



NAM THEUN 2 Hydroelectric Project Lao PDR

Complaint SG/E/2016/03

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

Part 2. Project reporting and monitoring

6 November 2018

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The EIB Complaints Mechanism

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

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

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EXECUTIVE SUMMARY

The Nam Theun 2 Hydropower Project (“the project”, or “NT2”), located in the Lao People’s Democratic Republic (“Laos”), concerns the development, construction and operation of a dam and related large hydroelectric power plant. Constructed between 2005 and 2011, the plant has been operational since April 2010. NT2’s PPP financing structure has involved loan and grant funding from International Finance Institutions (“IFIs”) including the European Investment Bank (“EIB”). The EIB’s loan of EUR 45 m to the Government of Laos (“GoL”), with the European Community’s global guarantee to the EIB, was used to finance GoL’s equity participation.

CEE Bankwatch Network (“the Complainant”) submitted an extensive complaint concerning NT2 on 6 April 2016. The present report¹ covers allegations concerning (i) EIB reporting to the EC and the public, and (ii) the EIB’s monitoring of compliance with EIB environmental and social (“E&S”) standards and GoL’s contractual commitments to the EIB. The Complainant called on the EIB to repair its alleged “failure to report honestly to the EC, the European Parliament and the Council”² on the environmental and social (E&S) project issues and to act to ensure compliance with EIB standards, the project Concession Agreement and universal human rights.

In order to assess allegation (i), EIB-CM carried out a review of the regulatory framework – the global Guarantee Agreement (“GA”) for EIB financing operations outside the EU signed between the EC and the EIB, together with the Council Decisions which provided the basis for the GA.

Bearing in mind that EIB reporting to the EU institutions is via the EC, EIB-CM noted that firstly, once the evaluation of the 2000-2007 mandate had been fulfilled in 2010, there was no further obligation for the EIB to include NT2 in annual reporting to the EC unless credit risk issues arose. Secondly, under the GA for 2000-2007 period, the EIB was required to provide credit risk and International Financial Reporting Standards information to the EC, but not individual E&S or project-risk information during implementation or operation. EIB-CM also observed that the reporting framework to the EC has evolved considerably since 2012 when the EIB introduced the Results Measurement framework (“ReM”); amongst other objectives, this provides the EC with an enhanced assessment of the EIB’s lending contribution to impacts on EU policy. However, there is no framework to identify projects which may deserve highlighting during monitoring – e.g. on grounds of public interest, EU “reputational” or accountability risk to EU policies.

Regarding EIB reporting to the public, the EIB-CM reviewed EIB documents on NT2 in the public domain, recognising as above that they were not required under the EIB’s reporting or publishing obligations. EIB-CM noted that the information the EIB provided regarding E&S issues is brief, but there is evidence in all the documents that E&S monitoring of NT2 was still required, and that it was indeed continuing.

¹ See EIB-CM Initial Assessment Report http://www.eib.org/de/about/accountability/complaints/cases/2017-08-18%20Complaint%20SG-E-2016-03%20_Nam_Theun_2%20Initial_Assessment_Report.pdf : As agreed with the Complainant, there are 2 Conclusions reports for this complaint 1. Access to information, and 2. Project reporting and monitoring (accessed on 20/9/2018)

² See complaint: <http://www.eib.org/attachments/complaints/sg-e-2016-03-complaint-en.pdf> “The Bank failed to report honestly by hiding and overlooking the project’s incompliance and its negative impacts” (accessed on 20/9/2018)

Concerning allegation (ii), EIB-CM found that a complex E&S monitoring framework of international experts with developmental experience has been in place for NT2, with considerable IFI participation, to carry out the overall E&S monitoring, including overseeing and supporting the human rights issues of the project.

With respect to EIB's internal monitoring procedures, EIB-CM noted that the continued operational phase monitoring by the EIB services included non-standard enhanced procedures with EIB sector specialists to cover the ongoing implementation of the E&S mitigation measures. EIB-CM concluded that EIB internal monitoring procedures have been followed.

EIB-CM noted that the EIB has had a lesser role in IFI monitoring of this project and that the lead was taken by the World Bank ("WB") and the Asian Development Bank ("ADB"). This is acceptable given that there was a complex monitoring framework in place. EIB-CM noted also that WB and ADB have local presence in Laos. Moreover, in terms of good practice, this approach of the EIB is consistent with EIB procedures to maximise synergies, cooperation and efficiency between IFIs.

The NT2 contractual framework included, firstly, considerable structured monitoring, and secondly, WB and ADB environmental safeguards in the Concession Agreement. These safeguards were more detailed than the EIB's at the time of loan approval in 2005, and they are cross-referenced with the EIB's contractual arrangements with the GoL and NTPC. EIB-CM concluded that the principles of EIB standards at the time were thus covered, and that they have been, and continue to be monitored within a contractual framework of independent experts and experienced IFIs, with the EIB project team maintaining an overview.

EIB-CM therefore found that with respect to the allegations addressed in Conclusions Report 2, the EIB was in broad compliance with its procedures and policies.

EIB-CM noted the progress achieved in implementing the E&S mitigation measures, and the commitment of IFIs involved in the project to address areas of safeguards, including sustainability of livelihood restoration, human rights, GoL's revenue management programme, longer term downstream impacts and environmental protection. The Resettlement Implementation Period ("RIP") on the Nakai Plateau has been closed in July 2018, and consequently IFI monitoring is reducing noticeably in 2018. Following the closure of the RIP and the resulting changed monitoring framework, the EIB's involvement in monitoring needs to be revisited. NT2 is a complex project, particularly in the development context. Therefore, the EIB's services have confirmed that they will analyse the EIB's future role and monitoring activities in line with its policies and contractual agreements under the new scenario.

CONCLUSIONS REPORT

Project: NAM THEUN 2 Hydroelectric Project
Lao People's Democratic Republic (Laos)
Complainant: CEE Bankwatch Network
Date received: 6 April 2016

1. THE COMPLAINT

On 6 April 2016 CEE Bankwatch Network ("the Complainant") submitted a complaint by email to the EIB Secretary General concerning the Nam Theun 2 Hydroelectric project ("the project" or "NT2") in the Lao People's Democratic Republic ("Laos"), attaching two studies in support of the complaint.³ The complaint letter makes a number of allegations relating to: (i) EIB reporting on the project to the European Commission, the European Parliament, the Council and the public; (ii) the Bank's compliance with applicable transparency requirements, and (iii) EIB monitoring of the project's compliance with the Bank's environmental and social standards and contractual commitments.

1.1. Summary of the allegations - Conclusions Report 2:

This Conclusions Report 2 addresses the allegations about the EIB's alleged failures concerning (i) and (iii) above on the EIB's project reporting and monitoring. The allegations regarding transparency are assessed in Conclusions Report 1. issued separately. EIB-CM summarises the allegations and claim of the complaint in Report 2 as follows:

ALLEGATIONS

(i) Failure to report properly to the European Commission ("EC"), the European Parliament ("EP"), the European Council ("the Council"), and to the public, specifically on the project's environmental and social ("E&S") risks. EIB has overlooked significant E&S non-compliance and failed to report honestly on the negative E&S impacts and risks of the project; and

(ii) Failure in the EIB's monitoring of project compliance with both the EIB E&S standards and the Borrower's contractual commitments.

The Complainant considers that the project has not brought desirable E&S outcomes and that it causes violations of human rights with respect to the project-affected people and that it is the EIB's "sole responsibility to ensure that it supports development carried out in a manner in which all human rights and fundamental freedoms can be fully realized"⁴.

³ Bruce Shoemaker, Ian G. Baird and Monsiri Baird (15 November 2001): The People and Their River (Lao PDR/Canada Fund for Local Initiatives); Ian G. Baird, Bruce P. Shoemaker and Kanokwan Manrom (September 2015): The People and their River, the World Bank and its Dam: Revisiting the Xe Bang Fai River in Laos, in Development and Change 46(5), page 1080–1105.

⁴ See the Complaint p. 20, point 3.3: <http://www.eib.org/attachments/complaints/sq-e-2016-03-complaint-en.pdf> (accessed on 20/9/2018)

CLAIM

The Complainant called on the EIB to:

- Repair the EIB's alleged lack of honesty about the project – the negative impacts known about the project by the monitoring bodies in place should have been passed on to the EC and the public;
- Act to ensure project compliance with EIB E&S standards, the Concession Agreement and universal human rights.
- The complainant proposed a number of procedural points to correct the allegations.

2. BACKGROUND INFORMATION

2.1. *The NT2 project*

- 2.1.1 The 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.
- 2.1.2 The purpose of the project was to supply clean energy for domestic use (5%) and export (95%) to Thailand. Significant revenues for the Government of Laos ("GoL" or "the Borrower") were expected to be generated from export receipts, and these revenues were to contribute to reducing Laos' dependence on Official Development Assistance ("ODA") for Millennium Development Goal-related investment programmes.
- 2.1.3 In 2005 the Bank approved a loan up to EUR 45m to support GoL's equity contribution in the Nam Theun 2 Power Company ("NTPC" or "the final beneficiary"), in which GoL holds a 55% ownership. NTPC is a special purpose vehicle created to build, own, operate and transfer (BOOT) NT2 under a 25-year concession agreement. The EIB and GoL signed a loan agreement in April 2005, with a guarantee from the European Community. NT2 commercial operations started in 2010.
- 2.1.4 The financial package for the project was committed by various financing institutions: IFIs - the World Bank ("WB"), the Asian Development Bank ("ADB"), the Nordic Investment Bank ("NIB"), the EIB, bilateral agencies Agence Française de Développement ("AFD") and PROPARGO, and international commercial bank syndicates.
- 2.1.5 EIB-CM noted that the project's impacts relating to its high development potential - poverty reduction in Laos, and to climate change mitigation, as well as strengthening the local regulatory framework, such as environmental protection – were important factors in the approval process of the EIB loan.

3. APPLICABLE REGULATORY FRAMEWORK

With respect to the allegation of reporting failures to the EC, EP and the Council:

- 3.1 Council Decision 2008/580/EC⁵ of 23 June 2008, repealing the original Council Decision 2000/24/EC, sets out the Commission's objectives and obligations regarding the European Community's global guarantee⁶ to the EIB for projects outside the EU in support of the EU's external policy. The external lending mandate ("ELM") objectives and requirements have been in principle fixed for financial periods of 7 years (2000-2007, and subsequently 2007-2014, 2014-2020) and the relative Decisions provide the basis for the global Guarantee Agreements for the corresponding periods.
- 3.2 At country level, the Council Decision referred to the Cooperation Agreement between the European Communities and Laos⁷, which specifically includes objectives relating, inter alia, to cooperation to achieve sustainable economic and social development (of which respect of human rights is an integral part), and improving environmental protection.

With respect to the allegation of failures relating to monitoring of EIB Environmental and Social Standards

- 3.3 EU law including international conventions ratified by the EU provide the main reference for the environmental and social performance requirements of the EIB. With respect to their application by the EIB, reference is also made to EIB Sustainable Development and Environment Documents (July 2002)⁸. The EIB Environmental Statement, 2004 was the reference for E&S at the time of project approval.
- 3.4 The environmental and social conditions included in the EIB loan approval procedures were reflected in the EIB's finance contract signed with the GoL and the project agreement between the EIB and NTPC.

4. WORK PERFORMED BY THE EIB-CM

General overview

- 4.1 On 6 April 2016 CEE Bankwatch Network brought the complaint to the Secretary General through the Complaints e-mail inbox. On 20 April 2016, EIB-CM acknowledged receipt of the complaint. EIB-CM also engaged later with the Complainant to discuss the general and specific issues of the complaint's handling and procedure.

⁵ Recital 20 and Art. 2 in particular <https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX%3A32008D0580> (accessed on 20/9/2018).

⁶ A global Guarantee Agreement ("GA") was signed between the European Community and the EIB on 24 July 2000, restated and amended on 2 September 2005, implemented in line with EU Decision noted above. This GA covers the EIB loan for NT2.

⁷ Cooperation Agreement between the European Community and the Lao People's Democratic Republic OJ L 334/15

5.12.1997 https://eeas.europa.eu/sites/eeas/files/cooperation_agreement_3.pdf (accessed on 20/9/2018)

⁸ EIB Sustainable Development and Environment Documents, July 2002 http://www.eib.org/attachments/strategies/environdoc_en.pdf (accessed on 20/09/2018)

- 4.2 On 18 April 2016 EIB-CM notified the EIB's services of the registration of the complaint. EIB-CM held discussions with the relevant services, which served to clarify for EIB-CM the broad scope of the project as well as its past and recent history and the EIB's involvement
- 4.3 EIB-CM's review of the complaint was a desk study, with consultation with the services. In relation to the allegations of E&S non-compliance, EIB-CM did not carry out its own technical E&S due diligence on implementation and the status of the individual points raised by the Complainant. An Initial Assessment Report was finalised in August 2017.
- 4.4 EIB-CM reviewed the complaint document, the regulatory framework, EIB procedures manuals and guidelines, the documents submitted by the EIB to the EC relating to ELM reporting for the 2000-2007 mandate, the NT2 project-related loan approval documents and project monitoring records, as well as other relevant documents. EIB-CM also took into consideration the assessment of a previous EIB-CM case handled by the EIB-CM concerning a hydropower project of a similar size in Uganda⁹.

5. **EIB-CM FINDINGS**

The project overall

- 5.1 Project implementation was completed relatively close to forecasts, although with some delays and slightly over budget. The hydropower plant is fully operational. In terms of development impact and technical success, the overall view from IFIs¹⁰ is that by making a significant contribution to GoL revenues, the project has contributed for example to poverty reduction, and improved education and healthcare provision in the country. As is typical for this type of project, resultant economic development is a long-term, multi-faceted process, and issues requiring attention relating to E&S are likely to arise for some years.
- 5.2 In the EIB decision-making process, IFI participation, including the EIB, was considered important for reassurance that E&S issues would be properly addressed, including overseeing implementation of mitigating measures.
- 5.3 The arrangements for E&S monitoring as set up by the various stakeholders for the project have been significant. So far, this framework has been maintained during operation:
- The Panel of Experts ("PoE")¹¹ - reporting to the GoL, and working in accordance with WB and ADB E&S safeguards;

⁹ See also Conclusions Report Complaint Bujagali Hydroelectric Project Complaint SG/E/2009/09

<http://www.eib.org/about/accountability/complaints/cases/sq-e-2009-09-bujagali-hydroelectric-project.htm> (accessed on 20/9/2018)

¹⁰ For example, see case Study by GIZ (Feb. 2014) "Compensation and Livelihood Restoration at Nam Theun 2 Hydropower project

https://orbi.uliege.be/bitstream/2268/197257/1/3.%20Case%20Study_Compensation%20and%20Livelihood%20Restauration%20at%20Nam%20Theun%202%20Hydropower%20Project.pdf; and Statement on Closure of the World Bank-funded Nam Theun 2 Social and Environment Project <http://www.worldbank.org/en/news/press-release/2018/01/30/statement-on-the-closure-of-the-world-bank-funded-nam-theun-2-social-and-environment-project> (both accessed on 20/9/2018)

¹¹ The POE was established jointly by the GoL and stakeholders as a requirement of the concession agreement to provide an independent review of and guidance on the treatment of E&S issues associated with this project. Its scope is to report to stakeholders on, and assess the extent to which, NT2 meets the requirements of the safeguard policies of the WB and ADB on

- Independent ad hoc monitoring agencies (required by the Concession Agreement (“CA”));
- Lenders’ Technical Advisers (“LTA”) - reporting to the banks, including the IFIs;
- IFIs - WB and ADB have taken on the lead monitoring supervision role for the IFIs;
- International Advisory Group (“IAG”) - reported specifically to the WB until 2011.

5.4 EIB-CM observed the frequent environmental controversies and human rights sensitivities around hydropower dams and the potential negative development-induced challenges to achieving sustainable development. NT2 involves known unavoidable negative environmental impacts (changes in river ecology, biogenic carbon footprint) and expected socio-economic impacts (resettlement, livelihood restoration, flooding of agricultural land, declining fishing).

Allegation (i): Reporting to EC and the public

5.5 Bearing in mind that EIB reporting to the EU institutions is made via the EC, EIB-CM’s assessment for this part of the complaint considered (a) Compliance with the EIB’s reporting obligations to the EC on NT2 in the context of the regulatory framework; and (b) The content of EIB reports in the public domain - whether the EIB had “failed to report honestly”¹² to the EC and the public on the E&S impacts of the NT2 project.

Reporting to the EC – (a) Compliance in the context of the regulatory framework

5.6 EIB-CM found that under Decision 2000/24/EC (subsequently repealed by 2008/580/EC), the EIB should provide an assessment of its ELM lending for projects signed between 2000 and 2007 at the levels of:

- Overall programme / policy;
- Country;
- Individual project.

5.7 Council Decision 2000/24/EC provided the framework for the GA signed between the EIB and the EC for the global guarantee (see above section 3. Applicable Regulatory Framework). Regarding the EIB’s reporting obligations to the EC set out in the GA for loans signed for the financial period 2000-2007, the content requirements (Article 3) related to:

1. Credit risk and accounting data as each project was signed on a 6 monthly basis;
2. Audited accounting data and credit risk information for the fulfilment of the EC’s IFRS obligations;
3. Any fact or circumstance which may cause the guarantee to be invoked;
4. Statistical and other information on the loans needed by the EC to fulfil its reporting obligations as currently practised between the EC and the Bank.

such areas as the environment, indigenous peoples and resettlement with development. The POE has a standing role and can be called upon until the end of the concession in 2035

¹² See complaint document <http://www.eib.org/attachments/complaints/sg-e-2016-03-complaint-en.pdf>

- 5.8 With respect to points 1., 2. and 3. above (relating to credit risk): EIB-CM observes that environmental and social aspects are not required.
- 5.9 With respect to point 4. above (relating to “statistical and other information on the loans needed by the EC to fulfil its reporting obligations”): The GA does not set out specific content or a format for reporting.
- 5.10 EIB-CM has nevertheless noted that the objectives and requirements of later Decisions and Guarantee Agreements have been expanded and have also become more prescriptive. In particular, following the 2010 “Report and Recommendations of the Steering Committee of Wise Persons”,¹³ the EIB introduced the Results Measurement (ReM) framework¹⁴ in 2012, whose objectives include enhancing the Bank's ability to report to the EC on actual results of its external lending activities. EIB-CM notes that under the ReM, indicators set out the baselines and targets at project appraisal and are reviewed twice - at project completion and then at project completion plus 3 years. However, ReM does not apply to NT2, as it was agreed with the EC that loans approved before 2011 would not be subject to ReM procedures.
- 5.11 With respect to the duration of the reporting obligations at individual project level under the GA - 5.7 above point 4. “information ... needed by the EC” – EIB-CM found that the obligations extend only during the EC 7 year financial period, plus a concluding evaluation on the mandate (reporting for credit risk reasons continues for the duration of the guarantee).
- 5.12 In terms of actual reports for the 2000-2007 mandate submitted by the EIB to the EC after NT2 had been signed in 2005, for point 5.7 above, “4. Statistical and other information on loans needed by the Commission to fulfil its reporting obligations”, EIB-CM was not able to find evidence of individual project reporting on E&S implementation.
- 5.13 For loans signed between 2000 and 2007, including NT2, EIB-CM found that ELM reporting was fulfilled in 2010, since this mandate was included in the mid-term review of the 2007-2013 mandate¹⁵ with the independent evaluation of the EIB's external mandate and the report by the 2010 Steering Committee of Wise Persons. This was confirmed in Decision 2008/580 EC¹⁶.
- 5.14 Therefore, as far as NT2 is concerned, EIB-CM found firstly that that there has been no requirement for the EIB to provide information to the EC at individual project level on the 2000-2007 ELM mandate either in the context of:

¹³ The Report and recommendations of the Mid-Term Review of EIB external mandate – Report of the Steering Committee of “wise persons”, February 2010 was part of the mid-term review of the EIB ELM 2007-2013. The scope of the report included an evaluation of 2000-2007 and the first years of the 2007-2013 mandate

http://www.eib.org/attachments/documents/eib_external_mandate_2007-2013_mid-term_review.pdf (accessed on 20/9/2018)

¹⁴ The EIB Results Measurement (ReM) Framework <http://www.eib.org/en/projects/cycle/monitoring/rem.htm> and Methodology: http://www.eib.org/attachments/rem_framework_methodology_en.pdf (both accessed on 20/9/2018)

¹⁵ Decision 2006/1016/EC Annex II b. <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32006D1016> : evaluation of ELM 2000-2007 to be included in mid-term review of ELM 2007-2013. The evaluation to be managed by a steering committee of “wise persons”: Report and Recommendations of the Steering Committee of Wise Persons, (February 2010) http://www.eib.org/attachments/documents/eib_external_mandate_2007-2013_mid-term_review.pdf. See also DG ECFIN Mid-term evaluation of EIB's external mandate (COWI A/S, March 2010)

http://ec.europa.eu/dgs/economy_finance/evaluation/pdf/ecfin_eval_en.pdf (all accessed on 20/9/2018)

¹⁶ Confirmed in Council Decision 2008/580/EC, Art. 20 “Hence, the Commission has reported on the application of Decision 2000/24/EC.” <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008D0580> (accessed on 20/9/2018)

- E&S issues; or
- Implementation or operational project risks being monitored (“problem” projects) other than project events that could invoke the EC guarantee.

Secondly, EIB-CM found that EIB’s obligations to provide information to the EC had been fulfilled in 2010, except for credit risk reasons for which reporting obligations continue.

Reporting to the EC and the public – (b) Content

5.15 According to the Complainant, the EIB failed to report “honestly” by hiding and overlooking the project’s in compliance and its negative impacts and existing risks. In this regard, the EIB’s documents do not raise concerns strongly enough about environmental impacts and human rights violations that the Complainant considers to have been caused by the project. EIB-CM reviewed 4 reports made public on NT2 – recognising that they were not required under the EIB’s reporting obligations under the framework of the EU Decisions as above or as part of EIB publishing practices:

i) *NT2 in the EIB’s 2013 report¹⁷ to the EC:*

EIB-CM found that the EIB had included in its 2013 ELM report to the EC an individual project fiche on NT2. In fact, NT2 was included in the report as an early example of the results reporting provided by the newly implemented ReM framework¹⁸. The example included a very short description of the NT2 project, and “important on-going E&S mitigation and compensating measures” were mentioned briefly and factually. The EIB’s analysis of outputs, outcomes and impacts were set out in a table. The same text and table were also included in the publicly available Commission Staff working document of 30 October 2014¹⁹ accompanying the EC’s 2013 report to EP and Council on the 2007-2014 ELM mandate.

ii) *NT2 as a case study in the publications on the EIB website “Report on results of EIB operations outside the EU – 2013” (full document and flyer versions)²⁰:*

NT2 was included in the documents as an example of a completed project financed by the EIB. The case study provides a brief, factual summary of the project, referring very succinctly to some of the complexities of the operation. In the full document, one page with highlighted text on “Ensuring sustainable impacts” is dedicated to providing an outline of the on-going environmental and social programme. The overview version is similarly brief.

iii) *Project update published in November 2015 on the EIB website²¹:*

A short description of the E&S monitoring still underway is included in the update, together with the statement “Although all objectives have not yet been met”.

¹⁷ “EIB Contribution to the Report from the Commission to the European Parliament and the Council on Operations Carried out under the EIB External Mandate in 2013.” Commission Staff working document accompanying the EC report on 1080/2011/EU <https://publications.europa.eu/en/publication-detail/-/publication/77bec3f8-6048-11e4-9cbe-01aa75ed71a1/language-en> (accessed on 20/9/2018)

¹⁸ The ReM framework compares expected results (foreseen at approval) with actual results (at completion and completion +3 years) <https://publications.europa.eu/en/publication-detail/-/publication/77bec3f8-6048-11e4-9cbe-01aa75ed71a1/language-en> (accessed on 20/9/2018)

²⁰ <http://www.eib.org/en/infocentre/publications/all/eib-rem-annual-report-2013.htm> (accessed on 20/9/2018)

²¹ Update: Nam Theun 2 Hydropower Project, Laos http://www.eib.org/en/infocentre/press/news/topical_briefs/2005-november-01/nam-theun-2-hydropower-project-laos.htm?f=search&media=search (accessed on 20/9/2018)

EIB-CM notes that the EIB normally only publishes implementation information in the context of case studies, and considered it to be a positive initiative for the EIB to have published an update on NT2 given the interest in the project at the time.

iv) EIB project completion report ("PCR") from December 2011:

This type of document is normally an internal document, containing commercial and therefore confidential information. However, the document was partially disclosed to the Complainant on 22 May 2015 (see Conclusion Report 1 of the present complaint). The PCR document summarises the status of NT2 at project completion, and includes text and ratings on environmental and social issues. Again, EIB-CM found that the document presents a brief and factual summary of the E&S status of the project. It also included the statement that there are "very significant impacts on the communities and the environment", and summarises the mitigation measures and the on-going monitoring framework in place. EIB-CM considered that some ratings appear understated in the context of the significant ongoing environmental, resettlement and livelihood restoration issues pending in 2011. However, EIB-CM found that *internal* E&S ratings take into account mitigating measures foreseen (or not). For NT2, the project team's assessment in 2011 could therefore, in that context, be justified since the heavy E&S monitoring programme mitigating measures – PoE, IAG, LTA, IFI monitoring with missions – was still in place and making progress.

- 5.16 EIB-CM observed that that the information in the public documents is brief, and does not refer specifically to sustainability. However, there is evidence to the public in all the documents that E&S monitoring was still required, and that it was indeed continuing. Taking into account the overall context of the completed project – the conflicting perspectives of the positive outcomes of the technical and revenue generating impacts in contrast to the difficult on-going E&S issues²², EIB-CM found that the EIB's reporting in the 4 documents in the public domain or disclosed to the Complainant has been succinct but not misleading.

Allegation (ii): Failure in monitoring of compliance with EIB E&S standards and the Borrower's contractual commitments

- 5.17 EIB-CM's assessment for this part of the complaint considered (a) Compliance with the EIB monitoring procedures, and (b) E&S Monitoring within the framework of EIB standards and the EIB finance contract.
- 5.18 EIB-CM noted however that the EIB's business case for monitoring projects outside the EU is not comparable to that of the mission of other IFIs participating in the project: the EIB "does

²² See also case Study by GIZ "Compensation and Livelihood Restoration at Nam Theun 2 Hydropower project https://orbi.uliege.be/bitstream/2268/197257/1/3.%20Case%20Study_Compensation%20and%20Livelihood%20Restoration%20at%20Nam%20Theun%20%20Hydropower%20Project.pdf and p.6 Improve policy coherence, "Careful assessment of the full effects" <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52001DC0264&from=EN> (both accessed on 20/9/2018)

not have a pure development mission”²³ and “in its external operations it has much lower staff resources per unit of financing compared to other MDBs.”²⁴

EIB Monitoring (a) Procedures framework

- 5.19 EIB-CM reviewed the EIB’s “physical” project-related monitoring procedures (i.e. not financial monitoring) covering E&S safeguarding and due diligence of EIB finance contract compliance.
- 5.20 The EIB project team defines a physical monitoring plan for each investment project as part of the loan approval procedures.²⁵ The plan may also refer to conditions (often related to disbursement), undertakings and project reporting requirements, which are transposed into the finance contract. Proactive physical monitoring by sector experts continues during project implementation. In addition, since 2014, for projects financed under the ELM, input for monitoring reporting, including for E&S when relevant is collated from all the EIB services for the life of the loan. As part of these monitoring procedures, where the EIB continues to bear project risk for E&S mitigating measures²⁶ after project completion, the sector specialist project team leader may decide to continue with specifically enhanced on-going physical monitoring.
- 5.21 EIB-CM also found that EIB procedures support liaison with IFI co-financiers of EIB projects in order to ensure coordinated, consistent and cost-effective execution of monitoring tasks.
- 5.22 EIB-CM found that the EIB’s non-standard procedure of enhanced on-going physical project monitoring has been applied. Project monitoring by sector specialists has continued in view of the E&S project-risks and the ongoing implementation of the E&S mitigation measures. In recent years the EIB project team has participated in IFI NT2 joint missions, although not between early 2010 and late 2015.
- 5.23 With respect to the E&S monitoring framework, EIB-CM found that the EIB has had a lesser role in IFI monitoring and that WB and ADB took the lead, although there is no formal EIB agreement on this. EIB leveraged on the WB and ADB’s experience and commitment to monitoring E&S compliance with their own safeguards, as well as with WB and ADB local presence. EIB-CM considered the EIB’s role was appropriate in institutional terms, given that there was a complex monitoring framework in place. Moreover, in terms of good practice, this approach is consistent with EIB procedures to maximise synergies, cooperation and efficiency between IFIs.

²³ Report and recommendations of the Mid-Term Review of EIB external mandate – Report of the Steering Committee of “wise persons”, February 2010, p.8 1. EIB external mandate and 1.1 The role of the EIB: http://www.eib.org/attachments/documents/eib_external_mandate_2007-2013_mid-term_review.pdf and DG ECFIN Mid-term evaluation of EIB’s external mandate (COWI A/S, March 2010) http://ec.europa.eu/dgs/economy_finance/evaluation/pdf/ecfin_eval_en.pdf (both accessed on 20/9/2018)

²⁴ See footnote 10 of the present document – Complaint 2009 Bujagali Hydropower project, p. 21 7.1. The EIB role and mandate

²⁵ Monitoring: <http://www.eib.org/en/projects/cycle/monitoring/index.htm>, and Environmental and Social Handbook Vol II, B.3.1 <http://www.eib.org/en/infocentre/publications/all/environmental-and-social-practices-handbook.htm> (both accessed on 20/9/2018)

²⁶ See footnote 26, Environmental and Social Handbook, B.3.1 § 275

EIB monitoring (b) Compliance with EIB environmental and social standards and the EIB finance contract:

- 5.24 Referring to the EIB's E&S regulatory framework for NT2 (as in point 3.3 above) EIB-CM noted that the 2004 statement includes the principles of sustainability, guidance by EU principles and standards, and cooperation with Multilateral Financial Institutions (MFI) co-financiers.
- 5.25 EIB-CM found that before contract signature, EIB had collaborated closely with IFIs to ensure safeguards were addressed consistently in their respective contracts with GoL and NTPC.
- 5.26 As mentioned above, the CA included WB and ADB safeguards. The EIB's NT2 contractual framework (finance contract and Project Agreement) between GoL, NTPC and EIB specifically refer to WB safeguards. At the time of the EIB loan approval and contract signature in 2005, these safeguards in the CA were more specific and detailed than the EIB's.
- 5.27 Thus, in the context of the extensive monitoring framework in place, as in point 5.3 above, and the collaboration between IFIs regarding finance contract negotiations, EIB-CM considered that the principles of EIB E&S policy and the finance contract undertakings have been included in the overall compliance monitoring of NT2.
- 5.28 The overall E&S monitoring framework has been maintained longer than expected. IFIs, including EIB, committed resources to continue monitoring sustainability and human rights issues which still needed attention, for example livelihood restoration, Revenue Management Programme, environmental protection. The PoE monitoring mission had been extended, but at the time of writing this Conclusions Report 2, it was foreseen to end with closure of the Resettlement Implementation Period ("RIP") on the Nakai Plateau. EIB-CM was informed in September 2018 that RIP closure had taken place in July 2018.
- 5.29 EIB-CM also noted that IFI monitoring is reducing in 2018, with WB withdrawing and ADB expecting to maintain a light desktop arrangement. In May 2018 the extent of future NT2 monitoring currently foreseen by EIB was also largely desktop based, reviewing the various monitoring documentation required in the finance contract, with missions as appropriate.
- 5.30 With respect to EIB monitoring of NT2, EIB-CM concluded it as being broadly compliant.

6. CONCLUSIONS

- 6.1 On the basis of the above assessment carried out by EIB-CM as a desktop study, the conclusions of each part of the complaint were as follows:
- 6.2 Concerning *EIB reporting to the EC*, EIB-CM found that the regulatory framework does not require the EIB to provide specific reporting on NT2 E&S project-risk related issues whilst the loan and guarantee are still in place. Firstly, reporting refers to projects signed within the EC's defined 7 year ELM financial period, so once the evaluation of the 2000-2007 mandate had

been fulfilled in 2010, there was no further regulatory opportunity for the EIB to include NT2 in a report to the EC, unless credit risk issues were identified. Secondly, the regulatory framework of ELM reporting focus was, and remains, to identify EIB lending contribution to impacts on EU policy. The EIB was not required to report to the EC on NT2 on either the E&S issues at individual project level, or as a project deserving to be highlighted during monitoring – for reasons of public interest, or EU “reputational” / accountability risk to EU policies.

- 6.3 Concerning *EIB reporting to the public*, the EIB was not required to publish information on NT2 E&S compliance or implementation of mitigation measures. With respect to the EIB documents on NT2 in the public domain, EIB-CM reviewed the content, recognising that they were not required under the EIB’s reporting obligations in the regulatory framework. EIB-CM notes that the E&S information on NT2 is brief and factual, but in all of the documents there is evidence to the public that E&S monitoring was still required, and that it was indeed continuing.
- 6.4 Regarding *EIB monitoring*, EIB-CM found that the EIB followed its procedures for ensuring its continued monitoring of implementation of environmental and social mitigating measures, so far for 8 years of project operation.
- 6.5 EIB-CM found that the EIB has had a lesser role in IFI monitoring of this project and that WB and ADB took the lead, although there is no formal agreement on this. EIB-CM considered the role for the EIB as appropriate in institutional terms, given that there was a complex monitoring framework in place. Moreover, in terms of good practice, this approach is consistent with EIB procedures to maximise synergies, cooperation and efficiency between IFIs.
- 6.6 In addition, with respect to monitoring EIB E&S standards and the finance contract undertakings, EIB-CM took the view that the WB and ADB safeguards which were included in the contract framework were more detailed than EIB’s at the time, and they covered the principles of EIB policy appropriately. These safeguards were being monitored by the framework in place, and so far this remains in place. In the context of the development and sector complexities, EIB-CM therefore concluded that the EIB has been in compliance with its policies.
- 6.7 In terms of future monitoring, the Resettlement Implementation Period (“RIP”) on the Nakai Plateau has been closed, consequently IFI involvement is reducing noticeably. Under this new scenario, and after considering different alternatives, the EIB should analyze its future role and monitoring activities in line with its policies and contractual agreements.

Overall, taking into account EIB-CM's assessment of the various allegations, EIB-CM concludes that the EIB has been in broad compliance with its policies and procedures with respect to the complaint allegations assessed in this Report 2.

Complaints Mechanism

Complaints Mechanism

- Annexes
1. Abbreviations and acronyms
 2. List of EU Decisions relating to the EIB's ELM

Appendix 1

ABBREVIATIONS AND ACRONYMS

ADB	Asian Development Bank
AFD	Agence Française de Développement
BOOT	Build, Own, Operate, Transfer (project procurement)
CA	Concession Agreement (between Government of Laos and Nam Theun Power Company)
EC	European Commission
EIB-CM	EIB Complaints Mechanism
ELM	External Lending Mandate (governing EIB outside of EU financing)
EP	European Parliament
E&S	Environmental and Social performance/obligations
EUR	Euro
GA	Guarantee Agreement (between EC and the EIB)
GoL	Government of Laos
IAG	International Advisory Group (reports to WB)
IFI	International Financing Institution (e.g. the EIB)
LTA	Lenders' Technical Advisers (reports to the IFIs)
MDG	Millennium Development Goals
MFI	Multilateral Financial Institutions
MW	Mega watt
NIB	Nordic Investment Bank
NNT NPA	Nakai-Nam Theun National Protected Area
NT2	Nam Theun 2 (the project)
NTPC	Nam Theun Power Company
ODA	Official Development Assistance
PDR Lao	Lao People's Democratic Republic
PoE	Panel of Experts (reports to Government of Laos)
PCR	Project Completion Report (EIB Projects Directorate document)
PPP	Public-Private Partnership
ReM	Results Measurement (EIB's impact assessment framework)
RIP	Resettlement Implementation Period
USD	US dollar
WB	World Bank

Appendix 2

List of EU Decisions on the Guarantee to the European Investment Bank against losses under loans for projects outside the Community.

Mandate	Council / EP Council Decision	Date of decision	Repealed by
2000-2007	2000/24/EC	22/12/1999	2008/580/EC
	2000/688/EC	07/11/2000	2008/580/EC
	2000/788/EC	04/12/2000	2008/580/EC
	2001/778/EC	06/11/2001	2008/580/EC
	2005/47/EC	22/12/2004	2008/580/EC
	2006/174/EC	27/02/2006	2008/580/EC
2000-2007	2008/580/EC	23-Jun-08	
2007-2013	2006/1016/EC	19-Dec-06	Annulled by ECJ 6/11/2008 case C-155/07: should be subject to Decision procedure by both EP and Council Replaced by 633/2009/EC
2007-2013	2008/847/EC	04-Nov-08	
2007-2013	633/2009/EC	13-Jul-09	1080/2011/EU
2007-2013	1080/2011/EU	25-Oct-11	
2014-2020	466/2014/EU	16-Apr-14	(EU) 2018/412
2014-2020	(EU) 2018/412	14-Mar-18	