

NAM THEUN 2 Hydroelectric Project
Laos

Complaint SG/E/2016/03

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

INITIAL ASSESSMENT REPORT

18 August 2017



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The EIB Complaints Mechanism

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

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

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

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

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

The Initial Assessment Report

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

- clarify the concerns raised by the Complainant(s), to better understand the Complainants' allegations and the views of other project stakeholders (the Bank's Services, project promoter, national authorities, etc.) and establish a position on the situation in the field;
- understand the validity of the concerns raised for those projects that cause substantial concerns regarding social or environmental outcomes and/or seriously question the governance of EIB financing;
- assess whether and how the project stakeholders (e.g. Complainants, the Bank's services and the project promoter) could seek resolution in respect of the allegations;
- determine if further work by the EIB-CM is necessary and/or possible to resolve the issues raised by the Complainant(s) (such as, but not limited to, investigation, compliance review, facilitation or mediation between the parties).

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INITIAL ASSESSMENT REPORT

EXECUTIVE SUMMARY

In April 2016, the Complainant brought a comprehensive list of allegations to the EIB-CM in relation to the Nam Theun 2 Hydroelectric project concerning (i) the EIB's reporting on the project to the European Commission, the European Parliament, the Council and the public; (ii) the EIB's compliance with applicable transparency requirements; and (iii) the EIB's monitoring of the project's compliance with the Bank's environmental and social standards, including respect of human rights, and with the provisions of the Finance Contract.

In this context, highlighting an observed (by the Complainant) variation in detail and the different issues and concerns reported by the various financing institutions, also in relation with the Panel of Experts (PoE) reporting to the Government of Laos (GoL), the Complainant addresses the alleged failure by the EIB to properly report on the results and impacts of the project, and challenges the Bank's monitoring of the project's compliance with the Bank's environmental, social and human rights standards.

The Complainant requests that the EIB act to ensure the project's compliance with the Bank's environmental and social standards, the Concession Agreement and universal Human Rights, and asks the EIB-CM to review the accuracy and objectivity of information related to this operation provided to the European Commission, the Council and the European Parliament.

The NAM THEUN 2 Hydroelectric project concerns an approximately EUR 1bn 1.070 MW hydropower plant, in the mountainous centre of Laos, predominantly designed for the exportation of power to Thailand. The Bank's financing supports half of Lao PDR's 55 equity share (ergo $\pm 25\%$) in the project company, a special purpose vehicle to build, own and operate the project under a 25-year Concession Agreement (CA), which is the key document for the building and operation of the project as well as for detailing compensation and other needs of resettlers and other people affected by the project.

The EIB-CM has performed a desk review of the available documentation, including the reports referred to by the Complainant, and has noted the variations between the information, on the project's reported in publicly available reports produced by several sources, which are part of the project's structure (PoE, IAG and LTA), and the Bank's own reporting. These variations would possibly result from the differences in the reporting objectives and scopes of various agencies.

In this context, it will be key to review in detail the Bank's due diligence in respect of the project and its monitoring of project implementation.

Therefore, the EIB-CM proposes to address and investigate (i) the Bank's responsibilities to verify the project's compliance with its environmental and social standards, including those arising from the Finance Contract and the Project Agreement; (ii) the Bank's compliance with its own reporting obligations and

accountability responsibilities and (iii) the Bank's compliance with its own policies on providing information, transparency and access to information and documents.

INITIAL ASSESSMENT REPORT

NAM THEUN 2 Hydroelectric project

Complainant: CEE Bankwatch Network (Anna Roggenbuck)

Date received: 6 April 2016

Project Status: Signed (FC + Project Contract & amendments) / Disbursed / under monitoring

Board Reports: 13 April 2005

Contract amount: up to EUR 45m (equivalent of USD 55m), project cost EUR 998m/USD 1 291m

1. ALLEGATIONS

In April 2016, the Complainant brought a comprehensive list of allegations to the EIB-CM in relation to the Nam Theun 2 Hydroelectric project concerning (i) the EIB's reporting on the project to the European Commission, the European Parliament, the Council and the public; (ii) compliance with applicable transparency requirements; and (iii) the EIB's monitoring of the project's compliance with the Bank's environmental and social standards and contractual commitments.

SUMMARY OF COMPLAINT RECEIVED IN APRIL 2016

1. Failure to properly report on the results and impacts of the project to the European Commission, the European Parliament, the Council and the public.

The Complainant is of the view that the Bank has failed to properly report on the implementation of the social and environmental programmes (mitigation and compensation measures) related to the project, both to other EU institutions and to citizens. The Bank is alleged to have failed to report objectively by hiding and overlooking the project's non-compliance and its negative impacts and existing risks (such as the inability to close the Resettlement Implementation Period - RIP), which might have prevented the European Commission, the European Parliament and the Council from properly assessing the operation's contribution to meeting the Community's relevant external policy objectives.

2. Failure to comply with transparency requirements applicable to the Bank, including the Council Decision of 22 December 1999 (2000/24/EC) the Aarhus Regulation¹, the Bank's own Information Policy Statement of 2002 and existing policies on access to information. This failure is extended to the EIB Group Statement on Corporate Social Responsibility of May 2005 and other public commitments made by the Bank in the press release of 26 April 2005 for the Nam Theun 2 project,

¹ The Complainant refers to the Aarhus Convention and to the obligation of, i.a. the Bank, under the Aarhus Regulation, Art 4, that environmental information "relevant to their – i.e. the Bank's – functions" shall be organised "with a view to its active and systemic dissemination to the public".

which informed of established cooperative arrangements between the financiers, e.g. regular consultative meetings for public scrutiny, transparency and accountability.

In the Complainant's view the Bank has failed to comply with the above laws and internal policies and declarations because the Bank has disclosed only the project summary, which presented the project at the appraisal stage and which has not been updated since.

On 8 April 2015 the Complainant requested environmental and social information. On 27 October 2015 the Complainant asked the Bank to disclose the "NT2PC RIP - Closure Assessment, LTA Review Meeting – Findings" from November 2014 (Lenders' Technical Advisory Report) and previous LTA Review reports. On 19 January 2016 the Complainant filed a confirmatory application for documents. On 26 February 2016 the Complainant filed an inquiry about the status of the confirmatory application regarding the documents concerning the Nam Theun 2 project in Laos.

The Complainant is of the view that the Bank has violated its rules on access to documents in line with the Bank's Transparency Policy and has simply ignored the Complainant's request for access to documents for four months.

3. Failure to ensure the project's compliance with the Bank's environmental and social standards, including respect of human rights, and with the provisions of the Finance Contract;
 - 3.1 failure by the borrower to implement the Revenue Management Programme in line with the Finance Contract;
 - 3.2 failure of the project to comply with the EIB's environmental standards and thus failure to protect the environment, nature and biodiversity;
 - 3.3 failure of the project to comply with the EIB's social standards and failure to protect the Human Rights of impacted people;
 - 3.4 failure of the project to comply with the EU's priority objectives and thus failure to comply with the mandate given to the EIB.

Concerning 3.1, the Complainant claims that the Bank does not have evidence of the amount of revenues generated or of the amount of revenues spent on social and environmental programmes in line with the Concession Agreement (CA) and the Finance Contract. The Complainant alleges that the Bank should have collected evidence and in the event of that evidence not being available, the Bank should have imposed penalties on the borrower – the Government of Laos (GoL). Instead, the lack of intervention by the EIB led to improper financing for social and environmental programmes, contrary to what was agreed in the Finance Contract and the CA, and this is alleged to have caused the Resettlement Implementation Period to be extended.

Concerning 3.2, the project is alleged to have failed, amongst other things, to protect Nam Theun watershed areas and safeguard biodiversity, the fishing population and forestry.

Concerning 3.3, the project is alleged to have undermined the human rights of individuals in the impacted communities. The Complainant alleges that the Bank did not envisage proper intervention measures or

intervene early enough to support and ensure the project's compliance with the Finance Contract and its own environmental and social standards.

Concerning 3.4, in the Complainant's view the project is not consistent with the priority objectives of the EU, e.g. as a consequence of the improper project appraisal which did not account for, amongst other things, the country analysis carried out by the European Commission – the EC Laos PDR Country Strategy Paper 2002-2006. This led to unsatisfactory implementation of the project's social and environmental programmes.

CLAIM

The Complainant requests:

- that the European Investment Bank act to ensure the project's compliance with all environmental and social standards, the CA and universal human rights, among other things by
 - providing financial and technical assistance to bring the project into compliance;
 - seeking assistance and advice from other relevant EU institutions and international and local stakeholders on how to secure the fundamental rights of people impacted by this project and how to help restore people's livelihood;
 - disclosing relevant environmental and social information documents for this project,
 - reporting to the other institutions on this project, including on its compliance with the EU's objectives of external cooperation,
 - reviewing, evaluating and improving its own practices and procedures, notably as related to human rights and large dams,
 - improving its due diligence regarding the project's potential environmental and social impacts.
- that the EIB-CM review the accuracy and objectivity of the information provided to the Bank's Board of Directors in relation to this operation:

2. THE PROJECT AND THE BANK'S FINANCING

- 2.1 The NAM THEUN 2 Hydroelectric (NT2) project concerns the construction and operation of a reservoir-type hydropower plant located in the mountainous centre of Laos, with a generating capacity of 1 070 MW. Some 95% of the electricity produced by the project is destined for export to Thailand, thereby generating significant revenues for the Lao People's Democratic Republic (Lao PDR²). The borrower of the Bank's loan is Lao PDR, and the purpose of the Bank's loan is to support Lao PDR's equity contribution in the company promoting the project, the Nam Theun 2 Power Company (NTPC), in which Lao PDR holds 55% (EIB financing is 25% of equity). NTPC is a special purpose company created to build, own and operate the NT2 project under a 25-year Concession Agreement (the CA). Shareholders in NTPC include Electricité de France - EDF (35%, together with the GoL (25%), the lead

² Lao's official name is the Lao People's Democratic Republic or Lao PDR. The Government is normally referred to as the Government of Laos or GoL.

promoter of the project), Electricity Generating Public Co Ltd (Thailand) 25% and the Italian-Thai Development Public Co Ltd 15%.

- 2.2 The investment cost of the project was estimated at EUR 998m (or USD 1 291m). On 13 April 2005 the Board of Directors of the Bank approved a loan of up to EUR 45m (equivalent in USD up to USD 55m) to finance up to 5% of the project cost. On 26 April 2005 the Bank signed a Finance Contract with the GoL and a Project Agreement with the NTPC.
- 2.3 The CA³ grants the NTPC a concession to develop, own, finance, construct and operate the NT2 hydropower plant for a period of 25 years from the date of commercial operations under the Power Purchase Agreement with the Electricity Generating Authority of Thailand (EGAT). The CA was signed in 2002 and the Power Purchase Agreements were signed in November 2003. The project is 'embedded' in a comprehensive series of contractual arrangements and commitments around the CA, covering the shareholdings, the technical services and agreements, the construction, and a series of lending agreements. The lending agreements involve notably the Asian Development Bank (ADB), Agence Française de Développement (AFD), the International Development Agency of the World Bank (IDA) and the EIB for the GoL's equity stake and a series of other, supranational and commercial banks for the debt financing component.
- 2.4 Construction of the NT2 project was completed in 2010 and it is currently in commercial operation.
- 2.5 The project was expected to be the largest single contributor to GDP and to the GoL's fiscal revenues. To ensure that the project's revenues to the GoL will effectively serve the long-term development of the country, the GoL has undertaken structural reforms to establish, with IFIs oversight, a revenue management framework that will help ensure that the project's revenues are used in a transparent and efficient manner, to reduce poverty, sustain development and improve the environment.
- 2.6 The physical and technical implementation of the hydropower project is being supervised by professional engineering firms and individual experts with relevant expertise in environmental and social aspects of this sector under contract with the NTPC and GoL. A key factor was the establishment, in 1997 through the CA, of the *International Environmental and Social Panel of Experts* (PoE), which reports directly to the GoL and the International Advisory Group (IAG) which reported to the World Bank and the *Lender's Technical Advisor* (LTA), a group of experts that reports to the other lenders.

The allocation of responsibility between NTPC and the GoL for environmental and social mitigation measures is clearly defined in the management plans and specialised units for implementation and monitoring have been established⁴. Mechanisms are also in place to ensure the participation of affected people in the process.

- 2.7 In the view of the PoE, the CA is a key feature of the NT2 project. It is an innovative document⁵ which details for the first time a programme of compensation and development for the people downstream

³ Made between the GoL and the Nam Theun 2 Power Company Ltd (NTPC).

⁴ NTPC is responsible for implementation of the Environmental Assessment and Management Plan and the Social Development Plan. The GoL is responsible for the Watershed Management Plan including management of the National Protected Area.

⁵ 24th Report of the PoE, p.2, § 1.3 Executive Summary.

of a large dam, covers the needs of the resettlers, initiates a health programme for all people affected by the project which has proved highly effective, creates a valuable precedent in setting aside long-term funding for a protected area - the NT2 catchment - as an offset for the loss of land and biodiversity to inundation and resettlement requirements, and establishes an ongoing contribution to the costs of maintaining the impressive project infrastructure well into the future. The CA defines a Resettlement Period (RIP) as commencing with implementation of the Resettlement Process, and ending when, on advice from the PoE, the Resettlement Objectives and Resettlement Provisions have been achieved.

3. FORECAST ENVIRONMENTAL IMPACT

- 3.1 The main overall final environmental impacts of the project had been evaluated as significant but extensively mitigated and compensated through a large number of measures. As a result the EIB considered that the project qualified as environmentally and socially acceptable subject to the mitigation and compensation measures being implemented.

This must be seen within the context of the main impacts that were forecast to be: disruption to wildlife habitats and potential loss of biodiversity - including a number of globally threatened species - and the loss of approximately 1 000 ha of productive agricultural land; the transfer of the Nam Theun river to the Xe Bang Fai (XBF) was expected to cause changes in the aquatic ecosystem, a reduction in fish stocks, loss of riverbank agriculture, river bank erosion, downstream flooding and deterioration in water quality. The EIA *"confirms⁶ that the project does not have any significant negative impact on protected areas. Cumulative impact studies indicate that there is no significant impact on the protected areas"*.

- 3.2 Social impacts concerned: the resettlement of 1 660 households, approximately 9 160 people, from the reservoir and construction areas, mainly from ethnic minority groups; the partial loss of livelihoods and protein intake for approximately 70 000 people due to reduced stocks of fish and other aquatic resources; loss of forest resources and agricultural land and flooding; and health and cultural risks affecting the local population due in part to the influx of more than 14 000 workers and camp followers.
- 3.3 Environmental and social management plans for the project proposed *'extensive measures to mitigate negative impacts'*. These management plans included: long-term watershed protection and management systems for the Nakai Nam Theun National Protected Area and associated corridors; compensatory forestry to offset the loss of primary forest in the reservoir; livelihood development initiatives for people to be resettled with clearly specified poverty reduction objectives; reservoir fisheries managed by local people; extensive independent monitoring; and performance bonds for non-compliance. A pilot resettlement village and demonstration farms were established to provide a focus for consultations on the design of the main resettlement programme. Other measures included compensation for livelihood losses resulting from the river's diversion, a limited release of reservoir water to the Nam Theun, operating rules to reduce the flood risk, and provisions to mitigate construction and health impacts.

⁶ Quoting from the 2005 Board report, p8.

3.4 Extensive environmental and social monitoring and mitigation or compensatory measures have been built into the project through the CA and a group of bodies has been established with the objective to oversee the project's implementation:

- The Panel of Environmental and Social Experts (PoE) referred to in § 2.5, reporting to the GoL, will advise on environmental and social issues. The PoE is a Standing Body for the period covered by the CA – i.e. until 25 years after the commercial operations of the project have started – and normally visits the Lao PDR once or twice a year (or more often at the GoL's request). The latest visit took place in April/May 2015 and its reports are publicly available.
- The International Advisory Group (IAG) is a group of experts chosen for their reputation and expertise and was appointed in 1997 as an independent source of advice on potential issues and problems arising from the project for the World Bank's President. It has been tasked with advising on "environmental management and social impacts of the Project, civil society participation in Project implementation, progress in building institutional capacity within relevant GoL agencies, management of revenues originating from the sales of electricity generated by the Project, and other issues of governance". The IAG first reported on the project preparation phase which was focused on project planning and then on the construction and commissioning of the project. It looked mainly at poverty alleviation, national and local development, capacity building, and environmental and social objectives. Once the project became fully operational in 2010, the IAG's role came to an end.
- The role of the IAG was taken over by the "Lender's Engineer" or the *Lender's Technical Advisor* (LTA) advising the World Bank's President on implementation of the project, covering revenue management arrangements as well as environmental and social aspects. LTA is an independent consulting firm that is contracted also on behalf of public and private sector financial institutions to monitor implementation and assess compliance with environmental and social safeguards through a review of monthly and half-yearly progress reports submitted by implementing agencies and through quarterly site visits.
- Independent Monitoring Agencies, reporting to the GoL's implementing agencies⁷, to monitor progress on resettlement, environmental impact mitigation, and watershed management issues;

3.5 Of particular interest to the EIB is the LTA in which it is party, according to the Contract for Independent Engineer, as *"equity lender to the Government of Lao PDR (GoL)"*⁸. *"LTA will be a consulting firm providing advice to the Interested Parties..... It will not affect the continuation of the current practices of consultation by the World Bank Group, ADB and other interested parties with NGOs, both local and international, governmental agencies, members of local and international civil society for the monitoring and evaluation of the Project"*⁹, i.e. regular supervision by staff of the World Bank, other

⁷ E.g. the Resettlement Committee (RC) to oversee activities and policy issues, the Resettlement Management Unit (RMU) to manage, coo-ordinate and monitor GOL's responsibilities, District Working Groups (DWGs) that will play a 'crucial role' in resettlement and compensation activities, and Village Resettlement Committees (VRCs) –village leadership and skilled village members representing the different ethnic groups- that will represent the interests of the villagers and mobilise population.

⁸ Annex A – Scope of Work 1. Introduction 1.1. General Contract for Independent Engineer's services for construction and operation period of the Nam Theun 2 Hydropower Project.

⁹ Ibid.

international financial institutions and bilateral agencies in the form of site visits, management and technical missions and practices of consultation with NGOs remains intact.

4. REGULATORY FRAMEWORK

- 4.1 When performing its activities, the EIB is bound by European Treaties and its Statute, the relevant legislative and regulatory framework of the European Union, including international treaties. In this context, the Aarhus Convention (a UN Treaty entering into force 30 October 2001) and the respective EC Regulation (N°EC 1367/2006) are of particular relevance. The EC Regulation N°1367/2006 entered into force on 28 September 2006 and became effective on 17 July 2007; it covers bodies, offices or agencies established on the basis of the EC Treaty that from the date of it becoming effective need to adapt their internal procedures and practice to the provisions of the Regulation. Regulation EC 1367/2006 addresses "three pillars" i) access to information¹⁰, ii) public participation and iii) access to justice in environmental matters. It furthermore requires those institutions and bodies to provide for public participation in the preparation, modification or review of "plans and programs relating to the environment" and enables environmental NGOs meeting certain criteria to request an internal review under environmental law of acts adopted, or omissions, by Community institutions and bodies.

Provisions for public participation in environmental decision-making were already to be found at the time of the project appraisal in a number of other environmental directives, such as Directive 2001/42/EC of 27 June 2001 (on the assessment of certain plans and programs on the environment) and Directive 2000/60/EC of 23 October 2000 (establishing a framework for Community action in the field of water policy). Both Directives also contain provisions on access to justice.

In the context of the current complaint the issue of the first pillar of Regulation EC 1367/2006, access to information, shall therefore be reviewed together with the obligations of the Bank under Regulation (EC) No 1049/2001 and the Bank's Transparency Policy.

- 4.2 The responsibility of the Bank arises from its role as a lender to the project under the Finance Contract with the GoL and its Project Agreement with NTPC and from its role as an EU institution, lending under a full EU guarantee with the corresponding accountability responsibilities vis-à-vis the European Commission, the European Parliament, the Council and the public.
- 4.3 In analysing whether or not there has been maladministration on the part of the EIB Group, the EIB-CM will notably take into consideration the EIB Group's own relevant policies and procedures at the time of the appraisal (2004-2005) and during the monitoring of the project thereafter, including policies on access to information, environmental and social standards, monitoring policies and procedures on reporting on projects to the European Commission, the European Parliament, the Council and the public.

¹⁰ The Aarhus Regulation extends Regulation (EC) No 1049/2001 of 30 May 2001 regarding public access to EP, Council and Commission documents to all Community institutions and bodies.

- 4.4 The EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure apply to complaints regarding maladministration¹¹ of the EIB Group in relation to its activities in support of and for the implementation of these policies and regulatory framework.
- 4.5 According to the EIB-CM's Operating Procedures (§5.4) the Initial Assessment serves
- to clarify the concerns raised by the Complainant(s), to better understand the Complainants' allegations as well as the views of other project stakeholders (the Bank's Services, project promoter, national authorities, etc.) and, if needed, express a view on the situation on the ground;
 - for those projects that raise substantial concerns regarding social or environmental outcomes and/or seriously question the governance of objects or vehicles of EIB financing, to understand the validity of the concerns raised;
 - to assess whether and how the project stakeholders (e.g. Complainants, the Bank's services and the project Promoter) could seek resolution of the issues under complaint;
 - to determine if further work is necessary and/or possible from the EIB-CM (investigation, compliance review or mediation between the parties) to resolve the issues raised by the Complainant(s).
- 4.6 The initial assessment will normally include a review of EIB documentation and of external information, meetings with the relevant EIB management and staff and meetings with Complainants. If deemed necessary, it may include fact-finding project visits, including meetings with affected people, the project promoter, relevant public authorities and interested civil society organisations. Opportunities for collaborative problem-solving can already be appraised in the initial assessment phase. However, it is unlikely that an assessment of the situation on the ground with a site visit would enhance the view of the EIB-CM on the issues raised in the current complaint.

5. WORK PERFORMED BY THE EIB-CM

- 5.1 On 6 April 2016, CEE Bankwatch Network brought the complaint to the Secretary General through the Complaints e-mail inbox. On 20 April 2016, the EIB-CM acknowledged receipt of the complaint and indicated that the Complainant could expect to receive a response from the EIB-CM no later than 11 November 2016.
- 5.2 On 18 April 2016 the Bank's services were notified of the registration of the complaint. The EIB-CM held discussions with the relevant services, which served to clarify the broad scope of the NAM THEUN 2 Hydroelectric project as well as its past and recent history and the Bank's involvement. The services provided an update of the latest joint mission by the International Financial Institutions conducted in October 2015.
- 5.3 The EIB-CM also engaged with the Complainant discussing the general and specific issues of the complaint's handling and procedure. It was agreed to deal with the allegations comprehensively and take the time required for that as the project is finished and operational and the complaint concerns in particular the post-completion accompanying measures and the reporting thereon.

¹¹Maladministration occurs when the EIB Group fails to act in accordance with the applicable legislation and/or established policies, standards and procedures, fails to respect the principles of good administration or violates human rights.

- 5.4 Since the acknowledgement of the complaint was sent to the Complainant, the EIB-CM has performed a desk review of available information on the NT2 hydropower project in-house and in the public domain. The desk review serves as the basis of this report.

6. INITIAL FINDINGS

6.1 Project-related

- 6.1.1 The project is being implemented in a low-income developing country with a, reportedly, weak governance that had to commit to not taking recourse to the possible opportunity of profiting from HIPC debt alleviation in order to fall within the terms of assuming the financing burden of this project. The project company NTPC is majority owned by the project promoters and a conglomerate of the Thai power off-take companies.
- 6.1.2 The very concept of dams for power generation is a heavily debated issue and the assertion by promoters that hydropower production is, by its nature, 'green' power production is disputed on the grounds of the environmental and social impacts of dams. In particular, also in the context of the NT2 project, experts – even those included in the close supervision of the project implementation and monitoring – disagree on its rationale and its success (see § 6.3.2).

6.2 Views of the Bank's services

- 6.2.1 The services confirmed what is also broadly described in paragraphs 2 and 3, i.e. that the NT2 project is very heavily monitored and supervised by various bodies. The project has a high profile as much in the context of the country in which it is undertaken as well as in the context of producing power through artificial lakes and dams. This is the rationale for the extensive environmental and social monitoring on the mitigation and compensatory measures that have been built into the project through the CA (see § 3.4 and 3.5).
- 6.2.2 Based on the joint lenders' visit in October 2015, the services confirmed the recommendation to extend the closure of the Resettlement Implementation Plan (RIP) for the NT2 project by 2 years. This recommendation is in line with the assessment of the PoE and with the lenders' shared assessment in the joint mission memorandum that there are some resettlement objectives and provisions from the CA that have not yet been achieved. The services elaborated that this was due to sustainability issues in the resettlement programmes, according to the PoE, that were expected to be sorted out within, possibly, a two-year period
- 6.2.3 On the Complainant's request for access to information and the Complainant's view that "*the Bank has simply been ignoring her request for access to documents for four months*", the services have explained that the other lenders, which are 'owners' of the required document (which is subject to copyright restrictions), had not yet given their green light for the disclosure of the required social and environmental information, and that discussions were ongoing.

6.3 The Complainant's views

- 6.3.1 The Complainant highlights the differences between, respectively, the PoE's reporting to the GoL and the reporting of the WB, based on the (non-public) reporting of the LTA, and the EIB's reporting on the project. The Complainant also highlights that contrary to the EIB's satisfaction with the project, the realisation of many project environmental and social conditions faced serious implementation problems putting in serious jeopardy the overall project sustainability. The Complainant is of the view that the EIB's public reporting aims at giving a generally positive impression in relation to the project's implementation and its outcomes whereas in reality, in the Complainant's view, the project's environmental and social programme for mitigating the project's impacts had been implemented unsatisfactorily.
- 6.3.2 Given the widespread and sustained criticism of large dam construction in general and the NT2 dam in particular, including from members of the PoE in a personal capacity in other fora¹², the Complainant (i) asked to be given access to the LTA's project reporting and (ii) questioned the EIB's reporting practices and accuracy or completeness in relation to its own transparency standards and as a mandate holder for the other EU institutions and Member States.
- 6.3.3 The Complainant reiterated her concern regarding the public disclosure policies on the NT2 project in general and the underlying non-compliance with the Bank's and the EU's/European social and environmental standards in particular. The Complainant was specifically referring to the fact that by failing to provide the relevant social and environmental project information, the Bank had in fact failed to comply with its own accountability commitments to the EU, the EU Member States, the general public and the NGO/CSO community. She noted that the NGO/CSO community in particular had been very concerned about the project since its inception.

6.4 Publically available project reporting

- 6.4.1 The successive reports by the PoE, which have been public on the WB's and the ADB's website, are made to the GoL.
- 6.4.2 In February 2014 the PoE (see above) undertook a mission, focusing on the process and progress of the resettlement on the Nakai Plateau in establishing new livelihoods in order to see whether handing over responsibility for execution and completion of the RIP¹³ to the GoL, a key component of the CA, could be definitively decided in the first quarter of 2015. The handover had been scheduled in the CA for the end of 2015. Secondly, the PoE was examining the performance of the Watershed Management and Protection Authority (WMPA) whose mission it was to provide for a future with secure forest, productive agriculture, secure land tenure, and positive human development within the Nakai Nam

¹² Dr Thayer Scudder, a renowned expert on the social and environmental impacts of dams and a prominent member of the Panel of Experts that monitored the NT2 hydropower project, openly criticised this World Bank showcase project in the *New York Times* on 24 August 2014. <https://www.internationalrivers.org/resources/8479>

¹³ The Resettlement Implementation Plan: provision of agricultural and forestry production areas and compensation to the population of the Nam Theun 2 Project zones with a view to upgrading and ensuring sustainable livelihoods.

Theun National Protected Area (NNT NPA)¹⁴. The performance of the WMPA has always been identified as problematic in the successive reports of the PoE, most particularly in terms of its responsibilities for conservation of the NNT NPA's globally important biodiversity.

- 6.4.3 In May 2014 the PoE issued (in its 22nd report) nine recommendations to the GoL and the NTPC, e.g. to step up their respective financial and staff resource commitments for the implementation of a comprehensive list of components of the RIP including recovering unpaid arrears in respect of the sale of agricultural and forestry products, forest management training, vocational training in the tourism sector. It also recommended that a "very high-level" GoL commission review the WMPA, given its reported failure to carry out its fundamental task. The review should result in an entire new design, the withholding of funds and the scaling down to a skeleton staff pending the review.
- 6.4.4 On 29 June 2014 the World Bank rated the project's overall implementation progress "Moderately Unsatisfactory". The World Bank's assessment was based on the LTA reports that are not publicly available. Not all CA conditions in relation to the RIP closure were, in the view of the WB, likely to be met by the end of 2015 due to non-compliance with CA conditions related to the five livelihood pillars. The WB noted serious concern regarding the GoL's capability to support its CA requirements. The lenders (including the WB) are not yet convinced that the livelihood criteria are being met on a sustainable basis and that the RIP should therefore be extended. There may also be evidence that income levels in the downstream areas may have dropped, mainly due to reduced income from fish-catch in the Xe Bang Fai River.
- 6.4.5 In October 2014 the PoE undertook another mission, focusing again on 1) the resettlement process, progress on the Nakai Plateau for handing over responsibility for execution and completion of the resettlement to the GoL and, again, 2) the status of the WMPA.
- 6.4.6 In December 2014 the PoE (in its 23rd report) formulated 28 recommendations on reinforcing the commitment of the local and national authorities to earlier engagements and, in particular, the GoL's funding commitments under the CA, the benefit-sharing from the project and the ancillary TA project and funding for and organisation of the WMPA.
- 6.4.7 In April/May 2015 the PoE came back to Laos to meet the legal requirement in the CA that at least six months before the expiry of the intended RIP the PoE review activities performed during the RIP, examine whether the Resettlement Objectives and Provisions spelled out in the CA were achieved in accordance with the CA, and make a recommendation to the GoL accordingly on whether the RIP should be ended in December 2015 or extended for a designated period.
- 6.4.8 In October 2015 the PoE (in its 24th report) recommended an extension of the RIP for two years to December 2017, with a review and a decision on further extension before that date. The report also recommends actions that should be taken with a view to achieving closure by the end of 2017. The PoE made 71 recommendations (32 of them binding¹⁵) on finance, demographics, migration,

¹⁴ NNT NPA represents Lao PDR's largest and most diverse natural forest area and has an outstanding conservation value for South East Asia with, for example, three of the last five large mammals to be discovered or rediscovered worldwide.

¹⁵ i.e. binding on NTPC subject to the consideration of the GoL and the IFIs

administrative as well as detailed/local technical agricultural & fisheries issues, tourism development, general livelihood support and TA measures. As part of the recommendations, the GoL was advised to make available substantial additional funds for implementing the Government's management, capacity-building and wider support requirements for the NT2 handover process.

- 6.4.9 By that time, the PoE, realising that fostering the development process in a context like that found on the Nakai Plateau is a time-consuming and demanding task which cannot be achieved within a restricted time frame, recommended that the closure of the RIP for the NT2 project be extended. The basis for the PoE to recommend the extension of the expiry of the RIP was, basically, that (1) the achievements under the livelihood and biodiversity pillars for the population directly affected by the project were not sustainable; and (2) that there was a high risk of the CA not being implemented as far as the programmes downstream of the NT2 projects were concerned.

6.5 The Bank's own reporting

- 6.5.1 In the EIB Project Completion Report (2011) and in the EIB Report on results of operations outside the EU in 2013 (2014) the EIB expressed satisfaction with the fact that the project was fulfilling a number of policy objectives, e.g. environmental and social objectives such as development impact, the generation of substantial revenues for poverty reduction and environmental protection. The project contributed to the EU's external action aimed at achieving poverty reduction and sustainable economic development. In the EIB's reporting the project represented an opportunity to contribute towards its own sustainable social and economic development in a significant way; the use of revenues received by Laos from the project were managed under a legal framework designed to ensure that they were employed for eligible projects elsewhere in the country, primarily aimed at alleviating poverty through health and educational programmes as well as environmental management programmes. The EIB reported "some disruption to wildlife habitats", "potential loss of biodiversity", "some changes in the aquatic ecosystem", "some deterioration in water quality"; however, overall, the project should help to reverse the trend towards the unsustainable exploitation of natural resources and help to improve the protection of ethnic minorities. Improved living conditions, the strengthening of resettlers' livelihoods and other necessary measures were promoted to ensure that the ambitious targets agreed when financing for the project was approved would be met.

7. PRELIMINARY CONCLUSIONS AND PROPOSED WAY FORWARD

- 7.1 The initial findings confirm the complexity of the complaint which arises from the multi-layered supervision and follow-up structure of the project, the number of sponsor parties involved and the diversity in the nature of those sponsors. In its preliminary review, the EIB-CM has found that the multi-layered supervision and follow-up structure of the project may have resulted in a highly complex mosaic of project reporting, different in terms of the scope and commitment of follow-up decisions.
- 7.2 On the basis of the desk review of documentation available, including the reports referred to by the Complainant, the EIB-CM notes that environmental and social impacts of the project and deficiencies of project implementation are reported in publically available reports produced by sources which are

part of the project's structure (PoE, IAG and LTA). The EIB-CM noted at this stage the variation between such information and the Bank's own reporting, which may be due to the differences in the reporting scopes and objectives of the involved agencies. In this context, it will be key to review in detail the Bank's due diligence of the project and its monitoring of project implementation.

- 7.3 Indeed, in its initial assessment the EIB-CM found substantial differences between, respectively, the PoE's reporting to the GoL and the reporting of the WB, based on the (non-public) reporting of the LTA, and the EIB's reporting on the project. The variety in reporting appears somewhat as an inverted pyramid with very comprehensive reports by the PoE to the GoL and by Parsons Brinckerhoff as reporting consultants to the LTA, the World Bank and then the lenders to the project. It also appears that the Bank applies a succinct public reporting policy that may well be the main ground of the Complainant's concern; assessing whether this is in line with the Bank's reporting obligations and its Transparency Policy will be object of the EIB-CM's investigation.
- 7.4 In its investigation, the EIB-CM proposes to seek a response to the Complainant in relation to the responsibilities of the Bank outlined above (§§ 4.2 and 4.3): (i) the verification by the Bank of the project's compliance with the environmental and social requirements applicable when the Finance Contract was signed, also in relation to obligations arising from the Finance Contract and the Project Agreement both based on the CA between the GoL and NTPC; (ii) the Bank's compliance with its own reporting obligations and accountability responsibilities viz. the European Commission, the European Parliament, the Council and the public; and (iii) compliance with the EIB's policies in respect of transparency and access to information and documents.
- 7.5 The compliance review in respect of (i) above will be carried out notably on the basis of the LTA, the engineer's contract concerning environmental and social deliverables¹⁶.

The compliance review on (ii) and (iii) will be carried out based on the regulatory framework in place on the Bank's mandate to lend in ALA countries and the EU guarantee mandate and on the EIB's own transparency policy and access to information regulations – including the Aarhus regulation and its relating Directives see REGULATORY FRAMEWORK § 4.1.

Potential conflict between the obligations regarding compliance on (i), (ii) or (iii) will need to be assessed and in the event of a conflict arising, the EIB-CM will formulate its Conclusions and Recommendations according to the CM's principles, rules of procedure and operating rules in force and the EIB Group's transparency rules.

In light of the EIB-CM Initial Assessment, the EIB-CM has identified the differences in the regulatory frameworks that cover every allegation on this complaint (Transparency and Public disclosure, Governance aspects of financed operation, Environmental and Social) As a result, and with a view to implementing the way forward, the EIB-CM deems it appropriate for reporting purposes to group the allegations of similar nature and applicable regulatory framework in separate reports.

¹⁶ Contract for independent engineer's services for the Construction and Operation period between Nam Theun 2 Power Company, BNP Paribas and PB Power NZ Ltd

Therefore, the EIB-CM will handle the three main allegations in two separate reports as follows:

- **Report on the allegations on Environmental and Social impact of the project as well as Governance aspects of financed project** covering
 - The alleged failure to properly report on the results and impacts of the project to the European Commission, the European Parliament, the Council and the public
 - The alleged failure to ensure the project's compliance with the Bank's environmental and social standards, including respect of human rights, and with the provisions of the Finance Contract;

- **Report on transparency and public disclosure allegations** covering

the alleged failure to comply with transparency requirements applicable to the Bank, including the Council Decision of 22 December 1999 (2000/24/EC) the Aarhus Regulation¹⁷, the Bank's own Information Policy Statement of 2002 and existing policies on access to information. This allegation will be registered as a new complaint on Access to information (A).

- 7.6 The EIB-CM notes that the Complainant had agreed to her concerns being answered comprehensively instead of receiving an answer that might be compromised by time pressure. However, it is important to note that the closure period for the RIP was extended by two years to the end of 2017.

¹⁷ The Complainant refers to the Aarhus Convention and to the obligation of, i.a. the Bank, under the Aarhus Regulation, Art 4, that environmental information "relevant to their – i.e. the Bank's – functions" shall be organised "with a view to its active and systemic dissemination to the public".

GLOSSARY

ADB	Asian Development Bank
AFD	Agence Française de Développement
CA	Concession Agreement
GOL	Government of Laos
EDF	Electricité de France
EGAT	Electricity Generating Authority of Thailand
IAG	The International Advisory Group, role taken over by the LTA
IDA	the International Development Agency of the World Bank
Laos PDR	Peoples' Democratic Republic of Laos
NNT NPA	Nakai Nam Theun National Protected Area
LTA	Lenders' Technical Adviser
NT2	Nam Theun 2 (the Project)
NTPC	Nam Theun 2 Power Company
MW	Mega Watt
PoE	Panel of Experts
RIP	Resettlement Implementation Plan
WB	World Bank
WMPA	Watershed Management and Protection Authority

