Land Act (2012) as applicable, but only did so with respect to regulations regarding the transfer of land. They did not refer to para. 155(4) on the criteria for determining unlawful occupation and adequate compensation. As a consequence, the NLC was not involved in determining

compensation (nor were they at a later stage). Though this is speculative, the NLC might have taken different position on the size of land and other compensation issues because it is the NLC's constitutional mandate to investigate historical land injustice (see below). According to the EIB, the NLC was not involved in 2012 because it was not yet functioning in practical terms, but they will be involved if resettlement is an issue in the context of future explorations such as Olkaria VI (Interview, EIB, 07.12.2015).

#### 2.2.2.1.5 Regulations to govern evictions and planned relocation

There was one piece of legislation in progress that would have matched OP 4.12 on involuntary resettlement if it had been finalized. The NLP (2009) provided the legal regulation for development-based evictions and involuntary resettlement to address the widespread problem of squatters in Kenya. In 2011 the then Ministry of Lands produced an internal framework document, the Eviction and Resettlement Guidelines of its Land Reform Transformation Unit (LRTU, 2011). The LRTU framework document echoes the spirit of the NLP: "Squatting is widespread in the country. It is usually a result of displacement due to development projects, different forms of violence, redundant labour/tenants, forest evictees, and corrupt land registration practices ..." (LRTU, 2011). In practice, the document never became relevant. However, in 2012 legislative efforts resulted in the introduction of the Eviction and Resettlement Procedures Bill 2012 (ERP Bill) (Republic of Kenya, 2012a).<sup>30</sup> This was supposed to be a comprehensive and progressive bill to deal with development-based evictions including compensation and relocation of people without formal title deeds or claims. The process of approval was interrupted by the 2012/2013 elections and the bill was renegotiated together with the Community Lands Bill by a task force in the Ministry of Lands (Taskforce on Formulation of the Community Lands and Evictions and Resettlement Bills, 2013). It was then reviewed by the commission for the implementation of the constitution (Interview, NLC, 25.03.2015). The NLC also drafted a version of the 2013 ERP Bill, but none of the drafts were ever tabled in parliament. Rather, the stand-alone bill was reduced to addressing eviction procedures only (i.e., in cases where the 'unlawfulness' was not questioned). It then became an amendment to the Land Act (amendment to sec. 152) and was included in the omnibus Land Laws Amendment Bill, 2015 (Republic of Kenya, 2015b, sec. 105). The amendment was designed to strengthen authorities' ability to carry out such evictions smoothly. This change to the initial bill might have partly been due to the proclamation of the Act on the Prevention, Protection and

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<sup>30</sup> The NLP (2009) stipulated the development of such bill with the view to address the squatter problem (and thus also historical land injustice).

Assistance to Internally Displaced Persons and Affected Communities (IDP Act) on 31.12.2012 (Republic of Kenya, 2012b).<sup>31</sup> The IDP Act already had a chapter on development-based evictions and relocation (part V on development and displacement) and thus overlapped the ERP Bill to some extent. KenGen submitted its resettlement ESIA to NEMA for approval in November 2012 (KenGen, 2012), one month prior to the adoption of the IDP Act, which was accordingly not considered as applicable to the Olkaria IV relocation scheme.

The IDP Act effectively domesticated the UN Guiding Principles on Internal Displacement (GPID) of 1998 and the 2006 Great Lakes Protocol on Protection and Assistance to Internally Displaced Persons (IDP Act, para. 3). Additionally, it drew from the AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (also known as the Kampala Convention; AU, 2009) and the UN Basic Principles and Guidelines on Development-Based Evictions and Displacement (BPGDevbED, HRC, 2007, A/HRC/4/18; Interview, KNCHR, 17.03.2015). The IDP Act addresses situations of displacement due to political violence, natural disasters, and development projects. It sets out a rights-based and participatory approach (paras. 4 and 8(3)), and highlights the need for special attention to communities “with a special dependency on and attachment to their lands” (para. 8(1)).

Evictions, displacement, and planned relocation in the context of development projects are addressed in Part V of the IDP Act. It applies to situations where the government of Kenya wants to vacate land for development or conservation purposes. The Act provides that the government “shall abstain” from displacement and relocation. Exceptions are cases of “overriding public interest” where “no feasible alternative” exists. If displacement and planned relocation cannot be avoided, there is a requirement to demonstrate and justify that alternatives are not feasible and displacement is unavoidable and

- to seek “free and informed consent” of the affected persons
- to hold “public hearings” and ensure “effective participation” on the planning and managing issues
- to guarantee access to “effective remedies” and the government must provide the affected population with “durable solutions” (paras. 1-3).

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<sup>31</sup> The KNHRC voiced concerns that the Eviction and Resettlement Procedures Bill and the IDP Act would overlap in content and oversight structures (Interview, KNHRC, 01.08.2014).

Conditions for durable solutions including return, and local integration and resettlement elsewhere as defined in Part II (para. 9(2)), are the following (but not limited to):

- (a) long-term safety and security
- (b) full restoration and enjoyment of the freedom of movement
- (c) enjoyment of an adequate standard of living without discrimination
- (d) access to employment and livelihoods
- (e) access to effective mechanisms that restore housing, land, and property
- (f) access to documentation
- (g) family reunification and the establishment of the fate and whereabouts of missing relatives
- (h) equal participation in public affairs
- (i) access to justice without discrimination

The government also has to ensure that displacement is carried out in a manner that is “respectful of human rights,” and cognizant of issues related to the “protection of community land” and the “special needs” of vulnerable groups (Part V, para. 4). When displacement and relocation is effected, the government shall moreover ensure the displacement and relocation are monitored by an independent body and with the presence of a government official. These provisions constitute an enormous improvement over the practice of evictions in the past and the numerous squatters that resulted from such practices. However, the IDP Act does not address compensation and how to determine it, nor does it refer to the Land Act 2012, Art. 155(4) for those purposes. This is likely due to the fact that the IDP Act is mainly driven by humanitarian thinking and puts an emphasis on ‘recent’ IDPs and not on long-standing squatters. For now, however, it is the IDP Act which (potentially) addresses gaps in existing legislation such as the Forest Act (2005), the Water Act (2002), and the Environmental Management and Co-ordination Act (EMCA) (1999). These Acts allow authorities to evict people who live in or have encroached designated protected areas absent any proscribed procedures to be followed when people and their habitats are removed. Other Acts such as the Kenya Airports Authority Act, the Kenya Ports Authority Act, and the Kenya Railways Corporation Act allow the respective authorities to demolish buildings for reasons of security. The only requirement for this is a High Court Order – a regulation which according Kenyan human rights organizations is barely followed (Hakijamii, 2012).

As mentioned, the provisions of IDP Act were not applied to the Olkaria IV project because it was enacted one month after KenGen submitted its ESIA for the resettlement to NEMA. But the physical resettlement did not take place until August 2014, so it might be asked whether the IDP Act could have been applied. However, the question whether its normative content could have been applied might not be as relevant because OP 4.12 has similar provisions. The more interesting question is that of institutional responsibility, which is addressed subsequently.

#### 2.2.2.1.6 Role of the National Land Commission (NLC)

The NLC was established by the new constitution (Art. 67) and was given responsibility for managing public land, giving advice on land policy and land registration, conducting research on land-use and monitoring land-use planning (including exploitation of natural resources), investigating present and historical land injustice, encouraging traditional dispute resolution mechanisms in land conflicts, and assessing land-related taxation. The NLC was further mandated to engage in the (re)settlement of squatters and IDPs (Art. 2) and, if necessary, to provide “access to land for shelter and livelihood” for such purposes (ibid, Art. 134) by means of the Land Settlement Fund (ibid, Art. 135(3)). As mentioned in the subsection on compensation (sec. 2.2.2.1.4), the NLC also has a central role in determining compensation entitlements in large-scale infrastructure projects. Its involvement in the planning of the Olkaria IV resettlement might have triggered a different approach to the compensation of land because its institutional mandate covers historical land injustice (see Land Act, sec. 112-117). The mandate of the NLC is, however, restricted to research and does not entail redress or determining compensation for past injustice. Moreover, the current government seeks to significantly curtail its mandate by means of the Land Laws (Amendment) Bill (2015). In the Memorandum of Objectives and Reasons, the proposed amendment stated that its purpose was to limit NLC’s functions in managing and allocating public land, its policy-making powers, in particular its mandate to “provide for the manner of undertaking evictions from private, community and public land,” and to eliminate the NLC boards at the county level. Instead, these powers were to be transferred to Cabinet. This was criticized as seeking to prevent the registration of all unregistered land, to “scrap” the county land management boards, and to make eviction and resettlement procedures a “mere task” of the Cabinet Secretary (Dolan, 2015; Ombati & Mosoku, 2014). This meant, institutional responsibility for evictions and resettlements would move from an institution with a land-justice mandate to one whose primary objective was the modernization of Kenya – very different interpretations of what is sustainable development and durable solutions. Finally, the Community Land Bill (2015) gave rise to similar complaints by NLC and county governments,

accusing the government of “undermining reforms in the land sector” and that the proposed legislation “only gives more power to the Cabinet Secretary” (Jemimah, 2015).

It is obvious that the period during which Olkaria IV was carried out was a crucial period for the development of Kenyan laws and policies. The NLC was one of the most celebrated achievements of the constitution to address the problem of squatting and land injustice in Kenya, but it was under threat of having its functions curtailed. Based on the Land Act 2012, sec. 155(4), financiers could have initiated a political dialogue about engaging the NLC in the implementation of the resettlement process and entrusting it with the determination of compensation. In an interview, GDC indicated that it was in favour of cooperating with the NLC to avoid the type of land conflicts which strained the implementation of Olkaria IV (Interview, GDC, 26.03.2015). During the interview with the NLC, it became apparent that none of the financiers had ever approached them. Requests by the NLC for funding from major donor institutions such as the World Bank are usually denied based on the fact that they are not involved in the land sector (Interview, NLC, 25.03.2015). As mentioned, EIB assumes that the NLC will be involved in future resettlements triggered by geothermal expansion (Interview, EIB, 07.12.2015).

#### 2.2.2.1.7 Environmental rights and regulations in Kenya: impact assessment

Art. 69(1)(f), Chapter V of the constitution requires the state to “establish systems of environmental impact assessment, environmental audit and monitoring of the environment.” The EMCA (1999) already had provisions for EIAs, but the newly adopted EMCA (Amendment) Act (2015) instituted new requirements. NEMA is the entity in charge of matters related to the environment and EMCA.

Sec. 58(1), EMCA (1999) requires a project proponent to carry out EIAs for projects listed under the second schedule to the act. However, the second schedule does not explicitly mention resettlement projects requiring EIAs. According to the EIA conducted for the Olkaria relocation, resettlements fall under category 1 (general) of the second schedule, which requires EIAs for activities or structures that are out of character or scale with its surrounding, and for major changes in land-use (EMCA 1999, Second Schedule). The Environmental (Impact Assessment and Audit) Regulations (EIAA Regulations) of 2003 further specify that an EIA has to include an analysis of the economic and social dimensions of the project, proposals for alternative project designs that minimize impacts as well as measures to mitigate impacts, and requires seeking

the views of those affected and of the public as part of EIA procedures (EIAA Regulations 2003, sec. 16 and 17; for the full text see box 1 below).

**Box 1: Environmental (Impact Assessment and Audit) Regulations of 2003, sec. 16 and 17**

16. An environmental impact assessment study prepared under these Regulations shall take into account environmental, social, cultural, economic, and legal considerations, and shall

- a. identify the anticipated environmental impacts of the project and the scale of the impacts;
- b. identify and analyze alternatives to the proposed project;
- c. propose mitigation measures to be taken during and after the implementation of the project; and
- d. develop an environmental management plan with mechanisms for monitoring and evaluating the compliance and environmental performance which shall include the cost of mitigation measures and the time frame of implementing the measures.

17. (1) During the process of conducting an environmental impact assessment study under these Regulations, the proponent shall in consultation with the Authority, seek the views of persons who may be affected by the project.

(2) In seeking the views of the public, after the approval of the project report by the Authority, the proponent shall -

- a. publicize the project and its anticipated effects and benefits by -
  - i. posting posters in strategic public places in the vicinity of the site of the proposed project informing the affected parties and communities of the proposed project;
  - ii. publishing a notice on the proposed project for two successive weeks in a newspaper that has a nation-wide circulation; and
  - iii. making an announcement of the notice in both official and local languages in a radio with a nation-wide coverage for at least once a week for two consecutive weeks;
- b. hold at least three public meetings with the affected parties and communities to explain the project and its effects, and to receive their oral or written comments;
- c. ensure that appropriate notices are sent out at least one week prior to the meetings and that the venue and times of the meetings are convenient for the affected communities and the other concerned parties; and
- d. ensure, in consultation with the Authority that a suitably qualified coordinator is appointed to receive and record both oral and written comments and any translations thereof received during all public meetings for onward transmission to the Authority.

The second schedule of the EIAA Regulations further states that “social considerations” include economic impacts, social cohesion or disruption, effects on health, immigration or emigration, changes in roads (communication), and effects on culture or objects of cultural value (EIAA Regulations 2003, Second Schedule 2). The only documents that explicitly mention resettlement are the Draft Environmental Impact Assessment Guidelines and Administrative Procedures (Draft Guideline),<sup>32</sup> which in chap. 2.11 lists criteria for reviewing EIAs by NEMA including the “adequate consideration given to provision of compensation for loss of/or damage to property, or for resettlement” as a component of mitigation measures (NEMA, 2002, p. 16).

Once the EIA has been conducted by an independent and registered expert, an EIA study report must be submitted to NEMA (established by EMCA 1999, sec. 7) for review and approval. NEMA then may issue an EIA licence, request improvements, or deny the licence as appropriate and necessary to facilitate sustainable development and sound environmental management (EMCA 1999, sec. 58). If a licence is issued, the owner of the premises or the project operator must keep accurate records and make annual reports to NEMA (EMCA 1999, sec. 68), describing how the project conforms to the EIA submitted under section 58. However, an EIA is not a holistic undertaking but project specific and thus “does not extend to existing or ongoing activities.”<sup>33</sup>

The EMCA (Amendment) Act (Republic of Kenya, 2015b) adjusting the EMCA of 1999 (Republic of Kenya, 2000) to the requirements of the devolved government, was passed in June 2015. Further, the amendment redefines EIAs as “integrated impact assessments” (i.e., additionally considering non-environmental, particularly social aspects) and stipulates the formulation of new guidelines (sec. 43(c) amending sec. 58 of EMCA 1999). It also introduces “strategic environmental impact assessments” (SEA), which allow for assessments of the “environmental effects of policies, plans, programmes and other strategic initiatives” beyond the project level (sec. 42 amending sec. 57A). The EMCA (1999) did not require SEAs. Instead, it required national and district environment action plans (part IV) and project-level EIAs (part VI). Additionally, it did not explicitly require EIAs to be “integrated.” The EIA Guidelines of 2002, however, did provide guidance on how to conduct SEAs (NEMA 2002, chap. IV) and on EIA

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<sup>32</sup> Despite being draft guidelines, NEMA posts them on its website as guidelines “to assist in the integration of environmental concerns in economic development to foster sustainable development in Kenya” ([http://www.nema.go.ke/index.php?option=com\\_content&view=article&id=135&Itemid=736](http://www.nema.go.ke/index.php?option=com_content&view=article&id=135&Itemid=736)).

<sup>33</sup> See [www.kenyalawresourcecenter.org/2011/07/environmental-impact-assessment.html#sthash.sQAHusri.dpuf](http://www.kenyalawresourcecenter.org/2011/07/environmental-impact-assessment.html#sthash.sQAHusri.dpuf) (accessed 18.02.2016).

study reports. They directed that EIA study reports consider “the environmental effects of the project including the social and cultural effects and the direct, indirect, cumulative irreversible, short-term and long-term effects anticipated” (ibid, p. 14), i.e., to be of an integrated nature.

The shift to SEAs was said to have been encouraged by donors and lenders, to align Kenyan EIA standards with international best practices (Interview, GDC, 26.03.2015). SEAs do not replace site-specific EIAs but complement them. If an EIA has been completed prior to an SEA, the SEA draws from it, although the SEA usually should precede an EIA. However, an SEA is not a “cumulative impact assessment” – one that looks at the effects on the environment caused by past, current and future direct and indirect human activities. Nor does it take into account the impacts on the various types of land-use, such as geothermal exploration or livestock grazing, in a programme area (ibid). Balancing the various land-uses in an area, however, is useful knowledge. It is evident that, like EIAs, SEAs also have limitations.

As a result of these changes, EIA regulations in Kenya were adjusted to align with internationally accepted standards. These included the need for alternative proposals with less-negative impacts, planning for mitigation measures of such impacts, and information and participation of the affected population in an appropriate manner. NEMA is the Kenyan authority with responsibility for issuing EIA licenses, assessing submitted EIAs, and monitoring compliance with the measures proposed in EIAs. An SEA was not mandatory and hence not undertaken for Olkaria IV, but SEAs were completed for Olkaria V and IV.

#### 2.2.2.1.8 Environmental regulations and institutional settings: climate measures and sustainability

As mentioned in subsection 2.1.6, there are no internationally agreed on criteria or procedures for assessing CDM projects’ contributions to sustainable development. Definitions and procedures of the host country are applied. The Marrakesh Accords, which define the implementation rules for the Kyoto Protocol’s “flexible mechanisms” including the CDM, simply require confirmation by the host country that a project assists it (the host country) in achieving sustainable development, without giving further specification.<sup>34</sup> Ergo, national regulation is crucial here. In Kenya, the constitution stipulates the “sustainable and productive management of land” (Art. 60) as well as sustainable use of resources (Art. 69(1)(f)). The EMCA (1999) provided for principles of sustainable development (sec. 3.5). These principles were also

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<sup>34</sup> Decision 3/CMP.1, FCCC/KP/CMP/2005/8/Add.1 of 30.03.2006, para. 40a.

reflected in the Kenya National Guidelines on the Clean Development Mechanism (2001) (GOK, 2001a) as project criteria and were based on a holistic understanding of sustainable development comprising ecological, social, and economic dimensions (see box 2 below).

**Box 2: Authoritative definitions and criteria of sustainable development in Kenyan law and policy**

In its general part EMCA defines “sustainable development” as “development that meets the needs of the present generation without compromising the ability of future generations to meet their needs by maintaining the carrying capacity of the supporting ecosystems.” In part II it further defines general principles that should guide the High Court in matters related to sustainable development: “(a) the principle of public participation in the development of policies, plans and processes for the management of the environment; (b) the cultural and social principle traditionally applied by any community in Kenya for the management of the environment or natural resources in so far as the same are relevant and are not repugnant to justice and morality or inconsistent with any written law; (c) the principle of international cooperation in the management of environmental resources shared by two or more states; (d) the principles of intergenerational and intragenerational equity; (e) the polluter-pays principle; and (f) the pre-cautionary principle.”

The national guidelines for CDM projects state that such projects are supposed to be environmentally effective whilst leading to sustainable development. To do so “they must be based on principles of equitable allocations and be directed to projects focused on non-greenhouse gas (ghg) emitting technologies especially on non-carbon renewable energy technologies”, which is translated into following project requirements: “a) Demonstrate firm and tangible contribution to sustainable development; b) Be supportive to and consistent with national development priorities and be pegged to poverty reduction; c) The technologies transferred must be locally appropriate and environmentally friendly especially, and demonstrate energy efficiency. Necessary precautions must be in place to avoid dumping of substandard technologies; d) Contribute to the enhancement of national institutional and human capacity building. e) Activities that generate maximum economic, social and environmental benefits should be accorded highest priority; f) Address community needs and priorities through effective public participation in project design, planning and implementation in order to ensure equitable distribution of sustainable development benefits. g) Contribute to global efforts to achieve stabilization of greenhouse gas concentrations in the atmosphere; h) The CDM financial inflows must be over and above the existing Official Development Assistance (ODA); i) Consistent with the objectives of the concurrent environmental conventions, including the Convention on Biological Diversity, the Ramsar Convention on Wetlands, and the Convention to Combat Desertification, Agenda 21, as well as with local and national environmental management laws.” The CDM guidelines are said to be under revision (Odingo, 2009), but results are not yet known.

Source: EMCA sec. 5, and GOK, 2001b

However, in practice, development interventions are shaped by other sector policies, eligibility criteria, and specific regulations such as those discussed above. NEMA advised the study team that the approval of CDM projects by the DNA normally works through a committee that involves lead ministries and governmental authorities, as well as representatives of various sectors (excluding the proponent). The composition of the committee varies, depending on the nature of the project. Special procedures to seek the views of the public are not provided for, though objections might be sent to NEMA. The focus of the consultations is, in practice, the mitigation effects. If the project is approved, the CDM board and the proponent are notified accordingly by NEMA, which serves as the DNA (Interview, NEMA, 25.03.2015).

At the time of the interviews for this report, it was anticipated that aspects of sustainable development might be enhanced by pending legislation. In 2014, the Kenyan parliament enacted the Climate Change Bill that laid the foundations for mitigation policies in Kenya. Amongst its most important outcomes is the establishment of a National Climate Change Council. The Council has responsibility for steering adaptation and mitigation policies, and managing a national Climate Change Fund (CCF) (Ottichilo, 2014). The CCF is to be funded partly by revenues generated through CDM projects and other emission trading schemes. By then it was the project proponents who receive the benefits accrued from the CDM (Interview, NEMA, 25.03.2015). It was hoped this would change with the enactment of the Climate Change Act. The CCF then might be used to finance social benefits for the people affected by a project (Interview, GDC, 26.03.2015). The adopted Climate Change Act (No. 11 of 2016), however, does not have details about revenues from emission trading nor does it define sustainable development. This suggests that little has changed with respect to sustainability criteria for mitigation projects or for the beneficiaries of emission trading.

#### *2.2.2.2 International legal frameworks, policies and institutions*

##### *2.2.2.2.1 World Bank*

As detailed in WP report 1.1, the World Bank was amongst the first actors to formulate a response to involuntary resettlement as a consequence of development projects. In 1980, it drafted an Operational Manual Statement on Involuntary Resettlement. This document has been revised many times, recognizing the issue of resettlement of relocated populations as an integral part of development project planning. The version used here (OP 4.12.) was revised in April 2013 (World Bank OP 4.12, 2013), hence the version before the revision of the entire

World Bank OP-catalogue.<sup>35</sup> A number of other World Bank policies (*inter alia* OP 4.10 on indigenous peoples and OP 4.01 on environmental assessment) are also relevant in this context. The policies address both procedural requirements for projects (to avoid resettlement in the first place) and technical as well as practical aspects of resettlement planning and resettlement (World Bank, 2004).

Additionally, the due diligence expected by the World Bank is expanded not only to projects financed by the bank but also to those integrally linked. As the operational policy states, this entails “all components of the project [...], regardless of the source of financing” (World Bank OP 4.12, 2013, para. 4). The determination of what falls under this policy is crucial in determining when the World Bank’s policy is applicable.

In order to receive financing, the potential borrower must prepare a resettlement plan or resettlement policy framework (paras. 6ff). Consultation with displaced persons is a key requirement. The content of the resettlement plan/policy framework is detailed in Annex A to OP 4.12. (last revision February 2011).

#### *2.2.2.2.1.1 Operational Policy 4.12 on involuntary resettlement*

The expansions of Olkaria I and IV are carried out under the operational policies of the World Bank’s International Development Agency (IDA). IDA guidelines apply to KEEP, of which the geothermal expansion is part. The World Bank thus provides the guidelines for the planned relocation of the population affected either by the resultant pollution or by the land needed for the plant and its transmission lines. The IDA guidelines thus align with the World Bank’s OP 4.12 on involuntary resettlement. The primary policy objective of OP 4.12 is stated in para. 2:

Involuntary resettlement may cause severe long-term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out. For these reasons, the overall objectives of the Bank’s policy on involuntary resettlement are the following:

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<sup>35</sup> During the drafting of this report the World Bank undertook a complete revision of all its OPs. According to a joint statement of NGOs who participated in the World Bank consultations on that issue, the outcome means a considerable deterioration of the protection of PAP (Press Release, 22.07.2016). Amongst others the World Bank is now allowed to finance projects in areas core to environmental protection and indigenous peoples. Projects that require involuntary resettlement can now be approved without knowing details about the number of people affected or plans how to restore their livelihoods elsewhere (Urgewald 2016).

(a) Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs.

(b) Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.

(c) Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher.

OP 4.12 further requires:

- Provision of “measures to ensure that the displaced persons are (i) informed about their options and rights pertaining to resettlement; (ii) consulted on, offered choices amongst, and provided with technically and economically feasible resettlement alternatives; and (iii) provided prompt and effective compensation at full replacement cost for losses of assets [...]” (OP 4.12 (6(a))).
- Provision of “development assistance in addition to compensation measures [...] such as land preparation, credit facilities, training, or job opportunities” (OP 4.12 (6(c))).
- With respect to land, the compensation of “(a) those who have formal legal rights to land (including customary and traditional rights recognized under the laws of the country, (b) those who do not have formal legal rights to land at the time the census begins but have a claim to such land or assets [...], (c) those who have no recognizable legal right or claim to the land they are occupying” (OP 4.12 (15)).
- Timely and relevant information, consultation, and opportunities to participate in planning, implementation, and monitoring for displaced communities and any host communities, (OP 4.12 (13(a))).
- Restoration of infrastructure and public services, including the provision of “similar resources [...] to compensate for the loss of access to community resources” (OP 4.12 (13(b))).
- Preservation of existing social and cultural institutions (OP 4.12 (13(c))).
- In all cases where indigenous people are supposed to be resettled, the exploration of “viable alternative project designs to avoid physical displacement of these groups” (OP 4.12 (9)).

- Provision of “an appropriate and accessible grievance mechanism” (OP 4.12 (13(a))). Such mechanisms should take the form of third-party mechanisms, including both the option of judicial recourse and traditional dispute settlement mechanisms (OP 4.12, Annex A,(17)).

#### *2.2.2.2.1.2 Operational Policy 4.11 on physical cultural resources*

Also applicable to the Olkaria IV resettlement was OP 4.11, regarding graves and cultural heritage sites. Concerns about such sites have, however, not been a priority. The final investigation report of the Inspection Panel concluded that World Bank management complied with the stated safeguards (World Bank Inspection Panel, 2015b). Therefore, they are not further discussed in this report.

#### *2.2.2.2.1.3 Operational Policy 4.10 on indigenous peoples*

It is debatable whether the OP 4.10 special guidelines for indigenous people should have been applied. The RAP does not mention OP 4.10 as part of applicable frameworks. However, the World Bank’s integrated safeguard datasheet for KEEP clearly demands that OP 4.10 be applied (World Bank, 2010). With regards to involuntary resettlement of indigenous peoples, OP 4.10 states that

“[...] the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples’ communities as part of the free, prior, and informed consultation process. In such cases, the borrower prepares a resettlement plan in accordance with the requirements of OP 4.12, [and] that is compatible with the Indigenous Peoples’ cultural preferences, and includes a land-based resettlement strategy. As part of the resettlement plan, the borrower documents the results of the consultation process. [...]” (OP 4.10 (20)).

OP 4.10(3) mentions self-identification and recognition by others, collective attachment to ancestral territories, customary institutions, and an indigenous language as criteria for identifying whether PAP are indigenous peoples. It further emphasizes special procedures for communication, such as use of customary institutions of self-representation and indigenous language, and need for translating negotiations and documents. Finally, OP 4.10 also makes provisions for benefit sharing from the exploitation of natural resources that affect indigenous peoples and their ancestral territories (para. 18).

The government of Kenya together with the World Bank developed an Indigenous Peoples’ Planning Framework (IPPF) as requested by OP 4.10(13), which includes several references to OP 4.10 (Republic of Kenya, 2010).

#### 2.2.2.2.2 European financiers

As mentioned, the European lenders coordinated their funding under the MRI. And the Agence Française de Développement (AFD) took the lead on the resettlement component. The following explores the social safeguard policies of each entity from a human rights perspective, as delegation of responsibilities does not free delegating entities from their due diligence obligations.

##### 2.2.2.2.1 *European Investment Bank (EIB)*

In 2009, the EIB issued a statement on Environmental and Social Principles and Standards (ESPS) (EIB, 2009). This document included Climate Standards that encouraged and promoted “climate change mitigation projects in various sectors.” There is also an “annual percentage target for lending of at least 25%” for climate action projects (EIB, 2013a, Policy Alignment, p. 45). EIB investment was expected to be in line with EU development policies regarding poverty reduction (even eradication) and sustainable development. This additional mandate was particularly relevant for ACP countries under the Cotonou Agreements as it allows for concessional credits (EIB, 2010b, p. 12).

The 2009 ESPS was already taking a human rights-based approach (HRBA), which they interpreted as standards that “aim to protect the rights and enhance the livelihoods of people directly and indirectly affected” by EIB-financed projects (EIB, 2009, p.17). The principles in the 2009 ESPS were the ones applied to the Olkaria project and the related resettlement, if the MRI was not taken into account. EIB’s HRBA explicitly considered involuntary relocation, vulnerable groups, indigenous people, and public consultation. In detail, it stated (ibid, p. 18):

Involuntary resettlement: “People whose livelihoods are negatively affected by a project should have their livelihoods improved or at minimum restored and/or adequately compensated for any losses incurred. As such, where physical or economic displacement is unavoidable, the Bank requires the promoter to develop an acceptable Resettlement Action Plan. The plan should incorporate and follow the right to due process, and to meaningful and culturally appropriate consultation and participation, including that of host communities.”

Vulnerable groups: “All policies, practices, programmes and activities developed and implemented by the promoter should pay special attention to the rights of vulnerable groups. Such groups may include indigenous people, ethnic minorities, women, migrants, the very young and the very old. The livelihoods of vulnerable groups are especially sensitive to changes in the socio-economic context and are dependent on access to essential services and participation in decision-making.”

Indigenous people: “Where the customary rights to land and resources of indigenous peoples are affected by a project, the Bank requires the promoter to prepare an acceptable Indigenous

Peoples Development Plan. The plan must reflect the principles of the UN Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent to any relocation.”

Consultation: “Stakeholder concerns should be considered as early as possible in the project assessment process in order to reduce risks and provide for timely resolution of conflicts. For all projects for which the EIB requires a formal EIA, the promoter should conduct a meaningful, transparent, and culturally appropriate public consultation of affected communities and provide for a timely disclosure of appropriate information in a suitable form; there should be evidence that the views expressed have been considered. ... meaningful dialogue and participation is crucial to promoting and supporting the rights of people affected by a project. This includes the rights to due process via recourse to independent appeal and arbitration procedures in the case of disputes. As such, public consultation is a general requirement of the environmental and social safeguards of the Bank, as well as being applied to specific social issues, e.g. involuntary resettlement” (EIB, 2009, p. 20).

The EIB’s Environmental and Social Practices Handbook (2010), which served to operationalize the 2009 ESPS, ranked projects that affect indigenous people as “high risk” as it did projects involving “the resettlement of more than very few people” (EIB, 2010b). Its Social Assessment Guidance Note on involuntary resettlement provided for screening questions that cover crucial topics such as land acquisition, mechanisms for consultation, participation and complaint, and compatibility of national legislation with EU law (ibid, p. 24f.).

The ESPS differentiated between projects inside the EU and accession states, and investments outside the EU in third-world countries. Social standards applied to EU countries must comply with the rights set out by the CFR. But applying HRBA in third-world countries meant “mainstreaming the principles of human rights law into practices through the application of its (EIBs) Social Assessment Guidelines” (ibid, p. 18). Inside the EU, the rights of the Aarhus Convention on access to information, participation in decision-making, and access to justice were applied, but “[o]utside the EU, national law sets the minimum disclosure, consultation and participation requirements of the Bank” (ibid, p. 20). It further stated that “In the case of co-financing of projects outside the EU and the enlargement countries, the EIB can agree to apply the standards of other international financial institutions, as far as they are equivalent to the requirements of the Bank” (ibid, p. 17). If EIB “is in partnership with [IFI’s that have developed policies for handling resettlement and relocation issues] it may only be necessary to ensure that those policies are adequate and are being implemented” (ibid, p. 105). Differentiations between inside and outside investment also run through the Environmental and Social Practices Handbook. The standard formulation for investment in third-world countries was “[w]here EU standards are more stringent than national standards, the higher EU standards are required if practical and feasible” (ibid, p. 18).

EIB social standards were developed along the lines of human rights. In 2011, the EU Parliament and the EU Council decided to include environmental and human rights as a priority for EU bodies' activities. For EIB this mainstreaming process included a "human rights gap exercise" using EU and international law, and UN soft law as a filter for reviewing their own safeguards. This included incorporating crucial elements of the "UN Framework on Protect, Respect and Remedy on Business and Human Rights," the Ruggie Guidelines (CONT, 2012, p.14). The current Environmental and Social Handbook of the EIB (EIB, 2013a) thus uses language that strongly borrows from human rights documents to formulate the objectives of the resettlement standards. For example, it defines adequate housing along the lines of General Comment No. 4 of the CESCR (Standard 6; EIB, 2013a, p. 53). It also explicitly covers FPIC for indigenous people along the lines of UNDRIP and ILO 169 (Standard 7; *ibid*, p. 65 and p. 86), as well as "free, prior and informed engagement" for other stakeholders (Standard 10; *ibid*, p. 85).

The new handbook is, however, not relevant to the Olkaria project. The new standards are intended to be "consistent with [...] international and EU human rights law" (EIB, 2013a, Policy Alignment, pp. 52, 55). As a body of the EU, EIB is also bound by Article 51 of the Charter of Fundamental Rights of the European Union (CFR). While this does not mean that EIB must actively promote human rights, it is bound to "not support projects that have a negative impact on those rights" (Pistoia, 2014, p. 333).

**Box 3: Procedural safeguards relevant for involuntary resettlement in the 2013 EIB handbook, Volume I, Environmental and Social Standards**

The new handbook emphasizes that consultations in the context of involuntary resettlement need to be carried out prior to resettlement and "will continue ... during the implementation and monitoring of the resettlement." It continues to stress that special emphasis has to be given in consultations to vulnerable groups (with a special emphasis on women) and that "where necessary ... special measures or procedures" should be adopted (EIB, 2013a, p. 59).

**Para. 6.50** emphasizes that "[r]esettlement is often a complex process involving a **variety of stakeholders**, including project affected people, host communities, the promoter, community-based organizations (CBOs), non-governmental organizations (NGOs) and a multitude of governmental agencies, national and local. It is crucial that the promoter identifies and consults with all persons and communities involved in the resettlement process, including the host communities who will receive those who are resettled. All relevant stakeholders must be given the opportunity for informed participation in resettlement planning with the goal that the mitigation of the adverse project impacts is appropriate and

the potential benefits of resettlement are sustainable. Consultation will continue in accordance with Standard 10 on Stakeholder Engagement and during the implementation and monitoring of the resettlement process” (ibid).

**Para. 6.51** again specifies the approach to be taken with **vulnerable persons** by stating that “[i]n line with this, opportunities for dialogue and consultation must be extended effectively to the full spectrum of affected persons, paying particular attention to the full participation in the consultation process of women, vulnerable and marginalized groups, in accordance with Standard 7, and, where necessary, adopting additional/complementary special measures or procedures. Limiting such consultation to heads of communities and/or households alone risks missing key gender dynamics in households and, as a result, further deteriorating the standing of women. It is therefore important to hold also separate consultations with women only, possibly broken down by different age groups.” And it further concludes in **para. 6.52** that “[w]ide consultation within each household unit is critical in cases of extended families, if conflicts are to be effectively mitigated” (EIB, 2013a, p. 59).

Above mentioned Standard 10 elaborates in detail on indigenous people and the free, prior, and informed consent (FPIC) principle (p. 90). **Para. 10.40** defines requirements necessary to “properly appreciating and applying FPIC” (EIB, 2013a, p. 90) stating that:

- **Free** should imply no coercion, intimidation, or manipulation.
- **Prior** should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes.
- **Informed** should imply that information is provided that covers (at least) the following aspects: (a) the nature, size, pace, reversibility and scope of any proposed project or activity; (b) the reason/s or purpose of the project and/or activity; (c) the duration of the above; (d) the locality of areas that will be affected; (e) a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and benefit sharing in a context that respects the precautionary principle; (f) personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others); and (g) procedures that the project may entail; and
- **Consent** should be premised on consultation and participation undertaken in good faith and full and equitable participation, allowing for as much time as needed and an effective system for communicating amongst interest-holders, participation of peoples’ own freely chosen representatives and customary or other institutions, and the participation of indigenous women, as well as children and youth as appropriate.

**Para. 10.41** further explains for FPIC “[t]he principle underlines the EIB’s acknowledgement of the important nexus linking **sustainable development and self-determination**. Moreover, and in line with the EIB’s commitment to human rights, it is the respect and protection of indigenous peoples’ human and collective rights that should guide the promoter’s actions. In affirming those rights, the FPIC process should produce a clear endorsement or rejection of the proposed intervention and a statement of all accompanying mitigating measures and/or benefit-sharing agreements.” (EIB, 2013a, p. 90)

Closely related to participation and consultation is the requirement for an operational-level grievance mechanism that, according to **para. 6.51**, complies with the following requirements:

“The promoter shall set up and maintain a **grievance mechanism** that is independent, free ... and that will allow prompt addressing of specific concerns about compensation and relocation from the affected people and host communities and other directly involved entities. The mechanism should be easily accessible, culturally appropriate, widely publicized, and well integrated in the promoter’s project management system. It should enable the promoter to receive and resolve specific grievances related to compensation and relocation by affected persons or members of host communities, and use the grievance log to monitor cases and improve the resettlement process” (ibid, p. 59).

**Para. 10.8**, additionally specifies that “[s]uch mechanism ought to be effective, by way of being verifiably legitimate; accessible; predictable; equitable; transparent; compatible with human rights; based on engagement and dialogue; and, a source of learning for all stakeholders involved, including the promoter” (ibid, p. 86). In para. 46 it stipulates that “[t]he promoter will ensure that a grievance mechanism is introduced at project level, irrespective of other complementary linkages or access to existing public grievance channels in the country concerned. It should be designed as a mechanism that is:

- legitimate and trusted;
- scaled to the risks and potential adverse impacts of the project;
- publicized and accessible, appropriately tailored to all potentially-affected persons and communities and other interested parties, irrespective of their literacy and administrative capacity;
- free of cost for the stakeholders;
- includes the anonymity option, where feasible, and guarantee confidential handling of requests, if so requested by the complainant;
- fair, transparent and inclusive;
- guided by engagement and dialogue;

- predictable in terms of process;
- timely;
- not impeding access to grievance and resolution on grounds of one's financial ability to seek judicial remedy; and,
- a source of continuous learning for the promoter and the lending operation at large." (EIB, 2013a, p. 91)

On **relocation sites** the new handbook stipulates in **para. 6.37** that "[a]ffected stakeholders should be consulted on the choice of sites and, as far as possible, offered choices amongst sites." (ibid, p. 57) and, in **para. 6.36**, the minimum conditions such sites shall fulfil are:

- not be situated on polluted land or in immediate proximity to pollution sources that threaten the right to mental and physical health of the inhabitants;
- not be located in zones identified as potentially subject to disaster risk followed by a natural hazard;
- not be threatened by (imminent) eviction (e.g., public right-of-way), thereby augmenting the compounding effect of the original displacement impact;
- be identified taking into account their adequacy in terms of (a) legal security of tenure; (b) availability of services, materials, facilities and infrastructure; (c) affordability; (d) habitability; (e) accessibility; (f) potential for further development; (g) have the capacity to accommodate influx of new settlers at acceptable density levels; and (h) location, and cultural adequacy;
- not be on land used by communities which have been displaced as a result of violence or conflict;
- be available and have the capacity to absorb the influx of resettled persons at acceptable density levels, i.e. resettlement should not lead to new resettlement.

Finally, **para. 6.38** clarifies that "[i]n cases of economic displacement, and where the asset impacted is arable land constituting the primary and sole source of income and subsistence of the affected household, it is equally advisable that land-for-land compensation is suggested, situated as close as possible to the original place of residence" (EIB, 2013a, p. 57).

#### *2.2.2.2.2.2 Agence Française de Développement (AFD)*

Although AFD was the MRI lead for Olkaria IV, the applicable social and environmental standards were unclear. Response to requests for interviews or for copies of their safeguards and operational policies was weak and no documents were forthcoming. The AFD website indicates that they apply a series of international standards to manage the environmental and

social risks of its projects over and above the national regulations of host countries, which are “sometimes incomplete or being developed.” Reference is made to:<sup>36</sup>

- UN Principles for Responsible Investment (UNPRI)
- World Bank Safeguard Policies
- IFC Performance Standards for private sector financing
- ‘Principles for Responsible Financing’ used by European Development Finance Institutions (EDFI Group)
- United Nations Universal Declaration on Human Rights
- ILO fundamental conventions on labour law
- United Nations Convention on the Elimination of All Forms of Discrimination against Women
- OECD guidelines

AFD further acknowledges that it “operates in countries where human rights are not necessarily applied, even if they do formally adhere to the relevant fundamental conventions,” and states that “[t]he mandatory due diligence for operations, conducted via the agreements signed with our partners and beneficiaries, looks closely at [...] respect for the rights of indigenous peoples.”<sup>37</sup>

#### *2.2.2.2.2.3 Kreditanstalt für Wiederaufbau (KfW)*

The KfW’s Sustainability Guideline on the evaluation of environmental, social, and climate aspects of funded projects were not particularly detailed, neither on resettlement nor (or even less) on complaint mechanisms. It states that projects that “require the resettlement of a large number of people” fall under category A of KfW funded projects.

“For category A projects, it is mandatory to analyze and appraise any negative ecological and social consequences as part of an independent environmental and social impact study (ESIS) and to draw up an environmental and social management plan (ESMP). The ESMP should describe all measures that need to be taken to avert, mitigate, offset and monitor any negative consequences that have been identified by the ESIS; it should also assign responsibilities for implementing such measures and list the costs involved. For category A projects, KfW

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<sup>36</sup> <http://www.afd.fr/lang/en/home/AFD/developpement-durable/DD-et-operations/maitrise-risques>

<sup>37</sup> <http://www.afd.fr/lang/en/home/AFD/developpement-durable/DD-et-operations/droits-humains-developpement>

Development Bank requires the executing agency to operate an appropriate monitoring system; if the projects are run by private operators, they are required to have their own environmental and social management system. Any such management system must comprise the following elements: (a) adequate organizational capabilities, (b) environmental and social assessment procedures, (c) management programmes, (d) specific environmental and social training measures, (e) well-structured relations with the target group, (f) monitoring and (g) reporting procedures” (KfW, 2014, p. 6f.). KfW commits itself to

“ensure that all projects funded by the bank comply with the principles of...

avoiding any adverse impact on community life, particularly of indigenous people and other vulnerable communities, and safeguarding the rights, living conditions and values of indigenous communities;

avoiding or minimizing involuntary resettlement and forced eviction of communities and mitigating the negative social and economic consequences arising from changes in the use of land and soil by restoring the original living conditions of the communities concerned; ...” (ibid, p. 9f.)

## **2.3 Stakeholder positions**

During our fieldtrip several substantive claims about the new settlement were made by PAP, the most important of which concerned land compensation. These claims were investigated by both the Inspection Panel and EIB-CM, the institutional, extra-judicial complaint mechanisms of the World Bank and the EIB. Their findings were published in summer and autumn 2015 (World Bank Inspection Panel, 2015b; EIB-CM, 2015a). A mediation process related to the claims was completed in May 2016 (see also subsection 2.4 and afterword). This report will focus on procedural issues and on the question of land and livelihood restoration of the Cultural Centre. To begin, however, an overview of the substantive claims and stakeholders’ positions is required.

### **2.3.1 Substantial claims other than those about the land (MDR specific)**

Fewer houses were built for the resettlement than was initially agreed to. This was primarily the result of (im)proper identification of eligible PAP. Whereas the GIBB Africa report (2012) calculated that 164 houses were needed, the MoU only specified 150 houses. The interviewed PAP did not know how or why that change was made. They recalled that the agreement was for 160 houses and after the requested update of the census was done, the number increased to 180 houses. Ultimately, KenGen only built 150 houses – the number of houses stated in the

MoU and 14 fewer than the PAP claimed were needed. The MoU contained a footnote saying that “[a]ny PAP, who may have been left out of the house beneficiary list and is found to have been captured in the GIBB Consultants’ list of 2009, will automatically be included as a beneficiary, and a house constructed for them” (MoU 2013, p. 5). The accurate number of houses thus depends on the interpretation of the 2009 census, which requires some explanation.

For several reasons the 2009 census was viewed as imprecise, partly due to procedural problems. The PAP protested that the first census was carried out without proper advance communication (“some fled because of fear”) and took place during the drought when many move away with their cattle to drought fall-back zones (FGD, PAP, 19.03.2015).<sup>38</sup> The census was built on “an initial social survey and mapping” done by KenGen “between 2008 and August 2009” (GIBB Africa, 2009, p. 2-1). A long-standing employee of Kedong Ranch Ltd. gathered the data on 106 households and verified claims regarding the duration of residence of identified PAP (Interview, KenGen, 26.03.2015).<sup>39</sup>

The 2009 census was subsequently updated on several occasions. According to the 2012 RAP document, there were annual updates or ‘editions’ (GIBB Africa 2012, p. 1-2). The first update took place in 2010 in the context of land acquisition for the KETRACO transmission line from Olkaria Domes to Suswa substation (2010 edition). From 2–4 November 2011, a “joint Social Supervision Mission” of AFD, EIB, and KfW took place and census-related findings were incorporated (2011 edition). Additionally, lenders’ recommendations for improvement of the census were incorporated into the 2012 update (2012 edition). The only update of which the PAP seemed aware, however, was that of 2012 when finger prints were taken (Cultural Centre, 2013).

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<sup>38</sup> Doing the compensation needs assessment in a hasty fashion was inconsistent with OP 4.12 (13(a)). However, other provisions of World Bank safeguards also contributed to the outcomes. The Bank requires that measures be taken to “... discourage inflow of people ineligible for assistance” (OP 4.12 (14)). KenGen’s approach, while compliant with OP 4.12(14), was to “[oust] non-resident opportunists” (Mwangi-Gachau 2011a) from the census. This effectively prevented the communities from consulting with independent experts and advisers, and from reflecting on their options, including objecting to the relocation, before the relocation planning started. Obviously, World Bank OP 4.12 contradicts itself in this regard.

<sup>39</sup> Interestingly, 106 is also the number of households for which income and livestock ownership data is presented in the annexes to the 2010 ESIA (see EIB-CM, 2015a, p. 21).

Another World Bank mission to the Olkaria project took place in November 2012 (World Bank, 2012). This was followed in early December 2012 by a short-term technical consultancy with Tacitus Ltd., a private consulting firm (Tacitus, 2012). The Tacitus report recommended relying on the original 2009 census without updates but with latitude for interpretation (see next para.). In May/June of 2013, KenGen undertook a final validation of the census which confirmed the requirement for 150 houses, the number stated in the MoU subsequently signed on 01.07.2013. It seems that at least some of the PAP were not aware of the changes brought about by the 2013 census validation. The census generally, but in particular this final validation of 2013, is still subject to investigation, mediation and supervision by the involved institutional complaint mechanisms of the EIB and the World Bank (Interview, EIB-CM, 06.06.2015).

The absence of clarity about the number of eligible PAP has its roots in the shortcomings inherent in the 2009 census, because it failed to establish unambiguous categories of PAP. According to the 2012 GIBB Africa RAP report, 164 houses had to be built to adequately compensate resettled PAPs. The figure of 164 included 14 additional houses due to “natural growth cases” (GIBB Africa, 2012, p. 8-4). This number was derived from the number of PAP belonging to the category of Land Owners with Assets, houses being included amongst the assets. In principle, the 2012 Tacitus report supported this 164 figure – although using the 2009 census data, it calculated that only 161 PAP qualified for a new house (Tacitus, 2012, p. 56). However, the report does include clarification on aspects of this matter.

The Tacitus report noted that, after the cut-off date for the census (16.09.2009), 37 PAP were added to the census list and “the process that led to their (sic!) being added did not appear credible as names were given during public disclosure meetings without actual verification in the respective villages” (Tacitus, 2012, p. 16 f.). It explained that the ‘forgotten cases’ claimed by some of the communities, in particular the Cultural Centre, did not change the number of PAP under the category of Land Owners with Assets, and thus did not affect the number of houses to be constructed. For example, tenants who built their own houses were eligible for monetary compensation at replacement cost but not to a house on RAPland (Tacitus, 2012, p. 57). The same was the case for landowners who owned additional houses which they rented out (ibid, p. 58). Members of the Cultural Centre business community, who did not reside in the village were assumed to not qualify for any compensation because the Cultural Centre continued to exist as a business centre in its original location (ibid, p. 33). The report did concede that the 2009 census did not always specify the assets owned by PAP in the Land Owner with Assets category (19 families from OloMayana).

Despite these irregularities in the 2009 census, the Tacitus report concluded that “opening the census up for confirmation of information might be unwise at this point in time” (ibid, p. 16). It instead recommended staying with the number of 164 houses, of which 19 (the OloMayana cases) it regarded as subject to KenGen’s good will.

Notwithstanding the Tacitus report’s recommendation, KenGen opted to exclude Land Owners with Assets if the assets had not been specified (a footnote in the MoU provided for only very limited ability to make adjustments). From the key informant group interview (KIGI) with the World Bank (KIGI, World Bank, 17.03.2015), including its social safeguard consultant, it was clear that the possibility of adding individuals to the list of eligible PAP was very limited. Since 2012, one person was added because he could prove he had been in jail at the time of the first census, and one natural growth case was accepted.

Another source of confusion might have been the different interpretation of the documents. The Tacitus report stated that 164 houses was the original number (Tacitus, 2012, p. 56), whereas the 2012 GIBB Africa report indicates 150 houses was the original figure and 164 the update (GIBB Africa, 2012, p. 8-4). It might thus be that the 2013 verification of the census was linked to this confusion of figures. It is subject to speculation whether the verification mission served the purpose of clarification (of the existing figures shortly before signing the MoU), of justification (for reducing the number of houses according to a strict interpretation of the 2009 census categories), or even of manipulation (consciously benefitting some to the disadvantage of others). As mentioned, this is subject to investigation, mediation and implementation of the mediation agreement. Though KenGen obviously profits from building fewer houses through reduced costs of the resettlement, acts of manipulation – if such took place – are not automatically attributable to KenGen’s senior management. Equally, manipulations could be the result of opportunists at the local level and/or lower management level who sought to take advantage of the outcome of a final census.

The PAP also claimed that the settlement was not culturally appropriate. First, the nature of the land with its steep-sided valleys did not allow polygamist men to easily move from one house/wife to the other to take care of them, particularly during the rainy season when the valleys and gullies flooded. Second, some polygamist families were separated when some of the households were in Narasha, a village not eligible for relocation in the context of Olkaria IV. Third, members of the Cultural Centre, who were used to living together in close proximity in a

circular setting, found it unacceptable to be living in scattered family clusters at relatively large distances from each other.

With regards to the allocation of houses, PAP claimed that there was insufficient consideration given to the needs of vulnerable persons (elderly, orphans, some female-headed households, and disabled). The Tacitus report stressed that “GIBB did not identify this category of PAP and KenGen is encouraged to quickly identify them and their needs in order to determine the type and level of support to be offered to them” (Tacitus, 2012, p. 59). It may be that this did not happen. According to MPIDO, the Inspection Panel during its visit in January 2015 expressed concern about the location of houses accommodating disabled persons (Interview, MPIDO, 16.03.2015). In the interview with the World Bank, they indicated that the PAP’s concerns regarding the closeness to family and (original) community members, and the design of housing were taken into account (KIGI, World Bank, 17.03.2015). This position was repeated in the final World Bank management response to the report of the Inspection Panel and defended by a description of the participation by the PAP in the decision-making about settlement layout and house design “through RAPIC and CAC” (World Bank, 2015a, p. 31). This representation of events, however, disregarded the existing differences between the resettled communities particularly with regard to settlement layouts (see subsection 2.1.4 above).

The Muslim PAP claimed they were offered neither a mosque in the resettled site nor compensation for costs to travel to the mosque in Naivasha (Chairman of Oloorkarian Maasai Muslims, 2012). KenGen dismissed this claim because neither a mosque nor regular commuting to Naivasha for prayer was reported by the census team. KenGen further claimed that there was only one Muslim family at the time of the census, and that KenGen “as a public agency ... is constrained in funding a religious entity outside of the RAP compensation guidelines” (KenGen, 2013).

Mobility of the PAP declined considerably after resettlement due to the increased distances and reduced access to established transportation facilities. These issues were identified as potential problems in the Tacitus report (Tacitus, 2012, p. 49). This particularly affected the Cultural Centre. Those PAP who had previously lived at the business centre now had to commute 14km each way, on a daily basis. It was therefore the Cultural Centre that lobbied KenGen hardest for their own means of transport after they had been resettled. KenGen made concessions in this regard, but due to inter-community dynamics and conflicts in the new RAPvillage, a very large bus (60-seater) was commissioned for the use of all PAP. The village was unable to maintain a

vehicle of this size and it was rented out to a newly formed bus committee. The Cultural Centre PAP thus remained without adequate means of transport. It was only in the context of the pending Inspection Panel's visit that it was decided that the RAPvillage would be provided with several smaller vehicles (Interview, KenGen, 26.03.2015). In addition, the quality and sustainability of the new roads were questioned by the PAP. They feared that the sandy soil and steep-walled valleys in this parcel of land had a high risk of mudslides. This fear was confirmed by the World Bank implementation support mission for KEEP and its road inspection visit to Olkaria IV in November 2012. They too were concerned about the absence of an adequate drainage system in this type of environment and the threat of mudslides during rainy seasons (World Bank, 2012, p. 6). Additionally, PAP had no assurance that the road would be maintained.

The imminent construction of Akira I, a new geothermal plant 200 metres (according PAP) to 700 metres (according to GDC) away from their resettlement site, raised renewed concerns for their health amongst the PAP. Both Akira I and the RAPland are located on Akira Ranch (which belongs to Kedong Ranch Ltd.) and, whatever the exact distance, Akira I will be closer to the RAPvillage than Olkaria IV is to most of the vacated former villages. PAP have written to NEMA to complain about the absence of an EIA or of having been included in an EIA (Maasai Community RAPland, 2015). From their perspective, this certainly put into question the whole resettlement exercise. KenGen explained that Akira I was not within their scope of responsibility because it was a private investor and operator, but they have asked to be involved in the planning of Akira I to avoid having to resettle PAP. According to GDC, KenGen recently funded an SEA for geothermal drillings in the Olkaria area that includes Akira I (Interview, GDC, 26.03.2015). But according to KenGen, its recent SEA only involved Olkaria V and VI (Interview, KenGen, 26.03.2015). AGIL, the operator of Akira I, created a website for its Longonot geothermal project stating vaguely that “[s]tudies and consultations suggest that significant resettlement is unlikely, although this will be confirmed by further studies. One of the objectives of the ongoing studies is to continue to work with project stakeholders and directly affected individuals, groups and organizations to assess the potential impacts and options for resettlement.”<sup>40</sup> The health risks and the possibility of repeated relocations impair the sustainability of the entire resettlement exercise. When asked about this, financiers expressed

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<sup>40</sup> <http://www.africa-geothermal.com/longonot-project/fags/>, accessed 03.09.2015. Note: A re-check in November 2015 revealed that all questions and answers provided on the AGIL webpage had been deleted.

concern and surprise, and at a loss what to do. Representatives of the KfW admitted that they were aware of concerns of the PAP but that even the Kenyan Ministry of Energy was surprised by the situation (Interview, KfW, 14.05.2015). It is, however, odd that financiers did not have any idea of these problems because GDC regularly invited potential investors to meetings to inform them of future possibilities in the Kenyan geothermal market.

Other substantive concerns voiced by the PAP included the unreliability of the water supply, substandard housing construction, fears that some houses were prone to being damaged or even washed-away by mudslides, increased human-wildlife conflicts (confirmed by the Tacitus report),<sup>41</sup> and the high costs of accessing electricity. As noted, these and other concerns described in this subsection are being mediated. Mediation was facilitated by EIB-CM and was initiated at the request of KenGen (Interview, EIB-CM, 06.06.2015). Implementation of the mediation agreement is ongoing. The photographs in figures 6 and 7, taken after the rains in May 2015, show the vulnerability of PAP on the RAPland to environmental hazards. The photographs in figures 8 and 9 illustrate aspects of the inadequacy of housing.

Figure 6: Collapsed tree on top of a RAPhouse



Figure 7: Landslide near the RAPland



Source: EIB-CM, 2015, Annex

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<sup>41</sup> During our field visit, PAPs mentioned hyenas and leopards. The Tacitus report mentions lonesome buffalos.

Figure 8: (a) Crack in wall; (b) adhesive tape to fix plug



Figure 9: Poor PAP in a RAPhouse



Figure 10: RAPland water kiosk, allegedly unreliable



Figure 11: Warning sign next to kiosk



Source of figures 8, 9, 10 and 11: Jeanette Schade

### 2.3.2 Rights of indigenous peoples

PAP claim that the special needs of vulnerable persons – elderly, disabled, and orphans – with regard to housing and settlement layout were not addressed by the operator. Moreover, the rights of indigenous people – a particular category of vulnerable groups – were inadequately addressed. This would have been significantly different if OP 4.10 had been applied. The issue was not raised by the PAP, and the impression from FGD was that they were unaware of World Bank OP 4.10 on indigenous people (FGD, PAP, 15.09.2015). However, the Inspection Panel and the EIB-CM were seriously concerned about the failure to apply OP 4.10 (EIB-CM, 2015a,

p. 32; World Bank Inspection Panel, 2015b, p. 10). The non-application of OP 4.10 was inconsistent with the World Bank's integrated safeguard datasheet for KEEP, which was produced during the early project appraisal stage and which clearly required the application of OP 4.10 (World Bank, 2010, p. 2).

The government of Kenya together with the World Bank actually drafted an IPPF for KEEP as required by OP 4.10(13). This framework included several references to OP 4.10 (Republic of Kenya, 2010). However, KEEP's IPPF had serious shortcomings. First, the existing draft document was very general and no detailed final version was published (as required) on the World Bank's InfoShop website.<sup>42</sup> Second, the Kenyan government sought to confine its application to the "ethnic minorities groups" of the Sengwer, Ogiek, Waata, and Boni. The framework failed to mention the Maasai or pastoralist tribes in general (Republic of Kenya, 2010). It did note the possibility of adding groups to this list but nevertheless, the Maasai, whose presence in the area was widely known, were not included or recognized as indigenous at any stage of the project. It should further be noted that none of the mentioned hunter and gatherer groups (Sengwer, Ogiek, Waata, Boni) were actually living in the project area (World Bank, 2015a, p. 25). See subsection 3.1.1.2 for more information on the socio-political background.

OP 4.10 was neither mentioned in the section on applicable laws and guidelines of the GIBB Africa RAP (the 2009 and the 2012 version) nor in the EISA of KenGen submitted to NEMA (KenGen, 2012). Interestingly, chapter 6 on the public consultation exercise in the 2009 RAP mentions that "[p]ublic consultation in the ESIA process is undertaken during the project design, implementation and initial operation" and that "[d]uring the consultations, the following were also considered as per World Bank's policy on indigenous people (OP 4.10) which outlines that consultations with indigenous peoples should be: culturally appropriate; gender and inter-generationally inclusive; conducted in good faith; [and] voluntary, free of interference and non-manipulative" (GIBB Africa, 2009b, p. 6-1). This is repeated in the 2012 RAP (GIBB Africa, 2012, p. 6-1). Hence, PAP were indirectly recognized in the RAP as indigenous, but no further operationalized normative aspirations of OP 4.10 for consultation processes were set out.

In response to the question of whether it would have made a difference if OP 4.10 had been fully applied, the World Bank said it would not (KIGI, World Bank, 17.03.2015). They held that this specific resettlement had "an intense consultation process," that "entry points were done

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<sup>42</sup> Last check 28.06.2013.

according to customs” going through elders, chairmen, etc. They added that OP 4.12 and OP 4.10 required similar information on impacts on livelihoods etc. and required the development of measures to mitigate negative effects (quotes according to written notes). Similar arguments were raised during the investigation process (World Bank, 2015a, p. 7). The rationale of World Bank management and the other lenders’ to not apply 4.10 was illuminating. Their explanations to the Inspection Panel and the EIB-CM mainly related to the political circumstances of the time.<sup>43</sup> The new Kenyan constitution had not been adopted at the time of project appraisal and political discussions about its scope regarding the protection of indigenous people were ongoing. Also, ethnic tensions were high throughout the province (post-election violence of 2008) and in the Naivasha region specifically (upheavals in 2009 and 2010 related to the land conflict about Maiella Ranch; see 2.1.1.1.) (EIB-CM, 2015a, p. 34; World Bank Inspection Panel, 2015a, p. 10). Additionally, the argument was raised that the Cultural Centre “certainly does not fall under this category on the basis of its income-generation model” and that “several families had casual wage-earning members ...” (EIB-CM, 2015a, p. 34). None of these arguments were mentioned during our interview with World Bank Nairobi in March 2015.

The decision to classify the PAP as vulnerable people and not as indigenous people was unanimously made by the lenders, and resulted in the non-application of OP 4.10 (EIB-CM, 2015a, p. 34).<sup>44</sup> In addition to procedural flaws, this decision resulted in PAP being excluded from a benefit-sharing scheme. If they had been designated indigenous, they would have been included in such a scheme according to OP 4.10, para 18, which for the exploration of natural resources requires that “[t]he borrower includes in the IPP [Indigenous Peoples Plan] arrangements to enable the Indigenous Peoples to share equitably in the benefits.” However, not only did financiers fail to ensure that OP 4.10 was applied and that benefit sharing in natural resource exploitation was secured, but in 2013 KenGen explicitly rejected the voiced claim of the Maasai to have a permanent share of the accruing benefits of 5 percent on the grounds that such claim lacked legal basis (Kariuki, 2013)! Financiers admitted that there was no discussion

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<sup>43</sup> Similarly the EIB Senior Social Development Specialist explained that “this was related to the political circumstances of that time” (Interview, EIB, 07.12.2015).

<sup>44</sup> Such a ‘unanimous decision’ was not necessarily accompanied by a formal joint process to take this decision, but might just have been the result of views exchanged on the topic (clarification received from EIB-CM, 06.03.2016). The decision to categorize PAP as a vulnerable group appears, however, to have been based on mutual consent. This position was not only voiced by EIB services to EIB-CM but also voiced at the meeting with World Bank staff and consultants in Nairobi with the author (KIGI, World Bank, 17.03.2015).

about geothermal promoters having any obligation to benefit-share until the adoption of the Natural Resource (Benefit-Sharing) Bill in 2014 (EIB-CM, 2015a, p. 34).

### **2.3.3 Security of tenure and adequacy of land compensation**

As mentioned, the soil of RAPland is sandy and the area characterized by steep-sided natural gullies. This makes it susceptible to land-slides and, from the viewpoint of PAP, unsuitable for cultivation, human settlement, or livestock grazing. PAP were also concerned that the size of the land did not match what the PAP and KenGen had agreed to. The PAP estimated that of the 1,700 acres only 600 to 700 acres were suitable for agricultural use and grazing (FGD, PAP, 21.03.2015).

The PAP claimed that adequate land compensation should have been 4,200 acres (FGD, PAP, 20.03.2015). Prior to the resettlement PAP had allegedly engaged a community surveyor who analyzed all known boundaries and confirmed the 4,200 acres. Documents to this effect are said to have been submitted to KenGen and the World Bank (FGD, PAP, 15.09.2015). It was well-known that the local area used for grazing was much larger than 1,700 acres. The Tacitus report criticized the original census of GIBB Africa because it failed to account for moveable assets such as livestock, although other sources for livestock data might have been available.<sup>45</sup> Whatever the correct livestock data might have been, at no point was a study done on the carrying capacity of the resettlement land. The Tacitus report justified that by arguing, "... while the 1,700 acre resettlement site (which has been unconditionally accepted by the PAP) will act as both a settlement site and grazing area for the PAP's livestock, it is also assumed that the status quo will be maintained with regard to their current grazing areas and beyond. Therefore, relocation to the resettlement site should have no direct impact on their grazing patterns" (Tacitus, 2012, p. 14). Similarly, the EIB Senior Social Development Specialist argued that grazing rights were maintained and a field visit confirmed that livestock was grazing everywhere (Interview, EIB, 07.12.2015). In fact, PAP confirmed, and it was evident from several sources, that they had agreed to the offer of 1,700 acres. An important rationale for doing so was the thinking that it was better to have 1,700 acres with a proper title deed than to continue with the

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<sup>45</sup> The RAP 2009 only provided livestock data for 14 households (GIBB Africa, 2012, vol. II, p. 20). The EIB-CM concluding report, in contrast, mentioned that livestock data for at least for 106 households was available (EIB-CM, 2015a, p. 21). 106 is also the number of households covered by the first base-line survey conducted by KenGen in early 2009 before the GIBB Africa census. This document is, however, not publicly available.

current situation where they were not legal land owners – despite the fact that it was their ancestral land.

Additional attention must be paid to the question of the land's adequacy to maintain livestock and the absence of due regard for this issue. In interviews with World Bank Nairobi and KenGen, stereotypical comments such as “they (pastoralist Maasai) walk with their cattle as far as Nairobi” were common, seemingly to emphasize the needlessness and even impossibility of assessing the land used by pastoralists for grazing. However, after stating that relocation had no impact on grazing patterns (see para. above), the Tacitus report makes a statement which qualifies this assumption:

“According to the GIBB report, the PAPs requested that even after the relocation, they should be allowed to continue grazing their livestock in the areas of their current settlements. KenGen however informed the PAPs that it could not commit itself to ensure the PAPs continue grazing in their current settlement areas since the land on which they are currently settled either belong to Kedong or to KWS and KenGen cannot make commitments on their behalf. KenGen hopes though, that because resettlement site is in close proximity to the current PAPs settlements and grazing command areas, the status quo would be maintained. In this respect, if there was to be any interference by the legal landowners, it would not have been occasioned by the fact of the resettlement.” (Tacitus, 2012, p. 16)

Though this is correct from a legal perspective, it potentially curtails the objective of sustainable livelihood restoration and disregards processes to work on historical injustices.<sup>46</sup> In fact, the first RAP of 2009 clearly stated that 1,700 hectares (sic! should be acres) was not enough to sustain the approximately 24,000 heads of livestock (cows and goats). It concluded that it was “imperative that the new resettlement area should not hinder access to current dry season livestock grazing lands” and recommended that land be set aside for the growth of fodder (GIBB Africa, 2009b, p. 7-13). Taking into account the expanding geothermal explorations in Olkaria, it is unlikely that PAP can maintain their grazing patterns. Leaving this crucial component of their livelihood maintenance up to the good will of land owners seems inadequate. However, the position of the operator and of the social safeguard consultant of the World Bank Nairobi on the question of adequate size was that the PAP made a “good deal” (social consultant at KIGI,

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<sup>46</sup> 4,200 acres may randomly coincide with the matter in a land dispute between members of the neighbouring Narasha community and the legal land owners there (this dispute was mentioned in an interview by KenGen's Director for Regulatory and Corporate Affairs on 26.03.2015).

World Bank, 17.03.2015) compared to their previous situation with regard to both land ownership and quality of housing. During the second field trip, however, it was reported that some pastoralist families already needed to sell livestock because they could not sustain them (FGD, PAP, 15.09.2015). A report about cattle dying because of soil and water contamination in the area of the geothermal explorations was undertaken (Koissaba, 2015b).

Another serious issue noted at the time of the second field visit was that title deeds for the land had not been transferred to the PAP. The delays in this process were related to a court battle on land ownership between Kedong Ranch Ltd. and Suswa Maasai. World Bank management emphasized that “due diligence revealed that the land had no encumbrances when the sale agreement was entered into between KenGen and Kedong Ranch Ltd” (World Bank, 2015a, p. 33). This only reflects the World Bank’s disregard of matters of historical land injustice and their role in court proceedings. According to news reports the land was bought in 2012 (Murage, 2012), whereas the first claim of the Maasai against Kedong Ranch Ltd. dated from 2010 (civil suit no. 21 of 2010). According to KenGen, a final judgement was made on 31.01.2015 and no appeal was received within the deadline (Interview, KenGen, 26.03.2015). According to MPIDO, the case went to the Court of Appeals in Nairobi (Interview, MPIDO, 11.09.2015), and PAP confirmed that the issue of titles was not yet resolved (FGD, PAP, 15.09.2015). Taken together, this represented serious non-compliance with the MoU between KenGen and the PAP as it was agreed that the transfer of title should take place before the physical resettlement to the RAPland. An amendment to the MoU gave KenGen an additional six months – which has long since passed. The PAP were understandably concerned about the delay and it triggered old fears and mistrust. To make matters worse, the addendum to the MoU was only published on the World Bank Infodesk in October 2015, more than a year after its signing and only after the inspections. In May 2015, KenGen informed EIB-CM that “due to fiscal matters related to the communal land title transfer, the process had been further delayed” and “could take up to one year” (EIB-CM, 2015a, p. 15).

The process of preparing for the land transfer started at the end of 2012 because financiers were keen to expedite the title transfer and get other pending questions of land resolved (World Bank 2012, p. 27). The process was initiated by a workshop to introduce PAP to the possible legal forms of jointly holding land. At that time the only available legal options were those of the Land Registration Act (2012), all of which were tailored for the needs of business and third sector entities (NGOs, trusts, self-help societies). These were all forms that allowed for easy individualization of land titles, which appeared to be an option some community members were

interested in (ibid). Taking the considerable delays into account, it may have been better (in the opinion of the author) to wait for the proclamation of the Community Land Bill which has better protection against individualization of community land (a quorum of two thirds of all adults of a community).

Another concern of the PAP and the financiers was a second piece of land for the Cultural Centre. The request for this piece of land developed along similar lines as the request for means of transportation quorum. The Cultural Centre asked for land to establish the business centre elsewhere, where overnight stay was possible. KenGen agreed and they searched for suitable land north of the existing Cultural Centre (Cultural Centre, 2011a, 2011b). The identified parcels were rejected by KenGen on the basis of a pending court case and of development activities already planned for this land. However, Cultural Centre members think it was because of the price. It was then agreed that the Cultural Centre could stay where it was but only be used as a daytime business place – 6 am to 6 pm and no overnight stays. And the ‘community’ of the Cultural Centre was to get the title deed over that land.

The size of the Cultural Centre land became yet another dispute. The Cultural Centre demanded 20 acres but KenGen offered only 2.4 acres. The issue was brought up in the RAPIC and, according to PAP, KenGen agreed to 14 acres (FGD, 20.03.2015). KenGen insisted it was 12 acres. In 2012, lenders urged KenGen to resolve issues with the PAP regarding the Cultural Centre land claim (World Bank, 2012, pp. 55, 92). But it was August 2014 before KenGen agreed to amend the MoU, i.e., in a legally binding manner, to read 14 acres (MoU, 2014, p. 2). PAP complained that this amendment was not put on the World Bank Infodesk until October 2015.

The Cultural Centre effectively became a RAPland community project and the land was registered under a new society that included all PAP, even those not involved in tourism. As such, the original Cultural Centre members feared their main source of livelihood (tourism) would be impaired. The Tacitus report, however, expressed doubts that the original Cultural Centre management was capable of managing a business centre and therefore recommended training for all PAP. The original Cultural Centre members opposed this approach (Tacitus, 2012, p. 65). In sum, the Cultural Centre PAP lobbied for improvements because they were negatively affected by the relocation, but the solutions offered benefitted all PAP, resulting in less or no benefit to the Cultural Centre PAP.

Size and ownership of the Cultural Centre land, and the management of the Cultural Centre thus became issues dealt with in the mediation process supervised by EIB-CM (FGD, PAPs, 15.09.2015).

Finally, the team found during its field visit that that there was a discrepancy between the number of alternative settlement sites that had reportedly been discussed with the PAP (mentioning the reasons why sites had been rejected) as stated in the annex to the GIBB Africa RAP of 2012 and in chapter 7.4 of the GIBB Africa RAP of 2009 (six sites), and the number of discussed alternative sites of which the PAP were aware of (two: Suswa Triangle (which was rejected) and the RAPland (which was accepted)). Additional confusion was caused because the executive summary of the 2012 GIBB Africa RAP stated that four sites had been discussed – three additional sites after the Suswa Triangle was rejected (GIBB Africa, 2012, Annex 5). This was less than the six mentioned in 2009 including the Suswa Triangle. KenGen confirmed the figure of six sites and stressed that they had been discussed with a committee that included elected community representatives (Interview, KenGen, 16.09.2015). This was supported by the World Bank management, which in its response to the Inspection Panel emphasized that PAP “were fully involved in the search for resettlement land and ... identified a total of eight possible resettlement sites” (World Bank, 2015a, p. 16). However, according to PAP (including the chairmen) only KenGen searched for land and informed the chairmen that land had been found (FGD, PAP, 15.09.2015). PAP mentioned that an initial proposal they had made concerning Ormokongo was never discussed (FGD, PAP, 20.03.2015).

### **2.3.4 Participation and consultation in project planning**

The main forum for PAP to participate in decision-making on the resettlement process was the RAPIC. It was the venue where decisions and agreements on the RAP implementation were made in consultation with PAP representatives. The PAP had 24 members represented in the RAPIC – five representatives from each community (three men, two women) plus one representative each for the youth, the vulnerable groups, the council of elders, and the Cultural Centre management (GIBB Africa, 2012, p. 10-1). Other RAPIC members included the Deputy County Commissioner (replaced by the Naivasha District Commissioner after introduction of devolved government) chairing the RAPIC *ex officio*, the KenGen implementation team, county-level heads of line ministries, and (prior to the devolution of government) one provincial-level administrative representative. According to KenGen, the structure and mechanism of RAPIC

was significantly influenced by the advice of the World Bank's local social safeguard consultant (Interview, KenGen, 16.09.2015).

It is not entirely clear when the RAPIC was formed. Lenders unanimously recall that it was in 2012 (Interview, EIB, 07.12.2015), more precisely June 2012 (EIB-CM, 2015a, p. 29). Both KenGen and PAP stated in interviews that RAPIC came into existence at the beginning of 2012 but gave different explanations for the timing. KenGen held that this was because RAPIC had not been accepted earlier by the PAP (Interview, KenGen, 26.03.2015). PAP held it was because they had rejected the Suswa Triangle as resettlement site (FGD, PAP, 20.03.2015). The RAPIC is formally part of the SCC "formed on 14<sup>th</sup> March 2012 as a result of stakeholders meeting of 21<sup>st</sup> February, 2011," which in addition to RAPIC is made up of three other committees: the Employment Committee, the Economic Opportunities Committee, and the Safety and Health and Environment Committee (GIBB Africa, 2012, Appendix 5).<sup>47</sup> According to KenGen, the SCC and the three committees existed before the RAPIC (Interview, KenGen, 26.03.2012) (here called Stakeholder Engagement Committee; Interview, KenGen, 16.09.2012), and was established when the ESIA for the Olkaria IV power plant was done (around 2008/2009). The participating chairmen of the PAP later moved to the RAPIC (Interview, KenGen, 16.09.2015).

The GIBB RAP of 2009 explained that "project affected persons are expected to participate through the following platforms throughout the implementation programme" and proposed the establishment of a "RAP Implementation Committee" as well as a "grievance mechanism for the RAP" (GIBB Africa, 2009b, p. 6-11). In line with that, the GIBB 2012 report stated that the RAPIC had been meeting since 2010 (GIBB Africa, 2012, Appendix 5), which corresponds with the KEEP project approval by the World Bank in May 2010. The World Bank management response to the Inspection Panel confirmed that an "intensive participatory process began in 2010" (World Bank, 2015a, p. 38). However, a letter from KenGen to the Cultural Centre dated

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<sup>47</sup> According to World Bank, the SCC was established to accommodate interests of the broader Maasai community (beyond the PAP) in the Olkaria expansion projects, after non-PAP Maasai had intervened several times in PAP meetings with violent outbursts (KIGI, World Bank, 17.03.2015). According to the World Bank management response to the Inspection Panel, these incidents involved "Maasai elders selected by the then Minister for Culture and National Heritage 'to look after the interests of the wider Maasai community stakeholders who would be directly or indirectly affected by the Project'" (World Bank, 2015a, p. 5). According to newspaper articles (The Daily Nation on the Web, 2011) and interviews with journalists (The Star, The Standard, and People Daily, 18.03.2015), the then cabinet minister was William Ole Ntimama, an influential Maasai and Member of Parliament (MP) from a neighbouring district, who engaged with the process to garner votes for the up-coming election.

30.06.2011 announced the establishment of the RAPIC (KenGen, 2011). The GIBB 2012 report confusingly stated that “since the development of the 2009 RAP, elections were held at the village level to identify community representatives in the RAP implementation committee,” and that the elected “members were presented to the Naivasha DC at ... 30.04.2012” and “to the PAPs for public ratification at ... 16 May 2012” (ibid, p. 10-2). The PAP hold that there was no RAPIC in 2009 and that only a group of chairmen negotiated with KenGen and the communities (FGD, PAP, 20.03.2015).

To the author this suggests that (a) there had been elections of chairmen at the beginning of the project – the usual way for Kenyan authorities to liaise with communities for certain tasks, but that (b) the RAPIC, with the structures described in the RAP documents of 2012 (major characteristics already proposed in the RAP of 2009),<sup>48</sup> came into existence later. Reasons for that are unclear. It might be related to the resistance of the PAP to the Suswa Triangle as a resettlement site and/or due to the identification of gaps in operator compliance with formal requirements of the agreed social safeguards during the joint AFD-EIB-KfW Social Supervision Mission late in 2011. The interpretation that, prior to the RAPIC system described in the RAP 2012, the applied system of participation may have been the usual one of chairmen selection is supported by the absence of and confusing information about elections, and by other complaints described subsequently.

PAP's complaints about chairmen and their selection were serious, though difficult to verify. First, PAP complained that becoming a chairperson could easily be achieved without elections, because the administration, which has to approve (elected) chairpersons, often did so without verifying that they had been elected. It was also easy for the administration to acknowledge chairmen who were sympathetic to the KenGen cause. This allegedly happened in the resettlement and formed the essence of the complaint of manipulation of community representatives. Second, the blend of traditional and modern forms of representation was regarded by some as a fundamental problem (Interviews: MPIDO, 11.09.2015; Narasha teacher, 15.09.2015). Elders are not traditionally elected by their villages, but selected – usually for lifetime – by members of councils of elders, according to the reputation of families etc. and with the firm understanding that they will act and advise impartially, and in the best interest of

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<sup>48</sup> The proposed composition of the RAPIC in RAP 2009 consisted of the PAP's village chairmen, elders, one female representative, and one youth representative. The RAPIC proposed in the RAP 2012 deviated from this by including more women representatives (two per village), only one representative of the elders, and an additional representative for each vulnerable group and the Cultural Centre.

the entire community. Chairmen, by contrast, were elected without any screening of their values, on a semi-democratic basis. For both elders and chairmen, there was the understanding that the position was for life, and there was no process for deselection or termination. However, chairpersons were supposed to be elected for legislative periods. The blended system resulted in leaders who lacked adherence to behavioural norms and honour that normally prohibit corruption and self-enrichment.

Several incidents of manipulation of or by chairmen were mentioned. Concern was raised that chairmen were often illiterate and had to rely on their KenGen counterparts to understand the documents they were signing (FGD, PAP, 20.03.2015). This was said to have happened, for example, with the letter that allegedly confirmed the acceptance of the Suswa Triangle for resettlement (Cultural Centre, 2011a). Further, the letter of complaint from the Narasha council of elders to the World Bank and EIB directly accused the chairmen and stated: “Majority of us elders always remain in the village; chairmen who attend the meetings always represent us. We have neither confidence nor the trust of our representatives” (EIB-CM, 16.07.2014).<sup>49</sup> It was reported that individual, outspoken (former) members of the RAPIC had been threatened and/or excluded from the RAPIC (Interview, PAP, 22.03.2015). It was further alleged that KenGen and some chairmen met behind closed doors for briefings in advance of RAPIC meetings. And some chairmen were said to reside (in addition to having houses on the RAPland) near the District Commissioner (now Deputy County Commissioner), suggesting that they were closer to the authorities and the operator than to their own communities. The same chairmen were also said to have accrued the greatest benefits in terms of jobs at KenGen, which they then distributed to their family and peers. Finally, the Cultural Centre had in their possession a letter of October 2014, allegedly drafted by KenGen to be signed (which did not happen) by the RAPIC and the CAC, to disqualify the complaints of the Cultural Centre (particularly those of one named individual) that wanted the lenders’ complaint mechanisms to become part of the process (RAPIC and CAC, 2014). The narrative of the letter was that these complaints were those of the minority and the majority were very satisfied. This was also the narrative of the World Bank during our FGD in March 2015. The letter was, however, not signed by the RAPIC and CAC, and there were divergent views for this. According to a handwritten note on the letter, it was because RAPIC and CAC refused to sign it without agreement of the named person (copy of the

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<sup>49</sup> At a FGD at Cultural Centre, an elder complained that the role of council of elders in conflict mediation was not as it should be. The council of elders was traditionally the highest level of conflict resolution. RAP documents state that the council of elders is the first/lowest level of conflict resolution.

letter in the hands of the Cultural Centre). According to KenGen, it was because of unrelated RAP implementation problems such as the “persistent intermittent water supply situation on the RAPland” (EIB-CM, 2015a, p. 31).

These allegations of manipulation by KenGen and that certain chairmen were compromised were certainly not confirmed by the operator. By contrast, they emphasized that meetings were always supported by translators, and that the inclusion of vulnerable groups was due to their insistence and contrary to Maasai culture (Interview, KenGen, 26.03.2015). World Bank management also stressed the high level of participation in the implementation processes of the Olkaria IV resettlement exercise and the effectiveness of its outcomes. From their perspective, it was the village-level elections of RAPIC members that legitimized the RAPIC as a representative forum for consultation and participation. The RAPIC was a hybrid with representatives of villages and vulnerable groups in addition to the traditional council of elders (World Bank, 2015a, p. 10f.).<sup>50</sup> The Inspection Panel and the EIB-CM, however, held that there was a lack of inclusiveness and consideration of the Maa language (EIB-CM, 2015a, p. 30; World Bank Inspection Panel, 2015a, p. 25). They also expressed deep concerns about allegations of intimidation (ibid). Inquiries into allegations of manipulation are ongoing (Interview, EIB-CM, 06.12.2015).

The legitimacy of the allegations of manipulation was finally confirmed when it was acknowledged that KenGen’s social safeguard adviser for the resettlement was the brother of the World Bank’s social safeguard consultant for the project.<sup>51</sup> KenGen stressed that the World Bank consultant only recommended her brother, who (allegedly) had the necessary qualifications, but that he was employed by KenGen not the World Bank, and there was no conflict of interest (Interview, KenGen, 16.09.2015). The financiers, including the European banks, were aware of the situation but supported KenGen’s position (Interview, EIB, 16.09.2015). When the resettlement did not go as smoothly as expected, the PAP contention that the World Bank consultant was siding with KenGen seemed well-founded. Though there might have been no formal breach of good-governance rules when the KenGen adviser was recruited, the impartiality of the World Bank consultant could be questioned. Further, the

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<sup>50</sup> The Community Advisory Council (CAC) and the traditional council of elders are not identical. The members of the traditional council of elders are elected by their peers for lifetime. The members of the CAC are elders (of the traditional council) but can be suspended from their position/participation in CAC by KenGen (see page 17).

<sup>51</sup> It was the PAP who first mentioned this and again confirmed it at the FDG held 15.09.2015.

consultant was also the author of the Tacitus technical assistance report (December 2012), which was commissioned by AFD to enhance the RAP implementation process. In fact, she was the director of Tacitus Ltd.<sup>52</sup> This also meant that the consultant assessed her brothers and her own work (e.g., her appraisal of RAPIC) in the Tacitus report – which was to have been an independent report. The conflict of interest here is overwhelming. According to PAP, by the time of the Tacitus report, they had already lost trust in the consultant (FGD, Cultural Centre, 20.03.2015), though it is unlikely that the financiers including AFD were aware of that. The first letter of complaint known to the author that explicitly criticizes the World Bank's social safeguard consultant was dated 21.08.2014. However, independent of the family relationships, it would have been advisable for AFD to engage an independent expert to take a fresh look. This was particularly important considering the close family relationship between the World Bank and KenGen's social safeguard advisers and the Bank's consultant's intimate involvement in the issues she was supposed to assess.

The Tacitus report basically recommended returning to the status quo previous to the 2012 census update. At the time of the report, the update had already taken place as a concession by KenGen to the PAP's complaints. But the report opened the door for KenGen to again minimize the costs of housing construction, which had increased due to the delays caused by the rejection of the Suswa Triangle site and the associated natural growth. The Tacitus report did little to address the uniqueness of the Cultural Centre community and its livelihood. It emphasized that the existing management did not show records as requested for the asset assessment of the census and pointed to their lack of management skills.<sup>53</sup> On that basis, the report recommended that all facilities be managed jointly (Tacitus, 2012, p. 65f.).

It is important to note that the community self-organization at the new village, which was formally decided in RAPIC meetings, had new characteristics and new dynamics. There was an umbrella organization Ewangan Sinyati Society (or Ewang Sinyati Welfare Society) and several sub-committees along thematic lines (e.g., bus management committee, Cultural Centre committee) and group characteristics (e.g., committees of pastors, elders). This structure

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<sup>52</sup> See the consultant's profile on LinkedIn: <https://ke.linkedin.com/pub/margaret-ombai/66/b10/a70> accessed 04.10.2015.

<sup>53</sup> Equating the lack of records with lack of management skills might be a culturally insensitive interpretation. The GIBB Africa report acknowledged that pastoralists do not like their cattle counted because it brings bad luck. This might be equally applicable to other livelihood sources for the Maasai such as the monetary income of the Cultural Centre.

corresponds to a mitigation measure envisioned in the KenGen ESIA of the resettlement. The report identified “[c]onflicts arising from management of shared resources and/or facilities” as a major concern and source of intra-community conflicts in the new RAPvillage which may result in rivalry and fighting (KenGen, 2012, p. 86). To mitigate this threat, it was proposed to “[e]stablish a management committee for each common facility” and “[t]rain management committees on efficient management” of such resources (ibid). From the perspective of the Cultural Centre community it was, however, this structure which contributed to their deprivation. Thus, the Cultural Centre business management is now comprised of a committee of representatives from all village communities. Equally, the transport facilities they originally requested to commute to the Cultural Centre site falls under the responsibility of the RAPvillage committee, which did not consider their specific needs. And last but not least, in accordance with this mitigation strategy, the title deed for the land of the Cultural Centre will not be held by the Cultural Centre community but by the umbrella organization of the RAPvillage (World Bank, 2015a, p. 13).

Based on a review of the available documents, the author concludes that the structure for participating in RAPvillage management was not the result of consultation with villagers. Rather it stemmed from the ESIA mitigation plan to address anticipated problems arising in the new village, which was communicated through the RAPIC to the PAP who accepted it. Though this may have been well-intentioned,<sup>54</sup> it was the main reason for the deficiencies the Cultural Centre community experienced and what they feared was to come due to their unique nature. Their main livelihood resource, i.e., the business centre, was now shared with other village communities though they did not depend on it for income generating activity. Finally, there were the allegations of manipulation of the consultative processes (although difficult to verify), and the pervasive distrust by Cultural Centre members of KenGen.

### **2.3.5 Access to justice/remedies: operational-level complaint mechanism**

The operational-level mechanism (the GCHM) for the Olkaria resettlement was organized into four-levels: a grievance is reported at the village level to the council of elders (village-level/first GCHM level) that notifies the secretary of the RAPIC who informs KenGen, who has to act on it.

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<sup>54</sup> It may have been well intentioned by the operator to prevent intra-community conflicts and well intentioned by the Cultural Centre to agree to this in order to maintain harmony with their Maasai peers.

The grievance is recorded and a copy given to the District Provincial Administration. If no solution can be reached, the council of elders notifies the RAPIC, again through the RAPIC secretary, to convene a RAPIC meeting (second GCHM level). If still no solution can be reached, the complainant(s) and KenGen are expected to agree on an independent external arbiter (third GCHM level). If the independent arbitration process does not result in a satisfactory outcome “the aggrieved party is free to seek court” (fourth level, outside operational-level) (GIBB Africa, 2012, p. 9).

The core of the GCHM was thus the office of RAPIC, the channel for all complaint-related communication. RAPIC consists of elected community representatives, the communities’ council of elders, KenGen, the provincial administration, and representatives of the line ministries “relevant to livelihood restoration” (e.g., Ministry of Health, Ministry of Education) (GIBB Africa, 2012, Annex 2, p. 1-1). RAPIC is chaired by the Naivasha District Commissioner, but the RAPIC secretary is a KenGen staff member and the RAPIC office is a KenGen facility (GIBB Africa, 2012, Annex 2, p. 1-4). Though the mechanism sets out strict time frames for KenGen to respond to complaints, there is no description of how decisions to settle complaints are made. Because there is no formal decision-making procedure (e.g., voting), RAPIC’s function seems to be limited to communication. Indeed, the GIBB Africa 2012 report calls it a “forward looking communication strategy” (GIBB Africa, 2012, Annex 2).

The GCHM adheres to World Bank standards to the extent that, in accordance with OP 4.12, Annex, para. 17, it considers traditional (first level) as well as judicial (fourth level) means to access redress. The third level allows for independent arbitration and thus might be read as complying with the requirement for affordable and accessible procedures for third-party settlement of disputes (ibid). However, the most important is level two, the RAPIC, which means that the GCHM emphasizes internal solutions procedures, i.e., solutions directly negotiated between KenGen and the communities. This is confirmed in the MoU between KenGen and the PAP that states that “both parties commit to let such grievances and complaints be resolved through the provisions of the GCHM” and that “[b]oth KenGen and the PAPs agree to respect the GCHM as the mechanism for resolving any grievances and complaints” (MoU, 2013, p. 4). The problem at the project internal level becomes obvious when the third level of the conflict-resolution mechanism – the independent third-party mechanism – is considered. In contrast to the RAPIC (the second level), the third-party mechanism is not budgeted for in the project, and communities and KenGen “must also agree on how to handle the cost of external arbitration” (GIBB Africa, 2012, p. 9). This is contrary to the best practice recommended in the World Bank’s

resettlement sourcebook, which endorses even for court procedures that “projects should provide legal assistance to affected people who wish to lodge an appeal” (World Bank, 2005, p. 339). Taking the different financial resources and the disparate power relationships between KenGen and the PAP into account, this is a distinct disadvantage for indigenous communities.

As an alternative to third-party arbitration, communities could approach the “group of lenders”, i.e., the World Bank, AFD, EIB, and KfW, to function as external arbiters. Though this would save costs, the group of lenders might (1) not be totally neutral depending on their investments or on the political sensitivity of the project and (2) they are only allowed “to be contacted by RAPIC, through its Secretary” (ibid), i.e., through a KenGen staff member. At least twice, community groups tried to directly approach the World Bank in Nairobi as well as headquarters in Washington, to circumvent the RAPIC mechanism. In both instances they were redirected to the RAPIC (GIBB Africa, 2012, Appendix 2, Min. 03.06.2012; KenGen, 2012, p. 128f). According to the PAP, the social safeguard consultant of the World Bank Nairobi explicitly discouraged them from approaching the lenders directly. This was supported by minutes from a RAPIC meeting that stated that she “urged the community that any complaints should be channelled through the representatives before it reaches the World Bank” after some of them had sent letters of complaint to World Bank headquarters (GIBB Africa 2012, Appendix 2, RAPIC minutes, 03.06.2012). Even worse, some PAP who had complained were intimidated by the government and allegedly threatened with jail if they continued (Interview PAPs, 22.03.2015). Asked during our FGD with the World Bank whether they had informed PAP that they are allowed to turn to the World Bank’s institutional complaint mechanism (the Inspection Panel), the World Bank consultant said this was done by a (equally present) colleague from the bank who, however, was reluctant to confirm this (KIGI World Bank, 17.03.2015, own observation). Other lenders, who were asked about the GCHM, stated that KenGen’s way of dealing with complaints was appropriate, they were satisfied with KenGen as a business partner (Interview, EIB, 17.03.2015), and they wanted to strengthen dispute resolution at the operational level to keep the operator in the ‘driver’s-seat’ (Interview, KfW, 15.04.2015) to create ownership (Interview, EIB, 07.12.2015).

The GCHM type of internal conflict-resolution mechanism can be susceptible to social pressure. Community representatives might be afraid to jeopardize already negotiated benefits, if a group wants to put new concerns on the table. For example, the same people who wrote one of the letters to the World Bank were in the process of taking a video of the new resettlement site to “share it with ‘the world’”, i.e., they wanted to go public. They ‘requested’ that the video be

viewed by the RAPIC, “a request that was turned down on the basis that the committee had no input in the decision to take the video shots” (KenGen, 2012, p. 129, from RAPIC minutes, 03.07.2012). It is unclear which rules governed RAPIC’s decision here, but it is an example (1) that at least some members felt the need to broaden the narrow circle of people involved and to include some kind of third party (the public), and (2) how the attempt to circumvent the RAPIC was blocked. The event, moreover, demonstrated that community members were not aware of GCHM procedures (ibid).

Another problem with the GCHM was the timing. The “harmonized GCHM” was disclosed to PAP on 16.05.2012 (GIBB Africa, 2012, p. 9-1). According to GIBB Africa, the GCHM was introduced after an “EIB-AFD-KfW joint supervision mission” came to the conclusion that such mechanism was required to foster “forward looking communication” in the project (GIBB Africa, 2012, Annex 2). Indeed, there had been several field visits by financiers by the end of 2011, including one by the French ambassador (see timeline of this report, p. 26). Whatever the exact process was, the failure to implement an operational-level complaint-resolution mechanism at the beginning meant most of the negotiation process on an appropriate resettlement site took place without a grievance mechanism. Equally the census survey was not supported by a grievance mechanism (first written complaint about flaws during the census survey known to the author date from May 2011). The possibility of recourse to the financiers’ institutional-level complaint mechanisms was discovered by PAP themselves and only much later.

## **2.4 Measures and mechanisms to address adverse impacts of the project**

The ex-ante ESIA for the 2012 resettlement identified negative impacts of the resettlement and produced an ESMP (KenGen, 2012, p. 71). The ESMP, for example, described how the RAPVillage community should be organised (see subsection 2.3.4) and suggested tree planting to mitigate the threat of mudslides (ibid; seemingly instead of doing further research on the suitability of the soil, see subsection 3.1.2.4). To address negative impacts that arose in the course of implementation, it was however crucial to have appropriate procedures for complaint and conflict resolution in place – on both the project level and the institutional level.

There were operational-level mechanisms to address complaints (the RAPIC and later the GCHM) and in several instances complaints were resolved. Examples include: an alternative resettlement site was sought after the first site was rejected; after complaints about lacking

mobility, a bus was provided; and in principle KenGen agreed to provide additional land for the Cultural Centre as a business site. It is, however, a main feature of the project that the mechanisms themselves were a major cause of concern and subject of complaints as were the negotiated outcomes.

In addition to the project-level processes, the project financiers also provided institutional-level complaint mechanisms. If individuals or communities felt they had been or were likely to be adversely affected by a World Bank-funded project, there was the option to turn to the Inspection Panel (created in 1993 as the first accountability mechanisms of its kind (Bissel & Nanwani, 2009)). The Inspection Panel is an impartial fact-finding body. It sends its finding to the board and to World Bank management, who have six weeks to respond with recommendations to the board on what actions the bank should take. The board then makes a final decision.<sup>55</sup> The Inspection Panel, which to date has reviewed more the 90 cases,<sup>56</sup> is not a judicial body and does not provide judicial remedies (Suzuki & Nanwani, 2005, p. 206). The World Bank also established the Grievance Redress System (GRS), which reports grievances directly to bank management and not the board. This entity mediates conflicts before the Inspection Panel is called in. There is no institutional relationship between these two mechanisms and they can be accessed at the same time (<http://www.worldbank.org/grs>).

The EIB has a two-tier procedure for handling grievances related to EIB-funded projects, one internal – the Complaints Mechanism Division (EIB-CM), and one external – the European Ombudsman (EO) (EIB-CM, 2015b, p. 3). Complaints are first directed to the institutional but independent EIB-CM, which determines admissibility, carries out investigations, and offers mediation between conflict parties if appropriate. If the handling of the complaint by the EIB-CM is not satisfactory, complainants can redirect their complaints to the EO, a fully independent EU body (EIB, 2008).

The PAP, mainly the Cultural Centre PAP, made extensive use of these institutional mechanisms. Just the knowledge that the project was being investigated brought about change in one instance – the 60-seater bus was replaced with several smaller ones (field observation of

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<sup>55</sup> For more information see <http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/CSO/0,,contentMDK:20098410~menuPK:224055~pagePK:220503~piPK:220476~theSitePK:228717,00.html>.

<sup>56</sup> For a case list see <http://web.worldbank.org/WBSITE/EXTERNAL/EXTINSPECTIONPANEL/0,,contentMDK:20221606~menuPK:4766130~pagePK:64129751~piPK:64128378~theSitePK:380794,00.html>.

March 2015). Moreover, in May 2015 KenGen agreed to engage in a mediation process under EIB-CM supervision (EIB-CM, 2015a, p. 6), and the World Bank board agreed that it would join and support the process through its GRS (World Bank, 2015b).

### **3 Analysis**

#### **3.1 Legal framework and overall accountability**

This chapter analyzes the findings described in section 2.3 by applying human rights norms relevant to the case. The analysis will focus on procedural and land-related issues but not on other substantive claims that are beyond the scope of this paper. Each allegedly affected human right is discussed separately and then considered in the following subsections: (a) applicable international and regional human rights framework, (b) relevant national legal frameworks, (c) institutional frameworks of financiers (safeguard policies), and (d) analysis. Because the EU is the main focus of the ClimAccount research project, subsection (c) on institutional frameworks mainly considers European banks, particularly the EIB.

Based on stakeholders' concerns (section 2.3), the alleged infringements of human rights can be summarized as follows:

1. (Potential) impairment of the right to health due to increased human-wildlife conflict, the risk of mudslides, and the Akira I drillings which could result in the construction of a new power plant in close proximity to the RAPvillage. This also affects the right to an adequate standard of living, including the right to adequate housing and food
2. Absence of the recognition of the special rights of indigenous people
3. Absence of the right to security of tenure and inadequate compensation of land
4. Infringement of the right to participation and consultation
5. Infringement of the right to access to justice and redress due to shortcomings of the operational-level grievance

Many of the above are related to procedural issues and many of the claims about substantive issues could have been avoided or resolved if the procedures had complied with existing

standards. For this reason, the analysis mainly focuses on procedural findings. The consequent infringement of substantive rights will be noted as needed.

### **3.1.1 Rights of indigenous peoples: What about the Maasai?**

#### *3.1.1.1 International and regional human rights framework*

The rights of indigenous peoples are enshrined in the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP), which is non-binding (UNDRIP, 2007). Its provisions are in accordance with the International Bill of Human Rights (see UNDRIP preamble) and partly derived from the binding ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (ILO, 1989). Many provisions of UNDRIP are relevant to the Olkaria case. These include: Art. 18 on the right to participate in decision-making, Art. 10 on forced relocation, Art. 26 on the right to their lands, Art. 32 on development projects on indigenous territories, Art. 8 on the duty of State to provide for effective mechanisms to protect indigenous people, Art. 18 on the protection of the family and vulnerable persons including women, children, the aged, and disabled persons, Art. 20 on the means of subsistence, Art. 22 on the rights and special needs of indigenous elders, women, children, and disabled, Art. 23 on their right to development, Art. 28 on redress and compensation, Article 29 on the right to conservation of their environment and right to health, Arts. 33 to 35 concerning self-organization, and Arts. 41 and 42 on the responsibilities of organs and specialized agencies of the UN system.

At the regional level, the African Charter on Human and Peoples' Rights (African Charter) can be read to protect the rights of indigenous peoples. In particular Art. 14 on the right to property and Article 21(1) on the right of all peoples to "freely dispose their wealth and natural resources" have at times been interpreted by the African Commission on Human and Peoples' Rights (ACHPR) to apply to indigenous peoples and not only to peoples in terms of a nation state.<sup>57</sup>

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<sup>57</sup> These two cases concern the Republic of Kenya: ACHPR Decision on Communication 276/2003, Centre for Minority Rights Development (Kenya) and Minority Rights Group International (on behalf of Endorois Welfare Council) v Republic of Kenya; and ACHPR Decision on Communication 381/09, Centre for Minority Rights Development – Kenya and Minority Rights Group International (on behalf of the Ogiek Community of the Mau Forest) v Kenya. In the latter case, the ACHPR referred the matter to the ACtHPR on 12.06.2012 according to Rule 118(1) because Kenya did not comply with the provisional measures issued by the ACHPR and violations continued (Application 006/12 – African Commission on Human and Peoples' Rights v Kenya). The first hearings took place end of 2014 (ACHPR, 2015, p. 9). The ACtHPR likewise released an order of provisional measures to stop land transfers on 15.03.2013 (ACtHPR, 2013).

Moreover, the ACHPR emphasized several times in its advisory opinion on UNDRIP (ACHPR, 2007) that UNDRIP “[...] is in line with the position and work of the African Commission on indigenous peoples’ rights as expressed in the various reports, resolutions and legal opinion on the subject matter” (ACHPR Resolution 121, 28.11.2007). The ACHPR further states that UNDRIP Arts. 10, 11(2), 28(1), and 32 are similar to the provisions of Art. 21(1) of the African Charter as well as to the objectives of the African Convention on the Conservation of Nature and Natural Resources (ACCNNR) of the AU “... ‘to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour’ (preamble) and which is intended ‘to preserve the traditional rights and property of local communities and request the prior consent of the communities concerned in respect of all that concerns their access to and use of traditional knowledge’ ...” (ACHPR, 2007, paras. 34 and 35; ACCNNR as quoted in para. 35). Moreover, in 2000 ACHPR established the Working Group on Indigenous Populations/Communities (ACHPR-WG) to promote and protect their rights in Africa (Resolution ACHPR/Res.51(XXVIII)00, 06.11.2000). According to the ACHPR-WG, the articles of the African Charter most relevant to the promotion and protection of indigenous peoples rights “include articles 2, 3, 5, 17, 19, 20, 21, 22 and 60” (ACHPR-WG, 2006, p. 20).

Indigenous peoples’ rights are a sensitive issue in Africa because of fears that marginalized ethnic groups will claim sovereignty over their ancestral territories. In its advisory opinion on UNDRIP, the ACHPR thus dedicates an entire chapter to its interpretation of self-determination and its impact on territorial integrity, emphasizing state sovereignty (chapter II). It clarifies that “[i]n Africa, the term indigenous populations or communities is not aimed at protecting the rights of a certain category of citizens over and above others. This notion does not also [sic!] create a hierarchy between national communities, but rather tries to guarantee the equal enjoyment of the rights and freedoms on behalf of groups, which have been historically marginalized” (ACHPR, 2007, para. 19). Concerns about state control over natural resources and provisions of UNDRIP (in particular Art. 37) being “impracticable within the context of the countries concerned” and not in “accordance with the constitutional provisions of these countries” (para. 33) are addressed by emphasizing that in Africa there barely existed any treaties or agreements on land between colonial powers and indigenous peoples as is the case in other regions

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The first hearing of the case took place 28-30.11.2014, a decision is pending. A summary of earlier jurisprudence relating to the interpretation of ‘peoples’ can be found in (ACHPR-WG, 2006, 20f.). There exists, however, no case on the Maasai.

(ACHPR, 2007, para. 37). The only exceptions are the Anglo-Maasai Treaties of the early 20<sup>th</sup> century (see subsection 2.1.1).

Kenya is one of the 19 AU member states (out of a total 53) that ratified all seven regional legal instruments including the African Charter and the protocol establishing its court (<http://www.achpr.org/instruments/>). However, Kenya gained notoriety for its disregard of indigenous peoples' rights as well as of the African human rights system more generally. Between 2006 and 2014, it did not submit the obligatory periodic state reports to the ACHPR. Further, it was not willing to implement the ACHPR Decision on Communication 276/2003 on the unlawful eviction of the Endorois community, or the ACHPR Decision on Communication 381/09 on the unlawful eviction of the Ogiek community from their forests. In the case of the Endoroi, this resulted in ACHPR Resolution 257 calling on Kenya to comply with its implementation duties (54th Ordinary Session of the ACHPR, 2013); in the case of the Ogiek, the matter was referred to the ACTHPR in 2012 (see fn 57 above). Kenya was also one of 11 states that abstained from voting in favour of UNDRIP, and it did not accede to ILO Convention 169. It is, however, party to the African Charter<sup>58</sup> without reservations and thus expected to follow and implement the advice and opinions of the Charter's treaty bodies.

### *3.1.1.2 National legal framework on indigenous peoples*

Kenya does not have a specific national policy on indigenous peoples<sup>59</sup> nor is the Constitution of Kenya entirely clear in this regard. Art. 21 of the constitution imposes on

“all state organs ... the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.”

Art. 260 of the Kenyan constitution defines 'marginalised community' as:

“(c) an indigenous community that has retained and maintained a traditional lifestyle and livelihood based on a hunter or gatherer economy; or (d) pastoral persons and communities, whether they are (i) nomadic; or (ii) a settled community that, because of its relative geographic isolation, has experienced only marginal participation in the integrated social and economic life of Kenya as a whole.”

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<sup>58</sup> <http://www.achpr.org/instruments/achpr/>.

<sup>59</sup> The National Policy for the Sustainable Development of Northern Kenya and other Arid Lands (MDONK, 2012) domesticates the African Union Policy Framework for Pastoralism in Africa of 2010 (AU, 2010). Hence, its application covers many pastoralist tribes/indigenous peoples. It takes, however, a spatial instead of an ethnic approach.

Hence, only hunter and gatherer communities are labelled ‘indigenous’ and pastoralists are a separate sub-category of marginalised communities. In the constitution, these communities are dealt with using a needs-based rather than a rights-based approach. This is evident in the constitution’s provisions on land. Land reforms and historical land injustice is a major issue addressed by the constitution. Art. 63 on community land defines it as “land ... managed or used by specific communities as community forests, grazing areas or shrines” and “ancestral lands and lands traditionally occupied by hunter-gatherer communities.” However, the term ‘community’ is not defined in the constitution and only ‘hunter and gatherers’ are explicitly mentioned as a group occupying ‘ancestral lands’. The definition of ‘community’ in the Community Land Bill (2015) is rather broad comprising “[...] organized groups of users of community land [...] with [...] socio-economic or other common interest [...]” (sec. 2).<sup>60</sup>

In sum, Kenyan laws avoid making a direct link between being indigenous and the right to ancestral lands, special participatory rights, or other means that may give the impression of prioritizing indigenous peoples. In the same vein, the ACHPR-WG criticizes Kenya that “neither Vision 2030 nor the Land Policy indicate how returning the ancestral land to indigenous communities is going to be done” (ACHPR-WG 2012, p. 79). This avoidance tactic regarding indigenous peoples mirrors national debates on indigenous peoples’ rights, where “those considered to be the majorities are always nonchalant and would want to shun such discussion because it allegedly polarizes a democratic state and retards economic growth” and where “questions such as, ‘who is not indigenous in Kenya anyway’ has been used to silence the advocates of minorities and indigenous peoples’ rights” (KNCHR and CEMIRIDE, 2006, p. 5).

### *3.1.1.3 Institutional frameworks on indigenous peoples of European actors*

Institutional frameworks of financiers on involuntary resettlement were described in subsection 1.2.2.2. And, as noted in subsection 2.3.2, OP 4.10 on indigenous peoples, while applicable to the KEEP, was not applied. The justification for this decision on the part of the World Bank was the Kenyan political climate and extensive participatory procedures equivalent to those requested by OP 4.10 were being established in lieu.

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<sup>60</sup> The full definition of ‘community’ given in the Community Land Bill, 2015, sec. 2, is “an organized group of users of community land who are citizens of Kenya and share any of the following attributes- (a) common ancestry; (b) similar culture; (c) socio-economic or other common interest; (d) geographical space; or (e) ecological space.” The Community Land Act (Act 27 of 2016) added the attribute of “(f) ethnicity.” However, a great majority of the Kenyan citizens belong to one of Kenya’s 43 ethnic groups, not all of which are indigenous groups according to the definition of the ACHPR (for the ACHPR definition see subsection 3.1.1.4).

On the part of the European financiers, the 2009 ESPS of the EIB on indigenous peoples is the most detailed. It states that “[a]ll policies, practices, programmes and activities developed and implemented by the promoter should pay special attention to the rights of vulnerable groups” and that “[s]uch groups may include indigenous people.” It further states that “[w]here the customary rights to land and resources of indigenous peoples are affected by a project, the Bank requires the promoter to prepare an acceptable Indigenous Peoples Development Plan” and that “[t]he plan must reflect the principles of the UN Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent to any relocation” (EIB 2009, p. 18).

The EU’s commitment to the rights of indigenous people was affirmed in the EU Commission’s working document SEC (1998) 773 final of May 1998 on Support for Indigenous Peoples in the Development Cooperation of the Community and the Member States” (EU Commission, 1998) and the EU’s Development Council Resolution of November 2000 reaffirming this working paper (EU Commission, 2002; MacKay, 2004, p. 53).<sup>61</sup> The resolution explicitly states that “indigenous peoples have the right to choose their own development paths, which includes the right to object to projects, in particular in their traditional areas” (Art. 5). The document also states that the council takes note of international instruments concerning indigenous people, including the ILO Convention 169 (Art. 1). Moreover, all EU member states, except Romania, have voted in favour of UNDRIP.

The EIB, acting as an entity on behalf of the EU in matters of energy, security, and development (EIB Steering Committee, 2010, p. 11), is responsible for applying and implementing these provisions. However, the EIB Environmental and Social Practices Handbook of 2010 does not operationalize any safeguards for indigenous people; neither did its Guidance Note 2 on vulnerable groups (including indigenous peoples) which was under review in 2010, when the project was approved by the financiers. Rather, it simply refers to MDB standards, the Extractive Industries Review, and the ILO Convention 169 (EIB, 2010b, pp. 111-112). Though the 2009 ESPS is a high-level policy statement, the relevant document for EIB staff guiding project implementation is the handbook, and here specific operationalization was lacking (Interview, EIB, 07.12.2015).

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<sup>61</sup> The Development Council Resolution is titled “Indigenous peoples within the framework of the development cooperation of the community and member states” (ibid).

*3.1.1.4 Analysis of the duty to apply special safeguards for indigenous peoples to the PAP*

The purpose of this subsection is to clarify whether the PAP (Maasai communities) should have been acknowledged as indigenous people and, if so, determine to what extent the Kenyan state and involved financing institutions failed to act accordingly. It is important to recall that (a) the World Bank in its project appraisal phase required KEEP to prepare an IPPF and required the application of OP 4.10; (b) the government of Kenya produced an IPPF for KEEP that referred to ACHPR's advisory opinion on UNDRIP, but whose applicability was restricted to "ethnic minorities groups" namely the "Sengwer, Ogiek, Waata, and Boni" (Republic of Kenya, 2010, pp. 4, 8); and (c) that neither the Olkaria RAP document of GIBB Africa nor the EIA on the resettlement of KenGen submitted to NEMA mention OP 4.10 or the IPPF as applicable frameworks. From this it is evident that, in principle, indigenous rights were considered in KEEP but the PAP, being Maasai, were not included in this category. It is also noteworthy that none of the mentioned hunter and gatherer groups (Sengwer, Ogiek, Waata, Boni) were living in the KEEP project area (World Bank, 2015a, p. 25).

Are the Maasai indigenous people? Yes. The ACHPR, a treaty body to the African Charter ratified by Kenya, defines indigenous peoples, as "Africa's indigenous communities" (para. 11) with the following characteristics (para. 12):

- (a) Self-identification
- (b) A special attachment to and use of their traditional land whereby their ancestral land and territory have a fundamental importance for their collective physical and cultural survival as peoples
- (c) A state of subjugation, marginalization, dispossession, exclusion, or discrimination because these peoples have different cultures, ways of life or mode of production than the national hegemonic and dominant mode

These are all characteristics of the Olkaria Maasai (see subsection 2.1.4). The Inspection Panel and the EIB-CM both conclude in their investigation reports that the Maasai are indigenous and OP 4.10 should have been applied (EIB-CM, 2015a, Chapter 8.3; World Bank Inspection Panel, 2015a, Chapter 2). More importantly, the ACHPR-WG in several of their reports explicitly acknowledged the Maasai as indigenous peoples (ACHPR-WG, 2006, p. 10; ACHPR-WG, 2012, pp. 45-50; ILO & ACHPR, 2009). Therefore, the government of Kenya had an obligation (a) to acknowledge the Maasai as an indigenous people, and accordingly (b) to provide for appropriate safeguards for resource exploitation on indigenous territories. However, it omitted to

list the Maasai as falling under the IPPF of KEEP, despite the fact that the entire Olkaria area (and beyond) is populated by Maasai tribes.

The World Bank also failed to recognize the PAP as indigenous people or to insist on making OP 4.10 a binding framework for the resettlement measure. This they did, even though the need for applying it to component A (Olkaria IV) was indicated in the appraisal phase (World Bank, 2010, p. 2). The World Bank made this decision in concert with the other financiers ... or at least without them raising any objections (see EIB-CM, 2015a, p. 34).

As required by the EC's SEC(1998) 773 final directive and the respective framework of the EU's Development Council (1998), the EIB recognizes the rights of indigenous people. Accordingly, these rights were referenced in the EIB's 2009 ESPS and were explicitly aligned with UNDRIP. However, more than ten years after SEC (1998) 773 final directive, the EIB seemingly had no Guidance Notes in place to operationalize this mandate as part of their project appraisal process. It was a failure of conduct of the EU and its member states to have not mandated a revision of EIBs operational policies according to the standards and principles they introduced as policies. The EIB handbook (2010) includes a reference to MDB standards for indigenous people and to the World Bank operational policies as the standards to which all lenders agreed. It can thus be argued that the EIB failed to comply with its human rights due diligence obligations by not having insisted in the application of OP 4.10.

The failure to insist on the application of OP 4.10 is telling. World Bank management's explanation was that the lenders unanimously decided not to apply OP 4.10. and instead categorize the Maasai as 'vulnerable people' because of the political climate (the Kenyan constitution was adopted in August 2010 and there were ongoing implementation issues) and the concern about interfering with existing ethnic conflicts. The changing legal consideration of the rights of vulnerable and indigenous people in Kenya had, on the part of the World Bank, been accompanied by a consultative process. In 2013 they came to an agreement with the Kenyan government to apply OP 4.10 to pastoral-nomadic groups at least in the future "on a project by project basis" (World Bank, 2015a, p. 25).

"In September 2010, Management decided to review the application of OP 4.10 to pastoral groups in Kenya, and in November of that year held a workshop in Nairobi with the Government of Kenya. At the time, the Government of Kenya was reluctant to apply the Indigenous Peoples policy to the Maasai and other pastoral groups until it had completed national consultations on which groups should be considered as "vulnerable". This sensitivity was not only an issue in Kenya, but in other countries in East Africa that were grappling with the political and social implications of singling out certain ethnic groups and/or including groups, such as pastoralists, in

a broader definition of Indigenous Peoples that would be involved in and affected by Bank-financed lending. Management continued the dialogue with Kenya in 2011 and 2012, and informed the Board of this dialogue through briefings and information about specific projects” (ibid).

This is a departure of the “[b]ank’s prior practice” regarding the broader Africa Eastern Electricity Project to interpret OP 4.10 “to apply solely to hunter-gatherer groups” (Memorandum of the President, approved in July 2012, as summarized in World Bank, 2015a, p. 7). Though this is an important step forward for projects approved after summer 2012, the question remains whether EIB was correct in agreeing to follow World Bank policies in the first place. That decision prevented the PAP community from being entitled to benefit sharing from the natural resource exploitation. Other human rights of the PAP and their impairments related to indigenous peoples’ rights are discussed under the subsections of this chapter.

### **3.1.2 Right to security of tenure and adequate compensation of land**

The entitlement to adequate compensation of land and other property is based on the right to property, which protects from dispossession and, in case of public interest, from expropriation without adequate compensation. The right to property is not explicitly included in the two international human rights covenants. However, it is in the Universal Declaration of Human Rights (UDHR, Art. 17) and in all regional treaties on civil and political rights, including the European Convention (Protocol 1, Art. 1), the EU Charter of Fundamental Rights (CFR, Art. 17), and the African Charter (Art. 14 and 21).

The interpretation of the right to property can vary. Most treaties try to strike a balance between the right to private property of non-state actors on the one hand, and the legitimacy of public property and of acts of expropriation by states in cases of public interest on the other hand. The Olkaria geothermal project is such a case where individuals had to concede to public interest in order to improve power supply and make the shift to renewable energy sources. Whereas the legal land owner, Kendong Ltd., can sell the required land to the largely state-owned KenGen at market prices (an attractive alternative to compensation for dispossession), the traditional users of the land were without formal title deeds that would have entitled them to compensation automatically.

Displacement in the context of development projects is often associated with land regulations that discriminate against poor and politically marginalized users of land. This results in the

infringement of their right to an adequate standard of living (ICESCR, Art. 11). Art. 11(1) clarifies that this right includes the right to “... adequate food, clothing and housing, and to the continuous improvement of living conditions.” Related rights have been specified by the Committee on Economic, Social and Cultural Rights (CESCR; General Comment No. 12 on the right to food and No. 4 on the right to housing). In 2002, the right to water was partly derived from General Comments Nos. 12 and 4 (CESCR, General Comment No. 15 on the right to water). The crucial meaning of land for national development and the impoverishment of project affected persons triggered discussions about the right to security of tenure and to land.

### *3.1.2.1 International and regional human rights frameworks*

The right to security of tenure was developed by the UN Special Procedures as part of the right to adequate housing, which is part of the right to an adequate standard of living of the ICESCR (Art. 11(1)). CESCR’s General Comment No. 7 on forced evictions points to “conflict over land rights” in the context of development projects as the underlying cause of forced evictions (para. 7) and thus a source of the violation of the right to housing. In 2007, Miloon Kothari, the then Special Rapporteur for the right to adequate housing, identified “the human right to land” as a crucial normative gap in the international human rights system for the protection of displaced persons and the realization of core human rights (HRC, 2007, pp. 2, 10). How the intersectional issue of land is related to other rights is best summarized in para. 29:

“Without the adequate legal recognition of individual as well as collective land rights, the right to adequate housing, in many instances, cannot be effectively realized. The right to land, however, is not just linked to the right to adequate housing but is integrally related to the human rights to food, livelihood, work, self-determination, and security of the person and home and the sustenance of common property resources. The guarantee of the right to land is thus critical for the majority of the world’s population who depend on land and land-based resources for their lives and livelihoods. In the urban context legal recognition of land rights is often critical to protecting the right to adequate housing, including access to essential services and livelihoods, especially for the urban poor.”

Kothari recommended recognizing the right to land and strengthening the protection of that right in international human rights law. So far, however, human rights regulations are still based on the normative content of “legal security of tenure” as a component of the right to adequate housing as defined in CESCR General Comment No. 4. According to the CESCR’s interpretation:

“Legal security of tenure refers to different forms of tenure such as rental accommodation, cooperative housing, lease, owner-occupation, emergency housing and informal settlements. It does therefore not imply a general right to land, but legal protection against forced evictions and harassments regardless of the type of tenure” (GC No. 4, para. 8).

On the basis of existing law, Kothari proposed the Basic Principles and Guidelines on Development-Based Evictions and Displacement (BPGDevbED), which in Annex II offers a set of national-level indicators to verify whether the right to legal security of tenure is realized or impaired (HRC, 2007, p. 28, A/HRC/4/18). The BPGDevbED put great emphasis on procedural issues in the preparation phase of development-based involuntary resettlement. Support for the operationalization of tenure security has been provided by the Voluntary Guidelines on the Responsible Governance of Tenure of Land, Fisheries and Forests in the Context of National Food Security (Tenure Guidelines), officially endorsed by the Committee on World Food Security (CFS) of the UN, on 11.05.2012 (FAO, 2012). Its implementation has been encouraged by G20, UNGA, Rio+20, and the Francophone Assembly of Parliamentarians.<sup>62</sup>

With regards to indigenous peoples, the right to land is more established. UNDRIP offers particularly strong provisions for these people. Art. 26 (1) uses the wording “right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired” and requires states to legally recognize and protect those lands with “due respect to the customs, traditions and land tenure systems ...” (Art. 26(3)). Art. 32 on development projects on indigenous territories requires states to “obtain their free and informed consent prior to the approval of any project affecting their land ...” (Art. 32(2)). And, Art. 10 on forced relocation prevents the removal of indigenous peoples from their lands without their free prior and informed consent (Art. 10). The ILO Convention 169, Art. 16, requires their free and informed consent in cases where relocation is needed and to provide them “[...] in all possible cases with lands of quality and legal status at least equal to that of the lands previously occupied [...]” (ILO Convention 169, Art. 16.4). Part II of Convention 169 emphasizes the importance of land and access to natural resources for indigenous peoples.<sup>63</sup>

On the regional level, the notion of tenure security as an integral component of the right to housing is less developed. The only relevant regional and supra-national human rights treaties that specifically speak to housing rights are the European Social Charter and the CFR. In the CFR, the EU “recognizes and respects the right to social and housing assistance” (Art. 34) and the European Social Charter (Art. 16) refers to the right of the family to social, legal, and economic protection in terms of “provisions of family housing” as a form of social protection. The

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<sup>62</sup> [www.fao.org/nr/tenure/voluntary-guidelines/en/](http://www.fao.org/nr/tenure/voluntary-guidelines/en/)

<sup>63</sup> As of April 2016, only 22 state parties have ratified ILO Convention 169 (see [www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300\\_INSTRUMENT\\_ID:312314:NO](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO:11300:P11300_INSTRUMENT_ID:312314:NO)).

articles of both charters do not directly match what is meant by the right to legal security of tenure. The ECHR (Art. 8) partially covers this right under the right to privacy, but only as an individual right and right of families, and it does not explicitly include indigenous communities. However, in 2012 the European Court of Human Rights (ECtHR) decided that, based on Art. 8 in *Yordanova et al. v Bulgaria*, Bulgaria could not simply remove Romas who had unlawfully settled on municipal land. Removing them would violate their right to privacy and home if their residing in that place had been tolerated for a considerable period of time.<sup>64</sup>

The regional human rights bodies most active with respect to the right of indigenous peoples to their lands are the Inter-American Commission (IACHR) and the Inter-American Court (IACtHR). In two cases of eviction of indigenous peoples by the government of Kenya, the African Commission on Human and Peoples' Rights (ACHPR) decided in favour of the indigenous peoples, and one of those cases was transferred to the ACtHPR.<sup>65</sup>

### 3.1.2.2 *National frameworks on tenure security and compensation*

Post-independence Kenya did little to protect people from forced evictions for the sake of development and resource exploitation. The weak rules that were in place on procedures and protection were often ignored (Hakijamii, 2012, pp. 14-21). Since 2000, development projects that trigger a large-scale relocation require an ESIA to NEMA for the resettlement (EMCA 1999, Second Schedule). New legal frameworks designed to improve tenure security in Kenya include the new National Land Policy (NLP), the constitution, and the Land Act 2012. The constitution protects the right to property (Art. 40) and requires prompt and just compensation in cases where land is appropriated in the name of public interest (Art 40(3)(b)). This can include “compensation to be paid to occupants in good faith” (Art. 40(4)). Art. 60 of the constitution further stipulates a new land and resource use policy based on the principle of “security of land right” (Art. 60). The Land Act 2012 specifies that compulsory land acquisition has to be grounded in public interest, that all persons whose interest in that land has been determined shall receive full and prompt compensation, and provides guidance on the steps of such determination and subsequent compensation (paras. 111-117). Para. 155(4) describes how to determine “unlawful occupation” which includes considering whether a “person has reasonable

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<sup>64</sup> *Yordanova et al. v Bulgaria*, ECtHR, final judgement, 24.09.2012, paras. 100f; <http://adsdatabase.ohchr.org/IssueLibrary/CASE%20OF%20YORDANOVA%20AND%20OTHERS%20v.%20BULGARIA.docx>.

<sup>65</sup> ACtHPR, 2013 available from [www.african-court.org/en/images/documents/Court/Cases/Orders/ORDER\\_of\\_Provisional\\_Measures- African\\_Union\\_v. Kenya.pdf](http://www.african-court.org/en/images/documents/Court/Cases/Orders/ORDER_of_Provisional_Measures- African_Union_v. Kenya.pdf).

belief” that the occupation is lawful, the length of occupation, the use made of the land, the number of dependents and distance to source of livelihood, the type of the environment, and potential conflicts with public interests. In addition, para. 155 describes in detail the procedures of redress.

To regulate the forced removal of people from land for public interest purposes, the 2009 NLP required the development of eviction and resettlement procedures, which in 2012 led to the ERP Bill being tabled in parliament. The ERP Bill was not adopted and the resettlement issue was omitted from the bill to amend the Land Act 2012. The only national legal framework currently in place is the IDP Act 2012, which provides that the government “shall abstain” from displacement and relocation. Exceptions to this expectation are cases of “overriding public interest” where “no feasible alternative” exists (Part V, para. 1). The IDP Act was, however, not considered applicable to the Olkaria resettlement. Despite the serious delays and setbacks in adopting the ERP Bill and other relevant acts such as the Community Land Bill, the Natural Resource (Benefit-Sharing) Bill, and the Mining Bill, it must be acknowledged that the legal environment in Kenya for security of tenure and for the relocation of occupants without title deeds is gradually improving. Improvements are, however, highly contested (for details see subsection 2.2.2.1, on relocation particularly 2.2.2.1.5).

Another positive step is the effort of the Ministry of Forestry and Wildlife to undertake a legal gap analysis. The ministry is using the Tenure Guidelines as their legal standard and is seeking FAO support to improve their REDD+ preparedness measures (Career Point Kenya, 2014). REDD+ programmes typically affect indigenous peoples. In Kenya, this is particularly related to land held under customary African law which until late August 2016 had the least developed legal protection. Applying the Tenure Guidelines to REDD+ programmes may partly made up for the delays in national land reforms and the protection of community land.<sup>66</sup> Another unanswered question is how to deal with land disputes where land is occupied and used by communities, but is legally owned by a private entity (i.e., theoretically community as well as private land). This is exactly the case in the Olkaria project. In practice, the legal framework currently applied to indigenous peoples and their special attachment to their lands is basically the same as the one applied to other occupants in good faith.

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<sup>66</sup> Art. 63 of the constitution about community land regards it as land (to be) “held by communities identified on the basis of ethnicity, culture of similar community of interest” (Art. 63(1)). In principle such land “shall not be disposed of or otherwise used except in terms of legislation specifying the nature and extent of the rights of members of each community individually and collectively” (Art. 63(4)).

### 3.1.2.3 *Institutional frameworks on tenure security and compensation*

The World Bank's OP 4.12, para. 13(d) states that with regard to the forced relocation from land and lost access to resources "[a]lternative or similar resources are provided to compensate for the loss of access to community resources (such as fishing areas, grazing areas, fuel, or fodder)." Para. 15 of the policy states, with respect to land and compensation, that those entitled are individuals

"(a) [...] who have formal legal rights to land (including customary and traditional rights recognized under the laws of the country, (b) [...] who do not have formal legal rights to land at the time the census begins but have a claim to such land or assets [...], (c) [...] who have no recognizable legal right or claim to the land they are occupying" (OP 4.12 (15)).

The safeguards further provide for "... prompt and effective compensation at full replacement cost for losses of assets [...]" (OP 4.12 (6(a)(iii))). To ensure that, in cases of land-for-land compensation, affected persons have the best choices, Annex A, para. 15(c) to OP 4.12 further requests

"a review of the resettlement alternatives presented and the choices made by displaced persons regarding options available to them, including choices related to forms of compensation and resettlement assistance, ... and to retaining access to cultural property (e.g. places of worship, pilgrimage centers, cemeteries)."

OP 4.10's safeguard policy for projects affecting indigenous peoples elaborates extensively on Lands and Related Natural Resources (paras. 16 and 17). The World Bank acknowledges that

"Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply ... [W]hen carrying out the social assessment and preparing the IPP/IPPF, the borrower pays particular attention to [...] [inter alia] the customary rights of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods" (para. 16(a)).

'Customary rights' to lands and resources is defined as referring

"to patterns of long-standing community land and resource usage in accordance with Indigenous Peoples' customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State" (ibid FN 17).

The World Bank's safeguards promote the legal recognition of such customary rights which "may take the following forms: (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or (b) conversion of customary usage rights to communal and/or individual ownership rights" (para. 17).

EIB's 2009 ESPS elaborates on land rights only to the extent that indigenous groups may be affected by a project. As stated above, infringement of customary rights to land and resources of indigenous peoples "requires the promoter to prepare an acceptable Indigenous Peoples Development Plan" and that "[t]he plan must reflect the principles of the UN Declaration on the Rights of Indigenous Peoples [...]" (EIB 2009, p. 18). The EIB 2010 handbook considers land in its Guidance Note on involuntary resettlement to the extent that it screens project applications (pre-appraisal phase) for people without title deeds being affected and for potential loss of access to natural resources (EIB 2010, p. 25). However, tenure security at the new place of residence is not mentioned. The Guidance Note on the interests of vulnerable people was still a work in progress at the time of the approval and appraisal stages.

#### *3.1.2.4 Analysis of alleged human rights breaches with respect to land*

The chapter on stakeholder concerns revealed that many substantive claims made by the PAP were related to the resettlement site, the RAPland. To summarize, the issues were:

- size of land was not adequate and should have been 4,200 acres (although they agreed in principle to the 1,700 acres), and had steep-walled natural gullies which made much of the land unsuitable (only 600 to 700 acres were usable)
- fear that the steep-walled valleys and the sandy soil made the site vulnerable to mudslides which could damage the quality and security of their housing
- land close to Akira I posed potential risks to their health and could result in another relocation (It is possible that in 2011 when the land was purchased, plans for Akira I did not yet exist and thus have not been known to the operator or financiers.)
- delay in the transfer of the promised title deed to the PAP due to pending court cases between Kedong Ranch Ltd. and Suswa Maasai (now allegedly at the Court of Appeals in Nairobi)
- lack of agreement on the size of the Cultural Centre land and its future ownership (original Cultural Centre management vs entire PAP community)
- number of resettlement sites under consideration as alternatives (GIBB Africa 2012, Annex 5 stated six sites for the entire PAP community in addition to the selected

Olkaria/Akira site. PAP claim only two were discussed with them (the refused Suswa Triangle (Kedong-Suswa) and the selected site).<sup>67</sup>

It must be emphasized that UNDRIP has the strongest language and provisions on the right of indigenous peoples to their land. Recognizing the Maasai as an indigenous people obliges states to “obtain their free and informed consent prior to the approval of any project affecting their land ...” (Art. 32(2)) as well as for the application of the related resettlement measure (Art. 10). In this regard it is, however, documented (news articles, RAP documentation, FGD) that the PAP confirmed several times their agreement in principle to the development measure and to facilitate this national development project. Thus the alleged violations solely concern the way the resettlement was carried out.

**Size of the land:** The question of the carrying capacity and the adequacy of the land-for-land compensation were dealt with inadequately. There are two approaches to assess this type of claim: land-for-land compensation in cases of involuntary resettlement and land-for-land compensation in cases where indigenous peoples are affected.

OP 4.12 states that “[a]lternative or similar resources are provided to compensate for the loss of access to community resources (such as fishing areas, grazing areas, fuel, or fodder)” (OP 4.12(13(d))). Accordingly, land-for-land compensation has to be grounded in a proper assessment of land use. The argument that the Maasai can probably use the same grazing grounds (on the same insecure legal basis) in the future as in the past is without merit. The geothermal boom in the region, which triggers land-use change in the near and wider vicinity, makes the return to the former grazing acreages unlikely. Pollution of grazing sites and water points pose additional obstacles to maintaining livestock populations (Koissaba, 2015b). For the purpose of livelihood reconstruction and maintenance, a comprehensive assessment of community resources including grazing land should have been done. If KenGen and the government of Kenya could not afford to buy such land and instead resorted to maintaining existing and former grazing rights, these rights should have been secured and not left to the proprietors’ good will. This could have been achieved by developing local land-use plans which considered and mediated between the need for land for geothermal explorations on the one hand and grazing land on the other, including, if necessary, the designation of grazing areas by

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<sup>67</sup> The GIBB Africa list includes land that was discussed as an alternate for the Cultural Centre business site. Hence, these were not all alternatives to the resettlement sites.

the state. This did not happen and thus the long-term rehabilitation of the livelihood of the PAP was impaired as was their right to an adequate standard of living (ICESCR, Art. 11). Whether a violation of this right will materialize has yet to be seen, but there are already a few indications.

There were failures to comply with due diligence requirements especially on the part of the Kenyan state. First, they did not have EIA rules in place with the strict resettlement requirement ESIA's and approvals (see subsection 2.2.2.1.7). Second, it was equally the failure of the Kenyan state not to have land-use plans and/or benefit-sharing rules in place that struck a balance between the public interest in geothermal exploration (and other natural resources) and the private interests of occupants to pursue their livelihoods. Both would have increased the sustainability of affected livelihoods and the fulfilment of the right to an adequate standard of living, and would have enhanced the objective of sustainable development as described in the National CDM Guidelines (see subsection 2.2.2.1.8). It must be acknowledged that several bills are being negotiated that consider benefit-sharing regulations (see subsection 2.2.2.1.3), but outcomes regarding the extent to which directly affected communities will benefit are unclear, and the bills have yet to be passed. The financiers, it could be argued, were in a position to know from past experience investing in rural areas that an assessment of grazing needs was required. EIB's project appraisal screening question for resettlement measures: "Will there be loss of incomes or livelihoods?" (EIB 2010, p. 108) could be regarded as covering this. Hence, their compliance with due diligence requirements is debatable.

**Quality of the land:** The survey of the resettlement site, the RAPland, was done by GIBB Africa in 19.10.2011. Its topographic analysis came to the conclusion that parts of the land were made up of "steep hills and mountains" (GIBB Africa, 2012, p. 7-3). The report also revealed evidence of soil run-off from higher grounds. This was a threat that would increase if less- or non-permeable surfaces were erected, such as houses and streets, and vegetation cover was reduced. It concluded that "impact on soil and percolation would need specialized hydrological studies" (ibid, p. 7-8). The report recommended further studies as well as further consultation.<sup>68</sup>

"The potential impact of highest significance is the potential impact of resettlement on the land use and biodiversity. These impacts may lead to cumulative impacts such as water and pasture availability for pastoralist communities during the dry season. Extensive investigations regarding impacts will be required prior to the commencement of resettlement.

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<sup>68</sup> Note that the annex to the GIBB report includes the 'Environmental Scoping Report on the Resettlement Site' which is not what the consultants ask for, but the source of their concerns.

Depending on the outcome of the scoping stage of the ESIA study, KenGen may be required to undertake Stakeholder and Public Consultation as well as detailed specialist investigations prior to the granting of environmental authorization for resettlement. Environmental authorization will only be granted in the case that all significant environmental impact can be mitigated to acceptable standards during the design and construction phases of the project.

The investigation of feasible alternatives and measures to mitigate significant impact will have to be undertaken to determine feasibility of the resettlement site during the EIA phase” (ibid, p. 7-9).

However, the KenGen ESIA report submitted to NEMA for the resettlement (KenGen, 2012) did not include a soil/land assessment nor any reference to such a study been needed and carried out. The absence of the additional assessment constituted a serious failure to comply with due diligence requirements by several parties: KenGen who did not provide the study; the Kenyan state represented by NEMA who approved the ESIA without the additional study; and the financiers who accepted KenGen’s ESIA without insisting that the recommended studies and consultations be completed. Based on a review of the various RAP documents, it can be argued that the financiers were in a position to know that the sustainability of livelihoods of the PAP was not ensured, and they should have insisted that the GIBB Africa report’s recommendations be followed up. Their failure to do so was arguably a breach of their human rights due diligence.

**Akira I:** The whole area was known by all parties to be open for licensing for geothermal drilling. However, the 2012 GIBB Africa RAP stated that it could not obtain information about who held the license to the area neighbouring the RAPland – the land where Akira I will be constructed – but that “it was reported that the holders of the license to this area is KenGen” (GIBB Africa, 2012, p. 7-4). This proved to be incorrect.<sup>69</sup>

The imminent construction of the geothermal plant, Akira I, brought new concerns to the relocated PAP. Their concerns included the potential for additional health risks and the possibility of another displacement/involuntary resettlement. This was contrary to “the spirit of the RAP” which is to prevent future resettlements, particularly for communities who had previously been resettled. This of course was the case for the PAP in RAPland who had been displaced from territories they occupied due to Olkaria I and Hells Gate National Park (ibid, p. 7-4). KenGen was asked to clarify this (ibid) but failed to comply with its due diligence requirements. Again, the failure to insist on clarification of ongoing projects in the area (of

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<sup>69</sup> Akira I is an operation of AGIL. During March 2015 interviews, KenGen mentioned this as a reason why Akira I was not covered by its SEA for Olkaria geothermal explorations. During later interviews, it was determined that KenGen had become a contractor to AGIL for the implementation of Akira I.

licensing) before the land was bought and the physical relocation carried out, breaches due diligence obligations of the government of Kenya (represented by NEMA) and the financiers. However, the main failure lies with the Ministry of Energy (MoE), the licensing body. The management structures of the resettlement (see subsection 1.1.3) ensured that MoE was always kept informed about the resettlement. Therefore MoE was in a position to coordinate the processing of licenses in this area.

**Title deeds:** Failure to transfer the land title deeds to the PAP prior to their physical relocation constituted a violation of their right to the security of tenure, particularly as this was based on an ongoing court dispute about the same land. According to the summary/protocol of the sensitizing workshop for PAP on optional forms of holding the title deed in November 2012, “lenders were keen that the transfer of the land title from KenGen to the PAP should be completed expeditiously.” The emphasis on the urgency of the issue reflected the seriousness of lenders about their due diligence obligations in this regard. However, the financiers could have rejected the timing of the physical relocation until title transfer had taken place.

**Agreement on Cultural Centre land:** The lack of agreement on the land for the Cultural Centre and the intention to make it a property of the entire PAP community jeopardized the livelihood and income of the Cultural Centre PAP. This thus impaired their right to an adequate standard of living. The proposal was propagated by the social safeguard consultant of the World Bank in her role as Tacitus consultant. Her engagement in this regard was confirmed by the PAP (FGD, PAP, 15.09.2015). OP 4.12 (13(c)) however states that “[p]atterns of community organization appropriate to the new circumstances are based on choices made by the displaced persons.” Though maybe well-intentioned, this top-down approach pursued by the consultant impaired the right to an adequate standard of living of one sub-group of PAP and triggered inter-community conflict. The mediation process established by the EIB-CM in the course of inspections also sought to mediate between the Cultural Centre PAP and the PAP who dominated the new community structures.

**Alternative resettlement sites:** Finally, the question arises how were so many PAP, even some officially representing their communities in the RAPIC, unaware of the number of alternative resettlement sites mentioned in the GIBB Africa and KenGen reports, which were allegedly discussed with “all stakeholders” in 2009 (GIBB Africa, 2012, Annex 5). This suggests that sites had been pre-selected by KenGen without consultation. A limited form of consultation may have taken place at a time when the reality of resettlement was far away and in an

inadequate manner, perhaps in the course of the census three years before the final RAP (PAP had been asked for their preferred sites). As the subsequent sections show, participation of the PAP (including during the census) was generally flawed throughout the project. The superficial compliance with OP 4.12 (para. 6(a)(i)) that required offering choices between “technically and economically feasible resettlement alternatives” (such as alternative sites) indicated a more persistent problem with the project: formal compliance with certain safeguards in disregard of the spirit of the safeguards.

Human rights failures with regard to the issue of land can be summarized as follows:

KenGen abused PAP’s human rights by not fully complying with existing norms and established best practices. More specifically, it failed to adequately adhere to BPGDevED, para. 37, that requires the dissemination of adequate information to PAP prior to relocation and “opportunities [...] to present alternative proposals and to articulate their demands and development priorities” (similarly para. 38). This can be interpreted to include proposals for alternative resettlement sites as is best practice and supported by OP 4.12 para. 6(a)(i). One proposal allegedly made by the PAPs involved the Ormokongo site, which was not duly considered – a breach of para. 38 (BPGDevED). Though KenGen may have formally complied with GPID, Principle 7(3)(d), that stipulates to “[...] involve those Affected [...] in the planning and management of their relocation,” the inclusion of PAP in selecting the resettlement site does not align with CESC, GC 7, para. 15 (a), which demands “an opportunity for genuine consultation with those affected,” hence the standard of meaningful consultation.

Further, KenGen abused the rights of the PAP to adequate compensation of the land they occupied (BPGDevED, para. 60; GPID, Principle 29; CESC, GC no. 7, para. 13; African Charter, Art. 21(2)) and thus breached the PAP’s right to property and adequate standard of living including their rights to adequate food and housing. In particular BPGDevED, para. 60, emphasizes that “[w]here land has been taken, the evicted should be compensated with land commensurate in quality, size and value, or better.” KenGen abused these rights by (a) negotiating the size of land instead of basing land-for-land compensation on a proper assessment of land use; and (b) not providing the EIA with an assessment of the soil/land quality of the proposed resettlement land as requested in the ESIA for Olkaria IV. Further, as an indigenous people the Maasai were entitled to compensation according to UNDRIP, Art. 10 and 28. Art. 28(1), which specifies that the right to adequate compensation extends to “[...] the lands, territories and resources which they have traditionally owned or otherwise occupied or

used [...].” Compensation might thus extend to lands and resources that are used on a less regular basis but traditionally belong to them. The survey allegedly commissioned by the PAP themselves would thus be a sufficient basis for just compensation, provided it had been conducted in an appropriate manner.

KenGen also abused the right of the PAP to security of tenure, as enshrined in the right to housing (CESCR, GC no. 4), by physically relocating them before the title deed to the land had effectively been transferred to the PAP. KenGen moreover impaired their right to health by failing to clarify in advance the issues of licensing for the Akira Ranch as requested by the GIBB Africa report.

Finally, the right of the Cultural Centre PAP to an adequate standard of living was abused by KenGen by not relocating them close to their previous settlement and source of livelihood, according to BPGDevED, para. 43. In addition, KenGen did not secure the PAP’s ownership and control over the Cultural Centre business centre and the associated land (their source of livelihood), or provide them with a separate site to rebuild the Cultural Centre’s business centre.

The government of Kenya failed to adequately protect the PAP by allowing NEMA to accept and approve the ESIA submitted by KenGen. They did this without insisting on the requested clarifications on the quality of soil/land, on investigating the licensing for geothermal exploration in the vicinity of the RAPland, and on the resolution of the land dispute. The government of Kenya further failed to respect the right of the PAP to an adequate standard of living when the Ministry of Energy denied them information on the issuance of licenses. It moreover failed to protect the PAP by not providing a local land-use plan that struck a balance between the public interest in geothermal exploration and the grazing needs of the local pastoralists on a permanent basis. In this regard, it should be noted that Art. 21(3) of the African Charter states that “[t]he free disposal of wealth and natural resources shall be exercised without prejudice to the obligation of promoting international economic cooperation [...].”

The introduction of SEAs and the completion of oneconducting one for the Olkaria area was an improvement, but not a solution. It should further be noted that the Kenyan constitution stipulates rules for benefit sharing in natural resource exploitation, but the associated bill has not yet been proclaimed. Again, the government of Kenya failed to protect the right to an adequate standard of living of the PAP and others, by not providing them with a permanent source of livelihood improvement or an opportunity for participation in national development.

The government also failed to follow national procedures stipulated by the constitution (Art. 67) and the Land Act 2012 (sec. 112-117) by not engaging the NLC in the determination of adequate compensation of land and land-use planning, particularly regarding the contested nature of land ownership in the geothermal area of Olkaria. All failures mentioned here are failures of conduct – mainly of omission.

Lenders failed in their due diligence by approving the project and later the resettlement without requesting an improved ESIA and awaiting final clarification of land ownership by the Kenyan courts. It should be acknowledged, however, that lenders sent their social experts to the projects when critical situations arose (particularly when PAP rejected the first resettlement site), though they did this without tangible outcomes. Thus, we see here a mix of failure of conduct and failure of result. Finally, it would have been preferable and in accordance with Kenyan law if the lenders had initiated a dialogue about engaging the NLC in the process. The failures of EU member states responsible for the EIB are discussed in chapter 3.

### **3.1.3 Right to participation and consultation**

#### *3.1.3.1 International and regional legal human rights frameworks*

The relevant international and human rights treaties provide for the right to participation in terms of participating in free elections of representatives as a voter and candidate (ICCPR Art. 25; CFR, Art. 39 and 40; European Convention, Protocol I, Art. 3; African Charter Art. 13). Art. 13 of the ICESCR on the right to education additionally stipulates that “education shall enable all persons to participate effectively in a free society,” and the CFR emphasizes the rights of elderly and disabled persons to participate in social life (Arts. 25 and 26). Whilst the first set of norms targets national and sub-national elections, the second set is tailored towards social inclusion. None of these, however, directly apply to participation in projects by project affected people. More applicable to the project level, though not designed for it, are provisions on the right to information (CFR Art. 42), to free expression and exchange of information (ICCPR Art. 19; European Convention Art. 10; CFR Art. 12; African Charter Art. 9), and to form associations (ICCPR Art. 22; ECHR Art. 11; CFR Art. 11; African Charter Arts. 10 and 11).

Nevertheless, there is consensus about the nature of adequate consultation, which is most clearly reflected in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, adopted in 1979), Art. 7 on political and public life, which speaks to the right to vote, to participate in the formulation and implementation of policies, and to engage in

associations and NGOs concerned with such matters (UN Women, 1979). Further, the 1986 Declaration on the Right to Development recognizes in its second paragraph that development means the

“[...] constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom” (UNGA Declaration 41/128, 1986, preamble and para. 2(3)).

Also the CESCER regards “active and informed participation” paramount for the success of projects and programmes to implement the provisions of the ICESCER (CESCER, 2001, para. 12). This provision is reiterated in the Millennium Declaration, Art. 25, which states that parties must be committed to “genuine participation by all citizens” and the “right of the public to have access to information” (UNGA, 2000, para. 25). With respect to changes in land tenure and land use, the above mentioned Tenure Guidelines stipulate that consultation and participation have to start prior to decisions, have to take “into consideration existing power imbalances between different parties”, and have to ensure “active, free, effective, meaningful and informed participation of individuals and groups in associated decision-making processes” (FAO, 2012, para. 3b.6). With respect to indigenous people, it supports the provisions of “good faith consultations” and FPIC (see below) (ibid 9.9).

There are certain synergies between international human rights law and environmental law. This is particularly evident in the 1998 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (also known as the Aarhus Convention), which in Art. 3(9) stipulates that the “... public shall have access to information, have the possibility to participate in decision-making and have access to justice in environmental matters without discrimination ....” The European Commission adopted the Aarhus Convention on 17.02.2005 ([Decision 2005/370/EC](#)).<sup>70</sup> These efforts are in accordance with Principle 10 of the Rio Declaration of 1992 that reads as follows:

“Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information

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<sup>70</sup> At the EU level, legislation for two of the three pillars of the Aarhus Convention has been in place since 2003. These were the public access to information ([Directive 2003/4/EC](#)) and public participation ([Directive 2003/35/EC](#)). At the Latin American regional level (ECLAC countries; ECLAC (Economic Commission for Latin America and the Caribbean), which consists of 33 Latin America and Caribbean countries, in addition to 21 Asian, European, and North American nations that have historical, economic and cultural ties with the region), a process is under way to develop a regional convention similar to the Aarhus Convention (Hunt, 2015).

concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided” (UN General Assembly, 1992).

The right to information and participation is closely linked to the due diligence requirement in environmental law to conduct environmental impact assessments prior to major interventions. Conducting participatory environmental impact assessments has thereby gained the status of international customary law. Human rights bodies repeatedly make use of it. In its 1997 report on human rights in Ecuador, the IACHR acknowledges with respect to development projects that access to information, participation in decision-making processes, and access to legal remedies are crucial measures “to support and enhance the ability of individuals to safeguard and vindicate [their] rights” (IACHR, 1997, p. 91, fn 34). The ACHPR in its decision on communication 155/96 on oil explorations in Nigeria argues similarly:

“Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicizing environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities ... and *providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities*” (emphasis added).<sup>71</sup>

The ACHPR thereby recognizes the link between such participatory impact assessments and ensuring socio-economic rights such as the right to food (ibid). In 2011, the Human Rights Committee in its GC No. 34 recognized the right to public participation and information (United Nations, 2011, paras. 18, 19), as did the IACtHR 2006 in its decision on *Claude-Reyes et al. v Chile* (IACHR, 2006, para. 77), and the ECtHR in 2009 in its judgement on *Társaság a Szabadságjogokért v Hungary* (ECtHR, 2009).<sup>72</sup> The HRC clarifies that Art. 27 of the ICCPR on minority rights specifies that “a State party’s decision-making that may substantively compromise the way of life and culture of a minority group should be undertaken in a process of information-sharing and consultation with affected communities” (HRC, 2011a, para. 18), thereby referring to its communication on *Poma v Peru* (HRC, 2009a).

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<sup>71</sup> ACHPR decision on communication 155/96, 27.10.2001, Social and Economic Rights Action Center (SERAC) and Center for Economic and Social Rights (CESR) / Nigeria, paras. 53 (quote) and 65. The case has also been used as a reference in the ACHPR decision on communication 276/03 on the Endoroi case in Kenya.

<sup>72</sup> See commentary to the Maastricht Principles (De Schutter et al., 2012, p. 22).

To protect people from potentially existence-threatening investment activities, in its judgements the IACtHR extended the duty to *consult* to a duty to obtain *free, prior, and informed consent* (FPIC).<sup>73</sup> FPIC has been endorsed by the treaty supervising bodies of the ICESCR and the International Convention on the Elimination of all Forms of Racial Discrimination (CERD) (CERD UN Doc. A/52/18, Annex V, 1997). With respect to FPIC as enshrined in ILO Convention 169, the Committee of Experts on the Application of Conventions and Recommendations emphasizes that consultations at a minimum must be conducted in *good faith* and with the aim of consent, and it emphasizes the requirement of consent in cases of relocation (Ward, 2011, p. 65f.). The ACHPR also recognized the FPIC principle, as stated in Arts. 10, 11(2), and 28(1) of UNDRIP, to conform with “similar provisions contained in many other instruments adopted by the [African Union]” (ACHPR, 2007). According to Griffiths, the EU equally interprets its Development Council’s Resolution on “indigenous peoples within the framework of the development cooperation of the community and member states” (EU Commission 2002) along the lines of FPIC (Motoc, 2005, p.7; Griffiths, 2003, pp. 28, 29, 46, 62).

FPIC is the most important procedural requirement with regard to indigenous people. It is enshrined in the UNDRIP and is an amplification of the consultation and participation requirements under the ILO Convention 169. The meaning of FPIC has been deliberated amongst experts at the UN Permanent Forum on Indigenous Issues (UNPFII, 2005), which characterized it as follows (UNPFII, 2008, p. 18):

- “Free” means that consent was achieved without coercion, intimidation, or manipulation.
- “Prior” means that consent has been sought sufficiently in advance of any authorization or commencement of activities, and that the time requirements of indigenous consultation/consensus processes have been respected.
- “Informed” means that information should at least cover the nature, reasons, duration, locality of affected areas, and the personnel and procedures involved. It requires a preliminary ESIA, including potential risks and fair and equitable benefit sharing in light of the precautionary principle.
- “Consent” means that dialogue should take place in good faith, allowing indigenous people to find appropriate solutions in an atmosphere of mutual respect, full and equitable participation, sufficient time, and adequate communication systems.

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<sup>73</sup> *Saramaka People v Suriname*; IACtHR 2007 (Ser. C) No. 172

Indigenous people should participate through their own freely chosen representatives and customary or other institutions. It further includes participation of indigenous women and gender perspectives as well as the participation of youth and children as appropriate. This process may include the option of withholding consent. Consent to any agreement should be interpreted as indigenous people having reasonably understood and agreed to it.

In addition to other provisions, UNDRIP stipulates that FPIC procedures must be invoked for cases of relocation measures (Art. 10); deprivation of land and other resources (Art. 28(1)); disposal of hazardous materials on indigenous lands/territories (Art. 29(2)); and projects that affect indigenous lands/territories, particularly utilization of natural resources (Art. 32(2)) (UNDRIP, 2007). Equally, the ILO Convention 169 states that “consultations [...] shall be undertaken, in *good faith* and in a form appropriate to the circumstances, with the objective of achieving agreement or consent [...]” (article 6; emphasis by the author). In cases of necessary relocations, it additionally states that “where [...] consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned” (Art. 16). It thus argues along similar lines as the human rights treaty bodies in their two-pronged approach to strike a balance between discretion of states to decide in issues of public interest and individual rights.

As detailed in the Panama case study report of the ClimAccount Project (Hofbauer and Mayrhofer, 2016), the attempt to strike a balance culminates in the core question of the meaning of ‘consent’ and whether this amounts to a *de facto* veto power.

According to Hofbauer, the drafting process of Art. 19 UNDRIP (originally Art. 20) reflects this balancing act. It was originally formulated as “States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures [legislative or administrative measures that may affect them]” (Commission on Human Rights, UN Doc. E/CN.4/2006/79, 2006, p. 46; for state criticism of the broadness of the original formulation, see UNGA, UN Doc. A/61/PV.107, 2007). However, the final version reads: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent [FPIC] before adopting and implementing legislative or administrative measures that may affect them” (Art. 19, UNDRIP, 2007).

With regard to forced relocation, Art. 10 UNDRIP expressly states that “[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned.” Former Special Rapporteur James Anaya points out that FPIC (as described in final Art. 19) “should not be regarded as according indigenous peoples a general ‘veto power’” but that it requires a negotiation process ‘towards mutually acceptable arrangements’ (HRC 2009, para. 46, A/HRC/12/34). He contrasts this with mere consultation obligations which often constitute “mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process” (HRC, 2009b, para. 46, A/HRC/12/34). Pursuant to Hofbauer (2015, p. 231ff), “this corresponds to widespread practice and scholarly opinion, even if the adopted text tempts some bodies to go further” (see for example UNPFII, above).

Standards for participation and consultation of FPIC, even if interpreted as not including veto power, only apply to indigenous peoples. Hence, it does not cover other marginalized people who for their livelihood may depend to similar degrees on access to land. The above-mentioned Tenure Guidelines therefore fill an important gap in giving marginalized groups a voice in decisions about land-use changes. With respect to climate policies, the Guidelines stress that these principles should be applied to all “[...] individuals, communities or peoples, with an emphasis on farmers, small-scale food producers, and vulnerable and marginalized people, who hold legitimate tenure rights, in the negotiations and implementation of mitigation and adaptation programmes” (Tenure Guidelines, Principle 23).

### *3.1.3.2 National frameworks on participation and consultation*

The Kenyan constitution contains several provisions related to participation. Participation of people (along with rule of law and human rights) are defined to be part of the “national values and principles of governance” enshrined in Art. 10. The constitution’s Bill of Rights guarantees the right to association (36(1)) and particularly emphasizes the right of the youth (Art. 55), minorities and marginalized groups (Art. 56), and elderly (Art. 57) to participate in social and political life. Further, the right to petition and participate in affairs of the national parliament, as well as to public participation on the county assembly level are enshrined in Arts. 118, 119 and 196. The right to participation is strengthened by the provision on access to information, which stipulates that “[e]very citizen has the right of access to (a) information held by the State; and (b) information held by another person and required for the exercise or protection of any right or fundamental freedom” (Art. 35(1)). Participation in environmental management is encouraged in Art. 69(d).

With respect to the project level, the EIAA Regulations of 2003 require that EIAs seek the views of the affected people and publish the assessment report to make it accessible to everyone (Ministry of Environment and Mineral Resources, 2003, Art. 17). The Draft Environmental Impact Assessment Guidelines and Administrative Procedures (NEMA, 2002) specify that

“consultation and public participation (CPP) may include a) Securing written submissions from Lead Agencies and the public; b) Public opinion; c) Holding community meetings and public hearings; d) Conducting preliminary field study/site visits; e) Conducting workshops/seminars; f) Establishing inter-sector task forces” (NEMA 2002, p. 10).

It regards “participation of affected person” in the EIA process “a cornerstone for project planning and implementation” and further clarifies that:

“CPP should be undertaken mainly during project planning, in implementation and decommissioning phases. It should involve the affected persons, lead agencies, private sector, among others. The methodology for CPP may include: meetings and technical workshops with affected communities; interpersonal contacts; dialogue with user groups and local leaders; questionnaire/survey/interview; and participatory rural appraisal or rapid rural appraisal (PRA/RRA) techniques” (ibid, p. 15).

According to the NEMA Draft Guidelines, adequate consultation and information thereby explicitly fall within the purview of the project proponent (ibid). By contrast, the ACHPR in *SERAC v Nigeria* (see above) argued that providing – or at least ensuring – “meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities” is the duty of the state. Hence, the methodologies proposed in the Draft Guidelines should at least be expressed in an obligatory manner (“shall” instead of “may”) and be effectively monitored, if the government of Kenya seeks to comply with its state obligations by protecting access to “meaningful opportunities” for participation. Compared to the National CDM Guidelines (see subsection 2.2.2.1.8), the Draft Guidelines show less emphasis on the social aspects. Whereas the first request that a CDM project should “[a]ddress community needs and priorities through effective public participation in project design, planning and implementation in order to ensure equitable distribution of sustainable development benefits” (GOK, 2001b), the latter only mentions that “social benefits should be provided” (NEMA, 2002, p. 8). It is worth noting that the National CDM Guidelines state that CDM projects are expected to be consistent with “concurrent environmental conventions” including Agenda 21, which can translate into strong participatory elements. However, the National CDM Guidelines did not appear to be relevant for project implementation. A trigger for improving the participation in future EIAs might be the Environmental Impact Assessment Review Guide for

Communities (December 2014), which strongly emphasizes the importance of participation (though this does not translate into a clear obligation) (NEMA, 2014). With special focus on involuntary resettlement, the IDP Act emphasizes the need for participation in planning and implementation (paras. 1-3; see also subsection 2.2.2.1.5).

### *3.1.3.3 Institutional frameworks on participation and consultation*

Para. 13 of the World Bank's OP 4.12 requires that "(a) Displaced persons and their communities, and any host communities receiving them, are provided timely and relevant information, consulted on resettlement options, and offered opportunities to participate in planning, implementing, and monitoring resettlement. ..." Annex A to OP 4.12 further details in para. 15 on community participation that for securing "involvement of resettlers and host communities," the World Bank requires "(a) description of the strategy for consultation with and participation of resettlers and hosts in the design and implementation of the resettlement activities."

OP 4.10's participation requirements are even more nuanced. Para. 10 on Consultation and Participation states that:

"Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the borrower (a) establishes an appropriate gender and intergenerationally inclusive framework that provides opportunities for consultation at each stage of project preparation and implementation among the borrower, the affected Indigenous Peoples' communities, the Indigenous Peoples Organizations (IPOs) if any, and other local civil society organizations (CSOs) identified by the affected Indigenous Peoples' communities; (b) uses consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits;<sup>74</sup> and (c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation."

For the World Bank, however, FPIC does have the same meaning as discussed above – the 'C' stands for 'consultation' not 'consent'. As indicated by Hofbauer in WP report 1.1, FPIC was

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<sup>74</sup> According to a footnote on the methods used, "Such consultation methods (including using indigenous languages, allowing time for consensus building, and selecting appropriate venues) facilitate the articulation by Indigenous Peoples of their views and preferences. The Indigenous Peoples Guidebook (forthcoming) will provide good practice guidance on this and other matters." An indigenous peoples' guidebook published by the World Bank could not be found.

introduced in a soft formulation to the World Bank's policies in 1991. The purpose of the FPIC requirements were

'[i]dentifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources' (World Bank OD 4.20, 1991, para. 8).

A veto right to a project or a resettlement was, however, explicitly excluded (OP. 4.10, FN 4). In 2004, the World Bank produced a legal note explicitly rejecting the requirement of consent – despite contrary advice by the Bank's Extractive Industry Review – arguing that it had the potential to interfere with national sovereignty. A consultation process which shows "broad community support" was regarded to be sufficient (MacKay, 2004; Tamang, n.d., p. 11).

The EIB 2009 ESPS guidelines state that each Resettlement Action Plan "should incorporate and follow the right to due process, and to meaningful and culturally appropriate consultation and participation, including that of host communities." It also states that maintenance of the livelihoods of vulnerable groups (including indigenous people) "are dependent on access to essential services and participation in decision-making" (EIB, 2009, p. 18). Further, "[s]takeholder concerns should be considered as early as possible in the project assessment process [...]" (ibid). The EIB Guidance Note 5 was limited to "public consultation and participation in project preparation," more specifically to the production of EIAs. The consultation component in EIB projects is in fact anchored in its EIA policy (EIB, 2004) which is based on EU EIA Directive 85/337 (amended by 97/11 and by 2003/35/EC) "to incorporate the provisions of the Aarhus Convention ... to all its regions of operation" (EIB 2010, p. 133; emphasis in the original). Accordingly, the 2009 ESPS states:

"For all projects for which the EIB requires a formal EIA, the promoter should conduct a meaningful, transparent, and culturally appropriate public consultation of affected communities and provide for a timely disclosure of appropriate information in a suitable form; there should be evidence that the views expressed have been considered" (EIB 2009, p. 20).

Outside the EU, it is equally the environmental assessment of projects with which "the Bank aims to promote public consultation and participation, according to EU standards" (EIB 2010, p. 133). The responsibility to ensure meaningful consultation and participation lies with the project proponent in the host country. "Bank staff as part of their environmental assessment check that these requirements have been fulfilled" (ibid) and the Bank generally encourages the promoter to adopt meaningful processes. Thereby,

“... consultation can range in intensity from limited discussions with a small number of concerned stakeholders, to structured processes that make provision for the formal involvement of concerned stakeholders in significant decisions about the project” (ibid p. 134).

In line with that, a Resettlement Action Plan “[a]t a minimum ... should ... (6) describe the process of consultation with affected people and integration with host populations” (ibid, p. 106).

In the ESPS 2009, the EIB further articulates a clear commitment to FPIC along UNDRIP lines and states:

“Where the customary rights to land and resources of indigenous peoples are affected by a project, the Bank requires the promoter to prepare an acceptable Indigenous Peoples Development Plan. The plan must reflect the principles of the UN Declaration on the Rights of Indigenous Peoples, including free, prior and informed consent to any relocation” (EIB, 2009, p. 18).

The 2010 handbook, by contrast, does not mention the need for an Indigenous Peoples Development Plan but refers to the ILO Convention 169, policies developed by multilateral development banks, the Extractive Industry Review, and the UN Human Rights Conventions as guiding its policies with respect to indigenous peoples (EIB, 2010b, p. 112f.). The Handbook’s Guidance Note 2 on Rights and Interests of Vulnerable Groups, including indigenous peoples, was under revision by that time of project approval.

#### *3.1.3.4 Analysis of impairments and breaches of the right to participation and consultation*

The chapter on stakeholders’ positions revealed that claims made by the PAP focused on procedural issues and externally imposed structures of self-organization on the (indigenous) communities. In sum, the findings are as follows:

- there exists evidence that the RAPIC, as described in the RAP of 2012 (GIBB Africa 2012), was not conceptualized and implemented as such from the beginning of the project
- the RAPIC (and its assumed predecessor) were inadequate, particularly considering that the Maasai are an indigenous people
- there are credible allegations of manipulation of the consultation and negotiation processes, and that this was partly connected to the imposed structures and their interface with traditional (indigenous) structures of self-organization. The allegations involve occasional appointment of chairmen by local authorities without elections; advantage taken of the illiteracy of chairmen; intimidation and exclusion of selected chairmen; closed-door meetings with selected chairmen before full RAPIC meetings;

offering (and accepting) benefits to (and by) chairmen; attempts by KenGen to discredit complainants by means of drafting a letter to the Inspection Panel signed by RAPIC and CAC.

- conflicts of interest in the supervision and monitoring process of the resettlement including its procedural components (in particular the RAPIC)
- new structure of self-organization in the RAPvillage was already envisioned by the risk management plan of the operator, and was not the result of community deliberations

**Veto right in FPIC:** As stated in subsection 2.2.2, there is evidence that the PAP did not resist the geothermal explorations or the required resettlement generally. Hence, even if their right to veto such a project had been acknowledged, this right was not breached because PAP did not intend to veto the project. The problem might be better described as a lack of “mutually acceptable arrangements” (Special Rapporteur James Anaya) – at least for some groups of PAP. The failure to reach acceptable arrangements seems to be closely related to weaknesses in the structures provided for participation.

**Timing of introduction of RAPIC:** The RAPIC, as described in the RAP 2012 and RAP 2009 documents, was not in place at the outset of the project. This constituted a failure to comply with the financiers’ policy and the World Bank’s requirements for such consultation structures (OP 4.12, para. 13 and Annex A, para. 15). Thus, the resettlement site-selection phase to a large extent took place before the RAPIC was formally installed in June 2012 (see subsection 2.3.4). However, the PAP were not completely side-lined during the site selection. Rather, the site-selection process seems to have been organized according to the Kenyan standards of the chairmen system (see subsection 2.1.4 above). This raises the question of whether the chairmen structure and the structure of the RAPIC were appropriate.

**Nature of institutionalized consultation/participation structures and allegations of manipulation:** The author wishes to emphasize that the project operators and representatives had numerous meetings with PAP and/or their representatives. The 2012 RAP, lists 20 meetings with KenGen between November 2009 and July 2011 (GIBB Africa 2012, pp. 2-5 to 2-7; usually without financiers), and World Bank management response to the Inspection Panel lists more than 20 meetings of the World Bank with PAP between February 2011 and November 2014 (World Bank, 2014a, pp. 30-33; usually jointly with KenGen). Many more meetings may have taken place between KenGen and PAP/representatives without participation of the World

Bank after the summer 2011. Allegations thus concern the quality not the quantity of participation.

According to UNDRIP, consultations in the spirit of FPIC should be “in good faith with the indigenous peoples concerned through their own representative institutions” (Art. 19, UNDRIP, 2007). The polar opposite to that are “mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process” (HRC, 2009b, para. 46, A/HRC/12/34). For non-indigenous persons, there exists consensus on their participatory right in issues affecting them including their right to information and participation in decision-making (see subsection 3.1.3.1 above). Applying OP 4.10 in this case could indeed have made a difference. According to OP 4.10(10), for cases involving indigenous people, a “gender and intergenerationally inclusive framework” for consultation has to be in place at “each stage of project preparation and implementation,” i.e., beyond the preparation of EIAs; and the consultation methods used should be “appropriate to the social and cultural values of the affected Indigenous Peoples’ communities.”

At first glance the concept of RAPIC, with its representatives from all PAP villages and from different vulnerable groups, closely mirrors the provisions of OP 4.10. However, the chairmen system seems to compromise this (see subsection 2.1.4). Though it allows for representation of groups that are not directly represented in the traditional system of the council of elders, it allows for parallel structures of representation that are susceptible to manipulation. This was apparently the case with the consultation mechanisms in Olkaria which, with different success, were allegedly used by KenGen as channels to inform PAP “about decisions already made [...] without allowing them genuinely to influence the decision-making process” (James Ayana on how consultation should not be (HRC, 2009b, para. 46, A/HRC/12/34)). This seems to be the case with the model of RAPIC, the structure adopted for the self-organization of PAPs at the new RAPvillage (see below), and last but not least the selection of the resettlement site (on all aspects see 2.3.4) – all very crucial to the process and the resettlement outcome. In sum, it seems that consultations were not free from manipulation and did not allow for genuine participation. This is confirmed by the Inspection Panel finding of

“serious shortcomings in achieving meaningful consultations and inclusive participation ... due to the ineffective communication with the community, the sidelining of the community’s traditional authority structure (the Elders), the omission of Maa language during consultations, and failure to disclose documents to the affected community in a place accessible to them and in a form, manner, and language understandable to them” (World Bank Inspection Panel, 2015a, p. vi).

This constitutes a breach of the PAP right to meaningful participation, particularly as indigenous people.

**Structures for self-organization in the RAPvillage:** The World Bank directs that “[t]o the extent possible, the existing social and cultural institutions of resettlers ... are preserved” (OP 4.12, para. 13). This aligns with the other rights of indigenous peoples. In the case of the Cultural Centre, the non-adherence to this principle and the introduction of new structures impaired some PAP’s sources of livelihood. And as a result, impaired their right to an adequate standard of living because they had to share the management of and revenues from tourism, which had not previously been a source of income for other PAP. This structure for self-organization in the new RAPvillage was not the outcome of a meaningful consultation with the PAP, but a mitigation measure proposed by KenGen in its environmental and social risk management strategy submitted to NEMA. Again, recognition of the Olkaria Maasai as indigenous people could have focused attention on the issues of self-determination and meaningful participation by involved parties.

**Conflicts of interest:** The financiers were aware that the World Bank’s social safeguard consultant was the sister of KenGen’s social safeguard adviser and that she played a significant role in conceptualizing the structures for participation and self-organization. It was a failure of their obligation to due diligence that AFD engaged her to assess her own and (partly) her brother’s work. The other European financiers could have intervened in this regard, but did not.

Human rights failures regarding participation and consultation can be summarized as follows:

KenGen, the operator in charge, abused the PAP rights to meaningful participation as enshrined in international customary law on the need for (and participatory quality) EIAs, which was confirmed for the African context by the ACHPR decision on *SERAC v Nigeria*. KenGen also abused the Maasai right to FPIC, as enshrined in UNDRIP (Art. 32 and 10, both confirmed by ACHPR to be in line with the African Charter). This right ensures that consultations and outcomes are free (no attempts to intimidate or manipulate), informed (reliable communication structures and appropriate language), and participants are able to express consent (consultation in good faith). There were also indications that the requirement for ‘prior’ consultation was not fully complied with (i.e., form and quality of consultation before the commencement of RAPIC as presented in the RAP 2012). In a similar vein, KenGen also infringed on the PAP’s right as indigenous people to self-organization, as enshrined in UNDRIP Arts. 33 to 35, by imposing

village-management structures on the new RAPvillage (accepted by RAPIC) and by not allowing the input and involvement in determining those structures by all PAP.

The government of Kenya (represented by the Ministry of Energy), as the majority holder of the parastatal company KenGen and involved in the supervision of its management, violated the rights of the PAP to meaningful participation by failing to protect these rights with adequate regulations and oversight. Beyond that, the government failed to protect the rights of the PAP by providing only weak national mandatory guidance for meaningful participation. It did not have effective mechanisms in place to protect indigenous peoples as required by Art. 8 of UNDRIP. Nor did it amend EIA regulations to improve and align them with UNDRIP requirements. The first EIA improvements could have been triggered by the EIA Review Guide for Communities (2014), which can be used to educate affected persons about procedures and rights (see subsection 3.1.3.2). With regards to the relocations, the legal basis for participatory rights had been improved by the passing of the IDP Act, which emphasizes the special needs and rights of indigenous peoples. It was, therefore, not applicable to the project which began shortly before the Act was passed.

Financiers failed to ensure that mechanisms for participation in the RAP 2009 were properly implemented from the outset, which meant they failed to properly monitor the provisions for participation. It seems that only when the PAP rejected the Suswa Triangle as a resettlement site and the project was threatened by resistance and delays, that the financiers became actively involved. Regarding the conflict of interest, the financiers, as mentioned, failed in their due diligence responsibilities by AFD contracting with the World Bank's safeguard consultant to assess her own and (partly) her brother's work. The other financiers, particularly the European ones under the MRI, should have intervened in this matter.

### **3.1.4 Right to access to justice and redress: operational-level grievance mechanism**

#### *3.1.4.1 International and regional legal human rights frameworks*

The right to access to justice and redress is enshrined in several human rights treaties. On the regional level, the right to remedy is enshrined in Art. 7 of the African Charter, Art. 35 of the American Convention, and Art. 13 of ECHR (Van Boven, 2010, p. 3). In Art. 25 the ECHR moreover stipulates the right to complain about decision-makers, which is also guaranteed at the EU level in the CFR, Art. 43. The CFR additionally enshrines the right to petition in Art. 44.

Finally, each of the two covenants (ICCPR and ICESCR) has an optional protocol that provides for an individual complaint mechanism. The Aarhus Convention's Art. 9 provides for access to justice (including remedies) in environmental matters before national courts or other independent and impartial bodies established by law. In 2005, the right to redress was defined in the United Nations Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UNPGRR) as including "(a) Equal and effective access to justice; (b) Adequate, effective and prompt reparation for harm suffered; (c) Access to relevant information concerning violations and reparation mechanisms" (Van Boven, 2010, para. 11). Though the scope of the UNPGRR is gross human rights violations, Art. 26 on non-derogation clarifies that the guidelines "are without prejudice to the right to a remedy and reparation for victims of *all* violations of international human rights law" (emphasis added), thus "generally acknowledging that in principle also all violations of human rights ... entail legal consequences"(Van Boven, 2010, p. 3).

These instruments, however, do not detail an operational-level complaint mechanism or elaborate on what such mechanisms should look like. Rather, they address access to redress on the level of the nation state and of treaty bodies. UNDRIP Art. 28 on indigenous peoples' right to redress does not provide project-level details either.

The gaps in the operational-level grievance mechanisms from a human rights perspective were considered by John Ruggie, the Special Rapporteur on business and human rights. In June 2011, the Human Rights Council (HRC) endorsed the Guiding Principles for Business and Human Rights (GPBHR; HRC, 2011b, A/HRC/17/31), in which Ruggie proposed detailed guidelines about which criteria "operational-level grievance mechanisms" should comply with (GPBHR, Principle 31). It specifically recommended that lenders modify their guidelines and requirements to mirror these developments in soft law, and thereby ensure that their operations and funding activities were human rights compliant. It was also recommended that host countries of projects adopt such principles in their policies regulating investor-community relationships.

According to the GPBHR, it must be ensured that an operational-level grievance mechanism (a) enjoys and fosters the trust of the affected stakeholder groups; (b) is accessible and known to them; (c) is based on clear and known procedures; (d) provides for "reasonable access to sources of information, advice and expertise" to ensure equitable terms between parties; (e) is

transparent about its functioning and performance to build confidence; (f) is compatible with human rights; (g) is a source of learning; and (h) is based on engagement and dialogue (para. 31).

The commentary on para. 31(h) provides additional details:

“since a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome, these mechanisms should focus on reaching agreed solutions through dialogue. Where adjudication is needed, this should be provided by a legitimate, independent third-party mechanism.”

The commentary on para. 31(d) moreover clarifies that imbalances between enterprises and affected stakeholders with respect to access to information and expert resources, and the financial means to acquire them, have to be addressed to ensure a fair process. The commentary on para. 29 clarifies that such a mechanism should not “preclude access to judicial or other non-judicial grievance mechanisms.” It is obvious that the GCHM for the Olkaria IV resettlement did not comply with criteria (a), (d), or (e).

#### *3.1.4.2 National frameworks on operational-level complaint mechanisms*

National-level policies were not explicit about operational-level complaint mechanisms. For problems with ESIAs, the appropriate authority to which complaints were to be filed was NEMA. Other relevant legislation included the Land Act (2012), which was identified in the ESIA as an applicable framework for the Olkaria IV resettlement. The Land Act prescribes procedures for redress in matters of compensation stemming from the appropriation of land for public interest purposes (Art. 155; see subsection 2.2.2.1.4). The institution in charge here was the National Land Commission (see subsection 2.2.2.1.6). Finally, the IDP Act stipulates that “conditions for durable solutions,” including resettlement, comprise “access to justice without discrimination” (IDP Act, Art. 9(2); see also subsection 2.2.2.1.5), which is not further defined and might be adequately covered by the national judicial system. Neither the Land Act, Art. 155, nor the IDP Act were applied to the project.

#### *3.1.4.3 Institutional-level frameworks on operational-level complaint mechanisms*

The introduction of an operational-level complaints mechanism is an indispensable procedural requirement for the successful and human rights-adequate management of an involuntary resettlement process. It is a mandatory requirement of the applicable World Bank operational policies (OP 4.12 (13(a))). Para. 13(a) of OP 4.12 explicitly requires that “[a]ppropriate and accessible grievance mechanisms are established for these groups [Displaced persons and

their communities, and any host communities].” Para. 14 of OP 4.12 on determining eligibility for compensation only states that a procedure to assess eligibility includes meaningful participation and “specifies grievance mechanisms.” The annex to OP 4.12 further states that grievance procedures should be

“Affordable and accessible procedures for third-party settlement of disputes arising from resettlement; such grievance mechanisms should take into account the availability of judicial recourse and community and traditional dispute settlement mechanisms” (OP 4.12, Annex, para. 17).

and requires that a resettlement policy framework document

“should describe the process for resolving disputes relating to resource use restrictions that may arise between or among affected communities, and grievances that may arise from members of communities who are dissatisfied with the eligibility criteria, community planning measures, or actual implementation” (ibid para. 27).

Finally, it is noteworthy that the World Bank’s resettlement sourcebook states that a “project should provide legal assistance to affected people who wish to lodge an appeal” (World Bank, 2004, p. 339). Beyond that, little guidance can be found on how to design such operational-level grievance mechanisms. However, these provisions at least allow for the conclusion that an operational-level grievance mechanism should have been in place when the census survey was carried out to determine eligibility of PAP for compensation; that there was a need for a conflict-resolution/mediation mechanism to deal with issues “relating to resource use restrictions” and concerns about the process of site selection; and finally that, according to the World Bank’s own sourcebook on involuntary resettlement, legal assistance to lodge an appeal should have been provided if needed.

EIB’s 2009 ESPS stated in the context of consultation requirements that “[t]his includes the rights to due process via recourse to independent appeal and arbitration procedures in the case of disputes” (ibid, p. 20). They did not mention an operational-level complaint mechanism and the related handbook elaborated on complaints only to the extent that during the project appraisal phase “complaints should be established through EIA documents and discussions with the promoter. If necessary the mission should be organized to include meetings with concerned parties ... through or in cooperation with the promoter” (EIB 2010, p. 56). Only in case of “significant third party concerns” should these be discussed with EIB’s Environmental Assessment Group (ENVAG) (ibid; see subsection 3.2.2.2 on ENVAG). As it was with the requirements for consultation, the main shortcoming was that provisions for the handling of

concerns were limited to the approval phase and not on an ongoing basis throughout implementation. The KfW sustainability safeguards do not mention complaint mechanisms as a requirement but require private operators to have a management system in place for implementing resettlements that provides for well-structured relations with the target group, and monitoring and reporting procedures (KfW 2014, p. 6f.).

In addition to operational-level grievance mechanisms, the World Bank and the EIB have institutional-level complaint mechanisms, the Inspection Panel and the EIB Complaint Mechanism (EIB-CM). If the latter fails to provide a satisfactory resolution, complainants can turn to the EU Ombudsman. There is, however, no obligation for the EIB to inform project affected people of the existence of the EIB-CM or the option to access the EU Ombudsman (Interview, EIB-CM, 06.12.2015).

#### *3.1.4.4 Analysis of failures regarding an appropriate operational-level grievance mechanism*

The chapter on stakeholders' positions revealed that the operational-level grievance mechanism, the GCHM, had shortcomings. These can be summarized as follows:

- the mechanism was introduced too late – after the census and after the resettlement site selection
- the third-party mechanism was not (easily) accessible because the question of financial responsibility was dependent on negotiations between PAP and the operator
- PAP did appear to have not been informed of their rights to access the institutional-level mechanisms of the financiers
- the mechanism did not (always) work in ways that fostered trust and encouraged dialogue

**Timing of the introduction of operational-level grievance mechanism:** According to OP 4.12(13(d)) on appropriate mechanisms for participation, “institutionalized arrangements by which displaced people can communicate their concerns to project authorities” must be in place “throughout planning and implementation.” Therefore, at crucial milestones of each resettlement measure such as the census and the site selection, PAP should have access to such a mechanism. OP 4.12, Annex A, para. 15 stresses that an appropriate operational-level grievance mechanism must be in place from the beginning, and this was not the case for the Olkaria resettlement. The absence of a grievance mechanism from the outset of the project was

also inconsistent with Principle 31 (para. 22) of the GPBHR. There clearly needs to be closer attention to this issue in future geothermal exploration projects.

As argued in the case of the PAP's right to meaningful participation (see subsection 2.2.3.4), the responsibility for KenGen's compliance with human rights and other applicable norms rested with the government of Kenya. As the National CDM Guidelines stipulate, CDM projects must comply with "concurrent environmental conventions" (see subsection 3.1.3.2) including the Rio Declaration and Agenda 21 with their strong commitments to effective participation. It may be argued that this also includes "the right to review procedures" and to "access to justice" on the project level.

It is, however, the main duty of the World Bank (and of AFD on part of the European lenders) to ensure that the operator complies with the applicable institutional safeguards. All financiers, not only those leading the resettlement component, could see from the RAP documents provided in 2009 that no adequate operational-level grievance mechanism was in place, and could have intervened at that early stage. The banks were derelict in their due diligence obligations by not calling for the implementation of an adequate operational-level complaint mechanism before the census and the site selection were carried out. It has, however, to be acknowledged that they intervened when the resettlement was jeopardized due to the rejection of the Suswa Triangle site. At that point, a complaint mechanism was implemented. Was this the banks' response to the non-adherence to required safeguards or to the threat of project collapse?

**Absence of third-party grievance mechanism:** The GPBHR stipulates that "[w]here adjudication is needed, this should be provided by a legitimate, independent third-party mechanism." This is in line with the operational policies applied by the World Bank that mandate "[a]ffordable and accessible procedures for third-party settlement of disputes arising from resettlement" (OP 4.12, Annex, para. 17). The way the third-party mechanism is conceptualized in the RAP 2012 document does not comply with those standards. The only affordable and accessible dispute mediation was to turn directly to the financiers, who upon receiving complaints often redirected them to the operator/RAPIC. Moreover, PAP were continuously and actively discouraged by the RAPIC and by the World Bank's social safeguard consultant from approaching the lenders directly. According to GIBB Africa, the design of the third-party mechanism was proposed by the lenders. Therefore, they were responsible for the design of the GCHM. It was probable that the World Bank's social safeguard consultant had a crucial role here, as she was for the design of the RAPIC and other structures for participation.

**Lack of information for PAP about institutional-level complaint mechanisms:** In addition to repeated disincentives to voice their concerns to the financiers, it may have been that the PAP were not been informed about their option to access the institutional-level complaint mechanisms of the financiers. At the key informant interviews with the World Bank (Nairobi, March 2015), their response to questions about whether the PAP had been informed about the Inspection Panel suggest that this did not happen. Rather, minutes from RAPIC meetings indicate that the World Bank social safeguard consultant actively discouraged PAP from writing to the Bank directly (in this case to its president) (KenGen 2012, p. 128f.; GIBB Africa 2012, Appendix 2, Min. 03.06.2012). The fact that the PAP turned to the Inspection Panel and the EIB-CM at a very late point suggests that they did not know about these mechanisms earlier. The author holds that it is the responsibility of financiers to ensure that people affected by projects they fund are made aware of institutional-level complaint mechanisms.

**Lack of trust and dialogue in the complaint mechanism:** The GCHM did not appear to comply with several ‘soft’ requirements of GPBHR, para. 31. They are ‘soft’ not only with regard to their legal status (soft law) but also with regard to the ability to monitor and enforce them (fostering trust, source of learning, good faith dialogue, etc.) because they depend to a great extent on the good will of stakeholders. With regard to outcomes, the GCHM was not a complete failure – it did resolve some complaints. But in some crucial areas, it did not function well (e.g., means of transport, RAPvillage management structures, Cultural Centre land and management). During the field trip in March 2015, it was obvious that the operator had addressed some complaints (e.g., the buses) expeditiously when they learned that the Inspection Panel was about to investigate. On the part of the financiers, it has to be acknowledged that at the end of 2012 they required KenGen to arrive at sustainable agreements with the PAP, particularly regarding the size of the Cultural Centre land. Though they did not mediate between KenGen and the PAP, they did at least signal their concern to KenGen. The question remains whether financiers had a duty to improve the soft requirements for such mechanisms by pro-actively providing such things as mediation.

Human rights failures with regard to complaint and redress can be summarized as follows:

At the start of the project, there was no internationally agreed on standard for operational-level complaint mechanisms. Such a normative standard was only adopted in the summer 2011. National standards were equally non-existent. Hence, the only applicable standard was that of the World Bank, which was only weakly operationalized. Nevertheless, it can be argued that

KenGen failed to put in place an operational-level complaint mechanism that was adequate and timely, and as such they failed to comply with OP 4.12. Further, the GCHM did not comply with the quality standards of the GPBHR for such mechanisms, which had been adopted (summer 2011) when the GCHM was introduced (summer 2012). The government of Kenya, represented by the Ministry of Energy, failed to protect the rights of PAP by ensuring that KenGen had a human rights-adequate complaint mechanism in place.<sup>75</sup> On the national level, the government of Kenya also failed to put in place adequate national regulations for operational-level complaint mechanisms. However, the institutional complaint mechanism of NEMA was an avenue for PAP to raise their concerns about non-compliance with mitigation measures proposed in the accepted EIA, and to complain about the work of NEMA when they accepted EIAs that were non-compliant with national standards.

The financiers failed to effectively monitor and enforce compliance with the safeguards they had agreed on. Their intervention to address this shortcoming (the proposal for the GCHM) did not comply with their own standards, nor with the GPBHR standards. By the time the GCHM was introduced, the EIB was conducting a gap analysis of its standards with respect to the GPBHR (see subsection 3.1.3). However, the effectiveness of an operational-level complaint mechanism can only really be assessed in retrospect. Further, there is some evidence that lenders failed to inform PAP about their institutional-level complaint mechanism, which absent that knowledge precluded PAP from accessing the institutional-level mechanisms.

## **3.2 Accountability and Responsibility (focus on ETOs)**

This section will focus on the extraterritorial human rights obligations of the EU and of its member states (in their function as EU members). The EU was the focus of this research project, therefore, the focus of this chapter is the EIB and the duties of EU member state representatives in EIB decision-making. The duties of KfW and AFD and their respective governments are beyond the scope of the project and this chapter.

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<sup>75</sup> While project documents and safeguards usually don't use human rights language, they may refer to human-rights adequate standards, meaning the normative content is aligned with human rights standards.

With respect to economic, social, and cultural rights, the non-binding Maastricht Principles formulate the challenge of ETOs this way: A state has an obligation to respect, protect, and fulfil human rights in situations

(a) “... over which it exercises authority or effective control ...”; (b) “... over which State acts or omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights, whether within or outside its territory”; and (c) “... is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially ...” (Principle 9).

Principle 26 further holds that states should, even if they are not in a position to *regulate* the conduct of non-state actors abroad, *influence* their conduct if they are in a position to do so, for example, through their procurement system or international diplomacy. The UN GPBHR clarify that

“[a]t present States are not generally required under international human rights law to regulate the extraterritorial activities of businesses domiciled in their territory and/or jurisdiction. Nor are they generally prohibited from doing so ...” and hold that there are “strong policy reasons” to do so (A/HRC/17/31; commentary Principle 2).

With respect to state-owned enterprises the GPBHR emphasize in:

Principle 4: “States should take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies, including, where appropriate, by requiring human rights due diligence.”

Principle 5: “States should exercise adequate oversight in order to meet their international human rights obligations when they contract with, or legislate for, business enterprises to provide services that may impact upon the enjoyment of human rights.”

The GPBHR thereby explicitly refer to agencies such as “export credit agencies, official investment insurance or guarantee agencies, development agencies and development finance institutions” or other business enterprises that strongly rely on “statutory authority or taxpayer support” (A/HRC/17/31; commentary Principle 4) where states clearly have the greatest leverage to regulate and influence corporate behaviour.

With regards to the European engagement in Olkaria, several issues require clarification. First, in contrast to its member states, the EU is not a party to international human rights treaties (except the UN Convention on the Rights of Disabled Persons (CRDP), ratified in December 2010) and accordingly cannot be automatically held accountable to their provisions; even less

so its bodies and agencies. Moreover, it is not a state with a territory that exercises territorial jurisdiction. Accordingly, the relevance of ETOs for EU external actions has to be established differently.

Second, it has yet to be established to what extent the EU and its member states can be held responsible for failures of the EIB as a bank, and what possibilities the EU and its member states have to influence its activities. This requires familiarity with EIB decision and supervision procedures.

Third, the management of the Olkaria project was characterized by agreed on delegations of responsibility, to wit:

- a. The European lenders function under the MRI and they agreed that AFD was to be the lead financier, which meant taking “the leadership in appraising/monitoring certain aspects of the projects on behalf of the three EU International Finance Institutions (IFIs)” (EIB-CM, 2015a, p. 37). AFD was particularly in charge of social due diligence.
- b. As the resettlement was only one component of the much larger World Bank Kenya Electricity Expansion Project (KEEP), all three EU-IFIs agreed to rely on the World Bank’s Operational Policies (OPs), and the World Bank was the financier closely supervising the resettlement process. The delegation of responsibilities thus further complicates the question of ETOs and the attribution of responsibility.

Having clarified these points, the assessment of the EIB’s compliance with its due diligence obligations (appraisal and monitoring) and the responsibilities of its shareholders, the EU and its member states are discussed. The chapter concludes with an analysis of the access to justice and remedy for the PAP at the EIB and EU level.

### **3.2.1 Legal framework determining the ETOs of the EU and its institutions**

As detailed in WP report 1.1., the CFR is binding on the EU, its institutions, and its member states where they implement EU law after the Lisbon Treaty came into force in 2009. The CFR combines civil and political rights as well as economic and social rights derived from the European Convention of Human Rights, the European Social Charter, and the case law of respective treaty bodies (WP report 1.1, p. 19). Hence, the CFR can be regarded as providing similar protection as the European human rights system as well as the international human

rights covenants, and provides for equivalent protection. However, the extraterritorial applicability of the CFR is less clear, although scholars as well as the European Commission confirmed that the EU's external actions must conform with the EU Charter of Fundamental Rights (WP report 1.1, p. 20, based on Report of the Expert Group on Fundamental Rights, 1999, p. 18; Wouters, 2001; Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 8 May 2013, COM(2013) 271 final, 2012 Report on the Application of the EU Charter of Fundamental Rights).

The EU's external human rights obligations are further shaped by the Lisbon Treaty, which introduced human rights obligations to the EU's external relations independent of the CFR (Bartels, 2014, p. 15f.). The amended Treaty on the European Union (TEU) emphasizes the EU's commitment to human rights in its relations with the 'wider world' in Art. 2 (EU values), Art. 3(5) (EU objectives in relation to the wider world), Art. 6 (applicability of the CFR), and Art. 21 (principles of EU external relations). Art. 21 states that the EU's external relations should be guided by the principles of

“universality and indivisibility of human rights and fundamental freedoms, respect for human dignity, the principles of equality and solidarity, and respect for the principles of the United Nations Charter and international law” (Art. 21(1)). Art. 2 on the EU's values further upholds “respect for [...] the rights of persons belonging to minorities.”

Art. 205 of the Treaty on the Functioning of the European Union (TFEU) determines that the EU's international actions are guided by TEU Art. 21 (EP, 2015, p. 1). For further details on the EU and human rights see WP report 1.1, sec. 1.3.5. With respect to developing countries, Art. 177(2) of the EC Treaty explicitly states that EU policies in the area of development cooperation must contribute to the respect of human rights. Since the 1990s, human rights related clauses have been included in trade agreements signed between the EU and non-EU countries (Bartels, 2012, p. 1).

In 2005 the EU became a party to the regional Aarhus Convention (European and Central Asian reach) that strengthened procedural rights with respect to environmental matters, particularly the right to information, the right to participation in environmental decision-making, and access to justice and remedies. John Knox argues that Article 3(9) of the Aarhus Convention to meet all obligations “without discrimination as to citizenship, nationality or domicile” (Art. 3(9)) “has the effect to create specific diagonal environmental rights of non-nationals and non-residents ...”, that is ETOs, with respect to the three enshrined rights (Knox 2010).

Art. 6(1) of the CFR stipulates that the CFR not only applies to EU institutions and bodies but also to member states when they are implementing EU law (WP report 1.1, p. 19). This is understood to refer to the domestication of EU law into national law and/or policies. The European Parliament clarifies that by interpreting Art. 6 of the TEU as: "... Member States must also respect the Charter in the EU's external relations[...]" (EP, 2015, p. 1). Hence, the obligation to respect CFR provisions in external relations also extends to the acts of member state representatives in EU institutions when they act in their capacities as board members of EU institutions.

### **3.2.2 Responsibility of the EU for their financial institutions**

In her article on "operationalizing extraterritorial obligations in the context of financed climate projects" using the example of DEG and FMO, Hofbauer argues that development banks "are separate legal entities from their respective home states." Accordingly, the EU and its member states cannot directly be held accountable for their activities. Rather it is necessary to determine, whether such banks "exercise some form of governmental authority" along the lines of ILC, Art. 5 (Hofbauer, 2017). It, therefore, has to be demonstrated that the EIB is an organ that exercises "functions of a public character normally exercised by state organs, and the conduct of the entity relates to the exercise of the governmental authority concerned" (ILC, 2002, Commentary to Art. 5(2) as quoted in Hofbauer, *ibid*). Based on ILC Art. 5(1), the Commentary to the Maastricht Principle, Principle 12 on the attribution of State responsibility for the conduct of non-state actors, holds that such public functions

"even under the narrowest understanding ... should comprise law enforcement activities and armed forces, as well as the provision of basic infrastructure, certain essential public services such as water and electricity, and traditionally public functions of the State such as education and, arguably, health" (De Schutter et al., 2012, p. 18).

An even stronger indicator for the accountability of states for the acts of their financial institutions is 'statutory authority' (A/HRC/17/31; commentary Principle 4). In the case of the EIB, these conditions apply because the statutory authority of EU member states over the EIB is given by EIB's governance structures, and because EIB is funding activities such as basic infrastructure, electricity, and the development of renewable energy (see subsequent section).

### 3.2.2.1 *EIBs as a finance institution of the EU and its Member States*

“The Bank is an EU body, bound by EU law and committed to promoting EU policy objectives” (EIB, 2009, p. 6). The EIB’s external mandate from 2007 to 2013 included enhancing the energy security of the EU, and since 2009, the bank was required to support EU development cooperation objectives (EIB Steering Committee, 2010, p. 11). The EIB thus exercises functions of public character, even in its activities abroad. Its external mandate also includes climate change mitigation and adaptation, which links to its energy mandate in matters of renewable energy promotion. Between 2010 and 2014 the bank financed renewable energy projects with 36bn EUR. This is its largest portfolio in climate finance, next to sustainable transport (EIB, 2015). Though 90 per cent of EIB’s finance is allocated within the EU, “supporting the Union’s development aid and cooperation policies ... throughout the world” is an explicit objective (<http://www.eib.org/about/eu-family/index.htm>). Cooperation with Sub-Saharan African countries (except South Africa) is specifically covered by the ACP-EU Cotonou Partnership.

“The central objective of the Cotonou Partnership Agreement is the reduction and ultimate eradication of poverty as well as sustainable development. In specific cases, notably projects with demonstrable environmental and/or social benefits, loans may be granted on concessional terms” (EIB, 2010b, p. 12).

It is without doubt that financing geothermal energy in developing countries falls within the EIB’s external mandate to foster development, promote climate mitigation, and enhance energy security. Decisions on the EIB’s external mandate and ACP-EU Partnership are made by the EU Parliament and the Council of the EU (ministerial level council; not to be confused with the EU Council which consists of the heads of governments).

The EIB is an EU body jointly owned by the EU member states (shareholders), and the EIB statute is part of the Treaty of the European Union (TEU). Hence, the EIB must adhere to all applicable EU regulations, and its activities must comply with the expectations of the CFR, the Aarhus Convention, and the CRPD. As the EIB exercises public functions in its activities abroad, the EU decision-making institutions and EU member states can be held accountable for the EIB’s omissions and its violations of human rights-based on Art. 5, ILC and on the TEU (all articles that apply without discrimination as to citizenship, nationality, or domicile). In fact, the EIB defines itself as a “policy-driven bank” (EIB, 2010b, p. 135) and explicitly regards itself as being obliged to consider UNDRIP and the EU’s indigenous peoples framework directive in matters of development cooperation (EIB 2009, p. 18). Taking John Knox’s diagonal interpretation of the Aarhus Convention into account, EIB’s adherence to the Aarhus Convention

extends to its activities outside the EU, which is acknowledged in its Environmental and Social Practices Handbook of 2010 (EIB, 2010b, p. 133). For more details on EIB safeguards see subsection 2.2.2.2.1.

From a legal perspective it can be argued that the EIB is directly responsible to its shareholders, the EU member states. This becomes obvious when looking at its management structures (KIGI, EIB, 07.12.2015).

### *3.2.2.2 EIB management structures and project cycle*

As detailed in WP 1.3 report, the EIB's governing body is the Board of Governors, which consists of one minister from each EU member state, usually the finance minister (similar to the Council of the EU). The Board of Governors determines the directives for the credit policy of the EIB, approves the annual accounts and balance sheet, and decides on a general level on EIB participation in financing operations outside the EU as well as on capital increases. It also appoints the members of the Board of Directors, the Management Committee and the Audit Committee. Decisions are made by a majority of members representing at least 50 percent of the subscribed capital (EIB, 2013, Art 8f, 2014c). The Board of Governors usually meets once a year (KIGI, EIB, 07.12.2015).

The EIB's Board of Directors decides which projects to finance, decides on new sectoral policies, and oversees the operation of the bank. It consists of 29 directors, one nominated by each member state and one by the European Commission, and 19 alternate directors. Decisions are adopted by a majority consisting of at least one third of the members and representing at least 50 percent of the subscribed capital (EIB, 2013, Art. 9). The Board of Directors meets about once a month.

The Management Committee consists of the EIB's president and eight vice-presidents, and conducts the EIB's ongoing business. It supervises the daily running of the bank, prepares decisions for the Board of Directors, and ensures they are implemented (EIB, 2013b, Art. 11). Its representatives are appointed by the member states. Whereas major owners, e.g., Germany, are permanently represented in the Management Committee, smaller shareholders, e.g., Austria, are represented on a rotating basis (every three/four years). The Management Committee meets once a week and, in contrast to the other governing bodies, resides within EIB (KIGI, EIB, 07.12.2015).

In specific instances of EIB cooperation with ACP countries, MS funds (member state funds) are used exclusively. The Investment Facility Committee was established to oversee the use of MS funds and meets once a month to discuss projects to be financed by the EIB. This committee includes representatives from each member state and the EU Commission. Proposed projects are presented to the committee by the project teams. Member states submit their written questions to the team prior to the presentation but also pose questions, which can be extremely detailed, during the meetings “to ensure they are happy with what the project wants to achieve.” After a project is accepted by the Investment Facility Committee, it is presented to the Management Committee. From there, it goes to the Board of Directors for final approval (KIGI, EIB, 07.12.2015).

During project implementation, any of these bodies can request additional information at any time. After the project approval stage, there is no established procedure to involve the EIB governing and management bodies in monitoring project implementation. Information requests might occur in the context of parliamentary inquiries or during times of drafting EIB’s external mandates. The exceptions to this would be the politically sensitive projects, where EIB staff might be required to keep the Management Committee informed of the fulfilment of certain contractual conditions on a regular basis (KIGI, EIB, 07.12.2015).

The responsibility of the six-member Audit Committee is to verify that the activities of the EIB conform to best banking practice and to audit its accounts (EIB, 2013b, Art. 12).

The day-to-day management of projects and project appraisal, the operational level so to speak, is the responsibility of EIB services. Projects are managed by project teams of the Project Directorate. With regards to the environmental and social aspects of projects, the Project Directorate established the Environment and Social Office (ESO; now Environment, Climate and Social Office (ECSO)), which develops handbooks and guidelines. The ESO/ECSO acts as the secretariat of the Environmental Assessment Group (ENVAG), the Social Working Group, and the Climate Working Group. ESO/ECSO staff members support project teams conducting assessments and in specific cases may form part of the project team or act as ENVAG. Responsibility for projects is with the Project Directorate Head of Department, who also designates an appropriate ENVAG member to support the project team, particularly during the project appraisal phase (includes PJ Opinion for Appraisal, ESIA, and Social Data Sheet and associated appendices), and the preparation of the Appraisal Report. The ENVAG must endorse the project teams’ conclusions on environmental matters. The ESO/ECSO provides

additional (e.g., social) expertise to ENVAG as necessary. Responsibility, however, for appraisal and monitoring remains with the project team (EIB 2010, pp. 10-11).

The project cycle consists of:

- pre-appraisal phase: project identification, environmental and social screening, and categorization of the project
- appraisal phase: ESIA according to different loan types and project categories, and preparation of the decision of the Management Committee and the Board of Directors
- implementation phase: implementation of the project after the Board of Directors has approved it and includes monitoring obligations

Figure 12: EIB Project Cycle



Source: Retrieved from [http://www.eib.org/img/project\\_cycle\\_h\\_de.jpg](http://www.eib.org/img/project_cycle_h_de.jpg)

EIB staff emphasized during interviews that stakeholder engagement was the responsibility of the client. Contrary to the practice of the World Bank, EIB does not dedicate resources to 'upstream' activities in these matters (KIGI, EIB, 07.12.2015). Instead, operators are provided with detailed guidelines on stakeholder engagement, including the requirement for operational-level complaint mechanisms (\*this requirement is in the 2013 handbook but not the 2010 handbook). Guidance on operational policies is the primary function of the EIB handbook.

### 3.2.3 Delegation of responsibilities in the case of Olkaria IV

Project management is characterized by a double delegation of responsibilities. As explained in subsection 1.1.2.1, the European engagement in Olkaria I (units 4 and 5) and Olkaria IV was guided by the MRI, a coordination and cooperation mechanism for co-financed development projects. For the Olkaria project, all three EU-IFIs adopted the World Bank's Operational Policies (OPs), and the EU lenders including the EIB "relied heavily on the presence of the World Bank" (EIB-CM, 2015a, p. 43). This can be regarded as a transfer of competences, which was accepted by the EIB Board of Directors (state representatives) at the time of project approval.

The legality of the transfer of competences and thus the delegation of responsibilities has been much discussed in the context of international law, particularly with regard to the activities of international organizations such as the World Bank and the International Monetary Fund. As detailed in WP report 1.1. (subsection 1.4.3), states "do not incur responsibility for human rights violations committed by an international organization simply because they are member of that organization" (CoE Committee on Legal Affairs and Human Rights, 2013, para. 69; cf. Ryngaert, 2011; ILC Articles on the Responsibility of International Organizations, Article 62 (Commentary, para. 2)). The only exception is when this transfer of competences is used by member states (individually or collectively) to perpetrate acts of human rights violation that would be wrongful if committed by themselves. Further, such transfer of competences must comply with certain conditions. Particularly relevant for the European context is the position of the ECtHR. In *Bosphorus* (*Bosphorus v Ireland*, ECtHR, Judgement, App. No. 45036/98, 30.06.2005), the ECtHR established under which conditions such transfer of competences and sovereignty can be justified without undermining the meaning of its own human rights obligations under the European Convention, that is by introducing the element of 'equivalent human rights protection':

"State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the *substantive guarantees* offered and the *mechanisms controlling their observance*, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation" (paras. 155-156) (own emphasis).

According to De Schutter et al., a similar decision was made by the ECtHR in *Matthews* (1999) (*Matthews v the United Kingdom* (Appl. N° 24833/94), ECtHR judgement, 18.02.1999, para 32)

(De Schutter et al., 2012, p. 24). Additionally, ILC Articles on the Responsibility of International Organizations emphasizes that responsibility for the acts of an international organization depends on the “factual context such as the size of membership and the nature of the involvement” (ILC Articles on the Responsibility of International Organizations, Article 58 (Commentary, para. 4)). The CESCR goes further, opining that

“... States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions” (CESCR 2000, General Comment No. 14 on the right to health).

Co-financing in development and climate initiatives is very common. Every year 60 percent or more of EIB’s projects are co-funded (EIB Steering Committee, 2010, p. 138). With respect to Olkaria IV and the resettlement, the question arises to what extent the transfer of competences and delegations of responsibility were responsible acts that did not interfere with the human rights obligations of the EU and its member states. In total, there were five levels of transfers of competences and delegations of responsibility:

- a) transfer of competences of the member states of the EU to the EU (discussed in WP report 1.1, sec. 1.4.3)
- b) transfer of competences of EU member states to the EIB (see EIB Management Structures)
- c) delegation of responsibility from EIB to AFD under the MRI
- d) delegation of responsibility from the EU-IFIs to the World Bank (more precisely, World Bank’s land acquisition and involuntary resettlement frameworks were included as applicable safeguards in the EIB Finance Contract with the Kenyan authorities; EIB-CM, 2015a, p. 12)
- e) transfer of competences from member states to the World Bank (discussed in WP report 1.1, sec. 1.4.3)

With regard to level (b), the Lisbon Treaty, which made EIB subject to the CFR and its treaty bodies (particularly the European Ombudsman and the Court of Justice of the European Union (CJEU)), was ratified at the end of 2009. But the Olkaria project was approved by the EIB Board of Directors in autumn 2010. Hence by the time of project approval, the EU and its bodies, including EIB did provide for “equivalent human rights protection” (as requested by the ECtHR, see above) to match the obligations and monitoring mechanisms that EIB shareholders (the EU

member states) are obliged to comply with under the international human rights treaties they ratified. However, at the time of project approval, the Lisbon Treaty/CFR did not yet have as strong an impact on EIB safeguards as it does today. Though the applicable EIB handbook (2010) demonstrated a strong commitment to human rights including the UNDRIP, operational guidance on vulnerable groups and indigenous peoples was weak and was actually under review. Taking this into account, it was thus not per se a failure of the EU and its member states or the EIB to delegate responsibilities for social safeguards to AFD (level (c)) and the World Bank (level (d)). Rather the answer to this questions depends on whether AFD and World Bank offer similar or even better developed and operationalized standards and monitoring, hence similar or even better substantive guarantees and mechanisms controlling their monitoring practices as stipulated by the ECtHR in *Bosphorus*.

AFD has no own standards but uses those of other IFIs, particularly the World Bank and the IFC (KIGI, EIB, 07.12.2015; see also subsection 2.2.2.2.2.2). To discuss the extent to which World Bank safeguards do conform with human rights is beyond the scope of this study. However, OP 4.12 on involuntary resettlement and OP 4.10 on indigenous peoples do reflect the increased influence anthropologists had within the World Bank over the past 20 years, and who improved the Bank's practices considerably. Further, EIB services held that the EIB complied with its due diligence obligations by carrying out an analysis of World Bank standards concluding that:

"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" (EIB services quoted in EIB-CM, 2015a, p. 12).

Hence, in this specific case, the delegation of responsibility was justified according to ECtHR requirements. More problematic is the later decision by the EU-IFIs and the World Bank to not apply OP 4.10 at all.

At the policy level, the EIB in 2011 embarked on a gap analysis of its guidelines with respect to the CFR and the GPBHR. In 2013 this resulted in the publication of revised guidelines, the Environmental and Social Handbook, which clearly reflects human rights as normative benchmarks (Hearing of EIB Director General Tamsyn Barton, 2012, p. 14; KIGI, EIB, 07.12.2015). The revised EIB handbook offered detailed guidance on indigenous peoples with strong references to UNDRIP. Even if the revision exercise had started immediately after the

Lisbon Treaty came into force, its outcomes would not have been applicable to this specific project.

As the ECtHR clarified, ‘equivalent human rights protection’ is not only a matter of safeguards but also of monitoring. Assessing this obligation requires taking a closer look at how operations are organized: AFD as the lead financier under the MRI assumed a

“... 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” (from monitoring reports quoted in EIB-CM, 2015a, p. 39).

According to the EIB social expert in charge of the project since 2012, the MRI was meant to create a cooperative environment so that, for example, only the lead bank and not each bank had to send a social expert into the field. Hence for the Olkaria project, AFD was the main actor responsible for the environmental and social safeguards, and for setting the scope of due diligence. This it did in consultation with EIB and KfW (EIB Interview, 16.09.2015 and 07.12.2015). In practice, it seems that the role of EIB social experts (in appraising and monitoring social issues including the resettlement) gradually increased over the course of the project from providing “desk review advice” at the beginning to continuous participation in EIB-AFD-KfW joint field missions (up to three visits a year instead of one) (EIB-CM, 2015a, p. 43; Interview, EIB, 07.12.2015).

In sum, the EIB did honour its monitoring obligations but at the start of the project they were limited to desk reviews and giving advice. This was understood to be in line with the objective of the MRI to create synergies through division of labour. EIB adapted its monitoring engagement practices as problems arose and tensions increased ... which can be viewed as an adequate response. This was in line with MRI Operational Guidelines, which stipulate that “... monitoring requirements which go significantly beyond the minimum defined in the OG [Operational Guidelines] would have to be addressed by the CFs [Co-Financiers] individually” (EIB et al., n.d., p. 2).

Nevertheless, the subsequent developments on the project level raise doubts about the MRI and their decisions about the delegation of responsibilities. The EIB-CM was very clear in pointing out the “limitations of the EIB’s involvement through third parties” and the “desk review approach” to closely follow the resettlement implementation and influence decisions adequately.

EIB-CM regarded the initial absence of EIB field visits as a major reason for why EIB fell short of adequately engaging PAP in important discussions. The EIB-CM concedes that, as the investigative body of the EIB but not of AFD, it “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” (EIB-CM, 2015a, p. 43). AFD, on the other hand, lacks an independent complaint mechanism of its own, to which PAP could turn. Nevertheless, the handling of complaints was explicitly excluded from the delegation of responsibilities under the MRI,<sup>76</sup> which meant that none of the institutional complaint mechanisms had the right to interrogate personnel of other IFIs. EIB-CM clarified that this was last but not least due to their insistence on such an exclusion to maintain EIB-CM’s mandate over EIB. This was based on the apprehension that, if complaint handling were covered by MRI arrangements, the complaint mechanism in charge would be the lead financier. In this case, it would have been AFD, which did not have a complaint mechanism.<sup>77</sup>

Given that AFD had no independent complaint mechanism and EIB-CM lacked a mandate over the lead financier AFD, compliance with the obligation of “equivalent protection” was seriously impaired by the MRI arrangement. It was thus a failure of the EIB Board of Directors to accept such delegation of responsibilities without ensuring that their own complaint and control mechanisms could be applied to EU-IFIs under the MRI and to the lead financier. In other words, from amongst the MRI participants, the one with the most appropriate complaint mechanism offering the best protection in normative and factual terms from a human rights perspective, is the one to which a mandate to handle and investigate complaints under the MRI should be transferred. As it currently stands, this is the EIB-CM. With regards to the delegation of responsibilities to the World Bank, an MoU on joint investigation activities was developed ... after the Inspection Panel and the EIB-CM became involved. Of note, the World Bank board endorsed the World Bank’s Grievance and Complaint Service’s cooperation with the subsequent mediation process facilitated by EIB-CM (World Bank, 2015b).

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<sup>76</sup> MRI Operational Guidelines, Executive Summary, as provided by EIB Infodesk via email on 16.02.2016. The full operational guidelines “cannot be disclosed on the basis of the exceptions for disclosure laid down by the EIB Transparency Policy.”

<sup>77</sup> In its Corporate Responsibility Report 2014, AFD announced it would have an institutional complaint mechanism by the end of 2015 (AFD, 2014, p. 17). As of April 2016, no such mechanism was accessible on their website.

Recommendation: Any delegation of responsibility regarding environmental and social safeguards from one IFI to another must be accompanied by a legally binding MoU that:

- (1) Clearly identifies the obligations of EIB services under such divisions of labour for appraisal and monitoring tasks to ensure EIB services act in accordance with the fact that EIB retains its due diligence and monitoring obligations (e.g., including EIB's obligation to participate in joint field missions, particularly during appraisal and other field missions crucial for resettlement development).
- (2) Ensures that not only adequate safeguards but also adequate mechanisms to control their implementation are part of such MoU, and that access to justice (complaint and redress) is guaranteed in case of maladministration by EIB and is extended to MRI counterparts, so that full investigation of cases is assured.

These recommendations are relevant beyond the specific Olkaria project. In fact, co-funding is a major feature of development and climate finance. Organizing co-funding in a manner that retains the human rights duties and attention of all parties, and which insures adequate appraisals, monitoring, and institutional control and redress is a challenge for climate policies and politics. Hence,

- (3) MoUs for co-funding of climate projects may additionally include paragraphs dedicated to specific considerations such as sharing of benefits accrued from CDM projects.

### **3.2.4 Assessment of compliance with due diligence obligations**

Assessment of due diligence obligations “can be summarized as an analysis of the extent to which the involved parties have complied with their due diligence obligations to prevent or minimize potential damage/harm from occurring” (Hofbauer and Mayrhofer, 2016, p. 67). With regards to state conduct, due diligence requires them to regulate the conduct of public and private parties to protect individuals from harmful activities and to ensure that appropriate remedies are available. In practice, great emphasis is put on ensuring that project decisions are based on an ex ante assessment of the risks involved. The ICJ considers prior EIAs a requirement under customary international law (de Schutter et al., 2012, p 22). In *Pulp Mills*, the ICJ made it clear that EIAs must “address the potential effects,” and not exclude issues that, if

ignored, would compromise the assessment successfully achieving its purpose.<sup>78</sup> The ICJ also clarified that once operations have started “continuous monitoring of its effects on the environment shall be undertaken.”

By inference, environmental matters intersect with a number of human rights. This reaffirms the importance of procedural obligations as some cases explicitly extend the obligation of prior EIAs to ESIAs (Hofbauer, *ibid*). This could also be the case for monitoring environmental and social obligations. It is best practice that EIA and ESIA monitoring includes mechanisms for participation in those matters as enshrined in UNDRIP Art. 19 or the Aarhus Convention, and confirmed by court decisions, in particular by the IACtHR and also the ACHR (*SERAC v Nigeria*).

With respect to human rights (ESC rights specifically), the Maastricht Principles (Principle 14) emphasize that such assessments should, in addition to developing appropriate mitigation measures, also inform and ensure effective remedies. With regards to corporate conduct, the GPBHR similarly holds that human rights due diligence covers all measures to “identify, prevent, mitigate and account for” human rights violations or the risk thereof (Principle 17). Carrying out human rights due diligence is understood in the GPBHR as a process that “[...] should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed.” It should cover “own activities” of a business enterprise as well as those “directly linked to its operations” and “should be ongoing, recognizing that the human rights risks may change over time as the business enterprise’s operations and operating context evolve” (GPBHR, Principle 17). Principle 15 stipulates that such processes are meant to “enable the remediation of any adverse human rights impacts they cause or to which they contribute.”

The Olkaria project was not subject to human rights due diligence as defined by the GPBHR, because the non-binding principles of the GPBHR were not adopted by the HRC until June 2011 and the review of EIB safeguards did not take place until the end of 2013. However, the

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<sup>78</sup> For example, if an EIA of a geothermal power plant assesses the potential impact of various pollutants but excludes hydrogen sulphide (the most potentially harmful pollutant) from the assessment, the EIA has failed to achieve its stated purpose of protecting humans and the environment from foreseeable damage. By inference, the same applies to ESIAs. If an ESIA of a resettlement measure assesses the geomorphic conditions of the resettlement site to determine the threat of mudslides, but does not assess the accessibility of water or of income opportunities for PAP, it too has failed to achieve its stated purpose of ensuring site viability.

Olkaria project was subject to due diligence obligations established in customary international law and other legal frameworks such as the Aarhus Convention. For the Olkaria case, it is important to note that due diligence always involved steps prior to project approval (in particular ex ante ESIA), steps during project implementation (in particular monitoring), and avenues for remedy/access to justice. The exercising of due diligence is a continuous process not confined to ex ante ESIA. Access to justice (remedy) on the institutional level (EIB complaint mechanisms) was discussed in 3.2.5. The focus of the subsequent sections lies on the first two project obligations (pre-appraisal and appraisal phase) and on the project implementation phase (monitoring).

#### *3.2.4.1 Analysis of compliance with due diligence obligations prior to project start*

In the project cycle of EIB projects, the pre-appraisal phase entails project identification, environmental and social screening, and categorization of the project. The latter determines the safeguards to be applied. The subsequent appraisal phase includes the ESIA accorded to different loan types and project categories, which is an integral part of preparing the decision for project approval by the Management Committee and the Board of Directors.

Allegations regarding the failures of lenders prior to project start were mentioned in chapter 3.1 and include:

- failure to classify PAP as indigenous peoples
- project approval without adequate consideration of ESIA recommendations

**Failure to classify PAP as indigenous peoples:** As previously noted, the World Bank's Integrated Safeguards Datasheet for the Approval Stage clearly indicated that OP 4.10 applied to the project (see 3.1.1) and an Indigenous Peoples Plan should have been triggered. The response of EIB services to EIB-CM indicates that the EIB initially was prepared to apply OP 4.10 (see quote in subsection 3.2.3). During investigations, World Bank management admitted to the Inspection Panel that it decided not to apply OP 4.10 because of the sensitivity of indigenous issues in Olkaria, and in Kenya and Africa more generally. EU-IFIs, including the EIB, equally decided not to treat the PAP as indigenous people because of (a) the “tribal sentiments ... still on the rise by 2010”; (b) the ongoing legal reforms concerning the implementation of the Kenyan constitution, particularly the aspect of benefit sharing; and (c) because not all income-generation models pursued by PAP were regarded as conforming with being ‘indigenous’, i.e., land/natural resource-based modes of livelihood (EIB-CM, 2015a, p.

34). Instead, PAP were categorized as ‘vulnerable people’ to ensure that appropriate mitigation measures for negative impacts were put in place. With regards to the matter of correct identification, the EIB-CM objected to the position of EIB services arguing that PAP complied with the majority of characteristics of ‘indigenouness’ including “close ties to the land of their forefathers and means of existence; ... (self-) identification with a particular group and recognition by others as belonging to it; ... indigenous language; ... primarily self-sufficient production; and presence of social and political institutions determined by customs” (EIB-CM, 2015a, pp. 34-35).

The World Bank management further justified its decision by emphasizing that this was in accordance with the Bank’s policy applicable to the larger African Electricity Expansion Project that, as a result of negotiations with African governments, determined that indigenouness is understood to apply to hunter and gatherer communities only, not to pastoralists. In addition, as constitutional reforms continued in Kenya, in 2012 the Bank initiated a political dialogue and in 2013 agreed with the government of Kenya to apply OP 4.10 in the future to pastoral-nomadic groups “on a project by project basis” (World Bank, 2015a, p. 25). This constituted a departure from the “[b]ank’s prior practice” (Memorandum of the President, approved in July 2012, as summarized in World Bank, 2015a, p. 7). Such a policy raises the question of whether EIB was right in agreeing to follow the World Bank’s prior practice of non-applicability of OP 4.10 on pastoralist indigenous peoples in Africa in the first place. The delegation of responsibilities was justified with reference to the better World Bank standards – standards that did not apply because of a conflicting agreement between World Bank and African governments. The ESIA for Olkaria IV and the first RAP did not consider indigenous issues, contrary to the documents of the pre-appraisal phase. Hence, it must have been known to EIB staff, the Management Committee, and the Board of Directors before project approval that OP 4.10 would not be applied. This constitutes a failure to comply with the requirement to respect indigenous peoples rights (UNDRIP) as requested in the EIBs 2009 ESPS, and based on preceding decisions regarding indigenous peoples of the EU Development Council dated 1998 (SEC(1998) 773 final directive of 1998). Further, it constitutes a failure of conduct by EIB Board of Directors and Board of Governors, that it took more than ten years after SEC(1998) 773 to start developing appropriate Guidance Notes for indigenous peoples to ensure appropriate consideration during EIB project appraisal processes (and beyond).

**Project approval without adequate consideration of ESIA:** The financiers, including the EIB, approved the project despite shortcomings pointed out in the ESIA and the RAPs. Thus,

the RAP of 2012 and KenGen's ESIA for the resettlement site were accepted without the additional studies and consultations about the quality of the RAPland, which were strongly recommended by the RAP 2012. Hence, the lenders failed to comply with their due diligence obligations by approving the resettlement without requesting an enhanced ESIA. Further, as the lenders' sensitivity to local tensions and the ESIA for Olkaria IV suggest, the financiers were aware of the land conflicts over Kedong Ranch though not necessarily of civil suit 21 (2010). The RAP 2012 states "[i]t was reported that during the land acquisition process, KenGen conducted due diligence investigations to confirm that there are no other people except the registered land owner, claiming ownership of the resettlement site" (GIBB Africa, 2012, p. 8-3). This indicates that no official document (e.g., confirmation by the court or land board) confirming the result of this "due diligence exercise" was submitted, which would have confirmed the opposite (as civil suit 21 (2010) was already pending). It also indicates that financiers accepted the RAP and the ESIA for the resettlement site without requiring such formal confirmation.

As the lead financier of EU-IFIs, it was primarily the responsibility of AFD to attend to these issues. However, legally EIB (and KfW) were still seized with their due diligence obligations, and should have ensured those issues were addressed. The conclusions of the EIB-CM further revealed that shortcomings on the part of EIB staff were an issue during the project appraisal as well. In addition to not having accompanied the appraisal mission because of the MRI, the EIB social safeguard expert sent his

"thorough list of issues [...] to AFD and KenGen only two weeks 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" (EIB-CM, 2015a, p. 42).

Many of those issues became subject of investigations (ibid, p. 38). The major failure of conduct, however, lies with the Management Committee and the Board of Directors who approved the project without seeking their in-house expertise on social issues. The EU member states thus failed to adequately consider and protect the rights of the PAP.

#### *3.2.4.2 Analysis of compliance with due diligence obligations during project implementation*

Allegations regarding the failures of lenders during project implementation were mentioned in chapter 3.1 and can be summarized as:

- failure to ensure adequate PAP participation throughout RAP planning and implementation

- failure to ensure adequate access to complaint mechanisms throughout RAP planning and implementation
- failure to ensure genuine self-determination regarding the new structures of governance at the RAPvillage level
- failure to avoid conflicts of interest

**Adequate participation:** The lenders failed to ensure that mechanisms for PAP participation proposed in the RAP 2009 were properly implemented from the outset of the project. In this way, the lenders failed to properly ensure that the provisions for participation were implemented. It was when the PAP rejected the Suswa Triangle as a resettlement site and the project was threatened with resistance and delay, that the lenders recommended improving structures for participation beyond the chairmen system. As a result, most of the site-selection process, a crucial step in resettlement planning, took place before the RAPIC (in its final form) was established. With regards to the EIB, staff confirmed that the EIB did not allocate resources to organize and accompany stakeholder participation. In this way, the EIB differs from the World Bank which engages substantially. For the EIB, stakeholder engagement is defined as entirely the responsibility of the client, and compliance is assessed based on the submitted stakeholder engagement plan and the required ongoing documentation (KIGI, EIB, 07.12.2015). This approach makes monitoring highly dependent on the client's documentation practices and good will.

**Adequate complaint mechanism:** In the same vein, financiers failed to effectively monitor and enforce compliance with their requirement to provide an adequate operational-level complaint mechanism. Again, most of the site-selection process took place before the GCHM was established. Further, their intervention to address this shortcoming (their proposal for the GCHM) did not comply with their own agreed on standards of OP 4.12. This was because level three of the GCHM, the third-party mediation, was not free of charge for complainants.<sup>79</sup> At the same time PAP were actively discouraged by lenders, in particular World Bank Nairobi, from turning to the lenders directly without obtaining the consent of the RAPIC. The lenders, however, were the only available no-cost, third-party arbiter for the PAP. To redirect all complaints to the RAPIC was an agreed policy amongst the IFIs to ensure ownership of the

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<sup>79</sup> In contrast to the RAPIC (second level of the GCHM), the third-party mechanism (third level) was not budgeted in the project and communities, and KenGen “must also agree on how to handle the cost of external arbitration” (GIBB Africa, 2012, p. 9).

operator, the 70 percent state-owned KenGen, and to keep the operator in the driver's seat (Interview, EIB, 07.12.2015; Interview, KfW, 15.04.2015). In light of demonstrated distrust of some PAP of the RAPIC, the centrepiece of the GCHM (in written form as early as December 2012 (EIB-CM, 2015a, p. 29)), such policy falls short of OP 4.12 (13(a)) that requires operational-level grievance mechanisms "should take the form of third-party mechanisms." Financiers became more attentive as soon as the unresolved problems resulted in project implementation delays. However, they limited their intervention to insisting on the establishment of the GCHM (at the end of 2011) and calling KenGen to act on unresolved issues (end of 2012).

**Adequate structures of self-organization in RAPvillage:** KenGen's ESIA 2012 for the resettlement site submitted to NEMA proposed a specific form of self-organization on the village level of the new settlement. It was designed to mitigate the identified risk of intra-village conflict. The proposal was more or less implemented as proposed without major modifications. It did not mention or identify opportunities for PAP to meaningfully influence that model. This was a breach of the right of the indigenous people to self-determination of their community structures. Further, it did not conform with OP 4.12 para. 13(c). By accepting the ESIA as adequately conforming to OP 4.12, the lenders, including the EIB, failed to adequately exercise their due diligence.

**Conflict of interest:** EIB confirmed that they were aware that the social safeguard adviser employed by KenGen for the resettlement was the brother of the social safeguard consultant of the World Bank for the same project (Interview, EIB, 16.09.2015). Nevertheless, the financiers, specifically AFD, contracted with the consultant firm Tacitus and this consultant to assess her brother's and her own work. Agreeing with this arrangement constituted a failure on the part of the financiers to prevent conflict of interest on part of the other EU-IFIs under the MRI, none of whom intervened in this matter. The EIB social expert in charge since 2012, however, indicated that they were unaware of this situation (Interview EIB, 07.12.2015).<sup>80</sup> She emphasized that a similar situation arose when searching for replacements for Independent Experts to supervise the resettlement process. In that case, financiers refused to contract again with GIBB Africa, the consulting firm that drafted the ESIA and the two RAPs for Olkaria IV (ibid).

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<sup>80</sup> The EIB social expert was aware of the two being siblings, but not that the World Bank consultant had also served as an external consultant hired by AFD to assess the same project.

The raised points do not touch on the responsibility of the EU and its member states, who direct and govern the EIB. As described in 3.2.2.2, the Management Committee and the Board of Directors are mainly involved with project approval, and not with the implementation and monitoring thereof. Exceptions to this rule would be when projects are politically sensitive and regular reporting about the ongoing implementation is required. This raises several questions regarding the identification of responsibility:

- On the one hand, the project was regarded as so sensitive that OP 4.10 was not applied as a project standard. On the other hand, EIB services was not required to regularly report back to the Management Committee and/or to the Board of Directors to inform them about the ongoing implementation. This indicates an inconsistency between circumstances of project approval and deduced monitoring needs, and thus a failure of due diligence to ensure adequate monitoring and oversight on the part of EIB decision-makers. The EIB shareholders represented on the Board of Directors thus failed to adequately protect the rights of the PAP by not putting procedures and reporting mechanisms in place to closely monitor the impacts of their decision to not apply the requisite safeguards (OP 4.10), and hence to intervene in a timely manner.
- Many of the failures regarding project monitoring (and at the pre-appraisal and appraisal stages) are related to the MRI and the delegation of responsibilities. When the project started, the MRI had no defined standards of what exactly the delegation of responsibilities entailed. These were developed later in 2012/2013 (see subsection 2.1.2.1). Because Olkaria IV was one of the pilot projects, it suffered from the unclear definition of responsibilities, or as the EIB-CM put it, many of the problems “may be seen as a sign [of] miscalculation by the Bank of limitations of the MRI arrangements and the Bank’s role in providing guidance” (EIB-CM, 2015a, p. 43). Considering the experimental nature of the MRI, the failure to require additional reporting is even less understandable. Aside from the MRI, there should have been guidance about which types of circumstances EIB services should report back to the Management Committee and/or the Board of Directors, even if it was not determined during the appraisal stage that reporting back was necessary.
- The Management Committee and Board of Directors were responsible for ensuring that there was sufficient institutional and staff capacity to implement safeguards and they could be supervised adequately. According to the EIB social expert, she was in charge of 30 to 40 projects of different complexity and in different capacities (Interview, EIB,

07.12.2015). As the Olkaria project gradually became more complex, engagement increased beyond normal, but dedicated work time might have been too limited to detect gaps, inconsistencies, or irregularities between the various reports. Hence, to ensure adequate supervision of the social aspects of a project, additional resources were necessary. This particularly applied to the manner in which stakeholder engagement was monitored. Direct observation of stakeholder engagement and meetings with the PAP at an early stage and on an ongoing basis in conjunction with other regular visits would have improved the understanding of the quality of client-stakeholder relationships and thus increased opportunities for early intervention and mediation.

- EIB failed to prevent emerging conflicts of interest that became a flash point for many problems and related human rights violations. Additional policies were necessary about how to deal with (potential) conflicts of interest. Such guidance should have included a requirement to report back to EIB decision-makers about conflicts of interest or the potential thereof.

#### Recommendations:

- Agreed deviation from EIB standards should be accompanied by requirements to report back to EIB decision-makers as part of the due diligence of EU member states, as EIB shareholders.
- Delegation of responsibilities must be accompanied with clear standards and rules how EIB operationalizes its due diligence requirements which it still retains, and should be accompanied by early-warning indicators when due diligence activities have to be increased.
- Monitoring of safeguards must be equipped with sufficient institutional and staff capacity. Otherwise, safeguards become meaningless. This also applies to monitoring of stakeholder engagement which should not be solely based on desk review of documents submitted by clients.
- Avoiding potential for conflicts of interest must be the rule.

#### 3.2.4.3 *High-level policy reforms and dialogues*

From the beginning of the Olkaria project, EIB underwent ground-breaking reforms regarding its safeguards triggered by the Lisbon Treaty of 2009 and the adoption of the GPBHR. The Bank undertook a gap analysis to examine the extent its 2010 safeguards deviated (a) from its duties arising from the CFR and (b) from the GPBHR (KIGI, EIB, 07.12.2015; CONT, 2012). As a

result, the updated EIB Environmental and Social Handbook was adopted in 2013. This revised version has safeguards formulated to a large extent in human rights language, including operational guidance for indigenous peoples and adequate complaint mechanisms, which were missing in the earlier version. It is beyond the scope of this study to assess the quality of the new handbook. Its normative content and use of human rights language is in any case striking (see box 3). However, the approach to monitoring stakeholder engagement did not fundamentally change. Asking how the new safeguards changed the work of the EIB social expert, staff answered that “... our standards ... are now all written down, all the requirements for our clients are written down ... so, instead of us explaining to them we can just point them directly... to the handbook.” Staff further argued that pressure to perform on social issues is rising because of both increased external stakeholder engagement and internal awareness of the importance of social performance (Interview, EIB, 07.12.2015). From an operational and human rights perspective, it is, however, questionable how well normative standards can be monitored if it relies on client-provided information.

Another major problem of social performance in the Olkaria resettlement was related to the project-based character of EIAs. Regarding the new settlement and the PAP's rights to health and an adequate standard of living, a source of concern was the approval of Akira I and associated drillings in its vicinity. EIAs and ESIs are project-based, they do not consider the broader context of a project. In this case, the broader context was the impact of the geothermal boom in Olkaria and Kenya. One approach to avoid these situations is to conduct a strategic environmental assessment (SEA), which assesses the impact of the overarching program such as the promotion of geothermal power (consisting of many power plant projects) in the same geographic area, for example. Though EIB requires SEAs for the European level, such a requirement did not exist for external operations when Olkaria IV was approved. According to EIB and KenGen (Interview EIB 16.09.2015; Interview KenGen 16.09.2015), it was not the co-funders but the World Bank that urged the government to enact legislation making SEAs a legal obligation in Kenya (now the case). Although this was an important step in promoting international best practice, according to KfW, it has limited ability to influence the planning of geothermal explorations. SEAs can only cover the wells and their expected potential known at the time of the assessment (Interview with KfW, 15.04.2015). For that reason, an SEA might not be enough. From a human rights perspective, a land-use plan that determines areas to be exempted from exploration and pollution in consideration of the livelihoods of the local population (e.g., grazing, agriculture, and settlement land) should be a precondition for project

approval. This would help protect the PAP's rights to an adequate standard of living and to health. This could also apply to other renewable and non-renewable exploration of natural resources.

Related to this, such explorations have to be accompanied by appropriate schemes of benefit sharing as required by OP 4.10, para 18: "The borrower includes in the IPP arrangements to enable the Indigenous Peoples to share equitably in the benefits." It is known that the World Bank again engaged in a dialogue with government of Kenya about the future applicability of OP 4.10 after agreeing that it did not apply to Olkaria IV. It is not known to the author to what extent the EIB, or more specifically the EU and its member states, engaged the ACP Partnership countries in a similar dialogue. EIB staff argued that changes depend much more on the outcomes of the national-level reforms in Kenya than on lenders' safeguards and policies (Interview, EIB, 07.12.2015). The difference between competing proposals for benefit sharing in Kenya was huge, the legal complexity is still challenging and effective policies for implementation are lacking (see subsection 2.2.2.1.3). The Maastricht Principles hold that "a state has an obligation to respect, protect and fulfil human rights in situations ...it is in a position to exercise decisive influence ... extraterritorially ..." (Principle 9). Decision-makers in the EU and EIB thus have a moral duty to exert influence in a direction that conforms with their human rights commitments and own standards.

#### Recommendations:

Important reforms have taken place on the policy level since the Olkaria project. Nevertheless, further steps are recommended:

- Review adequacy of monitoring requirements to ensure appropriate supervision and implementation of EIB human rights-based safeguards.
- Engage in high-level policy discussions and use other available means to exert influence (a) on existing national legislation in Kenya that protects the livelihoods and human rights of people affected by large-scale projects, and (b) that supports the development of legislation that is progressive with respect to human rights.

### **3.2.5 Access to justice**

The EIB has a two-tier system for complaints: an internal but independent mechanism (EIB-CM) and an external mechanism. Regarding the latter, as a body of the EU the EIB is also subject to the EO, where complainants can turn if they are dissatisfied with the EIB-CM. As contained in an MoU between the EIB and the EO, even people outside the EU can submit complaints about the EIB to the EO, whether they be directly affected or not. The EIB is also subject to the CJEU, which is inaccessible to non-EU citizens (Interview EIB-CM, 06.12.2015). EIB-CM and EIB services unanimously agreed that the EIB has the most accessible complaint mechanism compared with other IFIs (Interview, EIB-CM, 06.12.2015; KIGI, EIB, 07.12.2015). Subsequent to the investigations by the Inspection Panel and the EIB-CM in Olkaria, the EIB-CM successfully initiated a mediation process between KenGen and PAP. In this way, EIB-CM finally assumed the role of the independent arbiter proposed as the third level of the GCHM.

The question remains why it took so long for the EIB-CM to begin functioning as an external arbiter. PAP copied the lenders on their complaint letters to KenGen as early as 04.05.2011 and complained directly to World Bank Nairobi and World Bank Washington on 11.03.2012 and early summer 2012 respectively (see timeline, 2.1.5). However, as confirmed by EIB-CM, EIB services submitted complaints to financiers only after EIB-CM had become active because they had received complaints from the PAP directly (comments received 06.04.2016). An interview with EIB-CM confirmed that there was no obligation for the EIB to inform PAP of its institutional complaint mechanism or the existence of the EIB-CM and EO. The PAP wrote to the Inspection Panel only after they had discovered on their own initiative that such an option for complaints existed. The FGD at the World Bank Nairobi left the author with the impression that World Bank staff/consultants did not inform PAP about the existence and function of the Inspection Panel.

#### **Recommendation**

- Informing PAP in an adequate manner about institutional complaint mechanisms should be a requirement after approval and before the start of project implementation, and this should be documented.

### **3.3 Assessment Regarding the CDM Accreditation Process**

In addition to the recommendations in the previous chapter (chapter 3), this section raises points directly linked to the CDM, which was described in subsection 2.1.6 (see also Schade & Obergassel, 2014; and WP report 1.3). The Olkaria case study revealed that the CDM accreditation and stakeholder engagement was a minor step in the overall developments. It also revealed that the type of local stakeholder engagement for the CDM did not adequately reflect the situation. Further, by the time the physical relocation took place and the institutional complaint mechanisms of EIB and World Bank had been called in to investigate, the project was already approved by the DNA and the CDM board. Hence, the events had no impact on the status as a CDM project. Based on Schade and Obergassel (2014), and the recommendations given in Obergassel et al. (2017), the following recommendations should be considered to improve the human rights performance of the CDM and successor mechanisms under the Paris Agreement:

If the CDM had its own mandate to apply human rights or equivalent safeguard policies, this would provide consistent guidance for all kinds and constellations of stakeholders who wish to register a project under the CDM, independent of whether or not safeguards were already applied to a project in the context of (international) project finance. Such safeguard policies should entail an obligation to carry out ex ante human rights impact assessments (HRIA) as a precondition for project approval. Mandatory HRIAs would improve due diligence of both co-funded projects that are implemented under IFI safeguards (which do request ESIAs but not HRIAs), and projects that are carried out without international involvement and subject to no or very weak safeguards.

With regards to stakeholder consultation, the assessment of projects for CDM registration should take advantage of procedures for stakeholder engagement in the context of international project finance and of the documentation generated as a part of the monitoring obligations of IFIs. The designated operational entity (DOE) should be obliged to review existing documentation of participation and the handling of complaints of the institutional- and operational-level grievance mechanisms. This may require respective disclosure policies within financial agreements between IFIs and the operator.

CDM projects are registered before project implementation, because the CDM component is regarded as ‘additional’ and project approval is – theoretically – a precondition for project

implementation. In the Olkaria case, it is doubtful that the denial of CDM approval would have stopped the project. However, if CDM approval can be postponed, this would allow for consideration of the social impacts of the relocation. Human rights-based safeguards and a decision on UNFCCC level to allow for de-registration would permit CDM to withdraw project registration if violations occur during implementation and afterwards.

If action on the UNFCCC level is not possible on grounds of national sovereignty (main argument of developing countries against social safeguards for the CDM), individual countries or groups (such as the EU) should introduce their own unilateral requirements. The EU is bound by the CFR and the articles of the TEU (Arts. 2, 3, 6, 21) that stipulate human rights principles for its external relations (see subsection 3.2.1) and hence has an obligation to regulate its points of entry with the CDM and the carbon market accordingly. This mainly affects the issuance of letters of approval for a CDM project, the buying of CERs by EU entities, and allowing of CERs for the EU ETS (Hofbauer et al., 2016).

## **4 Conclusion**

Safeguarding human rights in climate-related projects is challenging. The Olkaria IV resettlement demonstrated (a) the complexity of due diligence obligations in the context of climate co-funding, (b) the local obstacles to successful project implementation in host countries, and (c) the inadequacy of CDM procedures to address negative impacts of the implementation of CDM projects. The circumstances as they emerged in the case of Olkaria IV can be described as an unhappy confluence of (a) institutional flaws at the level of individual financiers, and lack of clarity about how to manage human rights due diligence obligations under conditions of “division of labour”; (b) the political situation in Kenya including the myriad instances of legislation caught in ‘legal limbo’ due to the constitutional reform process, the local conflicts nurtured by historical land injustice, and the conflicts between operator and PAP communities as well as intra-community conflict; and (c) the disjointed CDM registration procedure. On all levels there appears to have been a tendency to apply and monitor social and environmental safeguards in a way to ensure formal compliance, but not in a way that consistently took into account the normative meaning of those safeguards. In several instances (such as the decision to not apply OP 4.10), conscious breaches of existing formal rules and safeguards were evident. Encouraging compliance with safeguards beyond the level of

minimum compliance is a question of organizational culture as well as human resources and established hierarchies of reporting and responsibility. To improve human rights (or at least social) due diligence, the following recommendations can be derived from the case study:

- Project approval by EIB decision-makers should not take place without due consideration of the EIB social experts' qualified opinion on the project. The social experts' endorsement of a project teams' conclusions on social matters should be mandatory – as is already the case with environmental matters.
- It is paramount to carefully read, interpret, and follow-up on pre-appraisal sheets, ESIA's, and other documents. This is crucial for successful resettlement that ensures the wellbeing of project affected people. Ignoring these key documents deprives the documents of their meaning and effectiveness. This requirement may require a review of the incentive system for project teams, and social and environmental experts alike.
- Particularly with large-scale programmes, such as those involving energy expansion, ESIA's should be complemented by SEAs. To make SEAs meaningful, this may require a binding local land-use plan that mediates between the interests of the local population and the public interest in, for example, electricity.
- Deviation from EIB social standards in the context of co-funding arrangements should be accompanied by requirements to report negative developments to EIB management and decision-makers. Being informed is a precondition to responding appropriately and in a timely manner. An alternate option is to categorize projects involving resettlement measures as highly sensitive and requiring more frequent and timely report backs.
- Delegation of due diligence responsibilities to co-financiers must be accompanied by clear standards and rules about how EIB operationalizes its retained due diligence obligations. It must also be accompanied with a requirement for early-warning indicators when their due diligence activities have to be increased as a result of co-financiers failing to perform adequately.
- EIB's operationalization of its existing safeguards should be improved and reviewed to ensure appropriate supervision and implementation of their human rights-based content. The gap between high normative expectations and their effective control has to be narrowed.
- Monitoring of safeguards must be undertaken with sufficient institutional and staff capacity. Otherwise, safeguards become meaningless. This also applies to the

monitoring of stakeholder engagement which should not be solely based on desk reviews of documents submitted by clients.

- Personnel, hired or freelance, involved in accompanying or assessing resettlement processes must be free from real or perceived conflicts of interest.
- To improve access to justice, PAP must be informed in an adequate and timely manner about institutional complaint mechanisms. This should be a requirement for both after the approval and before the start of resettlement planning and implementation, and this should be documented.
- Effective solutions are needed for complaint-mechanism arrangements for co-funded projects. For the EU level, namely the MRI, the solution could be to mandate the EIB-CM – the most comprehensive complaint mechanism of all European development banks – to investigate all involved financiers. An alternative solution could be to establish a stand-alone complaint mechanism at the EU level with a mandate for all EU banks similar to the EIB-CM in mandate and degree of independence.
- Beyond the project-level, EIB decision-makers and shareholders should engage in high-level policy discussions and use other available means to (a) exert influence on the national legislation of host countries that protects the livelihoods and human rights of people affected by large-scale projects, and (b) support the development of progressive, human rights legislation.

With regards to the level of CDM registration and access of emission certificates to the European market, the EU and its member states should engage to reform CDM procedures (or the procedures of its successor). Further, the EU could make its ETS unavailable to projects that witness grave human rights impacts.

It must be recognized that the attention to human rights at the EU level, including the EIB policies and safeguards, is astonishing and promising. The author hopes that appropriate steps are taken to make this promise a reality.

## **5 Afterword**

In December 2016, the results of the mediation process between the PAP and KenGen were disclosed. The mediation process, which flowed from the ‘agreement to mediate’, was

professionally organized. The ‘agreement on the Olkaria IV resettlement mediation’ confirmed that crucial issues had been addressed (see annex in World Bank, 2016). The mediation agreement includes measures to improve the quality of soil, roads and water provision; it acknowledges an increased number of PAP eligible for compensation and provides further reexamination of individual cases under supervision of the EIB and World Bank; and it includes steps to enhance the restoration and improvement of livelihoods, particularly for youth and women.

However, the mediation agreement failed to clearly address several contentious issues and others were only vaguely dealt with. Most importantly, it was not determined how the title deed is to be transferred; only under which conditions and when (90 days after the Cultural Centre is permanently vacated). This simply fuels the long-simmering conflict between the PAP and KenGen. Whereas the PAP seek a freehold under the Community Land Act, KenGen now wants the PAP to accept a leasehold (Bank Information Center et al., 2017). If this is true, it clearly breaches the rules of meaningful participation and negotiation. The promise of a proper title deed has always been interpreted as ‘ownership’, hence as a freehold (see e.g., World Bank, 2012, p. 27).<sup>81</sup> It was the main incentive for PAP to agree to the resettlement in first place. This change in KenGen’s strategy, if it is true, suggests that the Kenyan state and its company are seeking flexibility to be able to relocate the PAP again, if geothermal-well exploration requires it.

In addition, no specific agreement was reached on how to reform the operational-level complaint mechanism (the GCHM), apparently because of the lack of proposals on the part of the communities. External professional support in this regard could have been helpful. The conflict about the transfer and the type of title deed, as well as other issues have again led to public protests and demonstrations by PAP, alleged retaliation measures by KenGen, and PAP seeking help from international NGOs and financiers (ibid).<sup>82</sup> It remains to be seen whether the EIB-CM and financiers can successfully comply with their commitment to monitor and ensure the proper implementation of the mediation agreement. If the protection of the human rights of PAP cannot be achieved the development banks and their shareholders should reconsider their engagement in Olkaria.

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<sup>81</sup> The only reason registration under the Community Land Bill was dismissed in 2012 was because the Bill was not yet enacted.

<sup>82</sup> The author supports the claims raised by these NGOs on behalf of the PAP.

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## List of Interviews and Focus Group Discussions

Names kept confident

- EIB, Head of Regional Representation, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 17.03.2015
- EIB, interview by Jane Hofbauer, Nairobi, 16.09.2015
- EIB, Social Development Specialist/ECSO, interview by Jeanette Schade, Luxemburg, 07.12.2015
- EIB, KIGI (Social Development Specialist/ECSO, Managerial Adviser/Quality Management Division/Projects Directorate, Environmental Specialist/ECSO, and Deputy Head of Division/Corporate Responsibility and Civil Society/Communication Department) by Monika Mayrhofer and Jeanette Schade, Luxemburg, 07.12.2015
- EIB-CM, Head of Division/Complaints Mechanism, interview by Monika Mayrhofer and Jeanette Schade, Luxemburg, 06.06.2015
- GDC, Manager Environment, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 25.03.2015
- Journalists (Star, Standard, People Daily), interview by Jeanette Schade and Jane Hofbauer, Naivasha, 18.03.2015
- KenGen, Regulatory and Corporate Affairs Director, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 26.03.2015
- KfW (Head of Division/Energy and Financial Sector Eastern Africa, and Project Manager), interview by Jeanette Schade and Jane Hofbauer, phone-conference, 15.04.2015
- KNHCR, Human Rights Officer, interview by Jeanette Schade, Nairobi, 01.08.2014
- KNHRC, Human Rights Officer, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 17.03.2015
- MPIDO, Programme Officer, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 16.03.2015
- MPIDO, Programme Officer, interview by Jane Hofbauer, Nairobi, 11.09.2015
- Narasha teacher, interview by Jeanette Schade and Jane Hofbauer, Naivasha, 19.03.2015
- Narasha teacher, interview by Jane Hofbauer, Naivasha, 15.09.2015
- NEMA, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 25.03.2015
- NLC, Director Research and Advocacy, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 25.03.2015
- NTV-Journalist, interview by Jeanette Schade and Jane Hofbauer, Nairobi, 16.03.2015
- PAP-Representatives, interview by Jeanette Schade and Jane Hofbauer, Naivasha, 22.03.2015
- PAP, FGD by Jeanette Schade and Jane Hofbauer, Naivasha, 19.03.2015
- PAP, FGD by Jeanette Schade and Jane Hofbauer, Cultural Centre, 20.03.2015
- PAP, FGD by Jeanette Schade and Jane Hofbauer, RAPland, 21.03.2015
- PAP, FGD by Jane Hofbauer, Naivasha, 15.09.2015
- World Bank, KIGI (Program Leader, Environmental Specialist, Energy Specialist, Social Development Specialist, Social Consultant, and by conference call from Washington World Bank staff of the Climate Fund, the Community Carbon Development Fund, and the Task Manager of KEEP) by Jeanette Schade and Jane Hofbauer, Nairobi, 17.03.2015