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Office of the Compliance Advisor Ombudsman (CAO)

COMPLIANCE APPRAISAL: SUMMARY OF RESULTS

PLIV Advisory Project (IFC Project # 602084)

Panama

Complaint 01

Executive Summary

IFC has an Advisory Services (AS) project to support Empresa de Transmisión Eléctrica, S.A. (ETESA, “the client”), a state-owned Panamanian national transmission company, to structure and tender a public-private partnership (PPP) for the financing, construction, and operation of Transmission Line IV (“transmission line project”). The double-circuit, 500-kilovolt transmission line will run over 330 kilometers along the Atlantic coast from the Chiriquí Grande substation in western Panama, where the power generation takes place, to Panama III substation in the east.

According to IFC, the Advisory Services are being delivered through a two-phased approach. Phase 1 consisted of technical, legal, and financial due diligence, including an environmental and social (E&S) scoping study, that will underpin the development of a transaction structure. Phase 2 consists of the tender process, which includes project promotion, elaboration of the bidding documents including the concession contract, and support throughout the bidding process until commercial closing.

As of the writing of this appraisal report, the AS project was in Phase 2 and remained active.

In June 2018, CAO received a complaint¹ filed by Ngäbe, Buglé, and Campesina Territorial Organization of the Northern Region of Santa Fe de Veraguas (Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe de Veraguas) and the Movement for the Defense of the Territories and Ecosystems of Bocas del Toro (Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro, MODETEAB). These organizations filed on behalf of indigenous communities in the areas of Chiriquí Grande, who live inside the Ngäbe-Buglé Comarca, and of Northern Santa Fe, who live outside the Ngäbe-Buglé Comarca and who demand that the State of Panama recognize their territories as indigenous territory.

The complainants raise concerns regarding information disclosure for the transmission line project, the process of Free, Prior, and Informed Consent (FPIC), sharing of development benefits, and direct and indirect E&S impacts on the indigenous communities. With regard to the FPIC issue, the members of the indigenous communities living outside of the Comarca in the northern Santa Fe region are concerned that they have not been consulted on the transmission line project and its potential impacts, although they allege that they will be impacted. Those living within the Comarca raise a series of concerns concerning the FPIC process, including non-

¹ CAO complaint, June 2018, available on the CAO website at: <https://bit.ly/PLIV-01>.

compliance with national law, project presentations in Spanish and not in local languages, and meetings by ETESA to present the project without engagement or consultation with the communities. The communities also assert that they are unfairly excluded from the project benefits, as they will not receive electricity or other basic needs. They claim that, for other projects in the past, they have received promises of benefits that were not fulfilled, and they fear this transmission line project will be similar. The complainants are also concerned about a lack of information about the project, including the route of the transmission line, as well as who will be impacted and how.

According to the CAO Assessment Report,² ETESA claims that, in accordance with national law, it has been conducting an FPIC process since December 2017 with a project-specific commission ratified by the Ño Kribo Regional Congress of the Ngäbe-Buglé Comarca. ETESA initiated consultations with the support of the Vice Ministry for Indigenous Affairs and the Ministry of Environment, through which they reached the Ño Kribo Regional Congress Board of Directors. According to ETESA, in April and June 2018, the Congress of the Ño Kribo Region designated two commissions to discuss with ETESA the routing, social benefits, and environmental aspects of the transmission line. ETESA noted that the commission is disseminating information about the transmission line project and making announcements about the informational meetings in the communities that are within the project's area of influence. With regard to potentially impacted communities outside the Comarca, ETESA indicated that any person living within the area of influence will be informed as part of the E&S impact assessment.

The purpose of a CAO compliance appraisal is to ensure that compliance investigations are initiated only in relation to IFC projects that raise substantial concerns regarding E&S outcomes, now or in the future, and/or issues of systemic importance to IFC. In determining whether to initiate an investigation, CAO weighs a number of factors including the magnitude of the E&S concerns raised in a complaint, results of a preliminary review of IFC's E&S performance in relation to these issues, the existence of questions concerning the adequacy of IFC's requirements, and a more general assessment of whether a compliance investigation is the appropriate response in the circumstances.

A key requirement for an IFC AS project is to provide advice consistent with the requirements of the Performance Standards (PS). Based on materials reviewed, CAO finds that IFC's preparation of the AS project was generally consistent with its E&S policies and procedures, including the recently updated procedures specific to AS projects.

However, CAO's preliminary review of available documentation raises questions as to whether, within the scope of the agreed AS project, IFC's advice regarding consultation, disclosure of information, and engagement with Indigenous Peoples (IP) potentially impacted by Transmission Line IV was consistent with the requirements of PS1 and PS7. In particular, CAO has questions as to whether IFC's support for stakeholder mapping and analysis covered all IP communities in the project area of influence, including those that lack legal territorial recognition due to their location outside of the Comarca boundaries. Further, CAO has questions as to how IFC assured itself that the consultation processes it supported were conducted in a culturally appropriate manner considering issues of IP governance, leadership, and representation, both inside and outside of the Comarca.

While the transmission line project is in its early stages of development, any non-compliance with PS1 and PS7 requirements as part of IFC's AS project is considered serious, as appropriate engagement with the IP communities within and outside the Comarca is an essential foundation for FPIC, and as a result, for a socially sustainable project. Although it is not anticipated that IFC

² CAO Assessment Report, April 2019, available at: <https://bit.ly/PLIV-01>.

will finance the construction of the transmission line project, the preliminary stakeholder analysis (i.e., assessing the presence of IP communities outside of the Comarca) developed by the IFC consultant is reflected in project design documents including the ESIA scope of work, which will be carried out by the winning bidder. Deficits in IFC's advice thus give rise to risks in project implementation including the ESIA process and the achievement of FPIC. As a result, CAO concludes that potential shortcomings in IFC's advice against PS requirements, if not remedied, give rise to risks of significant adverse social outcomes in the future.

Given the questions concerning IFC compliance identified in this appraisal report and the potential for resultant adverse impacts on communities, CAO has determined that a compliance investigation in response to this complaint is warranted.

As set out in terms of reference annexed to this report, CAO's compliance investigation will consider whether IFC's advice in relation to the Transmission Line IV project was developed, implemented, and supervised in accordance with applicable IFC policies, procedures, and standards for Advisory Services projects. In particular, it will consider whether IFC's advice in relation to E&S issues was consistent with the requirements of Performance Standards 1 and 7, as they apply to stakeholder analysis and engagement planning, including identification of affected indigenous communities, information disclosure activities, consultation, and representation.

The preliminary time schedule is for CAO to have a draft compliance investigation report ready by August 2020.

About CAO

CAO's mission is to serve as a fair, trusted, and effective independent recourse mechanism and to improve the environmental and social accountability of IFC and MIGA.

CAO (Office of the Compliance Advisor Ombudsman) is an independent post that reports directly to the President of the World Bank Group. CAO reviews complaints from communities affected by development projects undertaken by the two private sector arms of the World Bank Group, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).

For more information about CAO, please visit www.cao-ombudsman.org

Table of Contents

Executive Summary	1
About CAO	4
Acronyms	6
I. The Compliance Appraisal Process	7
II. Background	8
IFC Advisory Services Project	8
Complaint and CAO Assessment	8
III. Analysis	9
IFC Policies and Procedures for Advisory Services	10
Preparation of the Advisory Services Project	11
Review and Approval	11
Scope of the Advisory Services Project.....	11
Conclusion	12
Implementation of the Advisory Services Project	12
IFC General Supervision	12
IFC Supervision in Relation to Issues Raised in the Complaint	13
Conclusion	14
IV. CAO Decision	15
Annex A. Terms of Reference for Compliance Investigation	16

Acronyms

Acronym	Definition
AS	Advisory Services
ASPI	Advisory Services Project Information
CAO	Office of the Compliance Advisor Ombudsman (IFC and MIGA)
E&S	Environmental and Social
ESDD	Environmental and Social Due Diligence
ESIA	Environmental and Social Impact Assessment
ESMS	Environmental and Social Management System
ESRP	Environmental and Social Review Procedures
ETESA	Empresa de Transmisión Eléctrica, S.A.
FASA	Financial Advisory Services Agreement
FPIC	Free, Prior, and Informed Consent
GIIP	Good International Industry Practice
GoP	Government of Panama
IFC	International Finance Corporation
IP	Indigenous Peoples
MIGA	Multilateral Investment Guarantee Agency
NGO	Non-governmental Organization
PPP	Public-Private Partnership
PS	Performance Standards (IFC)
PS 1	Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts
PS 7	Performance Standard 7: Indigenous Peoples
WBG	World Bank Group

I. The Compliance Appraisal Process

When CAO receives a complaint about an IFC or MIGA project, the complaint is referred for assessment. If CAO concludes that the parties are not willing or able to reach a facilitated solution, the case is transferred to the CAO compliance function for appraisal and potential investigation.

A compliance appraisal also can be triggered by the CAO vice president, IFC/MIGA management, or the president of the World Bank Group.

The focus of the CAO compliance function is on IFC and MIGA, not their client. This applies to all IFC's business activities, including the real sector, financial markets and advisory. CAO assesses how IFC/MIGA assured itself/themselves of the performance of its business activity or advice, as well as whether the outcomes of the business activity or advice are consistent with the intent of the relevant policy provisions. In many cases, however, in assessing the performance of the project and IFC's/MIGA's implementation of measures to meet the relevant requirements, it will be necessary for CAO to review the actions of the client and verify outcomes in the field.

In order to decide whether a compliance investigation is warranted, CAO first conducts a compliance appraisal. The purpose of the compliance appraisal process is to ensure that compliance investigations are initiated only for those projects that raise substantial concerns regarding environmental and/or social outcomes, and/or issues of systemic importance to IFC/MIGA.

To guide the compliance appraisal process, CAO applies several basic criteria. These criteria test the value of undertaking a compliance investigation, as CAO seeks to determine whether:

- There is evidence of potentially significant adverse environmental and/or social outcome(s) now, or in the future.
- There are indications that a policy or other appraisal criteria may not have been adhered to or properly applied by IFC/MIGA.
- There is evidence that indicates that IFC's/MIGA's provisions, whether or not complied with, have failed to provide an adequate level of protection.

In conducting the appraisal, CAO will engage with the IFC/MIGA team working with the specific project and other stakeholders to understand which criteria IFC/MIGA used to assure itself/themselves of the performance of the project, how IFC/MIGA assured itself/themselves of compliance with these criteria, how IFC/MIGA assured itself/themselves that these provisions provided an adequate level of protection, and, generally, whether a compliance investigation is the appropriate response. After a compliance appraisal has been completed, CAO can close the case or initiate a compliance investigation of IFC or MIGA.

Once CAO concludes a compliance appraisal, it will advise IFC/MIGA, the World Bank Group President, and the Board in writing. If a compliance appraisal results from a case transferred from CAO's dispute resolution, the complainant will also be advised in writing. A summary of all appraisal results will be made public. If CAO decides to initiate a compliance investigation as a result of the compliance appraisal, CAO will draw up terms of reference for the compliance investigation in accordance with CAO's Operational Guidelines.

II. Background

IFC Advisory Services Project

IFC has an Advisory Services (AS) project to support Empresa de Transmisión Eléctrica, S.A. (ETESA, “the client”), a state-owned Panamanian national transmission company, to structure and tender a public-private partnership (PPP) for the financing, construction, and operation of Transmission Line IV (“transmission line project”).³ The double-circuit, 500-kilovolt transmission line will run over 330 kilometers along the Atlantic coast from the Chiriquí Grande substation in western Panama, where the power generation takes place, to Panama III substation in the east.

IFC describes the expected development impact of the AS project in terms of developing the first transmission line along the Atlantic coast in order to help increase the reliability of the country’s electrical system.⁴

According to IFC, the Advisory Services are being delivered through a two-phased approach:

- *Phase 1:* Technical, legal, and financial due diligence, including an E&S scoping study, that will underpin the development of a transaction structure. The transaction structure will incorporate feedback from market sounding and a cost-benefit analysis. Phase 1 will be considered a success once the transaction structure is approved by the client and the AS project moves to Phase 2.
- *Phase 2:* Tender process, consisting of project promotion, elaboration of the bidding documents including the concession contract, and support throughout the bidding process until commercial closing. Phase 2 will be considered a success once the project is awarded to a private investor and the project documents have been signed.

As of the writing of this appraisal report, the AS project was in Phase 2 and remained active. Two bids for construction of the transmission line were submitted in April 2019, but in early May, the government evaluation committee declared the bidding process to be invalid because neither of the bidders had met the mandatory minimum requirements. In early May 2019, presidential elections were held in Panama and there was a change in government. The new president took office on July 1, 2019, and he appointed a new CEO and management team for ETESA.

Complaint and CAO Assessment

In June 2018, CAO received a complaint⁵ filed by Ngäbe, Buglé, and Campesina Territorial Organization of the Northern Region of Santa Fe de Veraguas (Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe de Veraguas) and the Movement for the Defense of the Territories and Ecosystems of Bocas del Toro (Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro, MODETEAB). These organizations filed on behalf of indigenous communities in the areas of Chiriquí Grande, who live inside the Ngäbe-Buglé Comarca, and of Northern Santa Fe, who live outside the Ngäbe-Buglé Comarca and who demand that the State of Panama recognize their territories as indigenous territory. The complainants received support from the Alliance for Conservation and Development (Alianza para la Conservación y el Desarrollo, ACD), located in Panama City, and the Center for International Environmental Law (CIEL), with headquarters in Washington, D.C.

The complainants raise concerns regarding information disclosure for the transmission line project, the process of Free, Prior, and Informed Consent (FPIC), sharing of development

³ Summary of Advisory Services Project Information (ASPI), available at: <https://bit.ly/2HKYAMS>.

⁴ Ibid.

⁵ CAO complaint, June 2018, available on the CAO website at: <https://bit.ly/PLIV-01>.

benefits, and direct and indirect environmental and social impacts on the indigenous communities. With regard to the FPIC issue, the members of the indigenous communities living outside of the Comarca in the northern Santa Fe region are concerned that they have not been consulted on the transmission line project and its potential impacts, although they allege that they will be impacted. Those living within the Comarca raise a series of concerns concerning the FPIC process, including non-compliance with national law, project presentations in Spanish and not in local languages, and meetings by ETESA to present the project without engagement or consultation with the communities. The communities also assert that they are unfairly excluded from the project benefits, as they will not receive electricity or other basic needs. They claim that, for other projects in the past, they have received promises of benefits that were not fulfilled, and they fear this transmission line project will be similar. The complainants are also concerned about a lack of information about the project, including the route of the transmission line, as well as who will be impacted and how.

According to the CAO Assessment Report,⁶ ETESA claims that, in accordance with national law, it has been conducting an FPIC process since December 2017 with a project-specific commission ratified by the Ño Kribo Regional Congress of the Ngäbe-Buglé Comarca. The goal of the process is to make the transmission line project known, and to jointly consider, consult, assess, and work towards consensus regarding the transmission line route and compensation for the affected communities. ETESA initiated consultations with the support of the GoP Vice Ministry for Indigenous Affairs and the Ministry of Environment, through which they reached the Ño Kribo Regional Congress Board of Directors. According to ETESA, in April and June 2018, the Congress of the Ño Kribo Region designated two commissions to discuss with ETESA the routing, social benefits, and environmental aspects of the transmission line. ETESA noted that the commission is disseminating information about the transmission line project and making announcements about the informational meetings in the communities that are within the project's area of influence. ETESA stated that concerns voiced in the meetings have been relayed to them.

With regard to the communities living outside the Comarca, ETESA indicated that any person living within the area of influence will be informed as part of the activities related to the environmental and social impact assessment (ESIA).

ETESA also noted that in response to environmental issues raised by NGOs, it organized a meeting in which the NGOs had an opportunity to express their concerns, which were then registered and addressed by ETESA.

Following CAO's assessment, the client decided not to pursue a CAO-facilitated dispute resolution process, and accordingly, the complaint was transferred to CAO's compliance function for appraisal in April 2019.

III. Analysis

This section outlines the framework of IFC environmental and social (E&S) policies and procedures applicable to the Advisory Services (AS) project. It then analyzes IFC's preparation and implementation of the AS project using these standards in relation to the issues raised in the complaint.

⁶ CAO Assessment Report, April 2019, available at: <https://bit.ly/PLIV-01>.

IFC Policies and Procedures for Advisory Services

IFC's engagement with the client was initiated in the context of its 2012 Policy on Environmental and Social Sustainability ("the Sustainability Policy") and Performance Standards (PS), together referred to as the Sustainability Framework. The Sustainability Policy includes high-level E&S commitments that apply to AS projects, stating that efforts to "carry out investment and advisory activities with the intent to 'do no harm' to people and the environment" are "[c]entral to IFC's development mission" (para. 9).

According to the Sustainability Policy, a key requirement for IFC AS projects is that "[w]ithin the scope of an agreed advisory activity, all advice and training will be consistent with the Performance Standards" (para. 4). Through their advisory services, IFC intends to "promote broad uptake of good environmental and social performance in business decisions and operations" (para. 16).

During the E&S review process of an AS project, when environmental and/or social risks are identified, "the advice provided to clients shall be consistent with the Performance Standards as a framework of good international industry practice (GIIP) in E&S risk management" (para. 39). IFC monitors implementation of AS projects on an ongoing basis, while formal supervision reporting is undertaken semi-annually. The supervision process includes a review and update of all key risks and issues, including those identified at the approval stage or through previous supervision reports (para. 45).

IFC operationalizes its commitments in the Sustainability Policy through its Environmental and Social Review Procedures (ESRP), which are updated periodically. These procedures outline how IFC evaluates the potential E&S risks around a proposed AS project. This AS project was approved and supervised under the most recent ESRP (October 2016).

In accordance with the ESRP, for standalone AS projects that are assigned a high E&S risk rating, as in this case, a CESI⁷ specialist is assigned to "provide recommendations to the AS TRL [transaction leader] on the design of E&S good practices for the AS project" (ESRP 11.2.2).

Over the past decade, IFC has made a series of procedural changes to the way it manages E&S risk through AS projects. These include the following: (a) inclusion of a standard clause in the Financial Advisory Services Agreement (FASA) stating that IFC will advise clients in a manner consistent with the Sustainability Framework;⁸ (b) clarification of IFC's environmental and social due diligence (ESDD) work, which is part of AS implementation, to be preparatory for but not a substitute for an ESIA;⁹ and (c) presentation to management of E&S risks and proposed mitigation measures at two key junctures—before the mandate is signed and before the transaction structure is presented to the client.¹⁰ In addition, in 2017, IFC updated its internal guidance on assessing and documenting contextual risk as part of the E&S risk assessment and decision making of IFC projects, including AS projects for public-private partnerships.

In this case, two Performance Standards are particularly relevant to the AS project review and supervision, as well as to the issues raised by the complainants. These are PS1: Assessment and Management of Environmental and Social Risks and Impacts and PS7: Indigenous Peoples (IP).

⁷ CESI refers to the Investment Support Group of CES (IFC's Environment, Social, and Governance Department) that is responsible for the E&S review and supervision of IFC's investment projects.

⁸ IFC Management response to CAO's audit report of IFC Advisory Service project with the Korporata Energjetike e Kosovës (KEK), Kosovo, March 2013. Available at: <http://bit.ly/KEK-01>

⁹ IFC Management response to CAO's compliance investigation report on IFC Advisory Service project with Vizhinjam International Seaport Limited, India, February 2018. Available at: <http://bit.ly/Vizhinjam-01-02-03>

¹⁰ Ibid.

As described in PS1, stakeholder engagement is an essential process for the successful management of a project's E&S impacts, which may involve stakeholder analysis and planning, disclosure and dissemination of information, and consultation and participation. Project information should be easily accessible to the affected communities and provided in a culturally appropriate language and format. When community representatives are the focus of engagement, PS1 also requires the client to verify that they represent the views of affected communities. Moreover, PS7 requires the client to identify all communities of IP within the project area of influence who may be affected by the project.

Under PS7, if the client proposes to locate a project on lands traditionally owned by IP or under the customary use of IP, and adverse impacts can be expected, then FPIC is required, whether IP possess legal title to the lands as defined by national law or not.

Preparation of the Advisory Services Project

Review and Approval

The IFC AS project team conducted a pre-mandate E&S mission in early 2017, meeting with several Panamanian government agencies. Based on the review, the IFC team assigned a high overall E&S risk rating¹¹ to the AS project and identified a series of potentially significant E&S risks and impacts along with a proposed mitigation approach. This is in accordance with the updated E&S procedures to present to IFC management the E&S risks and proposed mitigations at the first of two key junctures—before the mandate is signed.

At the time of the review, based on the nature, location, and size of the proposed transmission line project, the IFC team suggested that all eight PS would apply, particularly highlighting the following key E&S issues: (a) impacts on Indigenous Peoples (IP) lands and the need to secure FPIC; (b) land acquisition and involuntary resettlement needed to establish transmission right-of-way; (c) impacts on three legally protected and biodiversity areas with a potential loss of critical habitat; (d) potential for project opposition and high scrutiny; and (e) the client's E&S management system (ESMS) and relative unfamiliarity with IFC's Performance Standards.

At the time of the review, IFC documentation states that screening of contextual risk of engagement with the client from an E&S perspective was ongoing, and that any risks considered to negatively affect the transaction would be assessed during E&S due diligence in AS phase 1. Evidence of the contextual risk analysis is lacking in the review documentation.

Due to the high E&S risk rating assigned to the AS project, IFC management approved the AS project on the conditions that: (a) the AS project receive full support by the regional World Bank Group leadership; and (b) the AS project team reach out to other IFIs regarding lessons learned about stakeholder engagement and FPIC from their work with IP communities in the Ngäbe-Buglé Comarca and annex areas on a development project.

IFC's approval documentation for the AS project was finalized and the IFC management approved the project in June 2017.

Scope of the Advisory Services Project

The scope of the AS project was agreed between IFC and the client in September 2017. The FASA provides that IFC would conduct due diligence, including a full technical, legal, financial, as well as environmental and social due diligence (ESDD) review and preparation for the bidding process. IFC's ESDD was expected to include the conduct of an E&S scoping study. The scoping

¹¹ E&S risk rating categories for AS projects are High, Medium, and Low, and their definitions align with Categories A, B, and C for investment projects.

study was envisaged as an input into the transmission line ESIA, which would be carried out by the winning bidder.

The FASA states that IFC would hire a consultant to carry out the ESDD, which would include: (a) identification of potential E&S impacts and risks; (b) gap analysis between the national legislation and the IFC PS; and (c) recommendations on mitigation measures to support project development in accordance with national legislation, IFC PS, and GIIP. The IFC-hired consultant was also to produce the terms of reference for the additional studies and consultations required to complete the ESIA by the winning bidder in accordance with national legislation and IFC PS. The following issues were flagged as examples of studies for which TOR were to be produced: plan for land acquisition for easements; critical habitat and biodiversity protection plan; and plan to obtain FPIC from affected IP.

The FASA states that IFC will advise clients in a manner consistent with the IFC PS. In addition, the FASA specifies the requirement for IFC to include E&S provisions in bidding documents, including the results of the ESDD.

Conclusion

Based on materials reviewed, CAO finds that IFC's preparation of the AS project was generally consistent with its E&S policy and procedures, including the more recently updated procedures specific to AS projects.

However, CAO has questions concerning the robustness of IFC's contextual risk analysis, particularly given the historical nature of land conflicts with IP communities in Panama, namely, the lack of legal territorial recognition of some potentially impacted IP communities located outside Comarca boundaries.¹² As contextual risk analysis is not a requirement for AS projects, this does not provide the basis for a compliance investigation. However, CAO notes that weaknesses in such analysis may lead to potential compliance issues during implementation.

Implementation of the Advisory Services Project

IFC General Supervision

The implementation phase of the AS project included the ESDD (i.e., E&S scoping study), as well as the preparation of bidding documents, which were expected to include the results of the ESDD. IFC supervised the ESDD, which was carried out by an IFC-hired consultant.

In accordance with the updated E&S procedures, the E&S risks and proposed mitigation measures were presented to IFC management a second time—prior to presentation of the transaction structure to the client. A review of the bidding documents shows that, as required by the FASA, the E&S provisions reflecting the ESDD results were included.

IFC supervision documentation states that the proposed alignment of the transmission line would traverse land subject to traditional ownership and customary use by the Ngäbe and Buglé peoples, and as such, FPIC would be required. The client conducted a series of consultations beginning in December 2017 with indigenous community representatives in the Comarca, whose initial contacts were facilitated by the Vice Minister of Indigenous Affairs at the Ministry of Government. The Regional Congress of Ño Kribo of the Ngäbe-Buglé Comarca endorsed the formation of bilateral commissions to address concerns related to the alignment route,

¹² The World Bank Group has had past and ongoing experiences working with IP communities in Panama. The 2010 Inspection Panel investigation report on the Land Administration Project responded to claims by IP, including the Ngäbe, concerning their territories in the annex areas outside of the Comarca, as well as the consultation process (for more information, see <https://bit.ly/33RNl8x>). In addition, in early 2018, the World Bank approved the Panama Support for the National Indigenous Peoples Development Plan Project, which included an FPIC process that was conducted between 2016 and 2017 (for more information, see <https://bit.ly/2PjjSAW>).

environmental impacts, and benefits and compensation. According to IFC documentation, the goal of the ongoing consultation process was to receive consent to initiate detailed design and ESIA studies. In April 2019, the Regional Congress of Ño Kribo approved ETESA's request to conduct an ESIA and other necessary studies.

During the CAO assessment process, CAO was made aware of community opposition to the project dating from 2018, including a statement of opposition from Kankintú community leaders submitted to the World Bank office in Panama in March 2018, as well as a rejection of the project expressed during meetings in August 2018 organized by the traditional congresses in Coclesito, Caña Sucia, and Kankintú. In November 2018, the Consejo Coordinador Comarcal Ngäbe-Buglé, the consultation body of the Comarca as stipulated in the Political Constitution of Panama, whose objective is to coordinate, promote, and reconcile public activities of the Comarca in order to support its inhabitants and integral development, presented a resolution expressing opposition to the transmission line project. IFC supervision documentation from May 2018, however, states that there are no groups rejecting the transmission line project. There is no documentation of IFC advice regarding the later statements of community opposition.

Prior to submitting the complaint to CAO, in October 2017, February, March, and April 2018, the complainants representing IP communities both inside and outside the Ngäbe-Buglé Comarca contacted IFC, the client, and the World Bank to request information about the project and requested that they be included in the consultations. IFC's response to the complainants listed the series of informational meetings held in the Comarca between December 2017 and March 2018. IFC's response referred the complainants, some of whom reside outside of the Comarca, to contact the Comarca leadership in the neighboring Comarca district for information about the project and the consultation process that had been carried out.

According to reports of the Comarca meetings held in early 2018, in which the client and IFC representatives presented information about the project, Comarca delegates raised concerns regarding internal governance of the Comarca, including the decision-making process and the electoral process. In addition, during a meeting ETESA held with NGOs in May 2018, some of the participants raised the issue of consultation with IP communities located outside the Comarcas, as well as concerns about representation.

IFC Supervision in Relation to Issues Raised in the Complaint

Based on a preliminary review of available documentation, it is not clear to CAO that IFC or their E&S scoping study consultant assessed the potential presence of affected Indigenous Peoples in the project area of influence outside of the Comarca in accordance with PS1 and PS7.¹³

During implementation of the AS project, there are indications of the IFC team's knowledge of the presence of IP communities outside the Comarca. IFC documents indicate that the client reached out to local authorities in response to requests from local communities outside the Comarca. IFC reported to CAO that FPIC should not be restricted to government-recognized IP communities in accordance with PS7. From a preliminary review of documentation, however, it is not clear that this advice was provided to the client. The TOR for the stakeholder engagement plan, which are part of the E&S provisions for the bidding documents, provide for project information to

¹³ CAO notes that the historically rooted issue of indigenous territories in Panama is complex and contentious. While the Ngäbe-Buglé Comarca was legally designated in 1997 (Law No. 10 of March 7, 1997), traditional territories that are not contiguous to the Comarca, often referred to as annex areas, have yet to be demarcated and legally recognized. According to the 2010 census, IP comprise almost 10% of the district of Santa Fe, most of them pertaining to the Ngäbe and Buglé ethnic groups (Plan de desarrollo turístico del distrito de Santa Fe, Veraguas, Panamá, Instituto Interamericano de Cooperación para la Agricultura (IICA), 2014, available at: <https://bit.ly/2REjofn>.)

stakeholders outside the Comarca, but the extent to which consultation is envisaged with IP communities outside the Comarca is unclear.

With regard to the issue of representation of affected communities, IFC indicated to CAO that IFC considered elected representatives to be the legitimate representatives of the Comarca. Moreover, IFC suggested to CAO that the Comarca leadership also represents the IP communities outside the Comarca in northern Santa Fe.

The complainants also raised concerns about the accessibility of the project information, specifically that the informational meetings were conducted in Spanish, using slide presentations that make it hard for some to understand. According to IFC, some audio and video materials in the local language were prepared and circulated. Based on the available documentation, it is unclear, however, the extent to which the meetings were carried out in the local language.

Based on available IFC documentation, it is unclear how IFC assured itself that the individuals with whom the client had been carrying out consultations in fact represented the views of the affected communities in accordance with PS1 (para. 27). Nor is it clear how IFC assured itself that the transmission line project information was disclosed and disseminated in a culturally appropriate language and manner, in accordance with PS1 (para. 30) and PS7 (para. 10).

Conclusion

A key requirement for an IFC AS project is to provide advice consistent with the requirements of the Performance Standards (Sustainability Policy 2012, para. 4). A preliminary review of available documentation raises questions as to whether, within the scope of the agreed AS project, IFC's advice regarding consultation, disclosure of information, and engagement with Indigenous Peoples potentially impacted by Transmission Line IV was consistent with the requirements of PS1 and PS7.

CAO's compliance questions center on the identification of IP communities in the project area which lack legal territorial recognition due to their physical location outside of the Comarca boundaries. Because of this lack of recognition by the GoP, it is not clear that these groups were included in the information disclosure activities and the consultation process carried out by the client. As they are not formally part of the Comarca, it is not clear that they are appropriately represented by the Comarca governance structure. CAO also has questions concerning the preliminary stakeholder mapping and analysis conducted by the IFC E&S consultant, through which all IP communities in the project area of influence should have been identified, especially given the history of land conflict in relevant areas of the country. Although IFC knew of the presence of communities claiming IP status outside of the Comarca, at least by the early phase of AS project implementation, CAO finds no documentation of advice provided to the client regarding information disclosure and consultation, or the application of PS7 to these communities.

While the transmission line project is in its early stages of development, any non-compliance with PS1 and PS7 requirements as part of IFC's AS project is considered serious, as appropriate engagement with the IP communities within and outside the Comarca is an essential foundation for FPIC, and as a result, for a socially sustainable project. Although it is not anticipated that IFC will finance the construction of the transmission line project, the preliminary stakeholder analysis (i.e., assessing the presence of IP communities outside of the Comarca) developed by the IFC consultant is reflected in project design documents including the ESIA scope of work, which will be carried out by the winning bidder. Deficits in IFC's advice thus give rise to risks in project implementation including the ESIA process and the achievement of FPIC. As a result, CAO concludes that potential shortcomings in IFC's advice against PS requirements, if not remedied, give rise to risks of significant adverse social outcomes in the future.

IV. CAO Decision

The purpose of a CAO compliance appraisal is to ensure that compliance investigations are initiated only in relation to projects that raise substantial concerns regarding E&S outcomes now or in the future, and/or issues of systemic importance to IFC. In deciding whether to initiate an investigation, CAO weighs factors including the magnitude of the E&S concerns raised in a complaint, results of a preliminary review of IFC's E&S performance in relation to these issues, the existence of questions as to the adequacy of IFC's requirements, and a more general assessment of whether a compliance investigation is the appropriate response in the circumstances.

In response to a complaint from communities potentially affected by the Transmission Line IV project, this compliance appraisal identifies questions as to whether IFC's advice regarding disclosure of information, consultation, and engagement with Indigenous Peoples was consistent with PS1 and PS7 requirements. Any non-compliance in relation to these issues is considered serious as IFC's ESDD and scoping work have laid the foundation for the project ESIA and its approach to engagement with indigenous communities.

Given the questions as to IFC compliance identified in this appraisal report and the potential for resultant adverse impacts on communities, CAO has determined that a compliance investigation in response to this complaint is warranted.

As set out in terms of reference annexed to this report, CAO's compliance investigation will consider whether IFC's advice in relation to the Transmission Line IV project was developed, implemented, and supervised in accordance with applicable IFC policies, procedures and standards for Advisory Services projects. In particular, it will consider whether IFC's advice in relation to E&S issues was consistent with the requirements of Performance Standards 1 and 7, as they apply to stakeholder analysis and engagement planning, including identification of affected indigenous communities, information disclosure activities, consultation, and representation.

The preliminary time schedule is for CAO to have a draft compliance investigation report ready by August 2020.

Annex A. Terms of Reference for Compliance Investigation



January 17, 2020
Office of the Compliance Advisor Ombudsman (CAO)

Terms of Reference for Compliance Investigation of IFC

*PLIV Advisory Project (IFC Project # 602084)
Panama*

Complaint 01

About CAO

CAO's mission is to serve as a fair, trusted, and effective independent recourse mechanism and to improve the environmental and social accountability of IFC and MIGA.

CAO (Office of the Compliance Advisor Ombudsman) is an independent post that reports directly to the President of the World Bank Group. CAO reviews complaints from communities affected by development projects undertaken by the two private sector arms of the World Bank Group, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).

If CAO concludes that the parties are not willing or able to reach a facilitated solution, the case is transferred to the compliance function of CAO, to appraise whether the concerns raised in the complaint merit a compliance investigation of IFC/MIGA.

The focus of CAO Compliance is on IFC and MIGA, not their client. This applies to all IFC's business activities including the real sector, financial markets, and advisory services. CAO assesses how IFC/MIGA assured itself/themselves of the performance of its business activity or advice, as well as whether the outcomes of the business activity or advice are consistent with the intent of the relevant policy provisions. In many cases, however, in assessing the performance of the project and IFC's/MIGA's implementation of measures to meet the relevant requirements, it will be necessary for CAO to review the actions of the client and verify outcomes in the field.

CAO discloses the findings of its compliance investigation in an investigation report to inform the President and Board of the World Bank Group, senior management of IFC/MIGA, and the public about its decision.

For more information about CAO, please see www.cao-ombudsman.org.

Background to the Advisory Services

In 2017, IFC initiated an Advisory Services (AS) project to support the Empresa de Transmisión Eléctrica, S.A. (ETESA, “the client”), a state-owned Panamanian national transmission company, to structure and tender a public-private partnership (PPP) for the financing, construction, and operation of the Transmission Line IV.¹⁴ The double-circuit, 500-kilovolt transmission line will run over 330 kilometers along the Atlantic coast from the Chiriquí Grande substation in western Panama, where the power generation takes place, to Panama III substation in the east.

The AS project consists of two phases. Phase 1 consists of due diligence that includes a technical, legal, and financial, as well as environmental and social (E&S) scoping study, to underpin the development of a transaction structure. Phase 2 consists of the tender process, consisting of project promotion, elaboration of the bidding documents including the concession contract, and support throughout the bidding process until commercial closing. As of the writing of these TOR, the AS project was in Phase 2 and remained active.

The complaint

In June 2018, CAO received a complaint¹⁵ submitted by representatives of affected communities (“the complainants”), including Ngäbe, Buglé, and Campesina Territorial Organization of the Northern Region of Santa Fe de Veraguas¹⁶ and Movement for the Defense of the Territories and Ecosystems of Bocas del Toro.¹⁷ These organizations filed on behalf of indigenous communities in the areas of Chiriquí Grande, who live inside the Ngäbe-Buglé Comarca, and of Northern Santa Fe, who live outside the Ngäbe-Buglé Comarca and who demand that the State of Panama recognize their territories as indigenous territory. The complainants received support from national and international NGOs, including the Alliance for Conservation and Development and the Center for International Environmental Law.

The complainants raise concerns regarding information disclosure for the transmission line project, the process of Free, Prior, and Informed Consent (FPIC), sharing of development benefits, and direct and indirect environmental and social impacts on the indigenous communities.

Following CAO’s assessment,¹⁸ the client decided not to pursue a CAO-facilitated dispute resolution process, and accordingly, the complaint was transferred to CAO’s compliance function for appraisal in April 2019.

In January 2020, CAO released a compliance appraisal report in relation to the complaint and decided to conduct a compliance investigation of IFC’s E&S performance in relation to the AS project.

¹⁴ Summary of Advisory Services Project Information (ASPI), available at: <https://bit.ly/2HkYAMS>.

¹⁵ CAO complaint, June 2018, available on the CAO website at: <https://bit.ly/PLIV-01>.

¹⁶ The name in Spanish is Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fe de Veraguas

¹⁷ The name in Spanish is Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro (MODETEAB)

¹⁸ CAO Assessment Report, April 2019, available at: <https://bit.ly/PLIV-01>.

Scope of the compliance investigation

The focus of this CAO compliance investigation is on IFC, and how IFC assured itself of the environmental and social performance of its advice, and whether the outcomes of the advice are consistent with the intent of the relevant policy provisions.

The approach to the compliance investigation is described in the CAO Operational Guidelines (March 2013), and states that the working definition of compliance investigations adopted by CAO is as follows:

An investigation is a systematic, documented verification process of objectively obtaining and evaluating evidence to determine whether environmental and social activities, conditions, management systems, or related information are in conformance with the compliance investigation criteria.

As set out in CAO's appraisal report, CAO will conduct a compliance investigation of IFC's E&S performance in its Advisory Services concerning the Transmission Line IV of the Empresa de Transmisión Eléctrica, S.A. (ETESA) in relation to the issues raised in the complaint.

CAO's compliance investigation will consider whether IFC's advice in relation to the Transmission Line IV project was developed, implemented, and supervised in accordance with applicable IFC policies, procedures, and standards for Advisory Services projects. In particular, it will consider whether IFC's advice in relation to E&S issues was consistent with the requirements of Performance Standards 1 and 7, as they apply to stakeholder analysis and engagement planning including identification of affected indigenous communities, information disclosure activities, consultation, and representation.

The scope of the investigation also includes developing an understanding of the immediate and underlying causes for any non-compliance identified by the CAO.

Compliance investigation process and preliminary timeline

The preliminary time schedule is for CAO to have a draft compliance investigation report ready by August 2020.

A draft investigation report will be circulated to IFC senior management and all relevant IFC departments for factual review and comments. IFC comments should be submitted in writing to CAO within 20 working days of receipt by IFC.

Upon receiving comments from IFC on the consultation draft, CAO will finalize the report. The final report will be submitted to IFC senior management for official response. A notification will be posted on CAO's website. IFC has 20 working days to submit a written response to CAO. CAO will forward the investigation report and the IFC response to the President of the World Bank Group. The President has no editorial input as to the content of the compliance investigation report but may take the opportunity to discuss the investigation findings with CAO.

Once the President is satisfied with the response by IFC senior management, the President will provide clearance for the investigation report and the response. The President retains discretion over clearance. After clearance, CAO will disclose the investigation report and the IFC response to the Board. CAO will also alert relevant stakeholders of the disclosure of both documents on CAO's website and will share the documents with the complainants.

External panelists

As per its established practice, CAO will engage one or more external experts for collaboration on this task. For this compliance investigation, CAO considers the following as necessary for the compliance investigation panel:

- Significant expertise in stakeholder analysis and engagement, consultation and FPIC, assessment and management of risks around Indigenous Peoples in private sector projects in Central America;
- Experience working with indigenous communities in Central America, in particular, Panama;
- Knowledge of IFC's E&S policies, standards, and procedures, particularly Performance Standard 1 (Assessment and Management of Environmental and Social Risks and Impacts) and Performance Standard 7 (Indigenous Peoples);
- Experience and knowledge relevant to the conduct of compliance investigations;
- Demonstrated ability to analyze policies and practices and develop proposals for reform in complex institutional contexts; and
- Fluency in Spanish.