

Appendix 4: Terms of Reference for the Compliance Investigation



Terms of Reference for Compliance Investigation of IFC’s Environmental and Social Performance in relation to its Investment in ABBank and its investment in the Lower Sesan 2 hydropower project in Cambodia

IFC Project #29745

About CAO

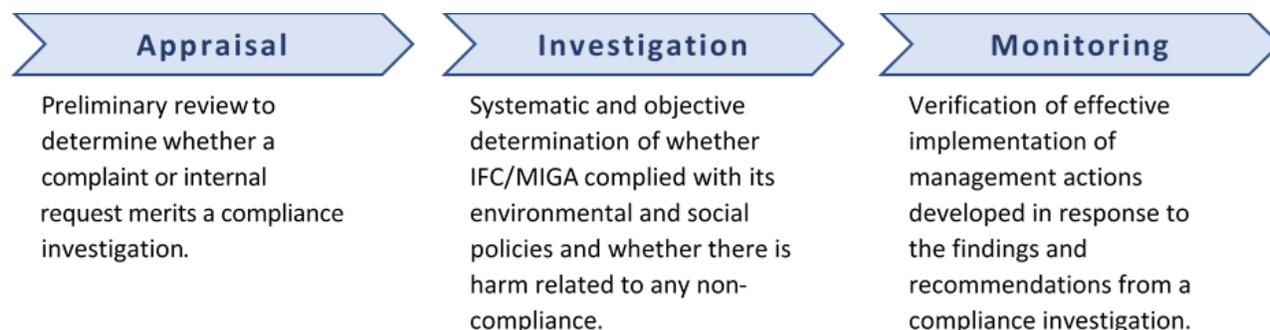
The Office of the Compliance Advisor Ombudsman (CAO) is the independent accountability mechanism of the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA), members of the World Bank Group. We work to facilitate the resolution of complaints from people affected by IFC and MIGA projects in a fair, objective, and constructive manner, enhance environmental and social project outcomes, and foster public accountability and learning at IFC and MIGA.

CAO is an independent office that reports directly to the IFC and MIGA Boards of Executive Directors. For more information, see www.cao-ombudsman.org.

About the Compliance Function

CAO’s compliance function reviews IFC and MIGA compliance with environmental and social policies, assesses related harm, and recommends remedial actions where appropriate.

CAO’s compliance function follows a three-step approach:



Context and Investment

IFC has had active investment in An Binh Commercial Joint Stock Bank (ABBank), a commercial bank in Vietnam, since 2010. Since 2013, IFC has been a shareholder and currently holds an 8.2% equity stake in ABBank. ABBank, in turn, holds a 10.31% share in Electricity Vietnam International Joint Stock Company (EVNI). EVNI holds 10% of the shares of the Hydropower Lower Sesan 2 Company, a joint venture in charge of construction and operation of the Lower Sesan 2 dam, together with The Royal Group (39%), a Cambodian conglomerate, and Hydrolancang International Energy Co. Ltd (51%), a Chinese firm. EVNI's 10% equity stake in Lower Sesan 2 gives it the right to appoint a representative to the Board of Directors. However, EVNI is not involved in the hydropower project's daily management.

Following the definitions in the CAO Policy,⁷⁷ EVNI is a sub-client of ABBank and Lower Sesan 2 is an IFC sub-project.

Lower Sesan 2 is the largest hydropower project in Cambodia, located in Stung Treng Province on the Sesan River. Construction began in 2014 and operations began in 2017. Numerous environmental and social allegations have been raised regarding the Lower Sesan 2 hydropower project since 2008, through public reporting and complaints.

The Complaint

In June 2018, CAO received complaints alleging widespread negative environmental and social impacts from three separate groups of people affected by the dam's operations. These included: (1) resettled villagers, (2) villagers who refused to resettle, and (3) upstream villagers.

- 1) *The resettled villagers* allege that their new living conditions are challenging and inadequate and that they were not provided livelihood restoration programs or support. They also claim that they were not able to participate in decisions about land allocation which lacked transparency.
- 2) *The villagers who refused to resettle* claim that their livelihoods have been affected by a significant decline in local fish stocks. Most now live in a communal forest outside their former villages. Some identify as indigenous peoples and seek to protect their cultural identity and sacred sites. Others complain about the lack of basic infrastructure and sufficient land to farm due to dam-related flooding.
- 3) *The upstream villagers* allege harms to their livelihoods, due to changing water levels and fewer fish in the Sesan and Srepok rivers. They also claim that they were never informed or consulted about the hydropower project or its compensation policies.

All three groups stated that they do not feel safe to voice their concerns and asked that their identities be kept confidential.

⁷⁷ CAO Policy, glossary.

Investigation Terms of Reference

Where, as in the present case, the CAO appraisal process results in a decision to investigate, CAO's appraisal report includes terms of reference for the compliance investigation, outlining:

- a. *The objectives and scope of the investigation;*
- b. *Any limitations on the scope of the investigation that may be appropriate, considering, among others, issues closed at the appraisal stage, the presence of concurrent judicial proceedings, or an IFC/MIGA Exit;*
- c. *The approach and method of investigation and specific consultant qualifications; and*
- d. *A schedule for the investigation tasks, timeframe, and reporting requirements. This schedule will include deadlines for the submission of information by IFC/MIGA to inform the compliance investigation process.*⁷⁸

Investigation Objective and Scope

As established in CAO's Compliance Appraisal Report, CAO will conduct a compliance investigation of IFC's 2010 investment in ABBank as it relates to the complaint. The investigation will determine whether IFC complied with its E&S Policies relevant to the investment and whether there is harm related to any IFC non-compliance. In determining whether IFC has complied with its E&S Policies, CAO will include, where appropriate, an assessment of whether IFC deviated in a material way from relevant directives and procedures.

Relevant to the issues raised in the complaint, the objective of the investigation is to determine:

1. Whether IFC has complied with its E&S Policies, including:
 - a. Whether IFC conducted a pre-investment E&S review of its 2010 investment in ABBank as required by the Sustainability Policy; and
 - b. Whether IFC has supervised its 2010 investment in ABBank, including the E&S commitments made in its legal agreements with ABBank, as required by the Sustainability Policy.
2. Whether the harms and potential harms raised by the complainants are related to any IFC non-compliance.⁷⁹

In considering findings regarding Harm and whether any Harm is related to IFC non-compliance, CAO will assess IFC's review and supervision of its E&S requirements at the project and sub-project level. CAO will consider project -or sub-project- level E&S performance particularly in relation to the application of the following Performance Standards to the sub-project, which are relevant to the issues raised in the complaints:

- *PS1 (Social and Environmental Assessment and Management Systems)* in relation to: the requirements of an appropriate environmental and social impact assessment;

⁷⁸ CAO Policy, para. 118.

⁷⁹ CAO Policy, paras. 112–114.

management of risk and impacts; disclosure of the hydropower project's information; and proper consultations and stakeholder engagement with affected communities,

- *PS4 (Community Health, Safety and Security)*, in relation to: the standards for community health and safety, given communities' allegations of illnesses from the frequent flooding; and threats and intimidation against those who voice their opposition to the project.
- *PS5 (Land Acquisition and Involuntary Resettlement)* in relation to: the requirements and standards for a proper resettlement and livelihood restoration plan, including consultation and proper implementation to effectively restore and compensate for the physical relocation and livelihood impacts on affected communities.
- *PS6 (Biodiversity Conservation and Sustainable Natural Resource Management)* in relation to: biodiversity risks and impacts on the fish population and other ecosystems.
- *PS7 (Indigenous Peoples)* in relation to: the requirements for a proper consultation with affected indigenous communities (free, prior and informed consultation in defined circumstances); consideration of communal land rights; and protection of cultural identity and sacred sites.

For the purposes of the CAO Policy and this investigation, the Lower Sesan 2 hydropower dam is considered a sub-project of IFC, through its sub-client EVNI.

EVNI does not currently have a controlling interest in the joint venture that constructed and operates the hydropower project. However, this does not mean that IFC, its client and sub-client (ABBank and EVNI) are or were without influence over the hydropower project. CAO's investigation will consider EVNI's current minority position in the Lower Sesan 2 hydropower project when assessing IFC's compliance with its E&S Policies. CAO will also consider the client and sub-client's E&S performance at the sub-project level.⁸⁰

Methodological Approach

CAO will base the compliance investigation on interviews, statements, reports, correspondence, CAO observations of activities and conditions, and other sources that CAO deems relevant.⁸¹

The compliance investigation process and compliance investigation report will include:

- a. The investigation findings with respect to compliance, non-compliance, and any related Harm.*
- b. Context, evidence, and reasoning to support CAO's findings and conclusions regarding the underlying causes of any non-compliance identified.*
- c. Recommendations for IFC/MIGA to consider in the development of a Management Action Plan (MAP) relating to the remediation of project- or sub-project-level non-compliance and related Harm, and/or steps needed to prevent future non-compliance, as relevant in the circumstances. In case of a project where the IFC/MIGA Exit has*

⁸⁰ CAO Policy, para. 114.

⁸¹ CAO Policy, paras. 115 and 117.

*occurred, recommendations will take into account the implications of such an IFC/MIGA Exit.*⁸²

Sufficient, relevant evidence is required to afford a reasonable basis for CAO's compliance findings and conclusions. CAO will assess whether there is evidence that IFC applied relevant E&S requirements considering the sources of information available at the time the decisions were made and will not make findings and conclusions with the benefit of hindsight.⁸³

External Expert(s)

Following established practice, CAO will engage one or more external experts for this investigation. For this compliance investigation, CAO considers the following qualifications as necessary:

- Significant expertise in project-related land acquisition and involuntary resettlement from hydropower projects;
- Significant expertise in environmental impacts from large hydropower projects, particularly those related to biodiversity and ecosystem services;
- Experience in social impact assessments, stakeholder engagement processes, consultations, and free, prior and informed consent from indigenous peoples;
- Knowledge of ethnic groups and indigenous peoples in Cambodia, particularly in Stung Treng Province;
- Knowledge of IFC's E&S policies, standards, and procedures, particularly the 2006 Sustainability Policy and the 2006 Performance Standards: Performance Standard 1 (Social and Environmental Assessment and Management Systems), PS4 (Community Health, Safety and Security), Performance Standard 5 (Land Acquisition and Involuntary Resettlement), PS6 (Biodiversity Conservation and Sustainable Natural Resource Management) and Performance Standard 7 (Indigenous Peoples);
- Experience and knowledge relevant to conducting compliance investigations;
- Demonstrated ability to analyze policies and practices and develop proposals for reform in complex institutional contexts; and
- Fluency in Khmer and English. Vietnamese desirable.

Field Visit and Potential Limitations of the Investigation

A field visit to the Lower Sesan 2 hydropower project area in Cambodia and ABBank's offices in Vietnam is anticipated during the compliance investigation. For such a visit, the CAO case team, external experts, and an interpreter/translator would be expected to participate.

⁸² CAO Policy, para. 120.

⁸³ CAO Policy, paras. 116–117.

Compliance Investigation Schedule, Timeframe, and Reporting Requirements

According to the CAO Policy,⁸⁴ a draft compliance investigation report should be completed within one year of the disclosure of an appraisal report. By November 2023, a draft compliance investigation report for this case should be circulated to IFC management for factual review and comment. Management may share the draft report with the client on the condition that appropriate measures are in place to safeguard the confidentiality of the draft report prior to public disclosure.⁸⁵ IFC will have 20 business days to provide written comments.

At the same time, the draft investigation report will be circulated to the complainants for their factual review and comment, provided that appropriate measures are in place to safeguard the confidentiality of the draft report prior to public disclosure. If such confidentiality measures are not in place, complainants will, at a minimum, receive a draft table of the investigation's findings for factual review and comment and as a source of information to inform future consultations on any IFC Management Action Plan (MAP).⁸⁶

Upon receiving comments on the consultation draft from IFC and the complainants, CAO will finalize the investigation report. The final report will be submitted to IFC senior management and circulated to the Board for information. The Board has no editorial input on the content of a CAO compliance investigation report. Once the investigation report is officially submitted to IFC Management and circulated to the Board, CAO will notify the public on its website of the investigation's completion.⁸⁷

Upon CAO's final submission of the compliance investigation report to IFC, IFC Management has 50 business days to submit a management report to the Board for consideration. The management report must include a MAP for Board approval. A MAP contains time-bound remedial actions that IFC proposes for the purpose of addressing CAO findings of non-compliance and related harm. IFC must consult with complainants and the client during its MAP preparation process, and its management report must also include a reasoned response to CAO's finding or recommendations regarding non-compliance or related harm that IFC is unable to address in the MAP.⁸⁸

CAO will submit comments on the proposed MAP to the Board, and the complainants may submit a statement to CAO on the proposed MAP and the adequacy of consultations for circulation to the Board.⁸⁹ Upon the Board's approval of the MAP, the compliance investigation report, management report, and MAP will be published on CAO's website.⁹⁰

⁸⁴ CAO Policy, para. 121.

⁸⁵ CAO Policy, para. 122.

⁸⁶ CAO Policy, para. 124–125.

⁸⁷ CAO Policy, paras. 123, 127–129.

⁸⁸ CAO Policy, paras. 130–132, 134.

⁸⁹ CAO Policy, para. 135.

⁹⁰ CAO Policy, para. 138.