

## National Contact Point for the OECD Guidelines

Specific instance submitted to the Italian NCP on March 11, 2016 by

**Survival International Italia against Salini Impregilo S.p.A.**

### FINAL STATEMENT<sup>1</sup>

#### The OECD Guidelines and the NCP Tasks

1. The OECD Guidelines for Multinational Enterprises (hereinafter the "Guidelines" or GL) are recommendations addressed by governments to multinational enterprises operating in or from their territories. The Guidelines contain non-binding voluntary principles and standards for responsible business conduct in the global context, consistent with applicable laws and internationally recognised standards.
2. They are part of the *OECD Declaration on International Investment and Multinational Enterprises* where adhering Governments engaged to foster an international open and sustainable investment market. Governments recommend to enterprises to voluntarily comply with the Guidelines to contribute to the afore-mentioned goal.
3. To disseminate the GL each adhering government is bound to establish a National Contact Point (hereinafter also "NCP"). The Italian Government established its NCP at the Directorate General for Industrial Policy, Competitiveness, and Small and Medium Enterprises of the Ministry of Economic Development.
4. Thus, the NCPs are the Governments' instrument to contribute to the effective implementation of the GL and they operate according to the principles of visibility, accessibility, transparency and accountability. The NCPs have the task of disseminating the Guidelines and raising business awareness for their implementation as well as to manage the "specific instances" mechanism, i.e. a non-judicial mechanism for settling disputes between a company and a stakeholder, arising from an alleged breach of the Guidelines. This mechanism aims at finding - through the provision of good offices - a concrete solution to the case, compliant with the Guidelines and agreed by the parties.

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<sup>1</sup> The official language of the Final Statement and of the Initial Assessment is Italian. The official language of the OECD Guidelines for Multinational Enterprises is English.

5. In response to the submission of an instance, the NCP assesses whether it merits further examination and, if so, offer its good offices, in other words a forum for dialogue to help interested parties to solve the issues in an efficient and timely manner and in accordance with applicable law.
6. The effectiveness of the specific instances procedure depends on the behaviour in good faith of all parties involved in the procedures. The parties should respond in a timely fashion, maintain confidentiality where appropriate, refrain from misrepresenting the process and from threatening or taking reprisals against parties involved in the procedure, and engage in the procedures with a view to finding a solution to the issues raised.
7. In the present case, the Italian NCP - given the complexity of the matter - considered appropriate to benefit from the scientific advice of experts from ISGI - Institute of International Law Studies of the CNR (National Research Council) in the matters related to international law.

### **Submission of the instance and alleged violations of the Guidelines**

8. On March 11, 2016, the NGO Survival International Italy (Italian branch of Survival International Charitable Trust, hereinafter also "Survivalö or the complainant) submitted an instance to the Italian NCP against the Italian company Salini Impregilo SpA, (hereinafter also "Salini" or the enterprise) on behalf of the indigenous peoples of the Lower Omo Valley, in Southwestern Ethiopia (Mursi, Bodi Kwegu, Kara, and nyangatom Dassanac) and Lake Turkana, in Kenya (Elmolo, Gabbra, Rendille and Samburu) (hereinafter also community or communities).
9. Survival International Charitable Trust advocates for the rights of indigenous peoples worldwide.
10. Salini Impregilo S.p.A. is an Italian industrial group specialised in the construction of major complex works, operating mainly as EPC (Engineering, Procurement and Construction) contractor within the framework of infrastructural projects developed by public and private clients.
11. According to the complainant, the design, construction and management of the Gibe III dam on the Omo River ó carried out by Salini as EPC contractor of the Ethiopian Electric Power Corporation (EEPCo)<sup>2</sup> ó resulted and results in the violation of the fundamental human rights of the above-mentioned communities.
12. Survival ascribes to Salini Impregilo, at the time of the start the construction of the Gibe III dam (2006), the violation of the following recommendations of the 2000 Guidelines:<sup>3</sup>
  - Chapter II (2) and Chapter V (2) (b).
13. Being the works for the construction of Gibe III still ongoing at the time of entry into force of the 2011 Guidelines<sup>4</sup>, Survival also charges the enterprise with the violation of the recommendations of this last edition of the Guidelines:

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<sup>2</sup> See below.

<sup>3</sup> <http://www.oecd.org/corporate/mne/2000oecdguidelinesformultinationalenterprises.htm>

<sup>4</sup> <http://mneguidelines.oecd.org/guidelines/>

- Chapter IV (1); (2); (3); (4); (5) and Chapter VI (2) (b)<sup>5</sup>.

### Position of the complainant

14. The complainant denounces that the construction of the Gibe III dam has caused the disappearance of the natural flood cycle of the river and the substantial depletion of the water reserves necessary for the flood-retreat agriculture and to irrigate the grazing areas, from which the downstream community depend for its sustenance.
15. The complainant also cites estimates<sup>6</sup> according to which the dam and the related irrigation projects are likely to reduce the level of Lake Turkana by 20 meters, with serious consequences on the salinity and, therefore, on drinking water and fish stocks of the basin.
16. This implies, according to the complainant, the violation of the human rights of the communities settled downstream of the dam, as set out in the African Charter on Human and Peoples' Rights<sup>7</sup>, because:
  - the communities were not adequately consulted nor were they asked for their prior consent on the project, in violation of their right to self-determination (art. 20/1 of the Charter);
  - the communities partly lost and partly risk losing their basic livelihoods, previously guaranteed by the annual flooding of the Omo River (art. 21/1 of the Charter);
  - the communities have been denied the right to development, because of the failure to carry out a proper environmental impact assessment of the project and, in this case as well, an adequate consultation process (Art. 22/1 of the Charter).
17. While imputing these violations primarily to the Governments of Ethiopia and Kenya, the complainant invites Salini to assume its share of responsibility, considering the enterprise non-compliant with the duty to respect human rights established in the OECD Guidelines.
18. In particular, according to Survival, the enterprise, even before signing the contract, was (or should have been) aware of the potential impact of the dam on the human rights of affected communities, as well as of the fact that the Governments of Ethiopia and Kenya had not addressed the issue. Therefore, the enterprise should have put in place its own due diligence, and an appropriate corporate policy.
19. Specifically, the complainant states that, in March 2006, an environmental assessment study commissioned by Salini to the Centro Elettrotecnico Sperimentale Italiano S.p.A. - CESI had denied the presence, in the territory of the project, of peoples whose traditional ways of life

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<sup>5</sup> In addition to the violation of several international obligations to protect human rights as enshrined in the *International Covenant on Economic, Social and Cultural Rights*, in the *International Covenant on Civil and Political Rights*, and in the *UN Convention on the Elimination of Racial Discrimination*.

<sup>6</sup> Avery, *Hydrological Impacts of Ethiopia's Omo Basin on Kenya's Lake Turkana Water Levels and Fisheries* [2010]; Avery, *What Future for Lake Turkana?* African Studies Centre, University of Oxford, 2013.

<sup>7</sup> According to Survival, the Public Consultation and Disclosure Plan, published by the Government in 2009, indicates that a limited number of people were consulted during a few meetings in 2007; that no consultation of the downstream communities took place before the beginning of the work; and that no consultation of the people of Lake Turkana took place; so much so that, a report published by Salini in 2010 denied the presence of populations affected by the impact of the dam.

could be compromised by the construction of the plant, Only in 2008, two years after the works had started, Salini had carried out the necessary Environmental and Social Impact Assessment.

20. The complainant also claims the absolute inadequacy of the artificial flooding plan envisaged in the framework of the mitigation measures prepared by EEPCo on the basis of the above-mentioned Social and Environmental Impact Assessment of 2008, since, according to the complainant, it is a contingent and doubtfully effective measure.
21. Survival, holding that the alleged damage done to the indigenous community cannot be compensated in monetary terms, asks Salini to take the following remedial measures:
  - financing the realisation of a proper impact assessment study, including the necessary consultations of peoples and the implementation of the decisions emerging from them;
  - commissioning and paying for a third-party study on the means through which the Government can give practical effect to Article 40(5) of the Constitution of Ethiopia, which stipulates the right of Ethiopian pastoralists to have free land for grazing and cultivation, and the right not to be transferred;
  - leveraging the negotiations with the Ethiopian government for the Gibe IV dam, by making it a condition of the contract that it receives such assistance from the Government as it may reasonably require to put into practice any recommendations that the NCP may make.
22. Finally, in its response to Salini's reply (July 4, 2016), Survival invites the enterprise to check the new room for an intervention from its side, to assist the indigenous peoples, following the recent downsizing of the government's agricultural programmes on the irrigated areas of the river.

### **Position of Salini (the Enterprise)**

23. Through its reconstruction of the facts, Salini rejects any allegation submitted by Survival and claims that it cannot be held responsible for any violation of the GL.
24. In particular, with reference to the duty of due diligence and to the Environmental and Social Impact Assessment of the dam, the enterprise replies that:
  - the due diligence obligation was not provided for in the Guidelines before 2011 and their latest edition cannot be retrospectively applied to the previous period;
  - according to Ethiopian legislation, stakeholder communication and consultation activities are the responsibility of the body that commissions the dam (EEPCo) and not of Salini in its quality of EPC contractor;
  - in compliance with this responsibility, a continuous stakeholder engagement process was initiated in 2006, through meetings and assemblies with representatives, peoples, elderly community and other stakeholders of the Gibe III Project, at federal, regional and local level, and with NGOs operating "on the spot"; further public consultations were conducted during 2007, 2008, 2009, 2010, 2014, 2015 and 2016;
  - in compliance with the Ethiopian environmental legislation, the 2006 EIA had been commissioned to CESI by EEPCo and not by Salini Impregilo; this had been done prior to the award and signing of the Contractual Agreement which was finalised on the basis

of the preliminary project and not of the final project. The EIA was then included in the Contract and only then Salini became aware of it;

- in accordance with Ethiopian legislation, the final project Gibe III was subsequently subjected to an Environmental and Social Impact Assessment (ESIA); EEPCo and the Italian companies CESI S.p.A. And Agriconsulting S.p.A., in collaboration with MDI Consulting Engineers of Ethiopia, prepared the relevant documents for approval by the Ethiopian Environmental Protection Authority (EPA), which was obtained in July 2008; Accordingly, the ESIA documents were released in their final version in January 2009;
- based on the results of the documents included in the Environmental and Social Impact Assessment, the following management plans have been prepared: an Environmental and Social Management Plan; a Resettlement Action Plan; a Public Consultation and Disclosure Plan;
- based on the outcomes of the public consultations, on the ESIA findings and on a dialogue between EEPCo, Salini Impregilo and the designer of the Project, a "controlled flood system" was envisaged as the solution to ensure the positive impact of the dam ó avoiding, at the same time, the catastrophic floods and mitigating the adverse impacts - to be obtained by modulating the flows of the river downstream.

25. Salini also disputes the veracity of the devastating impacts on the Turkana Lake paved by Survival, stating that they are denied by the hydrological study carried out in March 2010<sup>8</sup> and by the continuous monitoring, subsequently carried out on the basin levels.
26. In addition, the enterprise states that the alleged expropriation of lands and natural resources of the downstream communities is related to a systematic irrigation plan run by the Ethiopian Sugar Company, in coordination with the Government of Ethiopia. And that it has nothing to do with it.
27. With regard to the claims concerning Article 40 (5) of the Ethiopian Constitution, Salini states that it does not see how to "ensure" the outcome of this law-making process and influence such process inside a sovereign country.
28. The enterprise replies to the allegation of lack of a human rights business policy by listing the strategies and measures taken to this end, namely: its UN Global Compact membership; the establishment of an integrated framework for specific business policies (including a Code of Ethics and a Sustainability Policy); the adoption of an Integrated Management System in accordance with ISO 9001 (Quality), ISO 14001 (Environment), and OHSAS 18001 (Health and Safety), as well as an Anti-Corruption Compliance System aimed at strengthening the prevention and control structure secured by the company procedures and by the "231 Model"<sup>9</sup> (with a Supervisory Body on its application); the signing of an International Framework Agreement with the Italian and International Construction Unions in 2014; the establishment of a systems for receiving and handling instances and grievances from local stakeholders in all its worksites; the Group's Annual Sustainability Report, in accordance with the GRI (Global Reporting Initiative) standard.

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<sup>8</sup> Salini Costruttori S.p.A. e Studio Pietrangeli s.r.l. *Gibe III impact* í cit.

<sup>9</sup> Organisational and managerial model provided for by Legislative Decree no. 231/2001 "Discipline of the administrative liability of legal persons, corporations and associations without legal personality, pursuant to Article 11 of Law No. 300 of 29 September 2000"

## Outcomes of the Initial Assessment and offer of good offices

29. Upon receipt of the specific instance, the NCP carried out the Initial Assessment to determine whether, on the basis of the criteria set out in the Guidelines<sup>10</sup>, the issue merited further examination and whether it was *bona fide* and relevant to the implementation of the Guidelines.
30. **The ways in which the Initial Assessment has been carried out and its outcomes are reported in the document attached to this Final Statement as an integral part of it.**
31. At first, the NCP decided to communicate the outcome of the initial assessment only to the parties<sup>11</sup>, in the belief that not publishing the document could favour a positive outcome of the case.
32. During that initial assessment phase, due to the conflicting behaviour of the parties, the NCP sent to both parties a letter on September 22, 2016, explicitly recalling their duty to act in good faith in order to facilitate the best balance between transparency and confidentiality in all the stages of the procedure.
33. As a result of the initial assessment, the NCP considered that the case merited further examination, within the limits specified in the above mentioned attached document.
34. In the light of the above, the NCP, by letter of November 8, 2016, offered its good offices to the parties to reach a consensual solution to the dispute.
35. On November 25, 2016, each of the parties, with respective letters, accepted the good offices, although confirming, in substance, their position and the distance of their position from that of the counterparty.
36. In view of the complexity of the case and of the contraposition of the parties, the NCP decided not to carry out the good offices it-self, but, at its own expense, to entrust the conciliation procedure to an impartial and authoritative third party and identified for that purpose a Professor, expert in international law and international dispute resolution.
37. At the meeting of December 5, 2016, the PCN updated its Advisory Committee on the outcomes of the initial assessment and on the opening of the good offices phase.
38. By letter dated December 19, 2016, the PCN convened the parties separately on January 12, 2017 for a meeting devoted to the illustration of the initial assessment and of the terms of reference for the conciliation procedure (forwarded to the parties together with the aforementioned convocation) and to the subscription of the latter.
39. At the meeting of January 12, Salini's representatives signed the terms of reference for the conciliation procedure.
40. Otherwise, on the same day, the representatives of Survival proposed to renegotiate the parts of the terms of reference<sup>12</sup>, that requested the parties:
  - during the procedure, not to advertise the case and not to comment on it in public or on the media;

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<sup>10</sup> 2011 GL, Part II, Commentary on the Implementation Procedures, §§ 25-27.

<sup>11</sup> Being enabled to do so by virtue of 2011 GL, Part II, Commentary on the Implementation Procedures, §§§ 27, 32-33.

<sup>12</sup> First verbally, during the meeting and then, at the request of the NCP, by letter dated January 19, 2017.



- during the procedure and after its conclusion, to respect the confidential nature of the works by avoiding disclosure to third parties or to the public of all the information provided or communicated by the parties, as well as of the enterprise's sensitive information and data and information related to individuals.

According to the complainant, these conditions would prevent it from updating the represented populations on the developments of the procedure [in fact, the text referred to confidentiality towards "third parties" as specified by the NCP] and from continuing to provide information on the conditions of the Omo Valley peoples; while it considered more than ever useful, even in the course of the conciliation between the parties, to let possible the free use of the acts of the proceedings and a public and transparent debate.

41. The NCP replied that it did not consider appropriate to amend the terms of the conciliation procedure since they were consistent with the Guidelines provisions, with the NCPs' practices "in order to facilitate resolution of the issues raised"<sup>13</sup> and with the practices of conciliation procedures. In addition, it noted the anomaly of the amendment proposal, made more than three weeks after the receipt of the documents, during a meeting intended to subscribe to the terms of reference for the conciliation procedure and after the subscription of those terms by the enterprise.
42. Survival decided not to sign the terms of reference for the conciliation procedure and, by letter of January 19, 2017, as requested by the NCP, defined its position confirming the irrevocability of its decision.

### **Closing the phase of assistance to the parties. Final statement**

43. In the light of the above, in accordance with the Procedural Guidance of the Guidelines<sup>14</sup>, the NCP:
  - having acknowledged that Salini accepted his good offices and the terms of reference for the conciliation procedure, in search of a shared solution;
  - having noted the unwillingness of Survival to take advantage of the NCP's good offices and its reluctance to renounce public communication to the extent necessary to facilitate the resolution of the issues raised<sup>15</sup>;

<sup>13</sup> According to 2011 GL, Part II, Procedural Guidance, §, I, C, 4) the NCP "in order to facilitate resolution of the issues raised, take appropriate steps to protect sensitive business and other information and the interests of other stakeholders involved in the specific instance. While the procedures under paragraph 2 are underway, confidentiality of the proceedings will be maintained. At the conclusion of the procedures, if the parties involved have not agreed on a resolution of the issues raised, they are free to communicate about and discuss these issues. However, information and views provided during the proceedings by another party involved will remain confidential, unless that other party agrees to their disclosure or this would be contrary to the provisions of national law". Moreover (2011 GL, Part II, Commentary on the Implementation Procedures, § 38) "it is understood that proceedings include the facts and arguments brought forward by the parties".

<sup>14</sup> 2011 GL, Part II, Procedural Guidance, §, I, C, 3c

<sup>15</sup> The NGO, at the same time of the submission of the instance and during the Initial Assessment divulged the contents of the complaint and continued to campaign through public intervention of various nature on the conditions of the Lower Omo Valley. See, for instance, "Survival International vs. Salini Impregilo. Case overview" [http://www.oecdwatch.org/cases/Case\\_459](http://www.oecdwatch.org/cases/Case_459) (March 14, 2016); "Survival denuncia Salini Impregilo all'OCSE per la diga GIBE III in Etiopia" <http://www.recommon.org/survival-denuncia-salini-impregilo-allocse-per-la-diga-gibe-iii-in-etiozia/> (March 15, 2016); "Etiopia, quella diga che minaccia 400 mila persone lungo il fiume Omo" <http://www.repubblica.it/solidarieta/diritti-umani/2016/03/25/news/etiopia-136266761/> (March 25, 2016); intervention

- expressing its regret about the loss of the real chance offered to the parties - thanks to the work of the NCP and to the costs of this exercise of sitting around a table in search of a shared solution;

has elaborated a draft Final Statement to be submitted to the NCP Committee and to the parties.

44. On April 13, 2017 - the NCP Committee expressed its favourable opinion on that draft Final Statement, without requesting any amendment. Subsequently, in the same day, the draft Final Statement was transmitted to the parties giving them the possibility to send their comments. Both parties submitted their comments to the draft Final Statement within the given terms.
45. Finally, the NCP, taking into account the observations made by the parties, adopted this Final Statement.

## Examination of the case

### Premise

46. The Gibe III Dam Project was developed by the Ethiopian Electricity Power Corporation, a 100% government-owned utility responsible for the generation, distribution and sale of electric power in Ethiopia. Investment in the energy sector has been one of the main drivers of the country's economic growth over the last few years. Energy generation capacity tripled in 2008 and today about 90% comes from hydroelectric sources, that is, renewable energy sources.
47. The Gibe III dam was built within the Gibe and Omo rivers (the first one flows into the second, hereinafter also "Omo Basin"), about 450 km south of Addis Ababa and includes a 1,870 MW power plant with a 240-meter high dam, which creates a water reservoir with an area of approximately 200 Km<sup>2</sup>. Downstream of the dam, the Omo River flows into the Turkana Lake in Kenya.
48. Salini Impregilo has been awarded the project by the contractor on the basis of a turnkey contract signed on July 19, 2006 with EEPCCo and governed by the law of the Federal Democratic Republic of Ethiopia<sup>16</sup> (hereinafter also FDRE).
49. The Gibe III dam was inaugurated on December 17, 2016.

### Scope of the issues examined

50. The case brought to the attention of the NCP is **dated**, since the work was entrusted to the enterprise in July 2006 and the construction was completed in 2016 (see below).
51. In the initial assessment (see attached document), the NCP clarified that:

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at the Conference: *Il secolo dei rifugiati ambientali?* on the theme *Il caso della Valle dell'Omo* entitled: *Quando governi, aziende e progetti di sviluppo violano il diritto dei popoli indigeni al consenso libero, previo e informato* [http://www.meltingpot.org/IMG/pdf/il-secolo-dei-rifugiati-ambientali\\_programma.pdf](http://www.meltingpot.org/IMG/pdf/il-secolo-dei-rifugiati-ambientali_programma.pdf) (September 24, 2016); *Etiopia: inaugura oggi la catastrofica diga Gibe III* <http://www.survival.it/notizie/11546> (December 17, 2016); etc.

<sup>16</sup> Letter from the Representative of the Italian Ministry of Foreign Affairs in the NCP Committee to the Chair of the NCP dated July 25, 2016, in response to the request for information by the NCP about the GIBE III project. For more information about the project, see the EPPCCo website <http://www.gibe3.com.et/brief.html>



- concerning **the applicability of the 2011 or of the 2000 edition of the GL**, the activities necessary for the realisation of a work must be considered in the light of the provisions and principles of the Guidelines in force when they take place;
- the violations alleged by Survival arising from the **right of self-determination of indigenous peoples** and the **right to development** are to be regarded as not meriting further examination.

52. Lastly, the request of Survival to carry out a new ESIA in order to remedy the alleged violations of the GL cannot be taken into account, in the light of the factual circumstances, since it is obviously late.

*Consultation of the communities affected by the construction of the dam, on the basis of the 2000 Guidelines and of the 2011 Guidelines - Chapter "Human Rights"*

53. Both under the 2000<sup>17</sup> GL and under the 2011<sup>18</sup> GL, businesses are called upon **to respect human rights to the maximum extent possible**<sup>19</sup>.
54. The analysis of the international standards to which the GL refers, shows, in particular, the existence, of the **right of peoples to dispose freely of their natural resources**. This results in the related obligation of obtaining the **Free, Prior and Informed Consent** of indigenous peoples affected by the effects of works of high environmental and social impact<sup>20</sup>.
55. Therefore, in the light of the Guidelines and of the consolidated practice of other NCPs<sup>21</sup>, it should be considered that **the timely and appropriate communication and consultation of the communities affected** by investment projects should be ensured not only by the government of the State to which the population belongs or by the contracting state authorities, but also - in case of partial or total lack of assurance - by the enterprise. In those cases where the (even if potential) negative impact on human rights is **directly linked** to the enterprise

<sup>17</sup> 2000 GL Part 1, Chap. II General Policies, § 2: enterprises should "Respect the human rights of those affected by their activities consistent with the host government's international obligations and commitments". Also Commentary 4 to Chap. II " (i) **while promoting and upholding human rights is primarily the responsibility of governments**, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments' international obligations and commitments".

<sup>18</sup> 2011 GL, Part 1, Chap. IV Human rights, §, 1: enterprises should "Respect human rights, which means they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved". Comment 37 clarifies that "(...)Respect for human rights is the global standard of expected conduct for enterprises independently of States' abilities and/or willingness to fulfil their human rights obligations, and does not diminish those obligations". See also Comments 38 & 41 to Chap. IV.

<sup>19</sup> This statement refers to respect for human rights as a universal norm and derives from the combined reading of the 2000 and 2011 GL in the parts cited in the preceding notes.

<sup>20</sup> 2001 GL, Part 1, Comment 40 to Chap. IV, par 40 provide for the respect for human rights in particular cases such as the one in which the affected populations are indigenous peoples. "(...)pending on circumstances, enterprises may need to consider additional standards. For instance, enterprises should respect the human rights of individuals belonging to specific groups or populations that require particular attention, where they may have adverse human rights impacts on them. In this connection, United Nations instruments have elaborated further on the rights of indigenous peoples; persons belonging to national or ethnic, religious and linguistic minorities; women; children; persons with disabilities; and migrant workers and their families".

<sup>21</sup> UK NCP Final Statement, related to the case Survival International vs. Vedanta Resources plc, September 25, 2009.; Norway NCP Final Statement related to the case The Future in Our Hands (FIOH) vs. Intex Resources ASA and Mindoro Nickel Project, November 28 2011; Sweden NCP Final Statement related to the case Jijnjevaerie Saami village vs. Statkraft SCA Vind AB (SSVAB), February 9, 2016.

operations, products or services by its business relationship the enterprise exercise its leverage to influence the entity causing the adverse impact to prevent or mitigate that impact.<sup>22</sup>

Consultation of the communities affected by the construction of the dam, on the basis of the 2000 Guidelines and of the 2011 Guidelines - Chapter "Environment"

56. Under the "Environment" chapter of the Guidelines, businesses are called upon to arrange timely an appropriate assessment of the environmental impact of their operations and of the work to be realised, on environment, health and safety.<sup>23</sup> Also with regard to this potential impact, they must undertake an appropriate and timely communication and consultation process with the communities concerned<sup>24</sup>.
57. A series of sources and studies ó submitted both by the complainant and by the enterprise - highlighted the risks of impacts of the Gibe III dam on the environment and the life of the populations of the Omo Valley.
58. In 2006, under EEPCo's mandate, the firm Pietrangeli had completed the dam design, which included an EIA, drafted by CESI. At the restricted procedure for the assignment of works, EEPCo asked Salini to bear the costs of such preliminary project design, including the EIA.
59. This document was then incorporated into the Environmental and Social Impact Assessment<sup>25</sup> carried out in accordance with the Environmental and Social Legislative Framework of the FDRE and was entrusted to CESI S.p.A., in collaboration with MDI Consulting Engineers of Ethiopia on behalf of EEPCo. The ESIA, which takes into account both the environmental and social and economic impact of the dam, was approved by the Ethiopian Environmental Protection Authority in 2008 and was published in 2009. The complementary documents of the ESIA also included a study carried out by AGRICONSULTING, in collaboration with MDI Consulting Engineers of Ethiopia, which assesses the environmental and socio-economic impacts of the dam on the territories and populations of the Lower Omo Valley<sup>26</sup>.

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<sup>22</sup> See, specifically 2011 GL, Part I., Chap. IV (3) enterprises should "Seek ways to prevent or mitigate adverse human rights impacts that are directly linked to their business operations, products or services by a business relationship, even if they do not contribute to those impacts"; Comment 43 to § 3 ó3. Paragraph 3 addresses more complex situations where an enterprise has not contributed to an adverse human rights impact, but that impact is nevertheless directly linked to its operations, products or services by its business relationship with another entity. Paragraph 3 is not intended to shift responsibility from the entity causing an adverse human rights impact to the enterprise with which it has a business relationship. Meeting the expectation in paragraph 3 would entail an enterprise, acting alone or in co-operation with other entities, as appropriate, to use its leverage to influence the entity causing the adverse human rights impact to prevent or mitigate that impact. "Business relationships" include relationships with business partners, entities in its supply chain, and any other non-State or State entity directly linked to its business operations, products or services. Among the factors that will enter into the determination of the appropriate action in such situations are the enterprise's leverage over the entity concerned, how crucial the relationship is to the enterprise, the severity of the impact, and whether terminating the relationship with the entity itself would have adverse human rights impactsó.

<sup>23</sup> 2011 GL, Part I, Chap. VI, § 3 and, already, 2000 GL, Part I, Chap. V, §3; enterprises should "Assess, and address in decision-making, the foreseeable environmental, health, and safety-related impacts associated with the processes, goods and services of the enterprise over their full life cycle with a view to avoiding or, when unavoidable, mitigating them. Where these proposed activities may have significant environmental, health, or safety impacts, and where they are subject to a decision of a competent authority, prepare an appropriate environmental impact assessmentó.

<sup>24</sup> 2011 GL, Part I, Chap. VI, §2b; and already 2000 GL, Part I, Chap. V, §2b.: enterprises should "Engage in adequate and timely communication and consultation with the communities directly affected by the environmental, health and safety policies of the enterprise and by their implementation".

<sup>25</sup> Gibe III ó Environmental and Social Impact Assessment 300 ENV R CS 002 C - A9003099

<sup>26</sup> GIBE III EIA Additional study on Downstream impacts 300 ENV R AG 003 B.

60. In the framework of these impact assessments, consultations with the representatives of the downstream communities<sup>27</sup> have been carried out; EEPCo on its institutional website provides a summary of it<sup>28</sup>, also with reference to the populations of the Lower Omo Valley and the consultations carried out after the 2009 ESIA in execution of the Public Consultation and Disclosure Plan (see below).
61. Based on all the above, it is evident that, **after an initial lack of information, several forms of consultation have been implemented since 2007** and, in a more structured way, from 2008-2009 to date.

### Mitigation Measures

62. Following the specialist studies carried out during the years and the 2009 ESIA, EPPCo adopted a number of plans containing mitigation measures:
- An **Environmental and Social Management Plan (ESMP)**, in January 2009, elaborated with the collaboration of Salini. The ESMP includes controlled water releases among the remedial measures ó as proposed not only by experts, but also by the consulted populations<sup>29</sup>.
  - A **Resettlement Action Plan (RAP)**, which describes the EEPCo commitments in terms of redeployment and compensation of the community.
  - A **Public Consultation and Disclosure Plan**.
63. The **ESMP**<sup>30</sup> (point a) burdens EEPCo, the EPC contractor (Salini) and other stakeholders with several mitigation, compensation and social development measures for local communities, in accordance with what was required by the ESIA. Also in the implementation phase of the plan, Salini has put in place a number of actions with social scope in the territories<sup>31</sup>.
64. The ESMP identifies, among the main mitigation measures, the controlled water releases that have been implemented through the **Artificial Flow Releases Plan**. Indeed, the central element of all ESIA's and analysis of the impacts of Gibe III on the communities of the Lower Omo Valley is the possibility for these populations to continue to provide water for flood-retreat agriculture and for the growth of the grass needed for pastures<sup>32</sup>. If, on the one hand, the 2006 EIA describes the possible impact of the dam on the annual floods of the Omo River and recommends the use of artificial flooding, on the other, the 2009 VIAS also illustrates the positive effects of this work, intended to generate a substantial regularisation of the flow of water in the Lower Omo Valley and a consequent environmental and social stabilisation of the

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<sup>27</sup> Salini, in its replies refers to the following EPPCo documents: "Gibe III Public Consultation and Disclosure Plan (PCDP)"; "Gibe III Hydro Electric Project ó Presentation on Environmental and Social issues" Further consultations carried out in 2009, 2011, 2014 and 2015.

<sup>28</sup> <http://www.gibe3.com.et/public.htm>

<sup>29</sup> In the ESMP it is recommended to "release controlled floods during the rainy season in order to recreate, even with a shorter duration, the natural hydrological regime downstream of the plant".

<sup>30</sup> [http://www.gibe3.com.et/ESIA20Compresed/GibeIII\\_Environmental&SocialManagement%20Plan1.pdf](http://www.gibe3.com.et/ESIA20Compresed/GibeIII_Environmental&SocialManagement%20Plan1.pdf)

<sup>31</sup> Salini, Additional Brief Reply of June 23, 2016, Exhibit D ó 1, *Report on activities performed by Salini Impregilo in favour of the communities of the Project areas*. Activities in the area range from building roads to supporting educational and training activities for local communities.

<sup>32</sup> See ESIA 2009 § 0.6.3.

- area, to allow the maintenance of local traditions; provided that **appropriate mitigation measures are taken permanently**<sup>33</sup>.
65. EEPCo has envisaged the implementation of the **Artificial Flow Releases** (hereinafter also "AFR")<sup>34</sup> in 2016 and Salini has supported EEPCo in the definition of a structured plan for:
- i. implementing of the AFRs from a technical point of view;
  - ii. conducting wide-range consultations with the downstream communities and their elective leaders in defining the goals for flow releases;
  - iii. developing the stakeholder participation and the institutional support for releases;
  - iv. creating a monitoring programme to evaluate the effectiveness of the flow releases;
  - v. collecting feedbacks for an adaptive management of the future flow releases.
66. With regard to the Artificial Flow Releases Plan, Salini has produced evidence of the consultations that have been carried out<sup>35</sup>; such consultations have shown the appreciation of the communities concerned for the Artificial Flow Release Plan, which can allow them to continue with agricultural activities, whether it is flood-retreat or not, and with fishing and facilitating the development of the territories<sup>36</sup>. Also some risks associated with the releases have been identified and they require adequate preparation and an efficient reporting and information system<sup>37</sup>.
67. The water release activities continued beyond October 2016, as shown by the EEPCo monitoring document "Artificial Flow Release - Monitoring Activities - Update February 2017", prepared with the support of Salini and Pietrangeli.
68. That same document shows that the Release Plan requires an adequate infrastructure and a plan for the completion of artificial flow release operations based on the following essential **follow-up elements: consultation, monitoring and evaluation, and adaptive management**.
69. With reference to the **Resettlement Action Plan (RAP)** for the community (point B), this is strictly a responsibility of EEPCo<sup>38</sup>.
70. With reference to the **Public Consultation and Disclosure Plan** (point c), see paragraphs from 57 to 60.

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<sup>33</sup> *“The downstream flow regularization, following project implementation, will represent in general terms an overall long-term environmental and human stabilizing and developmental factor, the prevailing social settings and traditional cultural context as well as the present pattern of utilization of natural resources in the Lower Omo would not continue to take place unhindered to the current level and with the same (traditional) modalities if appropriate mitigation measures, as planned, are not deployed and secured on a permanent basis.”*

<sup>34</sup> Salini, Additional Brief Reply of June 23, 2016, Exhibit E, *Gibe III Activity schedule on AFR on MGT and Mnt*

<sup>35</sup> Salini, Brief Reply of May 17, 2016, Exhibit H, *October 2015 Environmental and Social Monitoring/Management Report*. Additional Brief Reply of September 23, 2016: Consultations carried out in 2016 with regard to the Artificial Plants Release Programme (see Exhibits F-1, F-2 e F-3): *“52 Kebeles (i.e. the last government administration at community level) in four administrative Woredas (namely Selamago, Nyangatom, Hamer and Dasenech) of the South Omo Zone of SNNPR (the Southern Nations, Nationalities and People's Regional State) [ ] by the end of August 2016, a total of 169 consultations were held with 3,441 people from those Kebeles. Namely, 2,143 community members were consulted, 508 women, 176 youths, and 240 elders and clan leaders. Furthermore, 310 Kebele officials and another 64 Woreda, Zonal, and Regional officials were consulted. In addition, 9 NGOs operating in the Lower Omo Zone have been consulted.”*

<sup>36</sup> Salini, Brief Reply of May 17, 2016, Exhibit F-2.

<sup>37</sup> Among the risks emerged, the most significant refers to (i) about 8,500 people with their nearly 40,000 cattle living in 19 small islands in the Omo River delta, which did not move before the rainy season began (as they normally do) due to rumors circulated about the failure to execute AFRs; (ii) some pumping installations (for irrigation) along the Omo River which could be damaged.

<sup>38</sup> See: Gibe III 6 Environmental and Social Impact Assessment, cit., p 23; Gibe III - Environmental and Social Management Plan, p. 165

### Human Rights of the Peoples of Lake Turkana

71. According to the complainant, the peoples of Lake Turkana were not consulted as well about the changes the dam would have produced, nor was their consent asked, in violation of the human rights enshrined in art. 20, 21 and 22 of the African Charter.
72. First of all, there is a clear divergence of views between the parties, not only on the accomplishment of the consultations of those populations, but also on the existence of a long-term negative impact of the dam on the areas and populations of Lake Turkana and this divergence is also found in the studies respectively deduced to support their position.
73. On the other hand, the issue of the use of rivers crossing different States is ruled by international treaties on waterways. In situations similar to the one in question, international law confers on the State to which affected populations belong the power to act towards the State which governs the river upstream, where the work is realised.
74. There is no news about any Kenya's action in defence of its populations against Ethiopia<sup>39</sup>. In any case, it is legitimate to doubt that the enterprise has the power and the real chance of exercising its influence in seeking to obtain some sort of informed consent of the population of a State which is not the one with which it has signed the contract.
75. **On the basis of these considerations, the NCP has decided not to further examine this issue, which falls outside its competences.**

### **NCP recommendations to the parties**

76. In the light of the above, the NCP addresses to the parties the following recommendations:

#### NCP recommendations to Salini Impregilo S.p.A.

77. On the basis of the reconstruction of the case, the NCP considers that an artificial flow release plan is crucial in order to ensure that indigenous peoples have free disposal of the resources necessary for their subsistence and to maintain their traditional agriculture, livestock farming and fishing practices. Therefore, the NCP recommends to Salini to continue to provide the needed technical support and to do everything that it can so that EEPCo carries out the activities foreseen in the Artificial Flow Release Plan according to the recommendations for the follow-up and, in particular, ensuring, all over the process, the consultation of the downstream communities.
78. In doing so, Salini can continue in the way it indicated, namely "*utilizing its leverage to monitor the status of the Downstream Communities, in addition to foster the implementation of the mitigation measures in their favour, according to the provision of the 2011 Guidelines and the UN Guiding Principles*".

#### NCP recommendations to Survival International Italia

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<sup>39</sup> The only known relations between the two states date back to January 13, 2017 when they agreed on the Terms of Reference to carry out a wide Strategic Environmental Assessment study (SEA) on the Lake Turkana Basin, as required by the UNESCO World Heritage Committee's Decision 36 COM 36 COM 7B.3.

79. The NCP recommends to Survival, for the future, to seize the opportunities of dialogue that are concretely provided by the specific instances mechanism, also in the interests of the populations it represents.
80. In addition, the NCP invites Survival to carefully consider the purpose of the GL procedure in elaborating and managing any future instance to the NCPs, taking into account that the mechanism is aimed to offer good offices to foster dialogue and reach an agreement between the parties.

### **Conclusions**

81. This Final Statement closes the procedure opened by the submission of the specific instance on March 11, 2016.

Rome, June 8, 2017

The Director General  
President of the NCP  
(Stefano FIRPO)