



European Investment Bank

Complaints Mechanism

CONCLUSIONS REPORT

Complaint SG/A/2010/01

**Gibe III Hydropower Plant
Federal Democratic Republic of Ethiopia**

4 May 2011

External Distribution

Complainants:

– Campagna per la Riforma della Banca Mondiale - Italy

Internal Distribution

Vice Presidents:

Secretary General, Inspector General

EIB services concerned

CONCLUSIONS REPORT

Gilgel Gibe III Hydroelectric Project, Federal Democratic Republic of Ethiopia

1. Complaint

Complainant: [redacted] on behalf of Campagna per la Riforma della Banca Mondiale (CRBM).

Date received: 8 June 2010

Subject of complaint: Alleged lack of transparency of the EIB Appraisal and unfair denial of access to documents concerning the contested project

1.1 On 8 June 2010, [redacted] on behalf of Campagna per la Riforma della Banca Mondiale – CRBM (hereinafter, the Complainant) lodged a complaint by e-mail to the EIB Complaints Mechanism (CM). In the message attached to the e-mail, she alleged the lack of transparency in the appraisal procedure carried out by the EIB on the Gilgel Gibe III Hydroelectric Project (hereinafter, the Project). In her view, the EIB would have – by means of Technical Assistance financed in the appraisal stage – carried out a “shadow appraisal” which did not allow any stakeholders’ engagement.

1.2 In this regard, the Complainant takes the view that her NGO as well as the CSOs coalition “Counter Balance” had provided the EIB with independent reports and information trying to engage in a constructive dialogue and that these efforts were constantly refused by the EIB services. The rationale behind such refusal was that “the EIB had not yet decided whether to undertake an appraisal of the project”. The complainant observes that whilst refusing meetings with officers and access to information on these grounds, the EIB had however decided to finance through Technical Assistance an Economical, Financial and Technical Assessment (EFTA,) in cooperation with the African Development Bank (AfDB), contributing with EUR 200.000 and an Independent review of the Environmental and Social Impact Assessment (ESIA for a total cost of EUR 283.200.

1.3 To further support its argument, the Complainant underlines that these studies had been financed in form of grants to support project-related technical assistance for the contested project and that, as enabled under the Cotonou Agreement, these grants were drawn from an endowment for technical assistance managed by the EIB under the Investment Facility as part of the European Development Fund (EDF).¹ In addition, the Complainant refers to the fact that in March 2009 the EIB opened a pre-qualification notice for the two studies published in the EU Official Journal which was cancelled on 24 March 2010. Finally, she identifies the principles (articles 1.1, 1.2.1, 1.3.1, 1.4.2, 1.5.1, 1.7.1 and 5.1.1) of the EIB Transparency Policy which she deems would have been breached by the Bank’s action in the contested operation.

1.4 The complaint also challenges the decision of the Bank not to disclose information relating to the Project and which the complainant considers should be made available to the public domain (an assessment of the

¹ The complaint also refers to the allocation by the EU-Africa Infrastructure Trust Fund (ITF) of EUR 1,3 million for two additional studies: a Comprehensive Environmental and Social Impact Assessment study (EASIA) for Lake Turkana and the Cumulative Impact Assessment (CIA) for the Omo River hydroelectric cascade <http://www.eu-africa-infrastructure-tf.net/activities/grants/gibe-iii-hydroower-project.htm>

info-request procedures initiated by the complainant is provided in §2 of this Report). As a result, the complainant claims that the EIB should provide her with access to the following information:

- The reasons of the cancellation of the pre-qualification notice for the "Comprehensive Environmental and Social Impact Assessment study (EASIA) for Lake Turkana" and the "Cumulative Impact Assessment (CIA) for the Omo River hydroelectric cascade" for which EUR 1,3 million had been allocated under ITF;
- The next institutional steps foreseen for the project pre-appraisal and the timing of the definitive decision on the lending operation.
- The Non Technical Summary (NTS) of the ESIA reviews study (financed with the TA allocations), once finalised and in compliance with the provisions of the Aarhus Convention.
- Information about the screening and evaluation procedure of the Project in relation to the World Commission on Dams (WCD) recommendations and request for access to documents recording such evaluation.
- Current status of the due diligence of the Project and information on which component the bank considers to finance.

1.5 Finally the complainant claims that the EIB should comply with the provisions of the Transparency Policy and commit to make the appraisal procedure for the contested operation a transparent process by undertaking stakeholders' engagement and by making public the timing and steps of the decision-making process.

1.6 On 22 June 2010, the EIB CM acknowledged the receipt of the complaint. The complainant was informed about the fact that the EIB CM was carrying out a review of her complaint as well as of the date by which she may expect an official reply from the EIB.

1.7 On 24 August 2010, the EIB Secretary General informed the complainant that, pursuant to article 10.2 of the EIB Complaints Mechanism, due to the complexity of the inquiry it was necessary to extend its time-frame with a view to obtaining all the necessary information in order to form a reasoned opinion on the issues at stake. The inquiry of the CO – besides exploring the extensive correspondence between the parties on the matter – focused on the assessment of the constraints of confidentiality of the claimed information as well as the compliance of the stakeholders' engagement performed by the EIB competent services with EIB standards and practices.

2. Background information

2.1 The preliminary assessment of the Project

2.1.1 The project consists of the construction and operation of a 1,870 MW hydropower plant. It is located on the Omo River in Southern Ethiopia and its environmental and social (cross-border) impacts were the subject of a previous complaint lodged with the EIB Complaints Mechanism by a coalition of civil society organisations.

2.1.2 The exchanges of correspondence between EIB competent services and the Complainant show that the latter was informed of the fact that the EIB governing bodies had not yet taken any formal decision on whether to undertake a formal appraisal of this project, the last position of the EIB Management Committee² having been to request additional studies prior to taking the decision to launch a formal appraisal or stop considering the proposed operation. Consequently, the project underwent a pre-appraisal screening with EIB operational services reviewing information provided by the Promoter in order to verify its eligibility for EIB's financial assistance and to identify the areas where compliance with EIB's environmental and social principles and standards might and should have been improved. In this context, it is worth recalling that if

² As referred to in the email from the EIB Communication Department to the Complainant dated 15 December 2009

the Environmental Impact Assessment (EIA) has been completed and – *a fortiori* – if construction has begun, the Bank must verify whether the EIA process, including public consultation with the indigenous group and other affected communities, has been carried out appropriately and that adequate mitigation and compensation measures have been adopted. Following such phase and provided that all EIB requirements are met during the formal appraisal, the operation is submitted for approval to the EIB Board of Directors before the project can qualify as an EIB-financed project.

2.1.3 Within the framework of the preliminary assessment of the project, on 15 May 2008 the EIB competent services met in Luxembourg with the Complainant as well as with a representative from CEE Bankwatch to listen to their concerns on the proposed operation. From the information provided by EIB services attending the meeting, the NGOs did not raise any significant new concern with respect to their previous correspondence and publications. The EIB welcomed the information shared and reiterated that, following the formal request by the Ethiopian authorities to finance the project, the EIB's decision to appraise it was subject to receiving a satisfactory response to a number of basic questions which largely corresponded to the Complainant's concerns. The EIB services also observed that the general tone of the meeting was not at all confrontational and both NGOs confirmed that they had found the discussion very interesting and they appeared to have appreciated it.

2.1.4 A first request for an additional meeting was sent by the complainant on 19 June 2008 (i.e. one month after the first meeting). In her message, the complainant requested to meet the engineers on the occasion of a future visit to the Bank on 3 July 2008 to discuss about the application of WCD recommendations. In their response of 27 June 2008, the EIB competent services declined the request on the basis of the fact that the engineers responsible for the project were not in Luxembourg on that date and asked the complainant to send their comments in writing; in this regard, the EIB competent services informed the EIB CM that they never received such comments and took the view that the reason for the refusal of the meeting was solely practical, that alternatives were suggested but the complainant did not react to the invitation of the Bank. Moreover, from the information provided by the Communications Department of the EIB, additional contact between the latter and the complainant, whereby – *inter alia* – the contested operation was discussed, was established on 30 June 2008 during an NGO workshop in Brussels.

2.1.5 On 25 July 2008 the EIB Management Committee authorised the allocation of up to EUR 230,000 from the technical assistance funds available under the Cotonou Agreement for due diligence studies to be performed in connection with the possible appraisal of the Gibe III hydropower plant. The Bank then intended to launch due diligence studies covered by the TA and consisting of an Economic, Financial and Technical Assessment (EFTA) and a review of the Environmental and Social Impact Assessment (ESIA) by a third party specialist as the in-house review concluded that there were potentially serious gaps in the existing ESIA's undertaken by the promoter. This would also include a review of the resettlement plan as well as the consultation and disclosure process. The overall objective of both studies was to assess the robustness and completeness of the existing studies, assess and verify NGO concerns, and determine what the further studies and actions would have been required to bring the project to a level where all (environmental and social as well economic, financial or technical) concerns could have been properly addressed and mitigated and to see whether it was at all realistic to expect a positive outcome in this regard; in short, the Independent ESIA Review and EFTA study were part of an up-stream review to decide whether the project could be eligible, *a priori*. The studies, whilst facilitating the future due diligence process in case of authorisation to appraise by the EIB Management Committee, should have also contributed to address the concerns raised by the NGOs opposing the project. The contract with the consultant selected to carry the EFTA study was signed at the end of February 2009.

2.1.6 Meanwhile, the EIB received a second meeting request from the Complainant on 7 October 2008 (i.e. 5 months after the first meeting). In the response of the EIB competent services dated 14 October 2008, the complainant was informed that the engineers responsible for project were again not available on the suggested dates and that "*as no further decision has been taken regarding a possible EIB pre-appraisal of the project since our last meeting, and as we have not received any new information from your side on the project, we believe a new*

meeting would be premature at this stage." The EIB competent services offered the alternative to meet the complainant "should there be any significant change regarding EIB involvement in the project, and subject to the availability of the concerned engineers", while informing them that "we will return to you as soon as possible with alternative dates for a meeting." Finally, a third request for a meeting with the EIB competent services was mentioned in the complainant's letter to the President of 25 November 2008. In their reply of 23 December 2008, the EIB competent services informed the complainant that they fail to see, under those circumstances, a reason for meeting at that stage "as all of us have to give priority to projects the Bank has decided to appraise; if the Bank were to decide to appraise this project, we would consider organising such a meeting to listen to you."

2.1.7 On 16 July 2009 the EIB Management Committee authorised the allocation of up to EUR 400,000 from the technical assistance funds available under the Cotonou Agreement for the independent review and studies regarding the environmental and social impacts, to be performed in connection with the possible appraisal of the Gibe III hydropower project. The independent studies were required to review, and where appropriate, complement the environment and social impact assessment following a preliminary analysis conducted by the Bank on gaps that exist between the ESIA and EIB standards.

2.1.8 From 10 to 18 October 2009, the EIB, together with the World Bank and the African Development Bank, undertook a joint fact finding mission to Ethiopia, for the proposed operation. The main objective of the mission was to conduct field visits to the Project and associated sites, and to the Lower Omo areas, in order to get a better understanding of the issues/gaps identified in the various environment and social studies already completed by the Promoter and thereby contributing to the refinement of the scope of further work to be carried out under the "Independent Review and Studies regarding the Environmental and Social Impact Assessment (ESIA)". The EIB team focused in particular on the social impact of the project: in this context, it participated to a meeting organised by the Promoter with members of the agro-pastoralist community of the Ocha Kebele in Soro Woreda who - according to some NGOs³ - would have been excluded from the Resettlement Action Plan (RAP) and from receiving compensation.

2.1.9 The EIB team also visited part of the new road alignment on the right bank of the River in Zaro Kebele, where the new road follows an existing path, passing through settled areas and farms; a meeting with Kindo Koisha District Officials was held at Bele Town where concerns about the road realignment were discussed and taken into account. The mission also included a brief visit of the historical Ijajo Walls of the Wolyata Community on the right bank which were re-discovered during the archaeological investigation. Finally, the EIB met with developmental NGOs in Addis Ababa namely VITA, EPARDA (Ethiopian Pastoralist, Research and Development Association), FARM AFRICA, and Action for Development, which are working in some of the downstream communities in the Lower Omo Valley. During the discussion, the EIB took note of the reluctance of participants to the meeting to take a view either way as to the impact of the dam. This could have been the result of the precarious climate for foreign/foreign sponsored NGOs due to an NGO law passed in early 2009 and which has constrained the level of debate on issues relating to development projects of national interest.

2.1.10 Furthermore, the EIB was informed that the NGOs had not seen any of the project related ESIA nor of the mitigation measures proposed. The NGOs stated that the communities living downstream were periodically at conflict with each other primarily over natural resources – access to grazing land and water – and that any changes to land use patterns and climate might have exacerbated such conflicts. Although there is quite a lot of mistrust of the authorities amongst these communities and a tendency not to accept their predicament, at the same time, it appeared that the communities were not averse to change if it genuinely helped them improve their livelihoods and food security situation. On the basis of the information gathered during the on-site visit, the EIB competent services drew conclusions for their preliminary assessment and issued clear recommendations to the operational services on mitigation/compensatory measures to be adequately implemented and monitored to minimise the social impact of the Dam, the Reservoir, the EEPKO Campsite, the Chida-Sodo Road and the Transmission Line

³ See letter from International Rivers Network and other NGOs dated 22 July 2009 - <http://www.internationalrivers.org/en/node/4309>

2.1.11 SOGREAH, the consultancy selected for the Independent Review of the ESIA study, was hired in December 2009. From the preliminary stages of this review, it was clear that downstream impacts of the Project especially in the Omo Delta were not appropriately investigated so far, whilst the impact on Lake Turkana (which is for most part located in Kenya) had not been investigated at all and that therefore additional studies would be required also in view of the development of an adequate set of mitigation and compensation measures. Meanwhile, in February 2010 another external consultant was hired through a grant from the EU Africa Infrastructure Fund to prepare the Terms of Reference for the undertaking of the required additional studies with a view to addressing the shortcomings that the ongoing Independent Review had started to reveal. In June 2010, the EIB received the final versions of the EFTA study and of the Independent Review which - according to the EIB competent services - provided for a comprehensive technical analysis of the issues concerned whilst indicating the nature of the follow-up studies to be conducted. The study moreover stated that with proper follow-up, the project's impact could have actually benefited the highly marginalised peoples of the Omo Delta and Lake Turkana. The Terms of Reference for the follow-up studies on the ESIA - which were also finalised in June 2010 - incorporated the findings of the Independent Review and identified the timeframe needed to conduct such studies. Such follow-up study intended to include a full-fledged ESIA for Lake Turkana, as well as a Cumulative Impact Assessment of the cascade of existing and planned hydropower projects. The new study was to include, *inter alia*, the development of a hydrological and hydraulic model of the Omo River in order to assess the potential downstream impacts upon the Omo River, Omo Delta and Lake Turkana based on reservoir filling and dam-operating options. It also envisaged an upfront scoping exercise with stakeholders, as well as consultation processes based on draft ESIA reports. Finally, the new study included work on developing a Community Development Programme aimed at strengthening and enhancing the socio-economic status of affected people and communities.

2.1.12 In July 2010, the EIB learnt through the press that the Ethiopian government had secured alternative funding to the proposed project and therefore no longer needed EIB's involvement. Although the Ethiopian government never confirmed this information in writing, from the informal liaison with the Promoter, it appeared that the latter did not consider as feasible to await the results of the additional studies required by the EIB in order to decide whether to appraise the project. As a result, the EIB halted any further preparatory work on the project and, on 19 July 2010, the EIB published a press release (Reference: 2010-126-EN)⁴ whereby it clarified its non-involvement in GIBE III project and explained that its services had ceased to work on that project insofar as the Ethiopian government had found alternative sources of finance. In the press release, the EIB referred to the detailed technical, environmental and social assessments carried out by its services, prior to any financial engagement of the Bank. The press release recalled that as part of preliminary consideration of possible financing of the Gibe III hydroelectric project the Bank was involved in a range of technical, environmental and social studies both independently and in cooperation with others and had at that time secured finance for further studies, notably to study the impact of the project and related mitigation measures in the downstream area, including Lake Turkana. Finally, the press release underlined that the decision to discontinue the EIB's engagement with the project was based on the decision of the Promoter who had meanwhile found alternative finance and could not be attributed to the results of the preliminary studies so far conducted.

2.2 Previous exchanges of correspondence with the EIB services

2.2.1 As an annex to the complaint, the complainant provided an index of correspondence with the Bank concerning the project ranging from a Letter to the EIB Board of Directors of 20 December 2007⁵ to an email from EIB Communication Department to CRBM dated 8 June 2010 replying to the last info-request submitted by the complainant prior to the complaint.

⁴ <http://www.eib.org/about/press/2010/2010-126-european-investment-banks-clarification-of-involvement-in-gibe-3-project-and-commitment-to-east-african-energy-sector.htm?lang=en>

⁵ The EIB replied to this correspondence by letter of the EIB Communication Department dated 24 January 2008.

Table 1 - Index of correspondence between the Bank and the Complainant concerning the project⁶

20/12/2007:	Letter from Counter Balance coalition to the EIB board of directors,
24/01/2008:	Letter from EIB to CRBM,
19/06/2008:	E-mail from CRBM to EIB Communication Department and Miss. Palanza, Subject: Follow up meeting about Gibe III hydro project.
27/06/2008:	E-mail from EIB Communication Department to CRBM, Subject: Follow up meeting about Gibe III hydro project
07/10/2008:	E-mail from CRBM to EIB Communication Department and Miss Palanza, Subject: Gibe III and WCD recommendations
14/10/2008:	E-mail from EIB Communication Department to CRBM, Subject RE: Gibe III and WCD recommendations
20/11/2008:	Letter from Counter Balance coalition to President Maystadt and Vice-presidents De Fontaine-Vive and Sakellaris,
23/12/2008:	E-mail from EIB Communication Department to CRBM, Subject: FW: Counter Balance letter about Gilgel Gibe III
09/02/2009:	E-mail from CRBM to EIB Communication Department, Subject: request of information about Gilgel Gibe III
17/02/2009:	E-mail from EIB Communication Department to CRBM, Subject: RE: request of information about Gilgel Gibe III
10/03/2009:	E-mail from CRBM to EIB Communication Department, Subject: request of access to information
02/04/2009:	E-mail from EIB Communication Department to CRBM, Subject: request of access to information
27/04/2009:	E-mail from CRBM to EIB Communication Department, Subject: Re: request of access to information
12/05/2009:	E-mail from EIB Communication Department to CRBM, Subject: Re: request of access to information
02/12/2009:	E-mail from CRBM to EIB Communication Department, Subject: Fwd: request of access to information
15/12/2009:	E-mail from EIB Communication Department to CRBM, Subject: Re: request of access to information
18/12/2009:	E-mail from CRBM to EIB Communication Department, Subject: Re: request of access to information
12/01/2010:	E-mail from EIB Communication Department to CRBM, Subject: RE: request of access to information
01/04/2010:	E-mail from CRBM to EIB Communication Department, Subject: request of information regarding Gibe III assessment study
08/04/2010:	E-mail from EIB Communication Department to CRBM, Subject: Re: request of information regarding Gibe III assessment study
23/04/2010:	E-mail from CRBM to EIB Communication Department, Subject: request access to information
07/05/2010:	E-mail from EIB Communication Department to CRBM, Subject: Re: request access to information
17/05/2010:	E-mail from CRBM to EIB Communication Department, Subject: request of information concerning Gilgel Gibe III project
08/06/2010:	E-mail from EIB Communication Department to CRBM, Subject: RE: request of information concerning Gilgel Gibe III project

2.2.2 Moreover, in her message the complainant refers to five previous info-requests which had been – in her view, unfairly - rejected by the EIB competent services. During the course of the inquiry, the CM asked the EIB competent services to provide additional information on the above-mentioned info-requests as well as on the rationale behind the rejection of the complainant's applications. The table below identifies key information concerning the above-mentioned procedures.

⁶ During the inter-services consultation on the complaint, the EIB competent services drew the EIB CM's attention to the fact that the list of correspondence provided by the complainant was incomplete. From the information provided by the EIB competent services, it appears that the following additional contacts were also established:

- 26/03/2007: e-mail from CRBM to the EIB Communication Department. Subject: Request for information regarding Gilgel Gibe hydropower projects
- 27/06/2007: e-mail from EIB Communication Department to CRBM. Subject: Your request for information regarding Gilgel Gibe hydropower projects
- 05/11/2007: e-mail from CRBM to the EIB Communication Department. Subject: follow up information about Gilgel Gibe Project
- 03/12/2007: e-mail from the EIB Communication Department to CRBM.
- 22/03/2008: e-mail and letter (dated 18/03/02) from Counter Balance to the EIB President and Management Committee. Subject: CSO response about Gilgel Gibe project
- 09/05/2008 : e-mail from EIB Communication Department to Counter Balance. Subject: CSO response about Gilgel Gibe project
- 14/07/2010: e-mail from EIB Communication Department to CRBM. Subject. Request for information
- 29/07/2010: e-mail from EIB Communication Department to CRBM. Subject. RE: Request for information

Table 2 – Info-request procedures

	Date Info-request	Subject	Date EIB's reply	Main Content of EIB's reply
1	10/03/2009	request for access to the Terms of Reference of the Economic, Financial and Technical Assessment (EFTA) Study	02/04/2009	<ul style="list-style-type: none"> - Protection of the EIB's internal decision-making process (art. 26 of the EIB Public Disclosure Policy (PDP)) - Third-party document (art. 33 PDP)
2	27/04/2009	request to know whether the consultants had been appointed, which firm had been chosen and when the study was expected to be delivered	12/05/2009	<ul style="list-style-type: none"> - Protection of the EIB's internal decision-making process (articles 26 and 34 of the EIB PDP)
3	23/04/2010	request for access to the Non-Technical Summary of the Environmental and Social Impact Assessment (ESIA) review study	07/05/2010	<ul style="list-style-type: none"> - The Independent Review of the ESIA Study on the project was still at a draft stage. - The complainant is informed that the Review study would not comprehend a Non-Technical Summary.
4	17/05/2010	request to know if the pre-appraisal procedure was still ongoing (following the news that a Chinese company took over the project's component which the EIB was supposed to finance)	08/06/2010	<ul style="list-style-type: none"> - The EIB is closely following developments on the project and will discuss the situation with the complainant once more information is available.

2.3 Request for access to the Terms of Reference of the EFTA Study

2.3.1 On 10 March 2009 the Complainant – following previous exchange of correspondence concerning the Project and whereby the EIB competent services had already explained the rationale behind the Technical Assistance on the Economic, Financial and Technical Assessment Study – requested for access to the Terms of Reference the EIB used to appoint the consultant which was carrying out such study.

2.3.2 On 2 April 2009 the EIB competent services replied by asserting that, after consulting the other co-financiers on the study, it appeared that the requested information was confidential on the basis of Article 26 of the EIB PDP regarding the protection of the Bank's internal decision-making process and Article 33 regarding third-party documents. Finally, the EIB services expressed the willingness to engage with the Complainant should have the Bank decided to appraise the project.

2.4 Request for information on the EFTA Study

2.4.1 As a follow-up to the EIB's message of 2 April 2009, on 27 April 2009 the Complainant requested to know whether the consultant who would have carried out the EFTA Study had been appointed and which the firm was chosen for the contract. Finally, the Complainant requested to be informed of the timing of the commissioning of the study.

2.4.2 In their reply of 12 May 2009, the EIB competent services reiterated the rejection of the application due to the fact that the requested information would be related to the Bank's decision whether to undertake an appraisal of the Gibe III project and therefore could not be disclosed on the basis of Articles 26 and 34 of the EIB PDP. Finally, the EIB services reiterated the willingness to engage with the Complainant should have the Bank decided to appraise the project.

2.5 Request for access to the Non-Technical Summary of the ESIA review study

2.5.1 On 23 April 2010, the Complainant requested to have access to the Non-Technical Summary of the Independent Review of the ESIA study concerning the project, which had been financed by the EIB through Technical Assistance.

2.5.2 On 7 May 2010, the EIB competent services rejected the application by informing the Complainant that the Independent Review was still in a draft stage and that EIB was in the process of reviewing it with the consultant. Moreover, the Complainant was informed of the fact that the Independent Review did not contain a Non-Technical Summary.

2.6 Request for information on the pre-appraisal procedure

2.6.1 On 17 May 2010, the Complainant wrote to the EIB by referring to news in African press⁷ reporting that the Chinese government had approved a USD 500 million dollar loan to cover the electro and hydro mechanical costs of the project. Considering that this component was expected to be covered by the potential EIB loan, the Complainant requested whether the EIB had ceased to be involved in the project or the pre-appraisal process was still ongoing and in this case for which specific component.

2.6.2 In their reply of 8 June 2010, the EIB competent services informed the Complainant of the fact that the EIB was fully aware of issues concerning the project raised in her message and that as indicated in previous correspondence from the EIB, the latter had not yet made any commitment or decision as regards a possible involvement in the financing of the project. The EIB competent services also expressed the willingness to discuss the situation with the Complainant once additional information would have been available.

2.7 A fifth info-request (dated 1st of April 2010) concerned the pre-qualification notice's cancellation referred to in §1.3 of this Report. Contrary to what stated in the complaint, from the evidence provided by the EIB competent services, it results that the EIB did not reject to provide the Complainant with information on the matter, but on the contrary on 8 April 2010 informed the Complainant that the notice had been cancelled "*due to the fact that the EIB needs more time to reflect on what the assessment studies will entail*".

2.8 It is worth noting that on several occasions the EIB competent services, when replying to the complainant and informing her of the rejection of her application, took the view that – insofar as the info-request concerned information relating to the Bank's decision whether to undertake an appraisal of the project - such information could not be disclosed in line with the PDP (and now Transparency Policy) provisions establishing the confidentiality of any information which might put at serious risk the integrity of the EIB's internal decision-making process. Finally, from a review of the exchange of correspondence, it results that the EIB competent services rejected the complainant's requests for a meeting on the basis of the unavailability of the operational services responsible for the project. They did so considering the need to prioritise the activities of stakeholders' engagement on projects for which the EIB decision to appraise had been formalised in a decision of the EIB governing bodies. It is to be noted that the complainant was informed of the Bank's willingness to meet and discuss their concerns once the EIB internal decision on whether to appraise the project would have been finalised.

⁷ http://www.ethjournal.com/index.php?option=com_content&view=article&id=2449:-ethiopia-signs-over-450mn-hydro-power-project-with-chinese-company-&catid=13:headlines&Itemid=19; <http://en.afrik.com/article17629.html>

3. Applicable regulatory framework

3.1 *The EIB Statement(s) of Environmental and Social Principles and Standards*

3.1.1 The EIB policy setting the standards for the contested operation at the time of its creation (19 March 2008) as well as at the time of approval by the Management Committee of the Technical Assistance referred to in §2.1.5 of this Report is the 2004 EIB Statement on Environmental and Social Principles and Standards (hereinafter, the 2004 Statement); this policy should be read in conjunction with the 2007 Environmental and Social Practices Handbook (the 2007 Handbook) describing the internal processes and practices of the Bank to ensure that all financing activities are consistent with its standards.

3.1.2 The 2004 Statement establishes that a EIB-financed project shall comply with EC environmental policies and standards subject to local conditions and law when operating in regions outside the EU⁸. EIB projects must comply with the EC Directive on Environmental Impact Assessment and apply good environmental management practices during project implementation and operation⁹. When operating in developing countries, the project shall accord with internationally recognised social safeguard measures, including labour standards¹⁰. The Statement underlines that, in its lending activities, the EIB applies the precautionary principle as well as the principles that preventive action should be taken, that environmental damage should be as a priority be rectified at source and that the polluter should pay.

3.1.3 The 2004 Statement¹¹ stipulates that, during the preliminary assessment of projects and prior to the launch of a formal appraisal, projects are screened to identify their environmental risks. This helps to determine the nature and form of the environmental assessment to be carried out during the cycle. The EIB's environmental assessment includes the due diligence carried out by EIB competent services on the assessment of the environmental impact of the project and the mitigation and compensation measures respectively undertaken and proposed by the Promoter. The EIB may decide not to support a project for environmental reasons. Equally, the Bank can provide technical assistance for environmental studies and other environment-related work and can contribute to design changes to improve the environmental impact of the project.

3.1.4 Following the decision of the Management Committee of 16 July 2009 requesting additional review of the ESIA study carried out by the Promoter and the adoption by the EIB Board of Directors on 3 February 2009 of the new EIB Statement, it appears appropriate to consider that the pre-appraisal activities carried out by the EIB competent services following such date are governed by the 2009 EIB Statement of Environmental and Social Principles and Standards (the 2009 Statement).

8 According to the 2004 Statement, in regions outside the EU, projects should comply with the principles and standards set by EC law, subject to local conditions and law. At that time, the EIB applied a presumption of legality, based on the necessary authorisations to construct and operate the project, supported by other available evidence, the own assessment carried out by EIB competent services and loan covenants.

9 The 2004 Statement stipulates that all projects likely to have a significant effect on the environment should be subject to an Environmental Impact Assessment (EIA), according to the definitions and requirements of Directive 85/337/EEC, amended by Directive 97/11/EC. The EIA, which includes public consultation, is the responsibility of the promoter and the competent authorities while the EIB may request more studies if necessary. The EIA should be completed and its main findings and recommendations should satisfy the requirements of the Bank prior to disbursement. Another aspect of the environmental standards of EIB-financed projects is the protection of biodiversity. In support of the general approach described in the sixth "Environmental Action Programme" and the principles of Directive 92/43/EEC (Habitats), the 2004 Statement required an appropriate assessment of the biodiversity effects of a project, including a detailed assessment of any likely significant effect on protected sites and/or species. The Statement requires that, where the effect is likely to be significant, appropriate mitigation and compensation measures are identified and implemented.

10 As regards the social impact of EIB-financed project, the 2004 Statement applied a relatively broad definition of the term "environment" to cover the natural environment, the human living and working environment as well as a number of social aspects. In general, the 2004 Statement established that in regions where EU and/or national social standards do not exist or are inappropriate, the EIB uses other guidelines of good international practice and, in particular, takes into account the IFC Safeguard Policies on indigenous peoples, involuntary resettlement and cultural property as well as the core labour standards that apply to members of the International Labour Organization (ILO). Moreover, in such matters, the EIB coordinates its approach with the European Commission, responsible for external assistance to developing countries.

11 For more information on the EIB Project Cycle see http://www.eib.europa.eu/attachments/strategies/cycle_en.pdf

3.1.5 One of the key features of the 2009 Statement is the expansion of the section on the social dimensions of sustainable development. The 2009 Statement informs stakeholders as to the requirements of the EIB as well as to the responsibility of the promoter as regards the application and enforcement of the EIB's requirements, including compliance with relevant laws and other obligation placed on the promoter by the EIB and reflected in legal undertakings; in addition, it clarifies that its principles and standards are derived from EU policy and law, thus including the fundamental rights enshrined in the EU Charter following the entry into force of the Treaty of Lisbon¹² and that the environmental and social requirements of the EIB reflect the principles of the Cotonou Agreement. Article 50 of the 2009 Statement stipulates that *"Promoters that seek EIB finance outside the EU are required to adopt the social standards regarding involuntary resettlement¹³, indigenous people and other vulnerable groups¹⁴, the core labour standards of the International Labour Organization (ILO) and occupational and community health and safety"*.

3.1.6 The 2009 Statement reiterates that - when there is a risk that a project may cause significant and irreversible damage to the environment - measures should be taken by the promoter to avoid it in the first place; if a feasible alternative is not available to reduce the risk to an acceptable degree and where such impacts are demonstrably unavoidable, the Bank requires the promoter to apply mitigation measures, and for impacts that cannot be fully mitigated, compensation and/or offsets should be implemented, in accordance with the relevant EU Directives, such as, those on EIA, Nature (Habitats and Birds) and Environmental Liability. In substance, the application of the prevention principle means that the promoter should demonstrate that appropriate action to protect the environment has been taken at an early stage.

3.1.7 As regards projects located outside of the EU, although the 2009 Statement sets the benchmark for EIB financing in the legal principles and standards of the EU. However, in some cases the Statement allows such compliance with EU requirements to be achieved in stages, an approach also sometimes adopted by the EU in the enlargement countries¹⁵. In addition, in the case of co-financing and with a view to ensuring consistency and harmonisation whilst avoiding duplication of efforts, the 2009 Statement acknowledges the possibility, in projects outside the EU and when working in cooperation with other international public and private financial institutions, to adopt a common approach, regarding environmental and social matters, based on the Equator Principles or the safeguards of the World Bank.

3.1.8 The 2009 Statement refers to the EIB Handbook as the document translating the environmental and social principles and standards described in the Statement into the operational practices followed by the staff of the EIB. It describes the extent of the work of the Bank and the responsibilities and roles of other parties, notably those of the promoter and the intermediaries with whom the Bank cooperates. The 2009 Statement refers to the fact that, where insufficient capacity might prevent the promoter from meeting its requirements, the Bank requires that capacity be enhanced and it may provide technical assistance for that purpose.

12 Article 30 of the 2009 Statement establishes that *"the Bank will not finance a project with significant residual social costs. To achieve this, the Bank follows a rights based approach when considering the social aspects of a project. This reflects the principles of the Charter of Fundamental Rights of the European Union (the "Charter"), and the UN Universal Declaration of Human Rights. Outside the EU, the Bank requires the promoter to apply its Social Assessment Guidelines described in the Handbook, which incorporate the social principles and standards of the Bank."* Article 46 limits EIB financing to *"projects that respect human rights and comply with EIB social standards, based on the principles of the Charter of the Fundamental Rights of the European Union and international good practices"* and excludes from financing *"projects located in countries declared "off-limits" by the European Council for EU financing, particularly due to violations of human rights"*. Finally article 47 stipulates that the Bank does not finance *"projects that give rise to conflicts or intensify existing conflicts"*.

13 In that regards, it is worth recalling article 51 of the 2009 Statement pursuant to which *"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."*

14 See article 53 of the 2009 Statement: *"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."*

15 In that sense, see also articles 40 and 42 of the 2009 Statement. Although article 40 refers to the general provision already expressed in the Principles that - outside the EU - a rigid and immediate adjustment to EU requirements may not be practical and sometimes even desirable and recalls that whenever this occurs provision could be made for a phased approach to higher standards, article 42 seems to reintroduce such rigidity at least as regards projects for which the EIB requires a formal EIA for which the EIA process and content cannot deviate but must be consistent with the requirements of the EU Directive.

3.2 The EIB Handbook(s) of Environmental and Social Practices

3.2.1 As resumed in §§2.1.3 to 2.1.10, the greatest part of the preliminary assessment of the Project was conducted within the framework of the procedures established by the 2007 Handbook of Environmental and Social Practices. A revised version of the Handbook was published on EIB website on 25 February 2010.

3.2.2 §2 of the 2007 Handbook stipulates that *"the Bank shall satisfy itself that projects to be financed comply with its environmental rules and requirements, in particular that...projects to be financed in third countries are assessed on the basis of EU environmental principles, standards and practices, subject to local conditions. In all cases, projects comply with related national and relevant international environmental legislation"*. The same paragraph also establishes that projects (regardless of the area of operation, within or outside the EU) must satisfy the social safeguards of the EIB. These provisions should be read in conjunction with §7 establishing that for projects outside the EU EIB financing is governed by separate mandates from the European Union and §8 which identifies the Cotonou Agreement as the legal basis of the separate mandate of the Bank in the region.

3.2.3 With regard to the procedural steps to be followed by the EIB when considering the eligibility of a proposed operation, §6 of the Handbook lays down that *"All projects are screened in terms of their specific contribution to EU policy, including environmental policy, known as eligibility"*; §14 further elaborates on the features of such screening by stipulating that *"all investment projects financed by the Bank should be subject to an environmental and social screening as part of its pre-appraisal"*.

3.2.4 §§24 and 25 describe the screening carried out at the pre-appraisal in order to identify environmental and social issues and risks. In particular §25 refers to the final act of the pre-appraisal procedure, i.e. the Authorisation for Appraisal which is to be given by the EIB Management Committee upon proposal of the EIB competent services. The screening (and more generally the whole pre-appraisal procedure) aims at providing the EIB governing bodies with the most comprehensive set of information on the Project at the earliest stage of EIB's consideration. *"As such"* – the Handbook concludes – *"it contains project information including the environmental and social issues and risks that have to be addressed during appraisal"*, i.e. the following stage of the project cycle concluded by the Authorisation to finance by the EIB Board of Directors upon proposal of the EIB Management Committee.

3.2.5 The 2007 Handbook prescribes that during the pre-appraisal the EIB competent services should record the main national, EU and international legal instruments that are relevant to the project and identify any other actual and foreseen legal issue, for example, compliance issues. §A4.2 2nd, 6th and 7th bullet points identify the main legal instruments on which the review should focus.

3.2.6 The Annexes to the 2007 Handbook describe procedures concerning (or refer to regulatory framework governing) the environmental and social assessment of projects. In particular Annex 12 contains the social assessment guidance notes of the EIB: Guidance Note n.1 addresses the potential impacts of Population Movements including involuntary resettlement, Guidance Note 2 deals with minority rights including women, indigenous people and other vulnerable groups; finally Guidance Note n. 5 tackles the issue of public consultation and participation in project preparation. The General Background Note (GBN) clarifies when to look at social issues and how to deal with them throughout the project cycle as well as the key current initiatives and standards applying to EIB-projects but emphasises that, although some safeguards are essential, procedures promoting positive outcomes identified in the Note are recommended and therefore cannot be considered as the exclusive means to achieve that objective but should be tested and adjusted, depending on circumstances. Such interpretation, also stemming from the analysis of the terminology used in the Note appears fully in compliance with the nature of social assessment which – in order to be effective and viable – requires an *ad hoc* analysis of the contingent interest of the concerned community(ies), the project's impact on the latter, the legal framework which the Promoter is subject to as well as the institutional capacity of the latter to deal with social issues.

3.2.7 The GBN also emphasises that *"the Bank recognises that it and the promoters supported through its investment programmes have different roles and responsibilities within the project's sphere of influence to ensure that adverse impacts are mitigated where possible"*. It identifies the role of the EIB as to ensure that the Promoter has adequate capacity to handle the various social issues arising from project preparation/implementation; where the EIB is unsure about a Promoter's capacity, it may wish to support the provision of Technical Assistance or – should other International Financial Institutions be involved in the operation – to share the TA provided by the latter. The role of the Promoter as described by the GBN is, *inter alia*, to plan the social assessment as an integral part of project formulation, identify and prioritise the range of likely social impacts and identify, assess social safeguard issues relevant to the project and examine key stakeholders' opportunities for participation in project design and implementation. The GBN also stipulates that when the project is likely to have adverse social impacts on vulnerable and/or poor groups more formal social assessment is advisable.

3.2.8 Guidance Note n.1 determines the content of the initial screening process with regard to population movements and resettlement. Guidance Note n. 2, which deals with minority rights, stipulates that *"when the presence of (...) minorities is evident, the Bank should ensure that appropriate arrangements for mitigating adverse impacts are put in place and that their customary claims are fairly addressed. (...) Where the Bank is one of a number of investment partners it may be possible to build on their existing social safeguard policy frameworks. The Bank's intention is to ensure that minorities including indigenous peoples profit from Bank's financed projects and to minimize or avoid harmful effects on their society. Local priorities will be determined in direct consultation with the representatives of minorities and the development of appropriate consultation and participation mechanisms will be one feature that Bank staff will wish to see in place"*.

3.2.9 Finally, among the provisions contained in Guidance Note n. 5 on public consultation and participation in project preparation it is worth emphasising those establishing that *"It is the responsibility of the Bank to ensure that the Promoter gives appropriate attention to the public consultation process during the earliest stage of project preparation. (...) Where significant gaps are identified, the Bank may wish to make sure that they are filled through particular provisions attached to the agreement with the Promoter and through monitoring during implementation. (...) Bank staff shall verify that the extent and form of consultation is appropriate for the project in question. (...) The disclosure of information is integral to a successful consultation process and Bank staff will wish to satisfy themselves that the results of the consultations as well as of assessments are accessible to interested parties and the general public"*.

3.3 EIB policies and procedures concerning the disclosure of information

3.3.1 As regards the allegedly unfair rejection of the info-requests submitted, the EIB 2007 Public Disclosure Policy (PDP) and the EIB 2010 Transparency Policy respectively apply to the info-requests referred to in §§ 2.3-2.4 and 2.5-2.6. Both policies establish a general presumption of disclosure of EIB-held information or documents unless there is a compelling reason for non-disclosure. Such principle stems from EC Regulation 1049/2001 which constitutes a key reference for the EIB PDP; moreover, following the entry into force of the Lisbon Treaty, article 15 of the Treaty on the Functioning of the European Union extends the application of EC Regulation 1049/2001 to the EIB when the latter exercises its administrative tasks.

3.3.2 When informing the Complainant of the reasons of the rejection of her applications, the EIB competent services referred to the constraints to disclosure enumerated in §§ 26, 33 and 34 of the PDP. §26 of the EIB PDP stipulates that *"unless there is an overriding public interest, access to information will also be refused where disclosure would undermine the protection of ...commercial interest of a natural or legal person...and/or seriously undermine the integrity of the Bank's internal decision-making process"*. §34 further expands the protection of the integrity of the Bank's internal decision-making process by laying down that constraints on disclosure motivated on this ground *"are to allow a frank and open internal exchange of views and evaluations. Documents, which contain opinions for internal use as part of deliberations and preliminary consultations, such as the Appraisal Authorisation, the request for an opinion of the European Commission or EU Member States, and the proposal to*

negotiate the operation, are not disclosed. This also applies to the minutes of the Management Committee or Boards of Directors and Governors."

3.3.3 The jurisprudence of Community courts (see Table 3) as well as the precedents established by the European Ombudsman on Regulation 1049/2001 suggest that the exceptions to the right of public access to documents must be interpreted and applied strictly and that as such the terms adopted by the Community legislator for this exception - "decision" and "decision-making process" - imply a high degree of specificity¹⁶. In his decision, closing an inquiry regarding a complaint against the European Commission¹⁷, the EO has concluded that to ensure proper application of the Regulation, in its reply to an application for public access to a document, the institution shall adequately identify *"the concrete and specific decision that it envisages taking and gives sufficiently clear information on the expected time-line for the decision-making process...the institution's invocation of the exception...cannot, in principle, be considered legitimate unless, at a minimum, its reply to the applicant...gives clear and understandable information on:*

- a. the kind of decision-making process;*
- b. the form and kind of decision that the institution, at the relevant moment, anticipates adopting;*
- c. the services or organs within the institution that are expected to adopt the decision; and*
- d. the anticipated time for the adoption of the decision."*

3.3.4 Finally, as regards the obligation to assess whether the *"disclosure of the document would seriously undermine the institution's decision-making process"*, the EO states that the relevant case-law of the Community courts has established a principle, according to which the risk that the interest protected by the exception will be undermined must be reasonably foreseeable and not purely hypothetical¹⁸. Furthermore, the institution's assessment on the possibility to grant access to the requested document, or to parts of it, must be based on a concrete and individual examination of the document¹⁹ and such assessment must be visible from the reasons put forward for rejecting access to the document requested. In addition, the extent of fulfilment of the obligation to state reasons depends on the circumstances of the case²⁰.

Table 3 – Community jurisprudence on article 4.3 of Regulation 1049/2001 (Case T-403/05)

FACTS: The case was triggered by the Commission's rejection of a request by the applicant for access to certain preparatory documents relating to a Commission decision declaring a concentration to be incompatible with the common market and the EEA Agreement and to documents drawn up by the Commission's services following the annulment of that decision by judgment of the Court of First Instance. Following the latter, the Commission established a working group comprising officials of the Directorate-General (DG) for Competition and the legal service in order to consider whether it was appropriate to bring an appeal against that judgment and to assess the implications of that judgment on the procedures for the control of concentrations or in other areas. The documents requested by the applicant were (i) the report of the working group, the documents relating to the preparation of that report and other internal documents on which the report was based or which were referred to in it. It is worth noting that in the case assessed by the CFI, the Commission had granted full access to the work plan, the work calendar and the mandate of the working group and partial access to two other documents.

¹⁶ "The limited scope ...is clearly reflected in the wording of the exception, which does not generally refer to possible future or hypothetical decisions, but to "the" decision of the institution itself that has not yet been taken." §19 Decision of the European Ombudsman closing his inquiry into complaint 70/2008/TS against the European Commission

¹⁷ http://www.ombudsman.europa.eu/cases/decision.faces/en/3824/html.bookmark#_ftn6

¹⁸ Case T-211/00 *Kuijer v Council* [2002] ECR II-485; Case T-194/94 *Bavarian Lager v Commission* [2007] ECR II-4523.

¹⁹ Case T-174/95 *Svenska journalistförbundet v Council* [1998] ECR II 2289; Joined Cases C-174/98 and C-189/98 P *Netherlands and Vander Wal v Commission* [2000] ECR I-1; Case T-211/00 *Kuijer v. Council* [2002] ECR II-485; Case T-84/03 *Turco v Council* [2004] ECR II-4061; Case T-2/03 *Verein für Konsumenteninformation v Commission* [2005] ECR II-1121.

²⁰ Case T-105/95 *WWF UK v Commission* [1997] ECR II-313; Case C-41/00 *Interporc v Commission* [2003] ECR I-2125; Case T-204/99 *Mattila v Council and Commission* [2001] ECR II-2265.

LAW: In its preliminary observations on the applicable regulatory framework the CFI reiterated the jurisprudence trend according to which exceptions set out in Article 4 of the Regulation must be interpreted and applied strictly²¹. Equally, the CFI stated that the application of these exceptions may, in principle, be justified only if the institution has previously assessed (i) whether access to the document would specifically and actually undermine the protected interest and (ii), in the circumstances referred to in Article 4(2) and (3) of Regulation No 1049/2001, whether there was no overriding public interest in disclosure; the risk of a protected interest being undermined must be reasonably foreseeable and not purely hypothetical and the above-mentioned examination must be apparent from the reasons for the decision²². Insofar as in Case T-403/05, the applicant challenged three different types of exceptions of confidentiality, the following paragraph only refers to the part of the decision of the Community Court on the exception relevant to the complaint lodged with the EIB Complaints Mechanism.

FINDINGS: The Court considered that the report was a document containing opinions for internal use as part of deliberations and preliminary consultations within the Commission and that from the very wording of the provision under the second subparagraph of article 4.3 of Regulation 1049/2001, the exception therewith contained may be relied upon *"even after the decision has been taken"*. On these grounds and recognising the concerns of the Commission, the Court concluded that the disclosure of the report would have seriously undermined the right of one of the Commission Members to the frankly-expressed and complete views of its own services as to the steps to be taken and that such disclosure would carry the risk not only that the possibly critical opinions of Commission officials might be made public but also that the content of the report could be compared with the decisions ultimately taken on those points by the Member of the Commission responsible or within the Commission as that would risk to seriously undermine the decision-making freedom of the Commission which adopts its decisions on the basis of the principle of collegiality and whose Members must, in the general interest of the Community, be completely independent in the performance of their duties.

The Court also held that the risk of the decision-making process being seriously undermined in Case T-403, were the report to be disclosed, was reasonably foreseeable and not purely hypothetical; to argue that, the Court observed that if such reports had to be considered not confidential and would thus risk being disclosed, it would be logical and probable that the Member of the Commission responsible for competition would be induced to cease making requests for the written, and potentially critical, views of his advisers. Merely to hold oral and informal discussions, which would not require the drawing up of a 'document' within the meaning of Article 3(a) of Regulation No 1049/2001, would cause significant damage to the effectiveness of the Commission's internal decision-making process, especially in areas in which it is required to carry out complex legal, factual and economic assessments and to examine particularly large amounts of documents, as in the case of the control of concentrations. Therefore, in accordance with recital 11 to Regulation No 1049/2001, the Community institutions must be allowed to protect their internal consultations and deliberations where, as in the present case, it is necessary in the public interest in order to safeguard their ability to carry out their tasks, in particular when they are exercising their administrative decision-making powers, as in the case of the control of concentrations.

Finally, the Court pointed out that the Commission gave the reasons for which it took the view that it was entitled to rely on the exception laid down by the second subparagraph of Article 4(3) of Regulation No 1049/2001 in order to object to disclosure of the report, of certain working papers and of the other internal documents while the applicant had not explained the reasons for which its own interest, which bore on its individual position in another dispute (Case T-212/03), in understanding what the Commission did subsequent to the annulment of its decision by judgment of the CFI could give rise to such an overriding public interest. In any event, even if it were to be assumed that such an interest were to exist, the Court found that the applicant had neither explained nor established in what way that interest was capable of prevailing over the general interest in the protection of the confidentiality of the documents in question in any weighing up of those two interests.

3.3.5 Article 33 of the PDP concerning third-party documents requires the Bank to *"consult with the third party to assess whether information in the document is confidential, unless it is clear that the document shall or shall not be disclosed."* As the wording of the policy clearly indicates, the outcome of the consultation with the third-party does not exclude the obligation of the EIB's competent services to assess whether the requested information is confidential or not.

²¹ (Case C-64/05 P Sweden v Commission and Others [2007] ECR I-0000, paragraph 66, and Joined Cases T-391/03 and T-70/04 Franchet and Byk v Commission [2006] ECR II-2023, paragraph 84)

²² (Case T-2/03 Verein für Konsumenteninformation v Commission [2005] ECR II-1121, paragraph 69)

3.3.6 In addition, §36 of the EIB 2007 PDP, which determines the timeframe for the application of the constraints, clarifies that in case of documents covered by the exceptions relating to commercial interests, the exception may, if necessary, continue to apply after the ordinary period of 30 years. Finally, it is worth recalling that §95 of the PDP stipulates that *"If, for reasons of confidentiality, staff are unable to divulge the information requested, in full or partially, they shall give the reason(s) why such information cannot be provided and inform the applicant of their right to make a confirmatory application"*.

3.3.7 The info-requests submitted in April and May 2010 fall within the scope of application of the EIB Transparency Policy. In that sense, as with the previously applicable policy, the TP establishes under article 5.2.5 that *"access shall be refused where disclosure would seriously undermine the integrity of the Bank's decision-making process. The Bank may refuse access to documents if the request concerns material in the course of completion or unfinished documents or data ... taking into account the public interest served by disclosure."* In line with the provision under §95 of the EIB PDP, article 5.2.11 of the TP stipulates that *"All requests for disclosure of specific information shall be handled promptly by the Bank, which will either grant full or partial access to the document requested (if only parts of a requested document are covered by any of the constraints above, information from the remaining parts shall be released) and/or the grounds for the total or partial refusal shall be stated"*. Finally, article 4.2 of the TP lays down that *"The EIB is committed to high standards of "Good administration" regarding its governing bodies, management and staff members' relations with the public, thus promoting values such as ...fairness – acting in a fair and reasonable manner [and] ... Courtesy – acting in a conscientious, correct, courteous and approachable manner."*

3.3.8 In view of the content of the info-requests submitted in 2010, it is also worth noting that, when handling requests for environmental information, the EIB is also bound by the provisions of Regulation 1367/2006 and of the Aarhus Convention.

3.4 EIB policies and standards concerning stakeholders' engagement

3.4.1 The 2004 Statement underlined the EIB's commitment to develop a constructive dialogue with the public, including representatives of civil society interests, such as NGOs and industry and consumer organisations, on its general approach on the environment, as well as, usually at the local level, on the environmental aspects of individual projects. In parallel, the 2007 Handbook addressed the issue of stakeholder involvement in the chapter concerning the appraisal, i.e. the project cycle phase between the EIB Management Committee's authorisation to appraise and its proposal to finance. §153 and the subsequent paragraphs give an outline of the scope of stakeholders' involvement as well as of its timing and modalities. §160 of the 2007 Handbook (amended by the EIB Complaints Mechanism of 24 June 2008) still partially defines the internal procedures (ENVAG Committee) which the EIB must follow if there are significant third-party concerns about the project or related issues. Finally, within the framework on the chapter on stakeholders' involvement, the Handbook refers to the Aarhus Convention, in particular with regard to the right of members of the public to access environmental information.

3.4.2 The 2010 TP also contributes to the definition of EIB's strategy with regard to stakeholders' engagement. In particular, art. 1.1 states that *"As an EU body, the EIB is committed to achieving the highest possible level of transparency in all its activities towards external and internal stakeholders, which it considers to be part of its mission to further the objectives of the European Union. It is firmly convinced that, as a publicly owned instrument for furthering and supporting EU development, it should maintain exemplary standards in all areas where EU policies have a bearing on its business and governance...Consequently, explaining these activities, enhancing the perceived value of its operational activity and strengthening support by decision-makers and shapers through increased transparency, is firmly anchored as one of the main objectives in its strategy map that underpins its integrated medium-term planning tool, the Corporate Operational Plan, which is published on the Bank's website"*.

3.4.3 Article 1.2.1 of the TP prescribes the establishment of an ongoing dynamic flow of information with stakeholders in order to provide the latter *"with the information they require to make positive contributions towards enhancing the quality of the Bank's activities"*. This includes, pursuant to art. 1.4.2, *"information that will*

enable them to understand [the Bank's] governance, strategy, policies, activities, practices, performance, impacts and outcomes with a view to allow stakeholders to take their actions and decisions on an informed basis."

3.4.4 Article 1.5.1 of the TP actively encourages stakeholders input by committing the Bank to open communication *"so as to benefit from their contributions to its work in fulfilling its mission"*. Finally, article 1.7.1 lays down that *"in its financing operations, the Bank recognises the rights, interests and responsibilities of stakeholders to achieve sustainable outcomes. In this context, the EIB actively promotes transparency with its counterparts, including with the development and operations of financed projects"*.

4. Findings

4.1 General considerations

4.1.1 The present complaint raises two different concerns: the general allegation of lack of transparency in the appraisal of the Project and the allegedly unfair rejection of info-requests submitted by the Complainant. Whilst the latter allegation focuses on actions taken by the Bank within the framework of a formally initiated and completed procedure (the info-request procedure), the former allegation challenges the earliest stage of consideration of the proposed operation by the EIB competent services.

4.1.2 However, it is worth highlighting that on the basis of the information referred to in § 2.1 of this report, although the preliminary consideration by EIB competent services never materialised in a formal decision of the EIB governing bodies to formally appraise the contested operation, from the assessment carried out by the EIB CM it results that it entailed a preliminary review ensured by the EIB under the form of Technical Assistance, and by some degree of engagement with Ethiopian' stakeholders directly carried out by the EIB staff on the project site. The methodology of the preliminary review adopted in this case was in part influenced by the peculiar features of the project as well as by the concerns on the Project's impact voiced by the Complainant as well as other representatives of the CSO community. Thus the pre-appraisal of the contested operation went much more into details than prescribed by the applicable regulatory framework, without a formal decision to appraise.

4.2 Transparency and Accountability of EIB pre-appraisal activities

4.2.1 Although it is common sense to consider that the EIB standards and practices concerning stakeholders' engagement apply to each and every step of the project cycle (starting from its very beginning) in order to ensure the most fruitful knowledge-transfer from civil society to the Bank and, if possible, to improve to the utmost the quality of the information provided to the EIB governing bodies for their decision, from the assessment of the applicable regulatory framework carried out in §3.4 of this Report it stems that none of the EIB policies applicable to the present complaint expressly require – at the stage of pre-appraisal – profuse interaction with external stakeholders. On the contrary, as the procedures described in §3.2 show, this phase of the EIB's assessment consists of a preliminary screening and normally lasts less than in the present case. As a result, the methodology of the Bank's engagement has to be modulated to the level of the Bank's involvement; a meeting with CSOs on matters pertaining to the appraisal of a proposed operation would normally take place – at the earliest stage – during the formal appraisal of the operation i.e. following the authorisation to appraise by the EIB Management Committee.

4.2.2 Meanwhile, from the information provided by the EIB competent services, it appears that when rejecting the requests for additional meetings submitted by the Complainant, the former justified such refusal by referring to the unavailability of the operational services responsible for the project and to the need to prioritise the activities of stakeholders' engagement on projects for which the EIB decision to appraise had been formalised in a decision of the EIB governing bodies; as a result, the EIB competent services have in several occasions expressed their willingness to further engage once the proposed operation would have achieved a higher degree of formalisation. Moreover, during the inquiry into the complaint, the

EIB competent services stressed that CounterBalance, whose network the complainant's NGO belongs to, had issued a large number of reports and statements which – in their view – extensively covered the complainant's concerns against the project and the EIB's involvement in it²³ without prior engagement with any of the EIB competent services.

4.2.3 Based on the chronology of pre-appraisal activities described in §2.1 of this Report, one could not fail to take note of the complexity of the pre-appraisal of the contested operation if compared with a standard EIB operation undergoing a pre-appraisal screening. The decision to allocate Community funds as Technical Assistance, the comprehensiveness of the study commissioned by the co-financiers which touched upon some of the concerns raised by the Complainant and the engagement of the EIB Competent services in the on-site mission referred to in §2.1.3 confirm that – although procedurally the EIB had not yet taken a decision on the project - the activities carried out by EIB services – either directly (the fact-finding mission) or indirectly (the activities carried out for the preparation of the Terms of Reference, the selection of the consultancy and the review of the latter's work) do not correspond to the ordinary assessment described by the Handbook when referring to the "pre-appraisal".

4.2.4 The contribution of interest groups, corporations and any other natural or legal persons could materially improve the quality of the output and/or help in identifying additional concerns to be assessed by the Bank. All that suggests that – when engaging important (financial and human) resources which are unordinary for a mere pre-appraisal screening – it would be appropriate that the stakeholders' engagement of the EIB with CSOs is modulated to what it is a *de facto* advanced stage of consideration.

4.2.5 The inquiry of the Complaints Mechanism into the complaint ascertained that the EIB competent services – besides the engagement with local stakeholders during their fact-finding mission in October 2009 – have engaged with the Complainant during the pre-appraisal of the proposed operation both directly as referred to in §2.1.3 and indirectly through the extensive exchanges of correspondence between the Complainant and the Communications Department outlined in Table I. With regard to the direct engagement, from the information gathered during the inquiry, it results that it took place prior to the contested info-request procedures, i.e. at a much more preliminary stage than the Complainant's requests for further meeting(s) and when the EIB Management Committee had not yet decided to allocated funds for Technical Assistance on the environmental and social impact assessment carried out by the Promoter.

4.2.6 Based on the above considerations, the EIB CM concludes that the EIB was not carrying out a "shadow" appraisal, but decided to engage additional and extraordinary financial resources as Technical assistance to improve the quality of the project impact assessments at a preliminary stage, given the global scrutiny of the project as well as the lessons learnt in the previous hydropower plant projects financed in Ethiopia. Due to this additional engagement materialising in an Independent Review of the ESIA carried out by the Promoter and given the great complexity of the issues affecting the project under consideration, the EIB CM considers that – besides the praiseworthy engagement with the complainant shown by the extensive exchange of correspondence dealt with the EIB Communications Department and referred to in Table I - the EIB operational services should have accepted the complainant's request for an additional meeting after the EIB Management Committee had formally authorised the provision of financial assistance to the Promoter. In this context, it could be argued that if such stakeholders' engagement of the EIB would have taken place, the EIB would have indeed focused on a project having reached a higher degree of consideration, not to mention that such engagement might have significantly reduced the extensive and – to a certain extent – excessive flow of correspondence from the complainant to the Communications Department of the EIB.

²³ The first being "THE GILGEL GIBE AFFAIR An analysis of the Gilgel Gibe hydroelectric projects in Ethiopia" issued in February 2008; http://www.counterbalance-eib.org/wp-content/uploads/2011/01/gibe_study.pdf

4.3 The requests for access to information

4.3.1 As regards the info-requests referred to in §§2.3-2.4 of this Report, from the assessment carried out by the EIB CM on the Terms of Reference for the EFTA Study, it stems that the latter is not a third-party document but it is a document co-owned by the EIB, the African Development Bank and the World Bank Group. Moreover, the CM takes note of the fact that, contrary to what prescribed in art. 33 of the EIB PDP, in their message, the EIB services simply referred to the consultation with the co-financiers but did not provide any of the policy-based arguments brought by the co-financiers and justifying the confidentiality of the document requested.

4.3.2 The inquiry carried out by the EIB CM did not cast light over the alleged risk that the disclosure of the Terms of Reference for the EFTA Study could seriously undermine the integrity of the EIB's internal decision-making process insofar as the EIB's services reply of 2 April 2009 does not provide any evaluation of the factors justifying such risk.

4.3.3 Considering that the requested document contains standard clauses which recur in contracts requiring the development of a study on the economic, financial and technical assessment of a project and based on the assessment carried out in §3.3, the EIB CM concludes that the EIB has failed to provide the applicant with clear and understandable information on the kind of decision-making process referred to in §3.3.3 as the requested Terms of Reference did not contain "*opinions for internal use as part of deliberations and preliminary consultations*" within the EIB whose confidentiality is protected by Regulation 1049 and recognised by the CFI in the case illustrated in Table 3. The same can be expressed – *a fortiori* – as regards the info-request of 27 April 2009 whereas it is inconceivable that the disclosure of the requested information (the name of the consultancy appointed and the timeframe within which it should have delivered the study) could anyhow harm the internal decision-making process (which moreover would not be the same as that "menaced" by the previous info-request and therefore would have required additional explications in the EIB's reply of 12 May 2009) of the Bank. It is also to be noted that as shown by case T-403/05, the European Commission did not consider that any exception of such nature could apply to the disclosure of the work plan, the work calendar and the mandate of the working group whose opinions were deemed confidential by the Commission and by the judgment of the Community Court.

4.3.4 As regards the info-requests referred to in §§2.5-2.6, from the information gathered during the inquiry, it appears that in her message of 23 April 2010 the Complainant requested access to the Non-Technical Summary of Independent Review on the ESIA carried out by the Promoter and that in their reply of 7 May 2010, the EIB competent services adequately informed her of the preliminary stage of the Independent Review as well of the absence of such a Summary in the Review. The same can be endorsed for their message of 8 June 2010 whereby the EIB took note of relevant information which – according to the chronology of events provided by the EIB competent services and referred in §2.1 – had not yet been received by the Bank and committed to further discuss the situation with the complainant once more information is available. Moreover, from the information provided in Table 1, footnote 6, it appears that the EIB competent services further engaged with the complainant following the issue of the press release mentioned in §2.1.12. Based on these considerations, the EIB CM concludes that the EIB did not commit an instance of maladministration with regard to the handling of the above-mentioned info-requests and proceeds to discharge the allegations as ungrounded.

5. Recommendations

5.1 When the activity performed by the services of the Bank during the pre-appraisal of a proposed operation exceeds the preliminary screening defined in the Handbook (as for instance in case of further assessment carried out within the framework of Technical Assistance), the EIB shall modulate its stakeholders' engagement, taking into consideration the financial and human resources deployed in the additional assessment, with a view to complying with its standards and practices.

5.2 Given the preliminary assessment carried out by the EIB CM on the Terms of Reference for the EFTA study as well as on the information requested by the Complainant on 27 April 2009, the EIB CM recommends the disclosure of such information as an annex to this Conclusions Report. For that effect, the Bank's services should conduct a new assessment on the basis of the provisions of the Bank's Transparency Policy, in view of disclosure (which can be partial if justified) of the Terms of Reference for the EFTA study.

5.3 As regards the Independent Review of the ESIA study, the EIB CM takes note of the fact that the EIB competent services rejected the Complainant's application due to the preliminary nature of the document but never provided the latter with a copy of the document once it had been formalised. The EIB CM thus recommends that the Complainant is provided with a copy of the Independent Review as an annex to this Conclusions Report.

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EIB Complaints Mechanism
04/05/2011

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04/05/2011