



NAM THEUN 2 Hydroelectric Project Lao PDR

Complaint SG/E/2016/03

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

CONCLUSIONS REPORT

Part 1

6 November 2018

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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/accountability/complaints/index.htm>

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EXECUTIVE SUMMARY

On 6 April 2016 CEE Bankwatch Network (“Complainant”) brought a comprehensive list of allegations to the European Investment Bank’s Complaints Mechanism (“EIB-CM”) in relation to the Nam Theun 2 Hydroelectric project (“project”) concerning the following: (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 the 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.

The EIB-CM addresses these issues in two conclusions reports. This report (Part 1) assesses the allegations about the failure of the EIB to comply with the applicable transparency requirements, as follows: (1) failure of the EIB to actively and systematically publish project-related environmental and social information on its webpage; (2) the EIB’s decision to refuse access to all monitoring results and actions breached the applicable transparency requirements; and (3) failure to reply to a disclosure request. The remaining allegations are assessed in a separate conclusions report (Part 2).

Regarding the first allegation, the EIB-CM found that the EIB’s internet page provided a link to the external websites where the project’s environmental and social impact assessment and numerous monitoring documents were published. Pursuant to the Aarhus Regulation, EU institutions and bodies may fulfil their proactive transparency obligations via references to external websites where the information can be found, therefore the EIB-CM concluded the allegation not grounded. The EIB-CM noted that the EIB is progressively developing its Public Register and will continue to assess the scope of environmental and social documentation it holds and can make public, in line with the Aarhus regulatory framework.

Regarding the second allegation, the EIB-CM found that the EIB made available to the Complainant those monitoring reports that could have been reasonably inferred from the language of the disclosure request of the Complainant. Hence the EIB-CM concluded that the EIB complied with the applicable transparency rules, and no further action is required from the Bank.

Regarding the third allegation, the EIB granted the Complainant access to the requested documents more than one year after the disclosure request was made. The EIB-CM’s review indicated that the long period of the EIB’s reply was not justified.

CONCLUSIONS REPORT

Complainant: CEE Bankwatch Network

Date received: 6 April 2016

Project Status: Signed / Disbursed / under monitoring

Board Reports: 13 April 2005

Contract amount: Up to EUR 45m for 30 years; project cost EUR 998m

1. THE COMPLAINT

On 6 April 2016 CEE Bankwatch Network (“Complainant”) lodged a complaint by email in relation to the Nam Theun 2 Hydroelectric project (“project”) and attached two studies in support of the complaint.¹ The complaint letter outlined a comprehensive list of allegations in relation to the following: (i) the EIB’s 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) the EIB’s monitoring of the project’s compliance with the Bank’s environmental and social standards and contractual commitments.

This report addresses the allegations about the Bank’s alleged failure to comply with the applicable transparency requirements. The remaining allegations are assessed in a conclusions report to be issued separately.

ALLEGATIONS

1.1. Failure of the EIB to actively and systematically publish project-related environmental and social information on its webpage

The Complainant states that *“the Bank failed to comply with the Council Decision of 22 December 1999 (2000/24/EC) requesting substantial enhancement of transparency of the EIB lending under this Decision. The Bank failed to comply with its own Corporate Social Responsibility Statement aiming at high level of transparency and accountability. [...] The Bank disclosed only the project summary which presented the project at the appraisal stage and which has not been updated since then. The Bank’s webpage provides a link to Non- Technical Summary of the Environmental Impact Assessment however no document could be found under this link. The scarcity of information on project implementation provided by the Bank is particularly striking in comparison to the World Bank’s project webpage where many updated information and documents can be found. The Bank could have also published the following social and environmental project’s safeguard documents known to the Bank at the time of project appraisal: Summary Environmental and Social Impact Assessment (SESIA),*

¹ 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 Manorom (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.

Environmental Assessment and Management Plan (EAMP), Social Development Plan (SDP), Social and Environmental Management Framework and 1st Operational Plan (SEMFOPI) for the watershed area. This is worth noting that even a Statement on the Release of the NT2 Panel of Experts 24th Report was not publicised by the EIB itself on its webpage, although the Bank undersigned the Statement next to Agence Française de Développement, Asian Development Bank, and World Bank Group which published this on their webpages. The Bank decided however not to undertake any effort in enabling wide public access to project information.”

1.2. The EIB’s decision to refuse access to all monitoring results and actions breached the applicable transparency requirements

On 8 April 2015 the Complainant requested from the Bank environmental and social information available in the documents related to Nam Theun 2 project, including among others “available monitoring reports”. The Complainant alleges that “[t]he Bank failed to provide all available monitoring reports, providing the link to where such reports can be found on the World Bank webpage, however not providing the complainant with access to its own monitoring reports (such as reports from monitoring missions) and Lenders’ Technical Advisory reports.”

1.3. Failure to reply

On 27 October 2015 the Complainant requested the Bank to disclose the Lenders’ Technical Advisory (“LTA”) Report of November 2014 and previous LTA Review reports. The Complainant submits that “[t]he Bank acknowledged receipt of the request however it failed to reply to it.” The Complainant further contends that the Bank failed to reply to the confirmatory application submitted on 19 January 2016, although the Bank acknowledged receipt on 20 January 2016. The Complainant considers that “the Bank violated its rules on access to documents in line with the Transparency Policy of the Bank. In particular it failed to provide reply in timely manner according to the procedure and it failed to explain the delay in replying. In fact the Bank has been simply ignoring the complainants request for access to documents for four months.”

CLAIM

The Complainant asks that the Bank

- proactively publishes on its webpage environmental and social information related to this project, in compliance with the applicable transparency requirements and
- grants access to the requested monitoring reports.

2. BACKGROUND INFORMATION

2.1. *The project*

- 2.1.1. 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 Government of Lao People’s Democratic Republic (“GoL” or “borrower”).

2.1.2. 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 “final beneficiary”), in which GoL holds 55%. NTPC is a special purpose vehicle created to build, own and operate the NT2 project under a 25-year concession agreement. The Bank and the Borrower signed a loan agreement in April 2005, and the project started commercial operation in 2010.

2.1.3. The project is co-financed by the World Bank, the Asian Development Bank (“ADB”), Agence Française de Développement (“AFD”), the French Export Credit Agency (“COFACE”), PROPARGO, the Thai Exim Bank, the Nordic Investment Bank and private sector financiers. Among the co-financiers, the World Bank has taken the lead on the environmental and social safeguard issues associated with the project.

2.2. *Previous exchange of correspondence between the Bank and the Complainant*

2.2.1. The Complainant and the Bank had exchanged several communications on the issues assessed in this report. The Table 1 below summarises the timeline of the key exchanges.

Table 1

TIMELINE	
08 Apr 2015	Complainant’s application to disclose project-related documents (disclosure request No. 1)
03 May 2015	Complainant’s additional request for information disclosure regarding the Bank’s monitoring (disclosure request No. 2)
22 May 2015	EIB reply to disclosure request No. 1
16 Jun 2015	EIB reply to disclosure request No. 2
27 Oct 2015	Complainant’s application to disclose the LTA Reports (disclosure request No. 3)
19 Jan 2016	Complainant’s confirmatory application relating to disclosure request No. 3
06 Apr 2016	Complaint lodged with the EIB-Complaints Mechanism
28 Nov 2016	EIB reply to disclosure request No. 3

2.2.2. On 8 April 2015 the Complainant requested access to environmental and social information included in the following documents: 1) environmental and social appraisal report (and potential updates); 2) Management Proposal to the Board of Directors; 3) full version of Environmental and Social Impact Assessment; 4) EIB’s own document based on the Development Impact Assessment Framework (“DIAF”) or relevant one; 5) available monitoring reports; 6) project completion report and 7) finance contract environmental and social clauses. On 22 May 2015 the Bank responded to the disclosure request. The Bank disclosed environmental and social information contained in the requested documents² and noted that

² The disclosed documents comprise 1. Report on the Environmental and Social Issues (part of the Appraisal report); 2. Proposal from the Management Committee to the Board of Directors; 3. a copy of the Value Added Sheet; 4. Project completion report; 5. Environmental and Social clauses of Finance Contract.

at the time of the appraisal of this project, neither the DIAF nor its successor, the Result Measurement Framework assessments existed. The Bank explained that redactions were made in the disclosed documents for reasons of protection of commercial interests of the Bank's counterpart and the protection of personal data, pursuant to the EIB Group's Transparency Policy. The Bank further stated that the full Environmental Assessment and Management Plan, as well as the monitoring and progress reports were available on the website of the World Bank that was acting as lead financial institution among the group of multilateral financiers involved in this project.³ The Bank also informed the Complainant that the project brief on the EIB's website had been updated.⁴

- 2.2.3. On 3 May 2015 the Complainant filed a second request by email, to access monitoring data related to the project. The Bank sent its response on 16 June 2015, informing the Complainant that it was not in possession of the requested information, however, it would be able to consider the disclosure request once the relevant documents were obtained, according to the provisions of the EIB's Group Transparency Policy.
- 2.2.4. On 27 October 2015 the Complainant submitted a third disclosure request, which concerned access to the Lenders' Technical Advisory Report (LTA) of November 2014 and previous LTA Reports. The Bank acknowledged receipt the next day. The Complainant lodged a confirmatory application on 19 January 2016, and the Bank acknowledged receipt on 20 January 2016.
- 2.2.5. By email of 1 March 2016 the Bank informed the Complainant that it was still processing the confirmatory application. The Bank stated that *"we apologise for the delay which is due to the complexity of your request which concerns third-party documents and involves consultation with several parties outside the Bank. [...] Without prejudice to the above, we would like to point out that the requested documents have now been superseded following the release of the NT2 Environmental and Social Panel of Experts 24th Report, the recommendations of which are closely being followed by the lenders in cooperation with the Government of Lao PDR, NTPC and other partners."* The Bank provided the weblinks to two relevant press releases.
- 2.2.6. On 6 April 2016 the Complainant lodged a complaint with the EIB-CM. Amongst other allegations, the Complainant qualified the four-month delay by the Bank in the handling of the application as a failure to reply.
- 2.2.7. The Bank and the Complainant exchanged emails on the 17-18 May about the delay. By email dated 28 November 2016 the Bank disclosed two documents: (i) the LTA report of November

³ The Bank's reply referenced the following websites: as regards the full Environmental Assessment and Management Plan: http://www-wds.worldbank.org/external/default/WDSContentServer/WDS/IB/2005/09/08/000011823_20050908153204/Rendered/PDF/E1050v2.rev.EAMP.maintextMarch2005010.pdf; for the monitoring and progress reports, including reports of the International Environmental and Social Panel of Experts and reports of the International Advisory Group: <http://www.worldbank.org/projects/P076445/lao-nam-theun-2-power-project-former-under-pe-p004206-len?lang=en> and <http://documents.worldbank.org/curated/en/docadavancesearch/docs?query=&projectId=P049290,%20P076445> Accessed on 09 May 2018.

⁴ The Bank's reply referenced the following website: http://www.eib.org/infocentre/press/news/topical_briefs/2005-november-01/nam-theun-2-hydropower-project-laos.htm Accessed on 09 May 2018.

2014 and (ii) the LTA Site Visit Report #32 – Part B: Environmental and Social, October 2013–March 2014. The Bank’s reply declared that the redactions in the documents were made pursuant to the exemptions under §5.4(b) and §5.5. first bullet point of the EIB Group Transparency Policy (the exemptions aiming at the protection of personal data and the protection of the commercial interests of the Bank’s counterparts). The Bank did not disclose other LTA reports. The Bank underlined that the 2014 findings are somewhat out of date and since then the LTA has continued reporting to the financiers. The Bank added that *“despite the significant progress made by the project since 2014, the LTA has identified a number of environmental and social issues that remain to be resolved”*.

- 2.2.8. It transpires from the complaint letter that the Complainant contests (i) the EIB’s reply to the first disclosure request (dated 22 May 2015) and (ii) the EIB’s failure to reply to the third disclosure request. The complaint does not concern the EIB’s response to the second disclosure request (dated 16 June 2015).

3. APPLICABLE REGULATORY FRAMEWORK

3.1. *The EIB Complaints Mechanism*

3.1.1. When performing its activities, the EIB is bound by European Treaties and its Statute as well as by the relevant regulatory framework of the European Union. The EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (“CMPTR”) apply to complaints regarding maladministration by the EIB Group in relation to its activities, in support of and for the implementation of the aforementioned policies and regulatory framework⁵. “Maladministration” refers to instances where the Bank 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 rights⁶.

3.1.2. Pursuant to article 4.2 of Title III of the CMPTR, the EIB-CM gathers and reviews existing information on the subject under complaint, conducts appropriate inquiries with a view to assessing whether the EIB Group’s policies and procedures have been followed and fosters the adherence to the EIB Group’s policies, in particular those regarding good administration, disclosure and transparency.

3.2. *EIB transparency rules at the time of project appraisal*

3.2.1. In the first allegation, the Complainant contested among others the compliance of the EIB with its proactive transparency obligations at project appraisal. The project was approved by the EIB in 2005, and the sections below cite the applicable transparency obligations of the EIB at that time.

⁵ CMPTR, Title II, article 4.1. and Title IV, Article 4.1.

⁶ CMPTR, Title II, article 1.2.

- 3.2.2. The EIB Information Policy Statement (2002)⁷ stated, among others, that the Bank “aims to strike a balance between its objective to disclose information and documents whenever possible and, notably, to respect the tenor and aims of the Aarhus Convention within the context of the relevant EU legislation and the EIB's operational framework”. The document also provided that “the principal tool for disseminating information to the public at large is the EIB’s website. All documentation published by EIB is either posted or listed on its website [..].”
- 3.2.3. In 2004 the Board of Directors adopted the document “Transparency Policy – Report and Proposals”. This document did not replace the Information Policy Statement but it constituted a review of the applicable transparency rules and a number of enhancements. Paragraph 3.7 of the 2004 Transparency Policy stated that “[a]s regards environmental information, for all projects requiring an EIA, EIB makes available the Non-Technical Summary and, for such projects outside the EU, the Environmental Impact Statement” (the “EIS”).
- 3.3. *EIB Transparency Policy (2015)*⁸
- 3.3.1. The Transparency Policy is consistent with the legal obligations of the EIB in respect of the principle of openness and the right of public access to documents (§3.5). The Policy applies without prejudice to the right of public access to information/documents held by the EIB which might follow from the Aarhus Convention and Regulation (EC) No 1367/2006 (“Aarhus Regulation”), or other instruments of international law or acts of institutions implementing them. The Policy ensures that information is protected from disclosure when disclosure would undermine the legitimate rights and interests of third-parties, and/or of the EIB Group in line with the exceptions defined in the Policy. The EIB Group must maintain the confidence and trust of their clients, co-financiers and investors, and it is necessary to allay concerns about the treatment of confidential information which, otherwise, could affect these partners’ willingness to work with the Group and thus impede its members from fulfilling their respective missions and objectives. (§2.5).
- 3.3.2. In compliance with the Aarhus Regulation, project-related environmental and social information held by the Bank is also disseminated through the EIB's Public Register that the Bank has set up on its website in January 2014 (§4.12). The Public Register currently contains documents related to projects financed by the Bank from 2012 onwards, while documents for projects approved before that date are provided upon request.⁹ The Bank is progressively developing the Public Register and will continue to assess the scope of environmental and social documentation it holds and can make public.¹⁰

⁷ Available at: http://www.eib.org/attachments/strategies/pai_ips_en.pdf Accessed on 09 May 2018.

⁸ Available at: <http://www.eib.org/infocentre/publications/all/eib-group-transparency-policy.htm> Accessed on 09 May 2018.

⁹ See: <http://www.eib.org/en/infocentre/registers/faq/index.htm>

¹⁰ See also: Report on the implementation of the EIB Group Transparency Policy in 2016, page 4. Available at: <http://www.eib.org/infocentre/publications/all/report-on-the-implementation-on-the-eibs-transparency-policy-in-2016.htm> Accessed on 09 May 2018.

- 3.3.3. As per §5.1 *“all information and documents held by the Bank are subject to disclosure upon request, unless there is a compelling reason for non-disclosure.”* §5.5 provides that *“access to information/documents shall [...] be refused where disclosure would undermine the protection of [...] the commercial interests of a natural or legal person. [...] Footnote 5 provides that the term “commercial interest” covers, but is not limited, to cases where the Bank concluded a confidentiality agreement. Also, commercial interests can be protected even after the expiration of the confidentiality agreement.”* §5.7 states that *“the exceptions under 5.5 [...] shall apply unless there is an overriding public interest in disclosure [...].”*
- 3.3.4. §5.9 provides that *“as regards third-party documents [...] the Bank shall consult with the third party whether the information in the document is confidential according to this Policy unless it is clear that the document shall or shall not be disclosed.”*¹¹ It must also be borne in mind that the objection of a third party other than a Member State is not binding upon the EU institutions, but must enable them to conduct their own assessment whether an exception to disclosure applies.¹²
- 3.3.5. All requests for disclosure of specific information/documents shall be handled promptly by the Bank, which will either grant full or partial access to the document requested and/or the grounds for the total or partial refusal shall be stated (§5.15). In the event of an application relating to a very long document or to a very large number of documents, the Bank may confer with the applicant informally, with a view to finding a fair solution (§5.21).
- 3.3.6. Requests are replied to without delay, and in any event no later than 15 working days following receipt (§5.22). In exceptional cases, for example in the event of an application relating to a very long document or when the information is not readily available and complex to collate, the time-limit may be extended and the correspondent shall be informed accordingly no later than 15 working days following receipt (§5.23) The Bank shall, however, endeavour to provide a reply to such complex requests no later than 30 working days following receipt. (§5.24)
- 3.3.7. If, for reasons of confidentiality, the Bank is unable to divulge the information requested, in full or partially, the reason(s) why such information cannot be provided shall be stated and the applicant will be informed of the right to make a voluntary confirmatory application or lodge a complaint (§5.25).
- 3.3.8. In the event of a total or partial refusal following the initial application, the applicant may, within 15 working days of receiving the Bank’s reply, make a confirmatory application asking the Bank to reconsider its position. Alternatively, the applicant may lodge a complaint with the Complaints Mechanism within one year of the EIB’s response. (§5.31).

¹¹ See also: Case T-380/04, Ioannis Terezakis v. Commission of the European Communities (Judgement of 30 January 2008), paragraph 54.

¹² See for example Case T-245/11, ClientEarth and International Chemical Secretariat v ECHA (Judgement of 23 September 2015), paragraph 223.

3.3.9. Failure by the Bank to reply to a request within the prescribed time limit shall be considered as a negative reply and entitle the applicant to make a complaint to the EIB Complaints Mechanism or institute court proceedings against the Bank before the Court (§5.34).

3.4. *The Aarhus Regulation*¹³

3.4.1. This Regulation implements the Aarhus Convention¹⁴ for the EU institutions and bodies. The Regulation entered into force on 28 September 2006 and became applicable on 28 June 2007. The objectives of the Aarhus regulatory framework include recognizing that, in the field of the environment, improved access to information enhance the quality and the implementation of decisions, contribute to public awareness of environmental issues, give the public the opportunity to express its concerns and enable public authorities to take due account of such concerns.¹⁵

3.4.2. Article 4.1 provides that *“Community institutions and bodies shall organise the environmental information which is relevant to their functions and which is held by them, with a view to its active and systematic dissemination to the public [...] They shall make this environmental information progressively available in electronic databases that are easily accessible to the public through public telecommunication networks”*. This provision further specifies that *“[t]he information made available by means of computer telecommunication and/or electronic technology need not include information collected before the entry into force of this Regulation unless it is already available in electronic form.”*¹⁶

3.4.3. Article 4.2 stipulates that *“the environmental information to be made available and disseminated shall be updated as appropriate”*. It is further specified that *“the databases or registers shall include the following:[...] (e) data or summaries of data derived from the monitoring of activities affecting, or likely to affect, the environment; (f) authorisations with a significant impact on the environment, and environmental agreements, or a reference to the place where such information can be requested or accessed; (g) environmental impact studies and risk assessments concerning environmental elements, or a reference to the place where such information can be requested or accessed.”* As per article 4.3, *“in appropriate cases,*

¹³ Regulation (EC) No 1367/2006 of the European Parliament and of the Council of 6 September 2006 on the application of the provisions of the Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters to Community institutions and bodies, OJ L 264, 25.9.2006, p. 13–19

¹⁴ United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters done at Aarhus, Denmark, on 25 June 1998. The European Community approved the Convention on 17 February 2005 via Council Decision 2005/370/EC (OJ L 124, 17.5.2005, p. 1).

¹⁵ See: Aarhus Convention, Ninth Recital; Aarhus Regulation, Recital (14)

¹⁶ Article 5 of the Aarhus Convention provides the following. *“Each Party shall ensure that: (a) Public authorities possess and update environmental information which is relevant to their functions. [...] Each Party shall ensure that, within the framework of national legislation, the way in which public authorities make environmental information available to the public is transparent and that environmental information is effectively accessible, inter alia, by: [...] Establishing and maintaining practical arrangements, such as: [...] Publicly accessible lists, registers or files [...] Each Party shall ensure that environmental information progressively becomes available in electronic databases which are easily accessible to the public through public telecommunications networks.”*

Community institutions and bodies may satisfy the requirements of paragraphs 1 and 2 by creating links to Internet sites where the information can be found.”¹⁷

3.5. *The External Lending Mandate (ELM) Decision*¹⁸

3.5.1. Article 1 of the ELM Decision provides that *“the Community shall grant the EIB a global guarantee in respect of all payments not received by it but due in respect of credits opened, in accordance with its usual criteria, and in support of the Community’s relevant external policy objectives, for investment projects carried out in Central and Eastern Europe, the Mediterranean countries, Latin America and Asia and the Republic of South Africa.”* Recital 18 of the ELM Decision states that *“EIB financing in eligible third countries should be managed, in accordance with the EIB’s usual criteria and procedures [..]. The recital adds that “[..] the transparency of the EIB lending under this Decision should be substantially enhanced[..].”*

3.5.2. It appears that the ELM Decision does not establish transparency rules that would modify the applicable regulatory framework identified in §§3.2-3.4.

4. WORK PERFORMED BY THE EIB-CM

4.1. On 6 April 2016 the Complainant 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.

4.2. On 18 April 2016 the EIB’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 project as well as its past and recent history and the EIB’s involvement. The EIB-CM also engaged with the Complainant to discuss the general and specific issues of the complaint’s handling and procedure.

4.3. In the course of the enquiry the EIB-CM reviewed the complaint, the relevant project documentation, the applicable regulatory framework, and the correspondence between the Bank and the Complainant and the Promoter. The information gathered during the investigation enabled the EIB-CM to reach findings and conclusions on the allegations that are presented in the sections below.

5. FINDINGS

5.1. *Alleged failure of the Bank to actively and systematically publish project-related environmental and social information on its webpage*

5.1.1. The contested obligation of the EIB arises from the Aarhus Regulation that implements the Aarhus Convention for EU institutions and bodies (see: §3.4). It should be noted that the

¹⁷ Article 5.3. of the Aarhus Convention formulates this obligation as follows: *“Information accessible [electronically] should include: (a) Reports on the state of the environment, as referred to in paragraph 4 below; (b) Texts of legislation on or relating to the environment; (c) As appropriate, policies, plans and programmes on or relating to the environment, and environmental agreements; and (d) Other information, to the extent that the availability of such information in this form would facilitate the application of national law implementing this Convention, provided that such information is already available in electronic form.”*

¹⁸ Council Decision 2000/24/EC of 22 December 1999 granting a Community guarantee to the European Investment Bank against losses under loans for projects outside the Community

Aarhus Regulation defines this obligation as a progressive one (see: §3.4.2), and it is implemented by the EIB via the Public Register, covering the dissemination of environmental and social information held by the EIB for projects signed after 2012 (see: §3.3.2). The project at hand was signed in 2005, consequently it does not appear in the Public Register. Accordingly, and in relation to the allegation, the EIB-CM enquired about the extent of project-related environmental and social information available in the domains of the EIB’s website.

- 5.1.2. It is noted that the EIB has published information about the project during different stages of the project’s lifecycle. The EIB-CM takes note of the EIB’s web announcements at the time of project appraisal (in 2004, 2005) and during project monitoring (in November 2015). In this context, it is observed that the weblink to the NTS published by the EIB in 2004 is no longer functioning.¹⁹ Furthermore, the web announcements issued by the EIB in 2004 and 2005²⁰ indicate that the EIB did not publish the EIS²¹ at project appraisal, despite the existence of such an obligation at that time (see: §3.2.3). However, the EIB’s web update of November 2015 established access to the EIS, hence before the complaint was submitted to the EIB-CM.
- 5.1.3. In November 2015 the EIB updated the project information on its website²² and made references to (i) the Promoter’s website²³ (ii) the World Bank’s website on the project²⁴ and (ii) the World Bank’s press release of the 24th Panel of Experts report.²⁵ These external websites provide public access to the EIS and other appraisal documents mentioned by the Complainant in §1.1, as well as some environmental and social monitoring reports.²⁶

¹⁹ The Bank referenced the following weblink: http://www.namtheun2.com/gallery/lib_eamp.htm. (Accessed on 09 May 2018.)

²⁰ On 26 November 2004 the Bank announced on its website that the project was under appraisal and included a weblink to the NTS. (See: <http://www.eib.org/projects/pipelines/pipeline/20020596>). On 26 April 2005 the Bank announced its decision to finance the project. (See: <http://www.eib.org/infocentre/press/releases/all/2005/2005-017-usd-55-million-for-hydropower-plant-in-laos>). Accessed on 09 May 2018.

²¹ For this project, the EIS is denominated as the “Environmental Assessment and Management Plan” (EAMP).

²² http://www.eib.org/infocentre/press/news/topical_briefs/2005-november-01/nam-theun-2-hydropower-project-laos.htm Accessed on 09 May 2018.

²³ The Bank referenced the following weblink: <http://www.namtheun2.com/> Accessed on 09 May 2018.

²⁴ The Bank referenced the following weblink <http://projects.worldbank.org/P076445/lao-nam-theun-2-power-project-former-under-pe-p004206-len?lang=en> Accessed on 09 May 2018.

²⁵ The Bank referenced the following weblink: <http://www.worldbank.org/en/news/press-release/2015/11/05/statement-on-the-release-of-the-nt2-panel-of-experts-24th-report> Accessed on 09 May 2018.

²⁶ It should be noted that the project’s independent environmental and social monitoring framework comprises the following entities, whose reports the EIB has also received: (i) the LTA, reporting to the public and private financiers, monitors implementation and assess compliance with environmental and social safeguards; (ii) Independent Monitoring Agency, reporting to GoL according to the concession agreement, monitor progress on resettlement, environmental impact mitigation, and watershed management issues; (iii) the Panel of Environmental and Social Experts (“POE”), reporting to the GoL, assesses the extent to which the project meets the requirements of the environmental and social safeguard policies of the World Bank and the Asian Development Bank; and (iv) the International Advisory Group (“IAG”), active until 2010, advised the World Bank’s President on revenue management arrangements as well as environmental and social aspects. In addition the finance contract between the EIB and the Borrower provides for an information undertaking that *“the Borrower shall deliver (i) annually during the operation of the Project a report on environmental and social aspects, the revenue management and on the developments of the Nakai-Nam Theun Biodiversity Conservation area; and report on (ii) any material adverse change to the transaction documents to which the Borrower is a party, as defined in the Concession Agreement. [...] The Borrower shall ensure that NTPC delivers to the Bank [...] (i) every 3 (three) months until the Project is completed, a report on the implementation of the Project and on its social and environmental aspects; (ii) 15 months after the Commercial Operating Date (COD), a project completion report [...]”*.

As far as public access to monitoring reports is concerned, the World Bank’s website – as referenced by the EIB – provides public access to the monitoring reports of the IAG and the POE as well as the World Bank board progress reports. See also: EIB-CM Initial Assessment report concerning the complaint on the Nam Theun 2 Hydroelectric project (18 August 2017), §3.4.

5.1.4. Regarding the Complainant's observation about the comparative scarcity of information disseminated at the EIB's website, it is worth mentioning the EIB's role in the co-financing. The leadership of the World Bank in environmental and social safeguard issues for this project (see: §2.1.3) entailed in practice, the publication of the relevant information by the co-financier. It is important to highlight that the Aarhus Regulation permits references to external websites as a means of implementation (see: §3.4.3). Considering the progressive character of the EIB's contested obligation, and the extent of information available to the public at the websites referenced by the EIB, it appears that the EIB's proactive transparency obligations have been satisfied in this case.

5.1.5. The EIB-CM notes that the EIB is progressively developing its Public Register and will continue to assess the scope of environmental and social documentation it holds and can make public (§3.3.2).

5.2. *The Bank's refusal to provide the Complainant with access to the monitoring results and actions*

5.2.1. In her first application the Complainant formulated a request for "available monitoring reports" (§2.2.2). The Bank's response, dated 22 May 2015, identified the monitoring reports published on the World Bank's website as the corresponding documents. In the complaint letter to the EIB-CM, the Complainant opined that the documents indicated by the EIB did not correspond to the full set of documents requested, amounting to the EIB's refusal to grant full access.

5.2.2. It appears that the complaint to the EIB-CM was the first instance where the Complainant specifically stated an interest in accessing EIB's own monitoring reports. Meanwhile, after receiving the EIB's response on 22 May 2015, the Complainant submitted two additional applications, to enquire about the existence of monitoring data and request access to the LTA reports (§§2.2.3-2.2.4). Based on the aforesaid, the EIB-CM considers that the EIB's response of 22 May 2015 made available to the Complainant those monitoring reports that could have been reasonably inferred from the language of the first disclosure request.

5.2.3. The EIB-CM further notes that the Bank replied to the third disclosure request during the course of the EIB-CM's enquiry. The EIB granted access to two LTA reports, and conveyed to the Complainant that the EIB considered the other LTA reports as outdated. (see: §2.2.5.). To the knowledge of the EIB-CM, the Complainant did not express a continued interest in accessing the undisclosed LTA reports. It is recalled that the Transparency Policy provides a possibility for the EIB and members of the public to find a fair solution for the disclosure of voluminous documents (see: §3.3.5.), providing the Complainant the possibility to contact the EIB concerning this matter.

5.3. *Alleged failure to reply*

5.3.1. The allegation stems from the absence of reply by the EIB within the deadline laid down in the Transparency Policy, providing the Complainant the right to lodge a complaint with the EIB-

CM (see: §3.3.9). It is pertinent to note, however, that the EIB replied to the disclosure request of the Complainant during the EIB-CM's enquiry. Hence the EIB-CM assessed whether the EIB's delay in handling the disclosure request is explained by the reasons cited in the EIB's correspondence with the Complainant (see: §2.2.5).

- 5.3.2. From the outset, it is noted that the requested LTA reports are environmental and social monitoring documents, and the LTA contract contained provisions on the confidentiality and use of the independent engineer's information by the Interested Parties.²⁷
- 5.3.3. The EIB's services started third-party consultation (§3.3.4) three working days after the disclosure request. Firstly, the EIB's services contacted the World Bank – the co-financier leading on the environmental and social matters for this project – in order to find out if the requested LTA reports were already in the public domain and/or had already been disclosed. Secondly, the EIB's services consulted with the Intercreditor Agent and the promoter in December 2015, which did not result in the agreement of the mentioned third parties to disclosure. The EIB's services decided to continue consulting with them until July 2016.
- 5.3.4. The EIB-CM notes that the EIB eventually granted the Complainant access to two LTA reports without the consent of third parties (see: §3.3.4. of this report), and the minor redactions made in the documents are in line with the Transparency Policy. It is noted that the EIB made available the LTA reports to the Complainant only in November 2016 whereas the last correspondence between the EIB and third parties dates June 2016. Regarding the length of the third party consultation, the EIB's services explained that they took into account the EIB's obligation to maintain the confidence and trust of its clients, co-financiers and investors, and to ensure that information is protected from disclosure when disclosure would undermine the legitimate rights and interests of third parties, and of the EIB Group in line with the exceptions defined in the EIB Transparency Policy (see: §3.3.1. of this report).
- 5.3.5. The EIB-CM understands in general that certain requests for access to information may raise complex questions, affecting the EIB's ability to comply with the deadlines in the Transparency Policy (see: §3.3.6). In the present case, however, the complexity of the case cannot justify the EIB's decision to pursue third party consultation for 7 months (see: §3.3.4), nor to delay the EIB's response to the Complainant for an additional 4 months.

6. CONCLUSIONS

- 6.1 The EIB-CM concludes that the EIB's proactive transparency obligations in relation to this project have been fulfilled, considering that the Aarhus Regulation characterizes the said obligation as a progressive one, and permits references to external websites as a means of implementation. The EIB-CM notes that the EIB is progressively developing its Public Register and will continue to assess the scope of environmental and social documentation it holds and can make public, in line with the Aarhus regulatory framework.

²⁷ See: EIB-CM Initial Assessment Report concerning the Complaint SG/E/2016/03 on the Nam Theun 2 Hydroelectric project, §3.5.

- 6.2 Regarding the second allegation, the EIB-CM found that the EIB made available to the Complainant those monitoring reports that could have been reasonably inferred from the language of the first disclosure request of the Complainant. Hence the EIB-CM concluded that the EIB complied with the applicable transparency rules, and no further action is required from the Bank.
- 6.3 Regarding the third allegation, the EIB-CM found that the EIB replied to the Complainant more than one year after the submission of the disclosure request. While the EIB gave the Complainant access to two LTA reports, the delay of the EIB's reply could not be justified.



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06.11.2018



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LIST OF ACRONYMS

ADB	Asian Development Bank
AFD	Agence Française de Développement
CA	Concession Agreement
CMPTR	Complaints Mechanism Principles, Terms of Reference and Rules of Procedure
COFACE	French Export Credit Agency
EAMP	Environmental Assessment and Management Plan
EC	European Communities
EDF	Electricité de France
EIA	Environmental impact assessment
EIB-CM	European Investment Bank’s Complaints Mechanism
EIS	Environmental impact statement
ELM	External lending mandate
EU	European Union
GoL	Government of Laos
IAG	The International Advisory Group, role taken over by the LTA
LTA	Lenders’ Technical Adviser
NT2	Nam Theun 2 (the project)
NTPC	Nam Theun 2 Power Company
NTS	Non-technical summary
MW	Mega Watt
PoE	Panel of Experts
SDP	Social Development Plan
SEMFOP1	Social and Environmental Management Framework and First Operational Plan
SESIA	Summary Environmental and Social Impact Assessment
UNECE	United Nations Economic Commission for Europe
WMPA	Watershed Management and Protection Authority