



**REVENTAZÓN  
Hydroelectric Project  
– Costa Rica**

Complaints Mechanism - Complaints Mechanism - Complaints Mechanism - Complaints Mechanism

**Complaint SG/E/2016/18**

# **Initial Assessment Report**

2 May 2017



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Complainants

Central American Bank for Economic Integration (Intermediary)  
Instituto Costarricense de Electricidad (Promoter)

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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 lodge a complaint against the EIB, any member of the public has access to a two-tier procedure, one internal – the Complaints Mechanism Division (EIB-CM) – and one external – the European Ombudsman (EO).

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

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

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

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

### **The Initial Assessment Report**

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

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

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**INITIAL ASSESSMENT REPORT****Executive summary**

On 28 September 2016, [REDACTED]

[REDACTED] (hereinafter the "Complainants") submitted a complaint to the EIB-CM concerning the Reventazón Hydroelectric Project (hereinafter the "Project"). The Complainants are the owners of the Lancaster Farm, a 190 ha property located within the area of influence of the Project. Lancaster Farm comprises various types of land uses, including two protected wetlands ("the Lancaster Lagoons"). The Lower Lancaster Lagoon is separated from the Reventazón River by an approximately 70 m high slope. The Complainants' allegations revolve around the Project's compliance with the Bank's standards relevant to nature conservation, biodiversity protection, climate change and land acquisition. The Complainants consider that the EIB failed to appraise and monitor the Project pursuant to the Bank's environmental and social standards.

The Project consists of the construction of a new 305.5 MW hydroelectric plant with a large dam and a medium-sized reservoir on the Reventazón River in Costa Rica. The Project is financed by, among others, the European Investment Bank ("EIB" or "Bank"), the Inter-American Development Bank ("IDB"), the International Finance Corporation ("IFC") and the Central American Bank for Economic Integration ("CABEI" or "Intermediary"). The EIB provides financing to the Project under a framework loan agreement signed with CABEI. The final beneficiary is Costa Rica's state-owned electricity company, Instituto Costarricense de Electricidad ("ICE" or "Promoter"). Construction works took place between 2009 and 2016 and the filling-up of the reservoir took place in 2016.

The EIB-CM is examining whether the Bank failed to assess and monitor the environmental and social impacts of the Project in accordance with the Bank's environmental and social standards. In particular, the Complainants have presented four main allegations: (i) non-compliance with the Bank's standards concerning nature protection; (ii) failure to reconstruct the Mesoamerican Biological Corridor; (iii) non-compliance with the obligation to remove the vegetation from the reservoir area; and (iv) failure to conduct land acquisition in line with the Bank's standards.

The allegations have to be examined in accordance to the relevant regulatory framework of the Project. The Framework Loan Agreement governing the Project's design and implementation indicated that all financed projects shall adhere to the Bank's environmental and social standards, and in addition, to the principles of the EU EIA Directive, the EU Habitats Directive and the EU Birds Directive, amongst others.

The initial findings of the EIB-CM confirm the complexity of the issues at stake. This complexity stems from the geological instability of the Reventazón River Basin as well as the scientific uncertainty that surrounds the adaptive capabilities of the fragile ecosystems affected by the Project.

During the fact-finding mission, the EIB-CM also discussed with the parties the possibility of applying dispute resolution techniques (such as mediation, joint fact-finding visits) in order to resolve the ongoing disputes. However, and taking into account a failed previous attempt at mediation in 2016, the conditions for the EIB-CM to facilitate dialogue do not seem to be currently in place.

According to the initial review carried out by the EIB-CM, the allegations concerning the assessment of risks of environmental damage deserve further attention. The initial assessment also revealed possible gaps between the EIB environmental and social standards and the monitoring framework of the Project.

As a way forward, EIB-CM will start an investigation/compliance review in respect of the allegations. The compliance review will be carried out notably taking into account the regulatory framework discussed in Section 4 of this report, the Framework Loan Agreement and the monitoring arrangements concluded by the EIB. The investigation will focus on the issues related to the four main allegations presented in this report, and will be coordinated with the other Independent Accountability Mechanisms involved in the project (MICI and CAO).



## INITIAL ASSESSMENT REPORT

**Reventazón Hydroelectric Project**

**Complainants:** [REDACTED]

**Date received:** 28 September 2016

**Project Status:** Signed / Disbursed / Under monitoring

**Board Report:** February 2013

**Contract amount:** EUR 60.6m (equivalent of USD 79.8m), project cost: EUR 1.0472bn

### 1. ALLEGATIONS

In September 2016, [REDACTED] (hereinafter the "Complainants") submitted a complaint to the EIB-Complaints (EIB-CM) email inbox. The Complainants presented a comprehensive list of allegations to the EIB-CM in relation to the Reventazón Hydroelectric Project. The Complainants challenge the Project's compliance with the Bank's environmental and social standards.

### SUMMARY OF COMPLAINT

#### **Failure to assess and monitor the environmental and social impacts of the Project in accordance with the Bank's environmental and social standards.**

The allegations of the Complainants concern issues related to the implementation of the Bank's environmental and social standards, which fall within the remit of the Promoter. The EIB-CM is enquiring whether the EIB has failed to assess and monitor the said environmental and social impacts. The list of allegations, which are described in more detail in this document, can be summarised as follows:

#### **1.1 Non-compliance with the Bank's standards concerning nature protection**

The Complainants allege that the Project has not included adequate measures to uphold the conservation objectives of the Lancaster Lagoons – two wetlands declared "protected" by Costa Rican law in 1994 and that are situated within the "area of influence" of the Project. The Complainants state that the Project has contributed to the destabilisation of the Lower Lancaster Lagoon, which now poses an imminent danger of collapse. They conclude that an obligation to prevent harm to the protected wetlands stems from the Bank's standards.

#### **1.2 Failure to reconstruct the Mesoamerican Biological Corridor**

The Complainants allege that the Project does not comply with the Bank's requirement concerning the reconstruction of the Barbilla Destierro Biological Subcorridor – a segment of the Mesoamerican Biological Corridor – and reforestation at the tail of the reservoir. They also allege that the project implementation involved illegal logging at the Lancaster Farm.

#### **1.3 Non-compliance with the obligation to remove the vegetation from the reservoir area**

The Complainants allege that the reservoir area was not cleared before filling-up the reservoir and



this constitutes a violation of the Bank's standards. They declare that the decomposing vegetation emits a substantial amount of methane and causes environmental damage to the ecosystems of the Reventazón River and the Tortuguero National Park. The Complainants also allege that the negative externalities associated with these emissions were not duly assessed in the lenders' economic analysis.

#### **1.4 Failure to conduct land acquisition in line with the Bank's standards**

The Complainants declare that the land acquisition plan, as approved by the Bank, did not foresee the partial expropriation of the Lancaster Farm. They also allege that the expropriation of the Lancaster Farm is being conducted contrary to the principles of transparency, fairness and due compensation.

## **2. CLAIM**

The Complainants request that the Bank:

1. recognises the environmental damage caused by the Project to the Lancaster Lagoons, the ecosystems of the Reventazón River and the Tortuguero National Park;
2. ensures the Project's compliance with the Bank's environmental and social standards. In particular, the Bank ensures that:
  - a) appropriate measures are taken to stabilise the wall of the Lower Lancaster Lagoon;
  - b) appropriate measures are taken to correct the course of the Reventazón River so as to prevent the further erosion of the wall of the Lower Lancaster Lagoon;
  - c) the barbed wire, installed by the Promoter and which had been impeding the migration of animals, is removed from the Lancaster Farm;
  - d) the Lancaster Lagoons and the surrounding forests are included within the reconstruction of the Barbilla Destierro Biological Subcorridor;
  - e) a legal mechanism is created to provide a permanent framework for the preservation of the Lancaster Lagoons, for example a trust fund or a reserve area;
  - f) the expropriation of the Lancaster Farm takes place according to the Bank's environmental and social standards.

## **3. THE PROJECT AND THE BANK'S FINANCING**

- 3.1. The Project consists of the construction of a new 305.5 MW hydropower plant with a 7 km<sup>2</sup> (118 million m<sup>3</sup>) reservoir and a 130 m high dam, situated in central Costa Rica, on the Reventazón River. The Project is expected to contribute to climate change mitigation and security of electricity supply by providing hydropower to meet increasing demand for electricity in Costa Rica and the region.
- 3.2. The Project is being developed by Costa Rica's state-owned electricity company, Instituto Costarricense de Electricidad ("ICE" or "Promoter"). Construction works took place between 2009 and 2016. Project completion and the filling-up of the reservoir took place in 2016. The first unit of the hydroelectric plant commenced electricity production in March 2016.



- 3.3. The Project is financed by several public and private financial institutions, including the EIB, the IDB, the IFC and the CABEL. The EIB's financial assistance is intermediated by CABEL under the Central America Climate Change Framework Loan Agreement (hereinafter the "Framework Loan Agreement").
- 3.4. The EIB and CABEL signed the Framework Loan Agreement in December 2011. The EIB funding under the Framework Loan Agreement was dedicated to supporting renewable energy and energy efficiency projects in Central America with the policy aims of reducing greenhouse gas ("GHG") emissions and increasing the sustainability and secure supply of electricity in the region.<sup>1</sup>
- 3.5. The EIB appraised the Reventazón Hydroelectric Project between October 2012 and February 2013. The EIB found the Project to be consistent with the overall objective of the Framework Loan Agreement. In February 2013 the Board of the Bank approved the allocation of a 20-year credit to the Project under the Framework Loan Agreement. In May 2013 CABEL signed a finance contract with the Promoter (hereinafter the "Sub-Loan Agreement").

#### 4. REGULATORY FRAMEWORK

- 4.1. When performing its activities, the EIB is bound by European Treaties and its Statute as well as by the relevant legislative and 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 framework.
- 4.2. "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 rights. Maladministration may also relate to the environmental and social impact of a project financed by the EIB.<sup>2</sup> Against this background, it is pertinent to highlight that the mandate of the EIB-CM is confined to reviewing the actions, decisions or omissions related to the allegations that may be attributable to the EIB and not to third parties.<sup>3</sup> Finally, Article 2.5., Part IV of the CMPTR states *"the EIB-CM cannot deal with complaints which have already been lodged with other administrative or judicial review mechanisms or which have already been settled by the latter"* (with same allegations and same respondent).<sup>4</sup>

<sup>1</sup> The Framework Loan counted towards the EIB's lending priorities regarding climate change, and it formed part of the EIB's Facility for Energy Sustainability and Security of Supply.

<sup>2</sup> EIB – Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (2012), part II, paragraph 1.2., available at: <http://www.eib.org/infocentre/publications/all/complaints-mechanism-policy.htm>

<sup>3</sup> EIB – Complaints Mechanism Principles, Terms of Reference and Rules of Procedure (2012), part IV, paragraph 2.3.

<sup>4</sup> See also: EIB – CM Operating Procedures (2013), page 6, paragraph 4.3., available at: [http://www.eib.org/attachments/strategies/complaints\\_mechanism\\_operating\\_procedures\\_en.pdf](http://www.eib.org/attachments/strategies/complaints_mechanism_operating_procedures_en.pdf)



- 4.3. The appraisal, approval and monitoring framework for the Bank's lending activities outside the European Union is set up according to the provisions of the EIB Statement on Environmental and Social Principles and Standards<sup>5</sup> and the EIB's Environmental and Social Handbook.<sup>6</sup>
- 4.4. For the Reventazón Hydroelectric Project, the Framework Loan Agreement further specified the regulatory setting in which the Project was appraised, approved and monitored by the EIB. The Framework Loan Agreement defined, amongst others, (i) the Bank's environmental and social standards, and (ii) the duties of the Bank and CABEL concerning project appraisal, approval and monitoring. The Framework Loan Agreement included a model contract for sub-loan agreements. The model contract presented the clauses required by the EIB to be incorporated into the loan agreements between CABEL and the final beneficiaries (the promoters).
- 4.5. The Framework Loan Agreement set forth the minimum requirements with respect to environmental legislation and access to information. According to this agreement, the projects financed must be carried out in accordance with the basic principles of EU Directives 79/409/EC (Birds); 85/337/EC (Environmental Impact Assessment), as amended; 92/143/EC (Habitats); 96/11/EC (Plastic materials and articles); and 2001/80/EC (Large combustion plants), as appropriate. In addition, they shall conform to the principles and standards set out in the EIB Statement of Environmental and Social Principles and Standards.
- 4.6. Concerning the division of competences between the Bank and the Intermediary, the Framework Loan Agreement stated that CABEL should submit project proposals to the EIB for appraisal. Subsequent to that, the EIB appraises the proposals against the standards provided in the Framework Loan Agreement, and the EIB's Board approves the allocation of credit as per project basis.
- 4.7. The Intermediary and the Promoter signed the Sub-Loan Agreement in May 2013. The Sub-Loan Agreement stated that *"the Borrower undertakes to develop and operate the Final Project in accordance with the standards of the Legislation of the European Union to the extent that they have been transposed by [Costa Rica] or that have been indicated by CABEL."*
- 4.8. The contractual arrangements between the EIB, the Intermediary and the Promoter have created several monitoring and reporting channels, where all monitoring reports were submitted to the EIB for evaluation.

## 5. BACKGROUND OF THE COMPLAINT

- 5.1. On 28 September 2016 the Complainants submitted their complaint to the EIB-CM. The complaint was supplemented by a geological study and the expert opinions of professors

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<sup>5</sup> EIB Statement of Environmental and Social Principles and Standards (2009), available at: <http://www.eib.org/infocentre/publications/all/environmental-and-social-principles-and-standards.htm>

<sup>6</sup> The Reventazón Hydroelectric project was appraised under the previous version of the Environmental and Social Handbook, of September 2010. The updated version of the Handbook, adopted in 2013, is available at: <http://www.eib.org/infocentre/publications/all/environmental-and-social-practices-handbook.htm>



from the University of Costa Rica<sup>7</sup>. The EIB-CM is processing these expert opinions as part of the Complainants' allegations. On 12 October 2016 the EIB-CM acknowledged receipt of the complaint and indicated that the Complainants could expect to receive a response from the EIB-CM no later than 2 May 2017.

- 5.2. The Complaint to the EIB-CM follows previous requests from the same Complainants to MICI and CAO, the independent accountability mechanisms ("IAMs") of the IDB and the IFC.<sup>8</sup> The Complainants contacted the IAMs only after they had exhausted other channels of communication established at project level. During 2016 there was an attempt by the IDB's operational services to put in place a mediation process between the Complainants and the Promoter, which did not materialise. The Complainants have also brought legal action before national courts concerning the value awarded to their property during the expropriation process.

## 6. WORK PERFORMED BY THE EIB-CM

- 6.1. On 7 October 2016 the Bank's services were notified of the registration of the complaint. The EIB-CM held discussions with the relevant services, which served to clarify the background of the Project, the status of the implementation, the Bank's involvement and to exchange views on the issues raised by the Complainants. The Bank's services also informed the EIB-CM about the monitoring framework and the non-governmental organisations (NGOs) that have been involved in project implementation.
- 6.2. The EIB-CM reviewed the relevant documents of the Project, including the Bank's appraisal report, the Environmental and Social Impact Assessment (hereinafter the "ESIA"), the contractual arrangements and other key documents.
- 6.3. On 12-17 November the EIB-CM undertook a fact-finding mission in Costa Rica together with MICI and CAO. During the fact-finding mission the EIB-CM met the Complainants, the Promoter and CABEL, as well as local communities and local NGOs. In support of their arguments, the Complainants also organised a meeting with several university professors with different areas of expertise (geology, economy, engineering, environmental and social impacts).
- 6.4. During the Fact-Finding mission, the EIB-CM explored the possibility of putting in place dispute resolution techniques in order to resolve the ongoing dispute between the Complainants and the Promoter. However, and based on exchanges and the discussions about a failed previous attempt to put in place a mediation process by IDB services, it seems that the conditions for facilitation dialog are not currently in place.

<sup>7</sup> The geological study was prepared by [redacted] – a certified professional geologist hired by the Complainants – and concerned the Project's impact on the stability of the Lancaster Lagoons. The Complainants also submitted the expert opinion of [redacted] concerning the ecological value of the Lancaster Lagoons.

<sup>8</sup> "MICI" is the Spanish acronym for the Independent Consultation and Investigation Mechanism of the IDB; "CAO" refers to the Compliance Advisor Ombudsman of the IFC.



- 6.5. Given the alleged imminent risk of landslides at the property of the Complainants, MICI requested an independent geologist<sup>9</sup> to assess the geological and geophysical aspects of the allegations on-site. In particular, the independent geologist examined whether the Lancaster Lagoons' stability may have been affected and/or jeopardised by the extraction of gravel and sand from the Reventazón River. The initial findings and conclusions of the independent geologist's report have been taken into consideration as part of the EIB-CM's initial assessment in accordance with Section 8.2., Part IV of the CMPTR.

## 7. INITIAL FINDINGS

### 7.1. General overview

- 7.1.1. The EIB became involved in the Project in October 2012, by which time IDB and IFC had concluded their own appraisal and approved the project for financing. The EIB's appraisal could rely on the technical documents and evaluations produced by the co-financiers, as well as on the independent monitoring panels that were about to be established according to IDB and IFC Standards.<sup>10</sup>
- 7.1.2. The Bank's appraisal identified a number of technical, environmental and social risks associated with the Project, based on the Promoter's environmental and social impact assessment (ESIA). The Reventazón River Basin constitutes a geologically demanding area, where the likelihood of landslides and earthquakes remains high. The Project's main environmental impacts included the disruption of the Mesoamerican Biological Corridor, genetic degradation of jaguars (a critical habitat), degradation of the river habitat downstream, and potential impacts to the ecologically complex Tortuguero National Park downstream on the Caribbean coast. The Project's main social impacts stem from loss of livelihood both in the reservoir area and downstream.<sup>11</sup>
- 7.1.3. The Promoter adopted an Environmental and Social Management Plan ("ESMP") – a set of mitigation and compensation measures developed according to IFC and IDB standards – to bring the Project's environmental and social impact to an acceptable level. The lenders appointed an independent panel of environmental and social experts ("Environmental and Social Panel") to monitor the implementation of the ESMP through periodic site visits and the desk review of project documentation.
- 7.1.4. The EIB-CM observes that the Environmental and Social Panel cast the scope of its monitoring activity to the Project's compliance with IFC and IDB safeguards. Based on the preliminary review of the monitoring reports, the EIB-CM observes that there are no references to the Project's compliance with EIB Standards.

<sup>9</sup> Dr. Augusto Ferreira Mendonça, a certified professional geologist.

<sup>10</sup> In the case of large dam projects, international financial institutions (IFIs) commonly condition financing upon the appointment of external advisory panels to assess dam safety and integrity, and to monitor the implementation of the IFI's environmental and social standards. The Reventazón Hydroelectric Project exemplifies this case, as the Promoter was required to create a Technical Panel and an Environmental and Social Panel of Experts. See: Reventazón Hydropower Project Environmental and Social Datasheet (08.02.2013), available at: <http://www.eib.org/infocentre/register/all/46807249.pdf>

<sup>11</sup> Reventazón Hydropower Project Environmental and Social Datasheet (08.02.2013), available at: <http://www.eib.org/infocentre/register/all/46807249.pdf>



7.1.5. At the outset, in cases of co-financing outside the European Union, the EIB may accept the implementation of the environmental and social requirements of financial partners, provided that those requirements are equivalent to EIB standards.<sup>12</sup> In practice IFC, IDB and EIB standards show certain overlap, however, this does not relinquish the due diligence duty of the EIB to identify possible gaps between other standards and EIB requirements.

7.1.6. During the initial assessment of this complaint, the EIB-CM could not confirm that the EIB had carried out such a gap analysis in relation to the Reventazón Hydroelectric Project. Therefore, as a way forward, EIB-CM proposes to include a gap analysis – as per the allegation raised by the Complainants – to determine whether monitoring and reporting under IFC and IDB standards were sufficient to meet EIB requirements under the Framework Loan Agreement.

## 7.2. Non-compliance with the Bank's standards concerning nature protection

7.2.1. Lancaster Farm is a 190 ha property located on the right bank of the Reventazón River within the "area of influence" of the project.<sup>13</sup> The farm is owned by the Complainants and comprises various types of land-uses: two wetlands (Lancaster Lagoons), primary forests, reforested areas and agriforestal plantations. The Complainants informed the EIB-CM that they purchased the farm as a largely deforested area 20 years ago. They have managed to plant more than 100 000 trees from their own financial resources and some support from FONAFIFO in 18 hectares.<sup>14</sup>

Figure 1. The Lancaster Farm and the Lower Lancaster Lagoon



7.2.2. In 1994 the Ministry of Natural Resources, Energy, and Mines of Costa Rica (MIRENEM) designated the Lancaster Lagoons protected wetlands ("humedales") due to their high

<sup>12</sup> EIB Statement of Environmental and Social Principles and Standards (2009), page 17, paragraph 44.

<sup>13</sup> The ESIA defined a direct area of influence and an indirect area of influence for the Project. The direct area of influence extends up to 500 m from each project component. The indirect area of influence aims to capture the Project's direct and indirect cumulative impacts, and it extends up to 2 km from each project component, or in some instances even further. See: ESIA, page 10.

<sup>14</sup> FONAFIFO is the national forest fund of Costa Rica that operates a scheme of contracts of payment for ecosystem services.



biodiversity value and ecosystem services.<sup>15</sup> The Complainants add that the Lancaster Lagoons represent an isolated ecosystem that provide shelter to various species protected under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES).

- 7.2.3. The Complainants' geological study highlights that the Lower Lancaster Lagoon is separated from the Reventazón River by an approximately 70 m high slope. The geological study indicates that the Lower Lancaster Lagoon's wall had been historically affected by natural erosion processes and landslides.<sup>16</sup> Against this backdrop, the Complainants declare that the Project has not included adequate measures to uphold the conservation objectives of the Lancaster Lagoons.
- 7.2.4. Regarding the project preparation phase, the Complainants claim that the ESIA did not assess the Project's likely impacts on the geological stability of the Lancaster Lagoons.
- 7.2.5. Concerning the implementation phase, the Complainants allege that the construction works *"undermined the base of the ridge where the Lancaster Lagoons are located, creating a danger of collapse of the wetlands. The elevation of the water table due to the filling of the reservoir is another factor that poses a major risk of destabilising the material even further."* They state that the Promoter extracted material from the right river margin as well as from the slope of the Lower Lancaster Lagoon without the necessary permits and authorisations. The Complainant's geological study concludes that the Lower Lancaster Lagoon now poses an imminent danger of collapse, and this event would dump up to 9 million m<sup>3</sup> of material into the Reventazón River.<sup>17</sup>
- 7.2.6. The Complainants conclude that an obligation to prevent harm to the protected wetlands stems from the Bank's standards.
- 7.2.7. During the initial assessment, the EIB-CM was informed that the Complainants challenged the legality of the excavations before the competent national authorities.<sup>18</sup> These administrative and judicial review mechanisms have been investigating the compliance of the Promoter with national law. In turn, the complaint lodged with the EIB-CM contests the conduct of the Bank during project appraisal and monitoring in light of the applicable EIB Standards. The complaint before the EIB-CM involves a different allegation and a different respondent than the proceedings before the national authorities of Costa Rica, as far as the first allegation is concerned. Hence the inadmissibility criterion provided in Article 2.5., Part IV of the CMPTR does not apply in this case.

<sup>15</sup> MIRENEM Decree No. 23004 of 21 February 1994 (published in the Official Journal of Costa Rica No 53. of 16 March 1994).

<sup>16</sup> Complainants' geological report, page 54-61.

<sup>17</sup> Complainant's geological report, page 97.

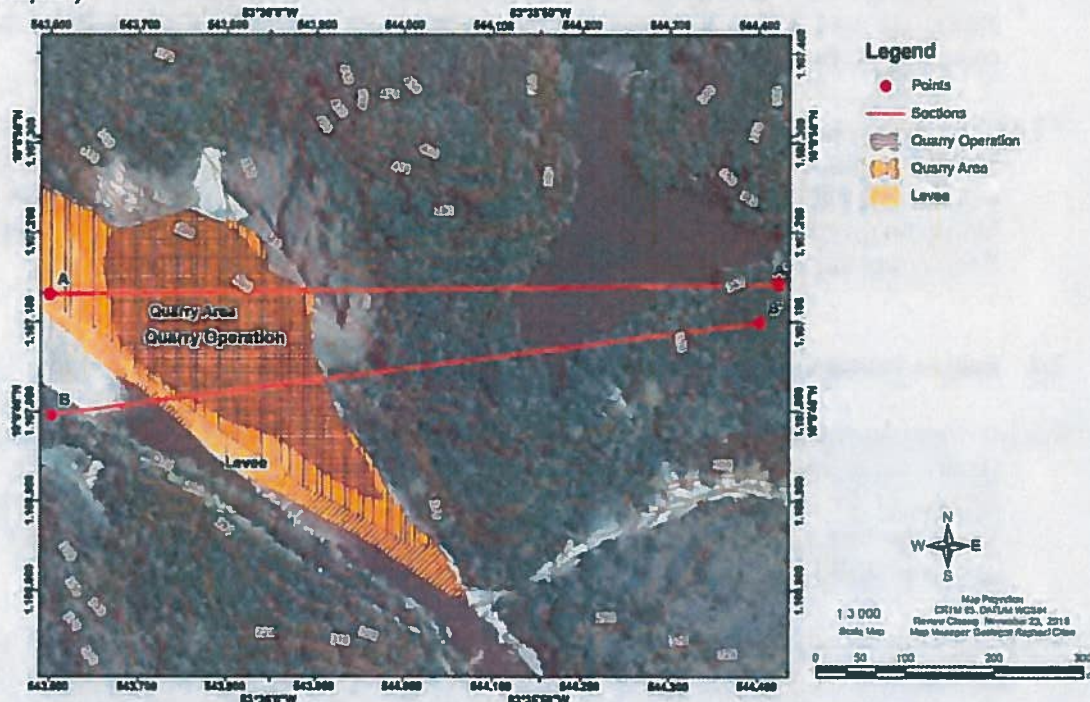
<sup>18</sup> The Complainants presented a claim before the Environmental Protection Agency (SETENA), the Ministry for Environmental Protection and Energy (MINAE) and the Environmental Tribunal (Tribunal Ambiental). The claim lodged with the Environmental Protection Agency (SETENA) asserted that the Promoter acted contrary to the ESIA under Costa Rican law. SETENA issued a decision dismissing the allegations in August 2016. The Department for Geology and Mining of MINAE issued a resolution in March 2016 that found no evidence that material had been extracted from the wall of the Lower Lancaster Lagoon (Resolution DGM-CMRHA-026-2016, of 4 March 2016). The proceedings before the Environmental Tribunal revolve around non-compliance with national environmental law.



7.2.8. The Independent Geologist hired by MICI found that the wall of the Lower Lancaster Lagoon would not be affected by the operation of the Project and that the risk of landslides remains as high as before the construction works. At the same time, and whilst the Independent Geologist could not review the Project's full licensing documentation, his report confirms that quarry operations took place adjacent to the wall of the Lower Lancaster Lagoon at the right river margin (See: Figure 4.).

7.2.9. The Independent Geologist Report states that the quarry operations most likely contributed to the ongoing gradual landslides and regressing erosion processes, which may result in the collapse of the Lower Lancaster Lagoon.<sup>19</sup> The Independent Geologist emphasised, however, that a conceptual analysis is not sufficient to assess the precise contribution of the excavations works to the evolution of the existing landslides. The Independent Geologist Report recommended further expert investigations into the stability of the wall of the Lower Lancaster Lagoon.<sup>20</sup>

Figure 2: Quarry operations at the Lower Lancaster Lagoon. (Source: Independent Geologist Report)



7.2.10. The Promoter argues that quarry operations at the riverbed took place in accordance with the concessions given by national authorities, and that the project did not involve material extraction from the wall of the Lower Lancaster Lagoon. The Promoter recalls that the Ministry for Environmental Protection and Energy (MINAE) concluded an investigation in

<sup>19</sup> A. Mendonça (December 2016): Lancaster Lagoons Stability Analysis, page 5, 37.

<sup>20</sup> The recommendations comprise geological, geotechnical and seismic studies: topographical benchmarks surveyed at regular intervals; rainfall and local river flow monitoring; earthquake activities evaluation; and some drilling to improve understanding of the local geology.



March 2016 that found no evidence of illegal excavations at the wall of the Lower Lancaster Lagoon.

7.2.11. The EIB-CM observes that one aspect of this allegation revolves around the Project's compliance with the environmental permits and mining concessions issued according to the law of the host country. On the other hand, the allegation also concerns the design and implementation of the Project *vis-à-vis* the Bank's standards on nature conservation (and the corresponding due diligence of the EIB during project appraisal and monitoring).

7.2.12. The EIB-CM observes that the ESIA was prepared by the Promoter and approved by the Environmental Protection Agency of Costa Rica (SETENA) in 2009, on the condition of implementation of the ESMP. The ESMP proposed 140 mitigation and compensation measures in response to the project's likely biophysical, social and economic impacts identified by the ESIA.

7.2.13. Based on a preliminary review of the project documentation, it appears that the ESIA listed the Lancaster Lagoons within the category of natural singularities affected by the Project.<sup>21</sup> The EIB-CM was not able to perform a full document review during the initial assessment phase, nor was it able to investigate the regulation of "wetlands" in Costa Rican law as compared to relevant EU legislation.

7.2.14. The initial assessment has shown that several documents have examined the geological stability of the wall of the Lower Lancaster Lagoon, and the likely impact of the project thereto. The EIB-CM considers that the authorisations, permits and technical reports must be further analysed in light of the regulatory framework set up for this Project as indicated in Section 4 of this report, to be able to reach a conclusion on the first allegation.

### 7.3. Failure to reconstruct the Mesoamerican Biological Corridor

7.3.1. In their second allegation the Complainants challenge the Project's compliance with the Bank's requirement to reconstruct the Barbilla-Destierro Biological Corridor ("SBBD"), a key section of the Mesoamerican Biological Corridor. According to the Complainants, the Lancaster Lagoons were excluded from the buffer zone ("*zona de amortiguamiento*") of the relocated SBBD, contrary to the provisions of the Master Plan.<sup>22</sup>

7.3.2. The Complainants declare that *"the reservoir constitutes a physical barrier for a large number of species of flora and fauna. The place where the Reventazón Hydroelectric Plant is located is called the Jaguar Passage because it is precisely here where the felines have their migration routes. In essence, the SBBD is a critical area within the framework of the Mesoamerican Biological Corridor. The new dam cuts off the main route of species migration, this disruption of the SBBD not only means a cut of the species' route in the national scope but also for the connectivity of the species of Mesoamerica."*

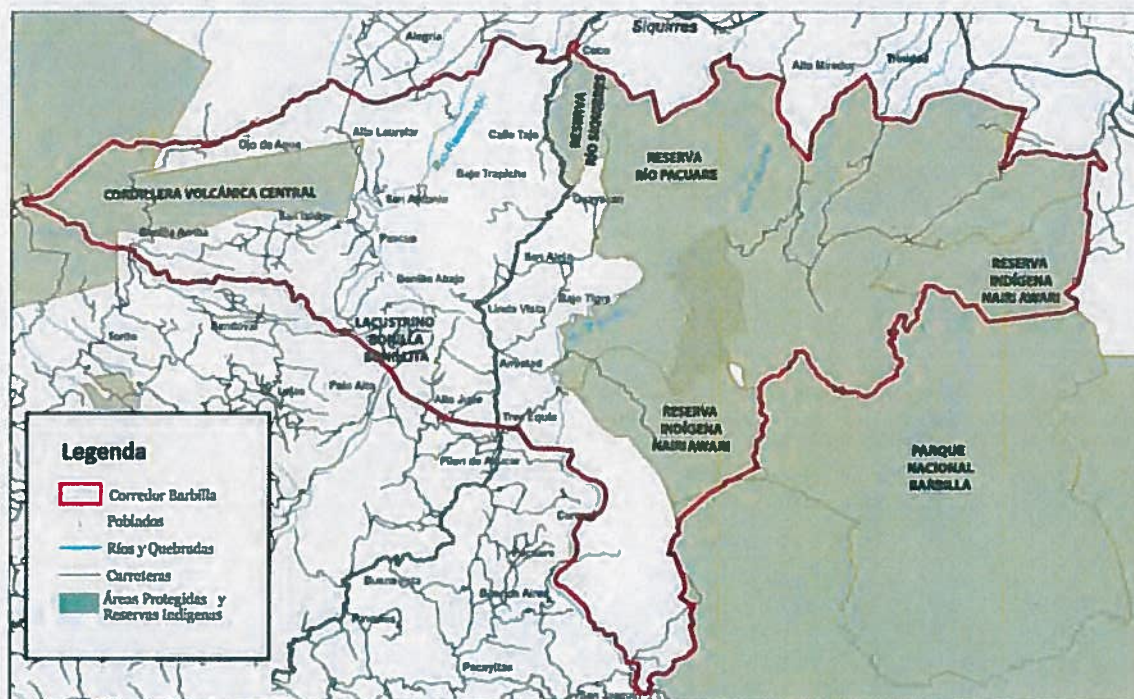
<sup>21</sup> ESIA, page 989, xli.

<sup>22</sup> The Master Plan ("*Plan Maestro para mitigar los efectos del Proyecto Hidroeléctrico Reventazón sobre la Conectividad y Funcionalidad del Sub-Corredor Barbilla Destierro*") is one of the project documents that has set forth biodiversity mitigation and compensation measures.



7.3.3. They recall that the Master Plan identified a 3 km range at the tail of the reservoir as the best option to restore connectivity. The Complainants state that *"according to the technical studies, the buffer zone should be the area around the reservoir, the ESIA contemplates the level of operation of the reservoir in the 265 m asl., however the maximum level of the reservoir is at 270 m asl., which is likely to reach in case of elevated river flows. The 270 m asl. surpasses the Lancaster Lagoon until arriving at the zone of the Moncha."*

**Figure 3: Barbilla Destierro Biological Corridor (Source: complaint letter)**



7.3.4. The Complainants also declare that the Reforestation Plan at the tail of the reservoir and around the dam has not been implemented. The Reforestation Plan formed part of the ESMP and aimed to restore connectivity as well as to stabilise the banks of the reservoir. The Reforestation Plan set forth an implementation schedule that is referenced in the complaint letter. The Complainants add that in 2016 the Promoter partially expropriated the Lancaster Farm and cleared a section of the forest plantations of the Complainants, which had been secured under FONAFIFO contract. The Complainants qualify the act as illegal logging on the grounds that it runs contrary to the reforestation component of the Project.

**7.3.5. In the Complainant's view, the EIB failed to monitor the project and take adequate measures to bring the Promoter into compliance with the ESMP.**

7.3.6. The EIB-CM observes that both the reconstruction of the SBB and the reforestation plan were among the mitigation and compensation measures that substantiated the eligibility of the Project for EIB financing. The Bank's project appraisal concluded that the project documents – in particular the ESIA and the ESMP – proposed adequate measures to







prevent biodiversity loss and bring the Project's environmental impact to an acceptable level. The Environmental and Social Panel was created with the object and purpose of informing the Bank in an independent manner about the Project's compliance with the ESMP.

7.3.7. The Promoter submits that the continued implementation of the mitigation strategy for the SBB and the Master Plan prevents any loss or impairment of connectivity at the SBB. The Promoter recalled that the Advisory Group on Biodiversity – a group of external experts advising the Promoter on the connectivity model for the SBB – concluded in March 2016 that the mitigation measures would yield a net positive impact if fully implemented.<sup>23</sup>

7.3.8. The EIB-CM takes note of the technical complexity of this allegation, and that the compliance review entails an analysis of the Environmental and Social Panel reports and the Bank's subsequent decisions. The EIB-CM decides to carry out the aforementioned analysis in the investigation phase.

#### 7.4. Non-compliance with the obligation to remove the vegetation from the reservoir area

7.4.1. The Complainants state that the filling-up process commenced without the prior clearing of the reservoir area, and this runs contrary to Section 3.3.4. of the ESIA<sup>24</sup>.

7.4.2. The Complainants stress that the decomposing vegetation emits a substantial amount of methane, which compromises the GHG mitigation potential of the Project. The Complainants also allege that the negative externalities associated with these emissions were not duly assessed in the lenders' economic analysis during appraisal. They believe that this would constitute a serious omission as the international lenders – including the EIB – are financing this project under their climate change initiatives. Finally, the Complainants indicate that the putrefaction suppresses oxygen levels in the reservoir that will result in environmental damage to the aquatic ecosystems of the Reventazón River and the Tortuguero National Park.

7.4.3. The EIB's project appraisal stage generally involves an analysis of whether a proposed project results in either a significant increase or decrease in GHG emissions. Where significant impact is likely, the EIB Environmental and Social Handbook recommends monitoring during the implementation and operation of the project, as appropriate.<sup>25</sup> For the Reventazón Hydroelectric Project, the EIB carbon footprint exercise calculated that the Project would deliver emission savings of 212 000 tonnes of CO<sub>2</sub> equivalent per year.<sup>26</sup> The Environmental and Social Datasheet ("ESDS") explains that the Bank's modelling largely relied on the sector-specific methodology of the Clean Development Mechanism.

<sup>23</sup> (March 2016): ICE Proyecto Hidroeléctrico Reventazón, Cuarto y último informe del Grupo Asesor de Biodiversidad.

(March 2016): ICE Proyecto Hidroeléctrico

<sup>24</sup> "The following are the different project works and a description of the actions that each task entails. Reservoir Site clearing: this consists of the removal of the vegetation that covers the sites to be flooded, such as grasslands, trees and minor flora. This activity is implemented by cutting the trees down with chainsaws, while the removal of logs is carried out using machinery such as tractors or excavators. Minor flora is removed by hand for transfer to other places, where it can be replanted."

<sup>25</sup> "The ESDS as well as the Flysheet should (...) indicate whether the project results in either a significant increase or decrease in GHG emissions (...). Where such a significant impact is likely, it should be monitored during implementation and operation, as appropriate." Source: EIB Environmental and Social Handbook (2010), page 51, paragraph 165.

<sup>26</sup> Reventazón Hydropower Project Environmental and Social Datasheet (08.02.2013), available at: <http://www.eib.org/infocentre/register/all/46807249.pdf>



- 7.4.4. The ESDS suggests that GHG emissions are not included among the subjects that the Bank has been monitoring in relation to the Reventazón Project. During the fact-finding mission, the EIB-CM could observe that biomass was floating within the flooded reservoir area. This is limited evidence collected in a one-day visit and therefore no conclusions can be drawn from it. However, and given that the Bank has an interest in ensuring the integrity of the climate change projects it is financing, additional investigations are needed.
- 7.4.5. The other aspect of this allegation challenges the broader environmental sustainability of the Project. The Complainants assert that the Project causes environmental damage to the ecosystems of the Reventazón River and the Tortuguero National Park as a result of the non-removal of vegetation from the reservoir area.
- 7.4.6. The EIB-CM has noted that it requires technical expertise to ascertain the merits of this claim, in addition to the review of the Bank's relevant actions, decisions and omissions, in light of the applicable EIB Standards.
- 7.5. Failure to conduct land acquisition in line with the Bank's standards**
- 7.5.1. The Complainants declare that the land acquisition plan, as approved by the Bank, did not foresee the partial expropriation of the Lancaster Farm. They allege that in April 2016 ICE took possession of the northern part of the estate up to 1.5 km, where primary forests, agriforestal and forest plantations (under FONAFIFO contract) and the sole water tank of the property are located.
- 7.5.2. The Complainants claim that the Promoter encircled the expropriated area with barbed wire that prevents the owners from accessing the water tank and their plantations and that poses an impediment to the migration of wild animals. The Complainants claim to have suffered economic losses due to the partial expropriation process, since their main economic activity that sustains the Lancaster Farm was taken without their consent. They have brought three legal cases before national courts regarding the compensation awarded for their property.<sup>27</sup>
- 7.5.3. The Complainants emphasise that the land acquisition plan provided the following public interests that may justify expropriation: geological stability of the hydroelectric plant and the reservoir, the reconstruction of the SBB and the infrastructure needs of the Project (e.g. transmission lines, cables, tunnelling). They claim that the Promoter refused to provide access to the expropriation methodology that would justify the partial expropriation of the Lancaster Farm.
- 7.5.4. In the Complainants view, the partial expropriation breaches the EIB Standards in two aspects: firstly, from an ecosystem perspective, the Lancaster Lagoons and adjacent forests constitute an indivisible unit for the reconstruction of the SBB. Secondly, the expropriation of the water tank and the plantations render the remaining parts of the Lancaster Farm economically unsustainable.

<sup>27</sup> The three cases (15-000585-1028-CA; 5-000955-1028-CA; 15-000956-1028-CA) are pending before the Administrative Court of the Second Circuit of San José.



- 7.5.5. During the fact-finding mission the EIB-CM observed signs reading "*Property of ICE – access prohibited*" in the northern part of the Lancaster Farm and that the barbed wire prevented the farm owners from accessing the water tank and plantations with vehicles.
- 7.5.6. The issues concerning the compensation for the property were discussed in detail with the Promoter during the fact-finding mission of November 2016. The Promoter explained that the law of Costa Rica establishes a clear and transparent administrative procedure in the case that affected people do not agree with the compensation terms. The EIB-CM was also informed that the expropriation of the Lancaster Farm is currently under judicial review before the national courts. The judicial review concerns the level of fair compensation.
- 7.5.7. The EIB approved the land acquisition plan of the project and the grievance mechanism established at project level. Given the ongoing judicial review of the compensation awarded to the Complainants, this particular matter falls outside the remit of the EIB-CM. However, the EIB-CM is competent to investigate if the process followed during the expropriation process adheres to the Bank's related standards.

## **8. PRELIMINARY CONCLUSIONS AND PROPOSED WAY FORWARD**

- 8.1. The initial findings of the EIB-CM confirm the complexity of the issues at stake. This complexity stems from the geological instability of the Reventazón River Basin as well as the scientific uncertainty that surrounds the adaptive capabilities of the fragile ecosystems affected by the Project.
- 8.2. The initial desk review of documentation and the fact-finding mission indicated that the risk of environmental damage cannot be excluded that must be taken into consideration in a more detailed review. The initial assessment also revealed possible gaps between the EIB environmental and social standards and the monitoring framework of the Project.
- 8.3. During the fact-finding mission, the EIB-CM also discussed with the parties the possibility of applying dispute resolution techniques (such as mediation, joint fact-finding visits) in order to resolve the ongoing disputes. The Promoter indicated preference that the complaint is referred for compliance review based on the failed previous attempt at mediation.
- 8.4. As a way forward, EIB-CM will start an investigation/compliance review in respect of the allegations. The Compliance review will be carried out notably taking into account the regulatory framework discussed in Section 4 of this report and the monitoring arrangements concluded by the EIB. The investigation will focus on the issues related to the four main allegations presented in this report.
- 8.5. This review will be carried out in coordination with the other IAMS. It is also expected that the compliance investigation will be carried out with the support of external experts.

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## LIST OF ABBREVIATIONS

<b>CABEI</b>	<b>Central American Bank for Economic Integration</b>
<b>CAO</b>	<b>Compliance Advisor Ombudsman</b>
<b>CMPTR</b>	<b>Complaints Mechanism Principles, Terms of Reference and Rules of Procedure</b>
<b>EIB-CM</b>	<b>European Investment Bank – Complaints Mechanism</b>
<b>ESDS</b>	<b>Environmental and Social Data Sheet</b>
<b>ESIA</b>	<b>Environmental and Social Impact Assessment</b>
<b>ESMP</b>	<b>Environmental and Social Management Plan</b>
<b>FONAFIFO</b>	<b>National Forest Fund of Costa Rica</b>
<b>GHG</b>	<b>Greenhouse gas</b>
<b>ICE</b>	<b>Instituto Costarricense de Electricidad</b>
<b>IDB</b>	<b>Inter-American Development Bank</b>
<b>IFC</b>	<b>International Finance Corporation</b>
<b>MICI</b>	<b>Independent Consultation and Investigation Mechanism</b>
<b>MINAE</b>	<b>Ministry for Environmental Protection and Energy of Costa Rica</b>
<b>MIRENEM</b>	<b>Ministry of Natural Resources, Energy, and Mines of Costa Rica</b>
<b>SBBD</b>	<b>Barbilla-Destierro Biological Subcorridor</b>
<b>SETENA</b>	<b>Environmental Protection Agency of Costa Rica</b>

