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**Complainant:**

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**A complaint to the European Investment Bank's Complaints Mechanism regarding the EIB's loan to Nam Theun 2 Hydroelectric Project's non-compliance with the Bank's environmental and social standards and human rights**

This complaint is based on the recommendation of the International Panel of Experts of 23 October 2015 to extend the closure of Resettlement Implementation Plan for Nam Theun 2 Hydroelectric Project.

This complaint is largely based on publicly available documents in a public domain, the documents disclosed by the European Investment Bank and complainant's correspondence with the bank. The documents which are not publicly available however are recalled were annexed to the complaint.

**Project objectives and main characteristics according to EIB's appraisal documents**

A loan to Lao People's Democratic Republic was signed in April 2005. The EIB loan was used by the Government of the Lao PDR (GoL) to make its equity contribution in the Nam Theun 2 Power Company, a special purpose company created to build, own and operate the NT2 project under a 25-year Concession Agreement.

The project concerned the development, construction and operation of a 1070 MW hydroelectric plant on the Nam Theun River in Laos which was expected to generate 5,636 GWh of electricity per year of which approximately 95% would be exported to the Electricity Generating Authority of

Thailand while the remaining 5% of electricity generated would contribute to meeting expanding national demand in Lao PDR and the needs of the project area.<sup>1</sup>

The 48m high dam was to create a 450 square kilometer reservoir on the Nakai Plateau and divert an average of 220 cubic metres per second of water (99% of the mean flow) from the Nam Theun river. Approximately 88% of the mountainous watershed area was located in the Nakai-Nam Theun National Protected Area recognised for its high level of biodiversity. The project also included 500 kV, 115 kV and 22 kV transmission lines, upgrading of 106 km of public roads and construction of 56 km of new roads.<sup>2</sup>

It was assessed that the project would have high development impact and would contribute to regional integration as it represented the best option to contribute to sustainable social and economic development, and was the country's first real prospect to reduce its dependence on development assistance. Additionally the project was presented as a material contribution to the EU's and the Bank's environmental policy, by tackling climate change and promoting sustainable use of renewable natural resources. The project would also make a material contribution to the conservation of one of the remaining regions of outstanding biodiversity in South East Asia, which would be endangered should the safeguard measures designed under the project not be implemented.<sup>3</sup> The project should have contributed to reversing the trend towards unsustainable exploitation of natural resources, and to improving ethnic minority protection.<sup>4</sup>

### **Projects environmental and social risks and mitigation measures at the appraisal stage**

EIB's Environmental and Social Appraisal report outlines anticipated project impacts, proposed mitigation measures and existing risks related to those impacts.

In general, main risks were associated with *the capacity constraints and governance issues, which entail reputational risks for the Bank and other institutions involved in the project, given the highly visible exposure from environmental and social standpoints. In particular, there remain concerns over the lack of government experience and capacity to implement key project-related programmes and commitments such as environmental and social mitigation/compensation measures, within the GoL's orbit of responsibility, and the NT2 fiscal revenue management, which could all pose risks to long-term project success.*<sup>5</sup>

Mitigation measures consisted of technical assistance to the Government of Laos, audits and reviews, shared management and financial responsibility for the outcomes of environmental and social mitigation and compensation programmes, monitoring and evaluation of project performance, including field based supervision, establishing international panel of experts to monitor realization of environmental and social objectives and regular public consultations to ensure transparency and accountability.

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<sup>1</sup> Nam Theun 2 Hydropower Project, Lao PDR, Consultant's Report on Environmental and Social Issues for the European Investment Bank, Executive Summary, March 2005

<sup>2</sup> NT2 HP, Consultant's Report

<sup>3</sup> Nam Theun 2 Hydropower Project, Lao PDR, Proposal from the Management Committee to the Board of Directors, Executive summary, April 2005

<sup>4</sup> Nam Theun 2, Laos, Value Added Sheet, Pillar 2

<sup>5</sup> NT2 HP, Proposal to the Board

All of the above measures were established to mitigate the number of risks in Environmental and Social Appraisal report related to areas of project impacts. For example in the area of resettlement, limited acceptability of livelihood model and sustainable resource management approach by local population was of particular concern. Other risks mentioned slow implementation of compensation leading to loss of income and negative perspectives of project for upstream, downstream and recipient river communities. Remaining risks to biodiversity were also reported as the consequences of possible lower than expected adoption of new livelihood models (sustainable resource management) required with the enforcement of conservation measures.

### **EIB's loan conditions**

The finance contract between the Lao People's Republic and the European Investment Bank includes Conditions of Disbursement and Borrower's Undertakings as conditionality aiming at ensuring the implementation of mitigating and compensating measures.<sup>6</sup>

In general two Conditions for Disbursement were based on satisfactory evidences of approval by the relevant institutions of Environmental and Management Plan, the Social Development Plan, the Social and Environmental Management Framework and 1st Operational Plan as well as evidences of the confirmation by regulatory instruments of the rights of the resettled and other affected people to forest resources, future reservoir fisheries and designated lands and borrower's commitment to livelihood enhancement objectives for the downstream affected people.<sup>7</sup>

The borrower was also obliged to ensure that the project was conducted in accordance with the Concession Agreement and maintain an International Panel of Independent Experts (Dam Safety Review Panel) to carry out periodic reviews of design and construction procedures relating to the dam and related structures, and the Social and Environmental Panel of Experts.<sup>8</sup>

### **EIB reporting on environmental and social performance of the project**

The project was completed in 2010 and in 2011 it generated 6115 GWh of electricity. The results of the project were presented in a Project Completion Report in December 2011 and in 2013 in the Report on results of EIB operations outside the EU. In May 2015 the EIB presented and updated the project on its website.

In 2011 the bank summarised the project results which in general were found good: *the project was implemented successfully, in line with the Technical Description, and has been operating at a high level of availability since the start of commercial operation in April 2010. The significant social and environmental impact of the project has been effectively mitigated by a comprehensive set of measures to protect the natural environment and to support the livelihoods of the resettled population and other project-affected persons. Implementation of the agreed mitigating measures is being monitored by a thorough programme of reporting, including regular reviews by a number of independent bodies. (...)*<sup>9</sup>

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<sup>6</sup> NT2, Value Added Sheet, Pillar 2

<sup>7</sup> Finance Contract between the Lao People's and European Investment Bank, FI No. 22.984 LA, 26 April 2005

<sup>8</sup> Finance Contract

<sup>9</sup> Project Completion Report, Nam Theun 2 Hydroelectric project, Luxembourg, 20.12.2011

It was also reported that the project fulfilled a number of policy objectives under the EIB mandate for financing outside the EU including the environmental and social objectives such as development impact, generating substantial revenues which were being deployed for poverty reduction and environmental protection purposes throughout the country and establishment of a conservation zone to protect an area of outstanding biodiversity (the Nakai Nam Theun National Protected Area, covering over 350 000 hectares).

Environmental and social performance was rated at the project completion, where environmental impacts were rated as acceptable, environmental capability of promoter as good while mitigation and compensation measures as satisfactory.<sup>10</sup> It was commented that *following an extensive environmental and social impact assessment, a comprehensive management plan has been implemented. This includes long term measures for protection of the watershed and the Nakai Nam Theun National Protected Area as well as livelihood development measures for both resettled communities and other project-affected persons. The Environmental and Social Management Plans are monitored by independent experts, including an International Panel of Experts reporting to the Government and an International Advisory Group reporting to the World Bank. The Bank has full access to monitoring reports, which indicate satisfactory results.*<sup>11</sup>

Project promotor compliance with contractual obligations (appraisal conditions) was also found to be satisfactory with the remark that requirement in the Finance Contract between the Bank and the Government for a compensatory reforestation plan had not yet been completed due to continued discussions about suitable reforestation areas.

In June 2014 the EIB presented the results of the project in its 2013 Report on results of EIB operations outside the EU. Among several impacts of this project were governmental revenues generating at least USD 27 million annually (expected to increase to USD 110 million after 2020), enabling poverty reduction and environmental programmes, including priority health and education programmes and the electrification of rural villages, to be financed. Special attention was given to describe environmental and social aspects such as relocation of 15 villages to new sites and achievements of the programme which provided improved or new housing, schools, clinics and places of worship, as well as electricity, water, road and irrigation infrastructure. Additionally the EIB reported that Household Income Target had been achieved which was an important milestone for Environment and Social Programme. The project required further monitoring in such areas as government revenue management, sustainability of livelihood objectives for resettled communities, monitoring and remediation of the future impacts of the project on the population affected downstream, and improved watershed management.<sup>12</sup>

In May 2015 the bank updated its website with new information on the Nam Theun 2 project. According to the bank *the hydropower scheme makes a significant contribution to the development of Laos by generating hard currency revenues from the export of electricity to Thailand and through the provision of power to the Lao grid. (...) Since being commissioned in April 2010, the project has generated over USD 145m of revenues for the Government of Laos from dividends and water usage charges. (...)The project has provided financing for the establishment of the Watershed Management and Protection Authority (WMPA), contributing US\$1.3 million per year towards the operations of the*

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<sup>10</sup> Project Completion Report

<sup>11</sup> Project Completion Report

<sup>12</sup> 2013 Report on results of EIB operations outside the EU

*WMPA throughout the concession period.(...) The use of revenues received by Laos from the project are managed under a legal framework designed to ensure that they are employed for eligible projects elsewhere in the country, primarily aimed at poverty alleviation through health and educational programmes as well as environmental management programmes.*<sup>13</sup>

Further on the EIB summarises the most recent results and impacts of project:

*To date, more than USD 65 million has been invested in supporting the resettlement of households on the Nakai plateau by the Nam Theun 2 Power Company. The Lao authorities, with support from multilateral co-financiers, have joined forces to foster the development of what was previously a poor and remote rural district. More than 1,300 new homes with electricity and toilets were built for resettler households, and access to clean water, education and healthcare was provided. Over 120 km of all-weather access roads have been constructed. Beyond cash compensation, significant efforts have been made to strengthen resettler livelihoods through the provision of equipment, training and advisory services, with a focus on agriculture, fisheries, community forestry, livestock and vocational training.*

*These investments have started to pay off in many areas and the development partners, together with the project company and the Lao authorities, are continuing to promote the necessary measures to ensure that the ambitious targets agreed when financing for the project was approved are met. Although not all objectives have yet been met, household surveys show that most resettled families are better off now than before they moved and over 87% of resettlers described life as better than before resettlement. In 2013, their median income was three times the national poverty line. Child mortality has dropped to 50 per 1,000 from 120 per 1,000. The incidence of parasitic infection is down to 21 percent of the population from 60 percent before. Today, 90 percent of children on the Nakai plateau aged 5 to 9 are attending primary school, up from 37 percent before the project. Improved management of natural resources, agriculture and livestock will nevertheless remain vital to sustaining the livelihoods of the resettled people.*<sup>14</sup>

### **Project impacts and results of environmental and social programs reported by the Panel of Experts**

All twenty four reports of the International Environmental and Social Panel of Experts (the Panel) are available on the World Bank webpage for the Nam Theun 2 Multipurpose Project.<sup>15</sup>

The Panel was established on the basis of Concession Agreement and its responsibility is to provide independent review of, and guidance on, the treatment of environmental and social issues associated with the Project, along with some executive functions, and towards the conclusion of the Implementation Period, to review and report on whether the Resettlement Objectives and the Resettlement Provisions “have been achieved and maintained for a reasonable period of time”. The Panel remains a standing body for the period of the concession. The Panel submits its findings to the Government of Laos, addresses recommendations to the Government of Laos, Nam Theun 2 Power Company (NTPC) and the International Financial Institutions (IFIs). It is required to act independently of the parties and in a manner which is in accordance with the World Bank Safeguard Policies and the

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<sup>13</sup> Nam Theun 2 Update, 18 May 2015 [http://www.eib.org/infocentre/press/news/topical\\_briefs/2005-november-01/nam-theun-2-hydropower-project-laos.htm](http://www.eib.org/infocentre/press/news/topical_briefs/2005-november-01/nam-theun-2-hydropower-project-laos.htm)

<sup>14</sup> Nam Theun 2 Update

<sup>15</sup> <http://www.worldbank.org/projects/P076445/lao-nam-theun-2-power-project-former-under-pe-p004206-len?lang=en>

ADB Safeguard Policies and which best protects both the environment and the interests of those affected by the Project Impacts.<sup>16</sup>

The Panel has been providing critical review of the implementation of environmental and social programmes during the lifetime of the project when it has been reporting on the flaws of the livelihood sustainability pillars and biodiversity conservation undertakings.

The 23rd report dated December 2014 (disclosed 30 April 2015) reports on the mission conducted in October 2014. The aim of this mission was to monitor and report on the resettlement process assessing progress on the Nakai Plateau in establishing new livelihoods, focusing on the five pillars which underlie sustainable livelihoods for the resettlers and the review of the status of the Watershed Management and Protection Authority (WMPA) in terms of its responsibilities for conservation of the globally important biodiversity of the Nakai-Nam Theun National Protected Area (NPA).<sup>17</sup>

In general the report recognises the situation on the ground in the areas of livelihood restoration and critical biodiversity protection while it differs from the EIB's recognition of the project's outcomes and impacts. The most striking summary of the NT2 Project livelihood restoration achievement can be found in just one sentence of the Panel's December 2014 report: *Of course fishing and forest products of varied provenance and legality have been the drivers of the livelihood incomes for the past few years but these two sectors are not without limits.*<sup>18</sup>

It has been acknowledged by the Panel that up to date achievements under livelihood and biodiversity pillars are not sustainable and it welcomed additional undertakings such as the Nam Theun 2 Power Company (NTPC) Road Map to guide the further evolution of the project's five livelihood pillars.<sup>19</sup>

The 24<sup>th</sup> report dated October 2015, has recommended an extension of the Resettlement Implementation Period (RIP) for two years to December 2017. The Report recommends actions that should be taken with a view to achieving closure by the end of 2017.<sup>20</sup>

### **The Panel findings on the resettlement program and livelihood restoration**

Recognising the current situation, the Panel emphasised that sustainability of this project should not be based on a few years of high consumption based on a short term, increased fish catches or on illegal harvesting of wildlife and high value hardwoods like rosewood. It noted that the fish catches dropped, as was predicted, to a relatively stable but lower level and the more accessible rosewood was harvested while prices were high. There has been no dividend paid from the villagers' forestry program for over two years. Planting on the village areas originally allotted for cultivation is in decline, additional lands allocated to resettlers including the new generation have largely been devoted to extensive and unsustainable swidden rice growing and there is insufficient forage available at this time to sustain greatly expanded herds of livestock. Potentially lucrative service industries like tourism are developing but at a slow pace.<sup>21</sup>

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<sup>16</sup> Twenty third report of the International Environmental and Social Panel of Experts, 29 December 2014, page 5

<sup>17</sup> 23rd Report of the Panel, page 4

<sup>18</sup> 23rd Report of the Panel, page 16

<sup>19</sup> 23rd Report of the Panel, page 4

<sup>20</sup> Twenty fourth report of the International Environmental and Social Panel of Experts, 23 October 2015, page 75

<sup>21</sup> 23rd Report of the Panel, page 8

Further the Panel analyses in details all five livelihoods pillars. In the area of fisheries it notices existence of illegal fishing both by villagers and by outsiders, which steals resources from the resettlers, undermining the sustainability of this important livelihood pillar. The 24<sup>th</sup> Panel of Expert Report further examined the above issues and concluded that in this pillar further illegal fishing and fish trading may undermine current sustainability.<sup>22</sup>

The forestry pillar, a sector which was to have produced up to a third of the villagers' income was found unsustainable by the Panel: *The situation should be addressed at the highest levels in the Government of Laos, the IFIs and the NTPC as a matter of urgency and decisive steps taken to start the process of correcting the weakness of a sector which is very shaky.*<sup>23</sup>

24<sup>th</sup> Report confirmed Village Forestry Pillar has failed to produce more than a fraction of the one third of resettlers' income planned, has been maladministered for a decade and heavily overtaxed, has little involvement by the villagers in any element of managing the resource they own, is inadequately supported by Government of Laos agencies, the NT2 company and the IFIs, and is thus unsustainable as at present run.<sup>24</sup>

Also agriculture was found a disappointing sector for various reasons, including low quality of soil, causing a decline in use of land. Progress on developing agro-pastoral-forestry was found very limited.<sup>25</sup> In 2015 the Panel reported some progress however the pillar has yet to reach the point of sustainability in terms of providing the planned level of agricultural intensity, resettler income and household sustenance.<sup>26</sup>

In the livestock pillar findings were also not optimistic. The Panel referred to another available report on livestock breeding which summarised that *Current practice in relation to crop and stock management are seen as unsustainable and will continue to result in land degradation and weed invasion. Farmers will need to change their attitudes.*<sup>27</sup> Only a shift in mind-set of farmers, which was found a great challenge, would allow livestock production become a profitable contributor to village incomes. The 24<sup>th</sup> Report confirmed this assessment that Livestock Pillar has not yet realized its potential as a contributor to household incomes, with current practices in pasture, forage and stock management regarded as unsustainable (...)<sup>28</sup>

Regarding the farm pillar of livelihood restoration, the 23<sup>rd</sup> Panel reported that *there has been a limited increase in the number and relevance of training activities in the off-farm sector. It is difficult to assess what the outcome of the expansion of capacity building has been.* The 24<sup>th</sup> Panel Report found Off-farm Pillar, which has boiled down in essence to tourism development and to training/capacity building, calls for further attention: tourism development only slowly evolving and the project's contribution is minor; there is an ongoing but largely unmet requirement for vocational training in a range of areas, notably at the village level, and seeks a further needs analysis.<sup>29</sup>

Funding of social programmes and education was found inadequate: *Across the country teachers and public servants were not able to be paid in full and low priority programs were being shelved. In response the POE suggested that there were significant risks in this shortfall on the funding side. A recent World Bank report had downgraded the project in terms of overall implementation progress*

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<sup>22</sup> 24<sup>th</sup> Report of the Panel, page 45

<sup>23</sup> 23rd Report of the Panel, page 12

<sup>24</sup> 24<sup>th</sup> Report of the Panel, page 45

<sup>25</sup> 23rd Report of the Panel, page 16

<sup>26</sup> 24<sup>th</sup> Report of the Panel, page 45

<sup>27</sup> 23rd Report of the Panel, page 20

<sup>28</sup> 24<sup>th</sup> Report of the Panel, page 45

<sup>29</sup> 24<sup>th</sup> Report of the Panel, page 45

*and it was clear that this related partly to GoL shortcomings on the financial side including financial reporting.*<sup>30</sup>

According to the Panel there was a high risk for the Government of Laos not to fulfill the Concession Agreement in terms of financing the Downstream Programs. This would raise difficult questions about the sustainability and the timing of the Resettlement Implementation Plan closure.<sup>31</sup> The 24<sup>th</sup> Report concluded that only one of the five livelihood pillars can be said to have achieved the Resettlement Objective of sustainability.<sup>32</sup>

The Panel also pointed that there are necessary data unavailable in order to assess the sustainability of the Concession Agreement's requirements in regard to the resettlement of natural growth households.<sup>33</sup>

In reference to the livelihood restoration program downstream, Xai Bang FAI Downstream, the Panel had been particularly concerned that livelihoods had not been restored in all of the 67 villages that received only cash compensation, somewhat less than \$100, for each household.<sup>34</sup>

### **The Panel findings on ethnic minorities**

The Panel reported that although the Concession Agreement paid special attention to the resettlement of ethnic minorities virtually no "Ethnic Minority Development Plans" have been developed and monitoring systems were not designed to deal with either ethnic or inter-village distinctions, both of which have been seriously underemphasized. According to the Panel, a serious confusion between ethnicity, language, and population stereotyping has caused significantly less NT2 project emphasis on the welfare of the ethnic minorities who were two thirds of the resettler population at the time of resettlement. The Panel found that in terms of participation in hamlet and village governance at all levels, minorities are often sidelined or held back by shyness (especially in regard to ethnic minority women), inadequate training and experience. The weakness of the training component of the Off-Farm Livelihood component indirectly has adversely affected the less educated ethnic minorities as has been the inability to take advantage of secondary education either because of inability to finance travel to an existing secondary school or lack of boarding facilities (government or kin-based) in places where Nakai Plateau secondary schools are currently located.<sup>35</sup> The Panel has called for applying the Concession Agreement requirements to the advancement and equitable treatment of ethnic minority resettlers.<sup>36</sup>

### **The Panel findings on biodiversity protection**

*From its first report in 1997 the POE [the Panel] has emphasized that effective conservation and management of the watershed area, the Nakai-Nam Theun National Protected Area (NNT-NPA), is crucial to the success of the Nam Theun 2 Project as a whole. This was both because of the globally significant biological diversity and cultural diversity of the area, and because its conservation was a key to the World Bank and others supporting the project. For the World Bank, the conservation of the watershed both served as an offset for the forests lost under the reservoir, as well as an important stand-alone conservation objective.*<sup>37</sup>

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<sup>30</sup> 23rd Report of the Panel, page 26

<sup>31</sup> 23rd Report of the Panel, page 26

<sup>32</sup> 24<sup>th</sup> Report of the Panel, page 46

<sup>33</sup> 23rd Report of the Panel, page 27

<sup>34</sup> 23rd Report of the Panel, page 33

<sup>35</sup> 24<sup>th</sup> Report of the Panel, page 53

<sup>36</sup> 24<sup>th</sup> Report of the Panel, page 66

<sup>37</sup> 23rd Report of the Panel, page 37

The protection of biodiversity was found a critical determinant of the achieving of the sustainability of livelihoods of the people resettled.

According to the Panel, the Watershed Management and Protection Authority (WMPA) created to accomplish the above objective, was the most securely funded protected area organization in the developing world. According to the Panel, WMPA did not succeed in its mission. The Panel indicated the need for restructuring the WMPA, including its funding which to the great extent was used for salaries of the senior staff rather than most needed law enforcement activities.<sup>38</sup> After the 23 Report of the Panel a special task force was created to restructure WMPA, including a change of its staff. The Panel recommended a series of corrective and monitoring actions.

### **Findings of Lender's Technical Advisory (LTA) Review Meeting**

The other document which shed more light on the status of the environmental and social programs associated with Nam Theun 2 hydroelectric project is LTA's Resettlement Implementation Period Closure Assessment from November 2014. Lender's Technical Advisory is a group of experts hired by lenders to the project. It reports to the World Bank, unlike the Panel of Experts which reports to the Government of Laos. The LTA's report available to complainant reviews the current status of Concession Agreement (CA) conditions in relation to the closure of the Resettlement Implementation Period (RIP) for the Nakai Plateau which was envisaged for 2015. This report provides detailed review of findings regarding specific points from the Concession Agreement, the current status and proposed mitigation measures. Nevertheless it stays critical to the overall compliance of the resettlement and livelihood restoration programs results compliance with the Concession Agreement. It provides in the summary that:

*(...) based on current progress and status of both parties, the Company (NTPC) and Government of Laos (GoL), all Concession Agreement conditions in relation to the Resettlement Implementation Period closure are unlikely to be met by the end of 2015 (tentative RIP Closure). This is primarily due to Non-Compliance with CA conditions related to the five livelihood pillars, and as a consequence, current household income targets that are not sustainable at this point in time of the project. (...) The LTA is of the opinion that the risks to the lenders associated with not achieving RIP closure include those of reputation and potential extension of the RIP period. Reputational risks relate to the project not achieving, on a sustainable basis, restoration of livelihoods and or household incomes. An extension of the RIP may require from both parties additional funding, resources, increased monitoring and involvement by the PoE (Panel of Experts) and LTA.<sup>39</sup>*

### **Complainant's correspondence with the European Investment Bank**

The complainants first contacted the European Investment Bank regarding the Nam Theun 2 project on 28<sup>th</sup> January 2015 with a request to comment on the findings included in a short case study prepared in the context of the Bank's Result Measurement Framework and in a response to its 2013 Report on results of EIB operations outside the EU. On 10<sup>th</sup> March 2015, the complainant renewed its request for a comment of the Bank and additionally requested disclosure of project completion report. On 9<sup>th</sup> April 2015 the Bank replied that the case studies included in the 2013 Report on results of EIB operations outside the EU present the results of ex-post assessments carried out in 2013 and that actual results of projects approved since the introduction of the ReM Framework may still take some years to become available. In a response to the environmental and social aspects of Nam

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<sup>38</sup> 23rd Report of the Panel, page 37

<sup>39</sup> Resettlement Implementation Period - Closure Assessment, LTA Review Meeting – Findings, 5 November 2014, Executive Summary, page iii

Theun 2 project the Bank replied that the project's environmental and social impacts, as well as the mitigation and compensation measures which have been put in place and are currently still being implemented. The Bank added that it was closely monitoring the project together with the other international financial institutions involved, and that the issues raised by International Rivers and reported in Bankwatch's document have been addressed or were being addressed by the promoter.

On 8<sup>th</sup> April 2015, the complainant requested disclosure of additional documents related to the project. On 22<sup>nd</sup> May 2015 the Bank provided access to requested documents and informed it had updated the project brief for the Nam Theun 2 on the EIB website.

On 3<sup>rd</sup> May 2015 the complainant posed further questions and requests for information on the Bank's monitoring results and interventions undertaken in the context of the Bank's information about the mitigation and compensation measures which were being implemented as well as in the context of the Panel of Experts 23<sup>rd</sup> report. The complainant requested evidences and information collected by the EIB referring to the Panel of Experts findings and recommendations. On 16<sup>th</sup> June 2015 the Bank replied that ongoing monitoring exercise on the project was conducted jointly by the group of International Finance Institutions which were involved in the project (within this group, each institution contributes to the monitoring based on its specific expertise and skill-set as well as local presence). The Bank informed that it was liaising with the other multilateral lenders involved in the project regarding the concrete and often complex issues raised in the latest POE report and that implementation of the various measures constituted work in progress that would be looked at within the current and up-coming joint-IFI monitoring. The Bank also replied to the questions raised by the complainant. The complainant was however unsatisfied with the answers given and concluded that the Bank did not properly monitor the project. The complainant decided to lodge a complaint to the Complaints Mechanism Office.

On 27<sup>th</sup> October 2015 the complainant requested the Bank to disclose the Lenders Technical Advisor's reports. This request was followed by two confirmatory applications, on 19<sup>th</sup> January 2016 and 26<sup>th</sup> February 2016. The complainant has not received a reply until today.

## **Complainant's allegations**

### **1. The Bank has failed to properly report on the results and impacts of the project to the European Commission, the European Parliament, the Council and the public.**

In accordance with the Council Decision of 22 December 1999 granting a Community guarantee to the EIB against losses under loans for projects outside the Community (2000/24/EC), the EIB's Board of Directors was responsible for setting the periodic review of the operation objectives and the measurement of their fulfilment while the European Commission was responsible for informing the European Parliament and the Council each year of the loan operations and for submitting an assessment of the contribution of the lending to the fulfilment of the Community's relevant external policy objectives.

The EIB's reports, 2011 Completion Report, 2013 Report on results of EIB operations outside the EU and 2015 Nam Theun 2 Update cannot be substantiated on the basis of available reports of the International Panel of Experts and Lenders' Technical Advisory.

In the 10<sup>th</sup> report of the International Advisory Group from 1<sup>st</sup> June 2011, thus few months before the publication of the EIB's Completion Report, the Group had issued a number of recommendations for further implementation of social and environmental programmes. In contrast to the EIB's satisfaction with the project fulfilling a number of policy objectives including the environmental and social

objectives such as development impact, generating substantial revenues for poverty reduction and environmental protection, the Group found, among others, that forestry on the plateau continued to be under threat, the sustainability of the reservoir fishery still required adequate levels of enforcement, it questioned the Watershed Management Protection Authority ability to manage the protection of the natural resources. In terms of sustainability of livelihoods restoration the Group noted that many activities had been driven by the project timetable and the livelihood activities had been pushed along by the company. In addition the company had supplied households with everything from building materials and fertilizer to free electricity and sometimes food aid to meet its obligations. There is a concern indeed that villagers on the plateau had become too dependent on the company. The Group expressed significant doubts about the sustainability of local irrigation schemes and drew a number of further recommendations for ensuring of sustainability of livelihoods restoration programmes. It was also unclear to the Group whether the government will commit the resources to meet the requirements of funding development initiatives and maintenance of the assets such as schools, roads, clinics or irrigation infrastructure.

The 23<sup>rd</sup> report of International Panel of Experts undermines the EIB's view on the project results presented in its 2013 Report on results. The Experts' recognition of the situation in the areas of livelihood restoration and critical biodiversity protection, although done just 8 months after the EIB's report, differed with the EIB's recognition of the project's outcomes and impacts. It has been acknowledged that up to date achievements under livelihood and biodiversity pillars were not sustainable. According to the Panel there was a high risk of not fulfilling the Concession Agreement by Government of Laos in terms of financing of Downstream Programs. The Bank however presented the project as the contribution to the EU's external action aiming at poverty reduction and sustainable economic development, not even mentioning that the realisation of many project environmental and social conditions faced serious implementation problems putting at a high risk of the overall project sustainability. The EIB's Report aimed at giving overall positive impression related to the project implementation and its outcomes while in fact project's environmental and social programmes aiming at mitigating the project's impacts had been implemented in an unsatisfactory way. In a result, the closure of Resettlement Implementation Period had to be eventually postponed by two years.

In May 2015, after publication of the Panel of Experts December 2014 report as well as November 2014 Lenders' Technical Adviser (LTA) Report, the Bank published an update on Nam Theun 2 Hydropower Project. At that time the World Bank project rating for Overall Implementation Progress dated 29 June 2014 was "Moderately Unsatisfactory".<sup>40</sup> This rating was repeated in June 2015 while the Overall Risk was assessed as "High". The EIB assured that the project represents an opportunity to contribute towards its own sustainable social and economic development in a significant way and that the use of revenues received by Laos from the project are managed under a legal framework designed to ensure that they are employed for eligible projects elsewhere in the country, primarily aimed at poverty alleviation 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" or "some deterioration in water quality". According to the Bank, the project should help to reverse the trend towards the unsustainable exploitation of natural resources and help to improve the protection of ethnic minorities. It also informed about the improvements of living conditions, strengthening resettlers' livelihoods and that necessary measures were promoted to ensure that the ambitious targets agreed when financing for the project was approved were met. However the Lenders' Technical Adviser which had been

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<sup>40</sup> <http://www.worldbank.org/projects/P049290/nam-theun-2-social-environment-project?lang=en&tab=ratings>

appointed to audit and report to the Financing Parties on the compliance of the Project against the provisions contained within the Concession Agreement as well as the environmental and social monitoring and management plans, was of the opinion that based on progress and status of both parties, the Company and Government of Laos, all Concession Agreement conditions in relation to the Resettlement Implementation Period closure were unlikely to be met by the end of 2015, primarily due to Non-Compliance with Concession Agreement conditions related to the five livelihood pillars. The LTA noted serious concern regarding the Government of Laos capability to support its Concession Agreement requirements. Also, in contrary to the EIB's update on households income, the LTA showed that household incomes were not sustainable (they had detrimental impacts on the environment, in particular due to the exploitation of Nakai forests) and in fact there had been a drop in income as recorded between the 2011 and 2013 surveys.

With respect to the downstream impacts mitigation the Bank informed that support included the provision of water supply, health services, micro-finance and livelihood training activities and that this programme which was financed and implemented by the government, would be important to secure the envisaged benefits for the affected people over the long term. The LTA however reported the last socio-economic survey indicated improvements in a number of areas but not income to previous levels. Government of Laos was unable to demonstrate that it could operate Company's initiated activities independently of the IFIs. LTA had serious concerns regarding the Government of Laos ability to continue to provide support to development activities initiated by the company.

In general the LTA presented a comprehensive review of the implementation of social and environmental programmes related to the Nam Theun 2 project listing a number of concerning findings and recommendations for IFIs. It also notes that all concerns raised in that report had been previously reported in LTA Mission reports submitted bi-annually to IFIs.

**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 the citizens. The Bank failed to report honestly by hiding and overlooking the project's incompletion and its negative impacts and existing risks (such as inability to close Resettlement Implementation Period) which might have prevented the European Commission, the European Parliament and the Council to properly assess the operation's contribution to the fulfilment of the Community's relevant external policy objectives.**

The European Investment Bank as an EU institution shall contribute to the EU's external policies, such as eradication of poverty or promotion of human rights and shall ensure the objectivity, fairness and reliability of its reports and publications describing the Bank's contribution and the outcomes of its operations. The Bank's reports such as 2013 Report on results of EIB operations outside the EU which are presented to the public, the European Parliament and the Commission, shall strive for presenting outcomes of its operations in an objective way, showing their positive and negative impacts to enable understanding of the complexity of the operations. Concealing information such as about the non-compliant clauses in the Concession Agreement related to the 5 livelihood pillars of social programme and the Government of Laos (project promoter in case of the EIB loan) lack of capability to support its Concession Agreement requirements shall not be used in order to protect the Bank's reputation. This is fundamental for the European Parliament, the Council and the Commission to receive objective information in order to undertake informed decisions in respect to the guarantee for the EIB's operations.

The complainant is of the view that the Complaints Mechanism Office shall also review the accuracy and objectivity of information related to this operation provided to the Board of Directors of the Bank. Indeed, in accordance to Council Decision of 22 December 1999 (2000/24/EC), the Board's

responsibility is to set the periodic review of the operation objectives and the measurement of their fulfilment.

## **2. The Bank has failed to comply with transparency requirements**

In line with the Council Decision of 22 December 1999 (2000/24/EC), point 18 of the preamble, the transparency of the EIB lending under this Decision should have been substantially enhanced.

The Bank is also subject to EU and international laws on access to information such as the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters, Regulation 1367/2006<sup>41</sup> (the "Aarhus Regulation").

Article 4 of the Aarhus Regulation provides that environmental information "relevant to their functions" [of EU institutions] shall be organised "with a view to its active and systematic dissemination to the public".

The Bank's Information Policy Statement 2002 provides that principal tool for disseminating information to the public at large is the Bank's website. This Statement provides, among others, that the EIB aims at providing the public with information on its policies, activities, and procedures to the maximum extent possible and that it undertakes an active information policy towards both the general public and specific interest groups, aiming to release information whenever possible and as early as feasible.

The subsequent EIB's policies on access to information, including the current EIB's Transparency Policy apply as well in case of disclosure of information and documents throughout the project cycle.

The EIB Group Statement on Corporate Social Responsibility from May 2005 states that the EIB Group stresses good governance, including a high level of transparency and accountability for itself and its counterparts while recognising the need to respect confidentiality where appropriate and ensuring trust (point 1.6, page 2). The Statement further explains that value added is the first pillar of the Bank's strategy, the second being transparency and accountability (point 4, page 3). The Statement also confirms the EIB will comply with Aarhus Convention which is about increased accountability, transparency and responsiveness regarding environmental matters.

In its press release dated 26th April 2005 announcing the EIB lending to Lao People's Democratic Republic for the construction of Nam Theun 2 project, the Bank announced the setting of cooperative arrangements between the financiers including annual consultative meeting, in order to guarantee sufficient public scrutiny, transparency and accountability.

### **In the complainant's view the Bank has failed to comply with the above laws, internal policies and declarations.**

In particular the Bank has failed to actively and systematically (thus to undertake an active information policy) publish project related environmental and social information on its webpage which constitutes the principal tool for the Bank to disseminate information. 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.

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41 Regulation (EC) 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.

In relation to Nam Theun 2, the Bank disclosed only the project summary which presented the project at the appraisal stage and which has not been updated since then. The 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. Despite the fact that the EIB's webpage was not providing for the same opportunity and technical possibilities for a similar disclosure, the Bank could have undertaken a minimum effort to list available environmental and social documents and provide links to these documents published on the World Bank webpage. 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), Environmental Assessment and Management Plan (EAMP), Social Development Plan (SDP), Social and Environmental Management Framework and 1st Operational Plan (SEMFO1) for the watershed area.<sup>42</sup> This is worth noting that even a Statement on the Release of the NT2 Panel of Experts 24<sup>th</sup> Report<sup>43</sup> 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.

On 8<sup>th</sup> 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 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.

On 27<sup>th</sup> October 2015 the complainant requested the Bank to disclose the NT2PC Resettlement Implementation Period - Closure Assessment, LTA Review Meeting – Findings from November 2014 (Lenders' Technical Advisory Report) and previous LTA Review reports. The Bank acknowledged receipt of the request however it failed to reply to it.

On 19<sup>th</sup> January 2016 the complainant filed a confirmatory application for documents requested in the initial letter from 27 October 2015. Although the Bank acknowledged receipt of the message on 20<sup>th</sup> January 2016, it has never replied to this confirmatory application. On 26<sup>th</sup> February 2016 the complainant filed an inquiry about the status of the confirmatory application regarding the documents on Nam Theun 2 project in Laos.

The complainant is of the view 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.

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<sup>42</sup> Nam Theun 2 Hydropower Project, Lao PDR; Consultant's Report on Environmental and Social Issues for the European Investment Bank, 2 March 2005

<sup>43</sup> <http://www.worldbank.org/en/news/press-release/2015/11/05/statement-on-the-release-of-the-nt2-panel-of-experts-24th-report>

### **3. Bank has failed to ensure project's compliance with environmental and social standards of the Bank, including respecting human rights and with the provisions of the finance contract**

The EIB's Environmental Statement 2004 provides that:

- *The European Investment Bank is a public institution driven by the policy objectives of the European Union. The Bank finances projects that protect and improve the natural and build environment and promote social well-being in the interest of sustainable development.*
- *The EIB finances projects that maximise the benefits for the environment.*
- *Project financed must safeguard biodiversity.*

Objectives of the Community policy for economic, financial and technical cooperation of the Community with third countries were established in the Treaty of Nice in 2001 and shall contribute to the general objective of developing and consolidating democracy and the rule of law, and to the objective of respecting human rights and fundamental freedoms.<sup>44</sup>

Within this framework, the Complainant referred to the United Nations Universal Declaration of Human Rights as a source of a common standard of achievement for all peoples and all nations.

The EIB Group Statement on Corporate Social Responsibility from May 2005 states that the EIB emphasises the importance of achieving a balance between economic growth, social well-being and the protection of the environment, in support of the goal of sustainable development. As a principle it states that the EIB Group aims to integrate environmental and social concerns into its business activities. This includes giving recognition to the rights, interests and responsibilities of shareholders and other stakeholders in order to achieve sustainable outcomes. The EIB Group seeks value added through the careful selection, appraisal, monitoring and evaluation of investment projects and programmes.<sup>45</sup>

The Statement provides that outside the EU, *the EIB priority is Community development aid and cooperation policy in the Partner Countries, helping fight poverty and improve the living standards of people in the developing world and aims to support the EU "Global Partnership for Sustainable Development" (...).* Further on it states that *the Bank approach to social issues aims to ensure that projects protect the interest of affected people while increasing attention to opportunities to enhance social well-being (...).*<sup>46</sup>

#### **3.1 The Bank has failed to ensure that the borrower implement the Revenue Management Programme in line with the Finance Contract**

The project was expected to generate substantial revenues for Laos which thanks to appropriate mechanisms would help to reduce poverty, sustain development, and improve the environment. The NT2 revenue management arrangements were to ensure that NT2 revenues are applied transparently and efficiently in financing agreed programmes.

However, LTA Review Report November 2014 noted that the LTA had serious concerns regarding the financial status of the Government of Laos and its *ability to continue to provide support to*

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<sup>44</sup> Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, signed at Nice, 26 February 2001, Official Journal C 080 , 10/03/2001 P. 0001 - 0087

<sup>45</sup> The EIB Group Statement on Corporate Social Responsibility, (CSR Statement), May 2005

<sup>46</sup> CSR Statement, pages 3-5

*development activities initiated by NTPC as per the CA commitments, especially if the RIP period is extended given the requirement for the GoL to fund extension activities.*<sup>47</sup>

23<sup>rd</sup> Report of the Panel of Expert also raised serious issues with the Government of Laos compliance with Concession Agreement related to shortcomings on the financial side including financial reporting.<sup>48</sup>

24<sup>th</sup> Report of the Panel of Expert noted that *to date the government has not carried out its undertakings to the IFIs whereby various NT2 revenues are to be used to finance eligible projects or GOL obligations related to the Project (...) continued failure of the government to carry out its responsibilities will require NTPC and the IFIs not just to extend significantly the length of the RIP, but also to increase significantly their own involvement, staffing and budgets included, in order to further improve resettler institutional capacity to manage their affairs as required by the CA.*<sup>49</sup>

The 24<sup>th</sup> Report of the Panel noted that *to date the government has not carried out its undertakings to the IFIs whereby various NT2 revenues “are to be used to finance eligible projects or GOL obligations related to the Project”.*<sup>50</sup>

According to the EIB’s project update from May 2015 the hydropower scheme makes a significant contribution to the development of Laos by generating hard currency revenues and since being commissioned in April 2010, the project has generated over USD 145m of revenues for the Government of Laos from dividends and water usage charges.

In the view of the Panel of Experts Reports and LTA Review the complainant is of the view that the Bank does not have evidences of the amount of revenues generated and the amount of these revenues spent on social and environmental programs in line with the Concession Agreement and the Finance Contract. In the complainant view the Bank should have collected evidences and in case of their non-existence it should have implemented penalties on the borrower – the Government of Laos.

Instead the lack of EIB’s intervention led to improper financing for social and environmental programs as agreed in the Finance Contract and the Concession Agreement which resulted in the necessity of extension of the Resettlement Implementation Period.

### **3.2 The Bank has failed to ensure that the project complies with the EIB’s environmental standards and thus failed to protect environment, nature and biodiversity**

The project was expected to generate substantial revenues for Laos which thanks to appropriate mechanisms would help to reduce poverty, sustain development, and improve the environment. In the project area, the project would support the long-term protection of the watershed and its 4,000 km<sup>2</sup> primary forest.

The Bank announced the potential environmental, social and economic impacts of the project had been subject to a series of thorough assessments and evaluations, including public participation, in line with the requirements of the concession agreement and with World Bank policies. The project provided for important measures to mitigate or compensate its social and environmental impacts.

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<sup>47</sup> LTA Review Report November 2014, page 22

<sup>48</sup> 23rd Report of the Panel, page 26

<sup>49</sup> 24th Report of the Panel, page 61

<sup>50</sup> 24th Report of the Panel, page 61

The Bank was conducting its due diligence to ensure that the final EIA and the proposed mitigating measures apply appropriate technologies and comply with EU environmental and social policies as well as national requirements.

Also, it would ensure that the project was in line with the Bank's policies on sustainable development. The assessment of environmental and social impacts of the project, including identification of risks and mitigation measures was included in the EIB's Environmental and Social Appraisal Report.<sup>51</sup>

Despite these commitments and the EIB's standards, undertaken project due-diligence, Finance Contract conditions and monitoring activities, after more than six years of operation, the project failed to bring positive and sustainable outcomes and stands in contradiction to "sustainable development":

- The project failed to ensure proper protection of Nakai-Nam Theun Watershed area and National Protected Area due to ineffective safeguarding of biodiversity;
- Changes in the river's ecosystem have caused downstream villagers to suffer dramatic reductions in fish catch, which had previously been the cornerstone of local livelihoods;<sup>52</sup>
- Fishing and forest products of varied provenance and legality which have been the drivers of the livelihood incomes cause environmental damages. Given failures of livelihoods pillars noted above, off farm income has become critical for resettlers. A lack of resettler community training on the back of programs implemented by NTPC and a lack of Government Laos enforcement have resulted in illicit trading in protected and endangered fauna, and wildlife,<sup>53</sup>
- Forestry sector continues to heavily underperform and remains unsustainable;
- Crop and stock management are unsustainable and will continue to result in land degradation and weed invasion.
- Studies carried out at the University of Toulouse show that the greenhouse gas CH<sub>4</sub> releases by NT2 hydroelectric project could be much higher than initially assessed.<sup>54</sup>

Significant environmental, direct and indirect impacts of the project, changes to the environment caused by the construction of the dam led to undermining of livelihood of people who were and are highly dependent on the environment in meeting their basic needs. There is therefore the relationship between the state of the environment and rights of people to life, health, food and water. In the view of the findings of the International Panel of Experts as well as the Lenders Technical Advisor related to the state of the environment and its protection, the complainant is of the view that the project undermined the human rights of individuals in the communities impacted.

The individuals and communities impacted bear the cost of damages caused to the environment directly and indirectly by the project Nam Theun 2, the externalities of what was called to be **the**

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<sup>51</sup> Nam Theun 2 Hydropower Project, Lao PDR; Consultant's Report on Environmental and Social Issues for the European Investment Bank, 2 March 2005

<sup>52</sup> The People and Their River, The World Bank and its Dam: Revisiting Xe Bank Fai River in Laos, Ian G. Baird, Bruce P. Shoemaker and Kanokwan Manorom, International Institute of Social Studies, 2015 and The People and Their River. A Survey of River-Based Livelihoods in the Xe Bang Fai River Basin in Central Lao PDR, Bruce P. Shoemaker, Ian G. Bair, Monsiri Baird; 15 November 2001

<sup>53</sup> LTA Review Report November 2014, page 22

<sup>54</sup> Physical controls on CH<sub>4</sub> emissions from a newly flooded subtropical freshwater hydroelectric reservoir: Nam Theun 2; 13 August 2014

**significant, clear and visible European interest**<sup>55</sup>: France's EDF firmly committed to the project, playing a critical and multiple role as lead-developer, lead shareholder and technical service provider during operation and significant transfers of technology and know-how from Europe.

The complainant is of the view that the Bank did not envisage proper intervention measures or did not undertake intervention early enough to support and ensure project compliance with Finance Contract, its own environmental and social standards and universal human rights. The Panel of Expert noted as well that: *at this stage in the evolution of the NT2 project, a review of the level and relevance of all monitoring work on the project be undertaken by stakeholders, covering all agencies involved, including the IFIs, the POE, the LTA and the GoL IMA.*<sup>56</sup>

The Bank relied on the Government of Laos capacities to deliver desirable outcomes as agreed in the Finance Contract despite the fact the issue of corruption and weak capacity or willingness to implement policies and reforms were known to the Bank.<sup>57</sup> The Finance Contract does not include any intervention measures or penalties in case the borrower would fail to provide undertakings as envisaged in the Art 6 of this Contract.

### **3.3 The Bank has failed to ensure that the project complies with the EIB's social standards and failed to protect human rights of impacted people**

The justification for the Bank's participation in the project was to improve considerably the economic outlook of the country. In the Bank's view the project was the best single-largest option to contribute to sustainable social and economic development, through reducing the country's dependence on Official Development Assistance.

In the project area, the project was expected to allow a significant improvement of living standards for the impacted population.

The assessment of environmental and social impacts of the project, including identification of risks and mitigation measures was included in the EIB's Environmental and Social Appraisal Report.<sup>58</sup> In particular the following commitment was made in the Appraisal Report: *To more fully reflect these recommendations [World Commission on Dams] and the overall objective of poverty reduction, an EIB loan condition has been proposed to ensure that mitigation measures for these affected communities go beyond an objective of compensation, to provide a share in project benefits. This can be achieved through targeted livelihood development initiatives financed from Government of Laos revenues and is consistent with the overall direction provided by the Government Letter of Implementation Policy.*

Despite these commitments and continuous project monitoring, after more than six years of operation, the project has not brought desirable outcomes:

- Displacement of people for the construction of the dam, impoverished individuals and communities while 5 Livelihood Pillars were largely unsuccessful and did not bring desirable benefits;
- Project revenues were used only in a limited amount for the development programs aiming at poverty reduction, health and education;

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<sup>55</sup> Proposal from the Management Committee to the Board of Directors, Nam Theun 2 Hydroelectric Project, April 2005

<sup>56</sup> 24th Report of the Panel, page 71

<sup>57</sup> This assessment is included in the EC-Laos PDR Country Strategy Paper 2002-2006, page 13

<sup>58</sup> Nam Theun 2 Hydropower Project, Lao PDR; Consultant's Report on Environmental and Social Issues for the European Investment Bank, 2 March 2005

- Communities lost their traditional livelihoods, lost access to their paddy and swidden fields, forests, and grazing lands and now are struggling with the poor quality of land parcels in the resettlement sites and lack of pastures and grazing lands to support livestock numbers;
- The failure of livelihoods restoration programs caused an increase in illegal fishing and forest logging, sustainability of households and villages income sources has been questioned by the monitoring bodies;
- In reference to the livelihood restoration program downstream, Xai Bang FAI Downstream, the Panel found that livelihoods had not been restored in all of the 67 villages. After less than 3 years of operation, the Downstream Program was handed over to the Lao government and subsequently terminated when the funds ran out prematurely. The Lenders Technical Advisor questioned the acceptance that sustainability has been achieved for the downstream communities;
- Requirement for vocational training in a range of areas were largely unmet, notably at the village level, as the Panel noted;
- Monitoring systems were not designed to deal with either ethnic or inter-village distinctions, both of which have been seriously underemphasized. According to the Panel, a serious confusion between ethnicity, language, and population stereotyping has caused significantly less NT2 project emphasis on the welfare of the ethnic minorities who were two thirds of the resettler population at the time of resettlement. As a result there is relatively poor performance of some hamlets and ethnic minorities on socio-economic indicators. In a result the project negatively impacted Indigenous People, Vietic, who should have been protected by the EIB's standards as indicated in the EIB's Project Value Added Sheet *The project should contribute to reversing the trend towards unsustainable exploitation of natural resources, and to improving ethnic minority protection.*

The Panel of expert indicated several other reasons affecting sustainability of the social programmes such as the delay in initiating several of the key social programs, building and introducing appropriate irrigation technologies, the late provision of fencing materials, delayed provision for the natural growth households, ceilings on some program expenditure introduced by lenders, including the EIB, as well as inadequate staffing (appropriate background) for the to head up the NT2 social programs like fostering livelihood development.<sup>59</sup>

What was supposed to be the best single-largest option to contribute to sustainable social and economic development became a source of hardship for people. Instead of promised social well-being, poverty reduction, improvements in the living standards, protection of the interest of affected people, including the ethnic minority, Vietic, which is considered as Indigenous People, the project caused impacts which are difficult to be properly managed.

**In the Complainant's view the project causes violation of human rights:**

- The right to equality and non-discrimination – was undermined by the lack of emphasis on the welfare of the ethnic minorities and vulnerable groups;
- The right to property and the right not to be arbitrarily deprived of property – was undermined by the lack of an equivalent quality of agreeable land for livelihood restoration;
- The right to social security and to realization, through national effort and international co-operation, of the economic, social and cultural rights indispensable for his dignity – was

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<sup>59</sup> 24th Report of the Panel, page 44

undermined by the deprivation of livelihood of the people resettled and those living downstream with the lack of effective livelihood restoration programs;

- The right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of other lack of livelihood in circumstances beyond his control - was undermined by the deprivation of livelihood of the people, by the lack of proper compensation and fair share in the project benefits;
- The right to be entitled to a social and international order in which the rights and freedoms set forth in the Universal Declaration on Human Rights can be fully realized – was undermined by the European Investment Bank financial contribution to the project which disrupted the order and deprived individuals their universal rights.

The European Investment Bank as an EU institution, which itself is based on the principles of democracy, rule of law and respect for fundamental rights, has a 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. In the complainant's view, the Bank has not recognised its duty to promote and secure human rights in project it financed through the proper clauses in the Finance Contract with the borrower. In doing so, the Bank must not limit its function to monitoring but must actively intervene if the rights are at risk. In the complainant's view, the Bank failed to undertake such intervention with the objective to protect human rights undermined by the project realisation. Eventually the project's social and environmental outcomes stay in contrast to assumptions in the EIB's appraisal documents.

### **3.4 The Bank has failed to ensure project's consistency with the priority objectives of the EU and thus failed to comply with the mandate given to the Bank**

The Bank's loan for the construction of Nam Theun 2 Hydroelectric Project was presented to the Board of Directors as consistent with the priority objectives of the EU for South East Asia and as making a material contribution to the attainment of these objectives.<sup>60</sup>

Specifically the proposal stated that the project would have **high development impact**, would constitute a material contribution to the EU's and the Bank's environmental policy, by **tackling climate change and promoting sustainable use of renewable natural resources**, would make a material contribution to the **conservation of one of the remaining regions of outstanding biodiversity** in South East Asia, which would be endangered should the safeguard measures designed under the project not be implemented.

The evidences presented in this complaint, in particular International Panel of Experts Reports, Lenders Technical Advisor report, the World Bank project's rating, indicate that the EU objectives have not been achieved by the project: it did not result in high development impact, its contribution to climate change mitigation was overestimated, it did not make material contribution to the conservation of natural resources and biodiversity, on the contrary contributing to unsustainable use of these resources and decreasing of biodiversity.<sup>61</sup>

In the complainant view this situation has been caused by the improper project's appraisal which underestimated or ignored the country analysis done by the European Commission in the the EC-Laos PDR Country Strategy Paper 2002-2006. The Strategy Paper assessed the state of rule of law and

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<sup>60</sup> Proposal from the Management Committee to the Board of Directors, 13 April 2005

<sup>61</sup> See also the World Bank project result <http://www.worldbank.org/projects/P049290/nam-theun-2-social-environment-project?lang=en&tab=results>

human rights, socio-economic situation, state of public finance and sectoral policies indicating, among others corruption and weak capacity or willingness of the government to implement policies and reforms. This analysis had not been taken into account by the EIB in project's appraisal, especially in identifying project's risks and safeguard procedures (such as monitoring, interventions and conditions in finance contract). In consequences, underestimated factors such as the government weak capacity and the lack of willingness to implement social and environmental programmes, including transparency of revenues, led to unsatisfactory implementation of project's social and environmental programmes.

#### **4. The summary and complainant's request**

It is very difficult for the complainant to indicate maladministration in the way the Bank executed its procedures however this is undisputable that the project caused severe, negative impacts on people and environment and extraordinary measures needs to be taken into account also by the Bank. In the view of the findings of the International Panel of Experts, the Lenders Technical Advisor and the decision to continue Resettlement Implementation Plan, the complainant calls on the European Investment Bank to act to ensure project's compliance with environmental and social standards, Concession Agreement and universal human rights:

- The EIB shall provide financial and technical assistance to bring the project into compliance and shall inform the public about its undertakings;
- The Bank shall seek assistance and advice from other relevant EU institutions, civil society groups, networks and community based organizations on how to secure the fundamental rights of people impacted by this project and seek assistance of other EU based programs which could help in restoring of livelihood of people;
- The Bank shall disclose relevant documents for this project which include environmental and social information, as indicated in the point 2 of the complainants allegations;
- The Banks shall honestly report to the European Commission, Council and European Parliament on this project, including on its compliance with the EU's objectives of external cooperation such as the promotion of democracy, rule of law, human rights and sustainable development;
- The Bank shall establish external revision and evaluation of its practices and procedures related to financing of large hydropower projects, including the evaluation of contribution of such projects to sustainable development objective and if the Bank properly secures the interest of environment and people in finance contracts with borrowers;
- The Bank shall establish external revision and evaluation on its practices and procedures related to human rights with the view that human rights based approach shall guide all of the EIB's operations and as the EU institution it bears moral and legal responsibility to ensure that projects it finances do not lead to violation of human rights;
- The bank shall further require comprehensive human rights and participatory gender impact assessments with actionable implications are undertaken for all projects;
- Recognize the track record of safeguard violations associated with large hydropower projects and withdraw from financing large dams and associated facilities;
- Approve projects through more transparent processes that are accountable to – and meet the needs of – the people, in the particular country where the project is located;

- Improve its project due diligence to ensure that:
  - Full social and environmental costs for the project life-cycle have been incorporated into a publicly accessible project cost-benefit analysis;
  - Proposed project sites do not destroy or submerge critical places of social, ecological, cultural and/or economic value;
  - Affected populations have been meaningfully consulted and given their free, prior and informed consent for the project to advance; and
  - Affected populations have access to effective remedies and complaints/grievance mechanisms that are identified from the outset and function throughout the project cycle
  - For currently financed projects where repeated safeguard violations are noted by affected people and/or civil society, undisbursed funding should be put on hold while these concerns are investigated and until comprehensive mitigation measures are in place to fully address the situation

**Annexes:**

1. The People and Their River, The World Bank and its Dam: Revisiting Xe Bank Fai River in Laos, Ian G. Baird, Bruce P. Shoemaker and Kanokwan Manorom, International Institute of Social Studies, 2015
2. The People and Their River. A Survey of River-Based Livelihoods in the Xe Bang Fai River Basin in Central Lao PDR, Bruce P. Shoemaker, Ian G. Bair, Monsiri Baird; 15 November 2001