
COMPLIANCE INVESTIGATION REPORT

PLIV Advisory Services (IFC Project # 602084)

Panama

Complaint 01

Compliance Investigation of IFC's Environmental and Social Performance in Relation to its Advisory Services to Empresa de Transmisión Eléctrica, S.A. in Panama

Office of the Compliance Advisor Ombudsman (CAO)
for the International Finance Corporation (IFC) and the
Multilateral Investment Guarantee Agency (MIGA),
Members of the World Bank Group

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Executive Summary

Overview

This compliance investigation responds to a complaint regarding the environmental and social (E&S) impacts of the Panama Transmission Line IV (the PLIV project). PLIV is a major new powerline that is proposed to connect Panama City with the province of Bocas del Toro. When complete, the transmission line will run a total of 330 kilometers across the north of Panama. The PLIV project is being structured and tendered as a public-private partnership (PPP) by Empresa de Transmisión Eléctrica, S.A. (ETESA), a state-owned electricity transmission company in Panama. IFC has an Advisory Services project to support ETESA in structuring and tendering the PLIV project.

The complainants are members of Ngöbe and Buglé Indigenous groups who live in the area of the proposed project. The complainants raise concerns regarding the process for gaining Free, Prior, and Informed Consent (FPIC) for the PLIV project from impacted Indigenous Peoples. In particular, the complainants raise concerns that: (a) the FPIC process has excluded Indigenous groups that are impacted by the project and (b) that the consultations undertaken to date have been insufficiently inclusive.

The key IFC Sustainability Policy requirement for an IFC Advisory Services project of this type is that IFC provides advice “consistent with the Performance Standards” as a framework for good international industry practice in environmental and social (E&S) risk management. The Performance Standards (PS) include specific requirements for conducting consultation with Indigenous Peoples and gaining prior consent (FPIC) of Indigenous Peoples when projects impact land or natural resources under traditional ownership or customary use.

As relevant to the issues raised in the complaint, this investigation finds that IFC’s advice to ETESA was partially consistent with Performance Standards requirements. Positively, IFC has helped to move the development of the PLIV project toward alignment with Performance Standards requirements for consultation with Indigenous Peoples. However, this alignment has been incomplete, and important aspects of IFC’s advice have not been consistent with the Performance Standards. Key shortcomings in IFC’s advice relate to: (a) the exclusion of some potentially affected Indigenous groups from the FPIC process and (b) the design of a consultation process that is insufficiently inclusive of traditional authorities, project-affected communities, and women.

This report includes recommendations for IFC to address CAO’s non-compliance findings. IFC has an ongoing advisory role in relation to the PLIV project. In this context, CAO’s recommendations focus on the provision of supplemental corrective advice to ETESA, to ensure that the consultation processes for the PLIV project cover all affected Indigenous groups. CAO also recommends that IFC provide supplemental advice to ETESA with a view to aligning the preparation of the PLIV project more closely with IFC’s Performance Standards. This supplemental advice should: (a) consider all Indigenous groups impacted by the PLIV project and (b) focus on measures needed to conduct inclusive and culturally appropriate consultations with Indigenous Peoples consistent with Performance Standards requirements.

Absent action to address the shortcomings in IFC’s advice to date, there is significant risk that the project will not achieve FPIC of the affected Indigenous communities as required by the Performance Standards. This may heighten the risk of negative project impacts on the cultural, economic, and territorial (including customary) rights and interests of those Indigenous communities. Taking into account historical opposition to infrastructure development in the region,

lack of effective consultation with Indigenous groups could also contribute to increased social tension and potential conflict around the PLIV project.

The Complaint

This compliance investigation responds to a June 2018 complaint filed on behalf of Indigenous groups in Panama who claim to be impacted by the PLIV project. The compliance investigation considers concerns in relation to the project raised by Indigenous groups from two distinct areas where the proposed transmission line runs (see Figure 1 of report). One group of Indigenous communities is located in a government-recognized Indigenous territory, Comarca Ngöbe-Buglé (the Comarca). The other group lives in the Norte de Santa Fé region of the province of Veraguas, which is outside the Comarca. While it has a significant Indigenous population (approximately 6,500, per the 2010 census), the Norte de Santa Fé region is not formally recognized as Indigenous territory by the Government of Panama.

During the Factual Review and Comment process for this report, the complainants clarified that they also represent a third group of Indigenous communities that is impacted by the project. This group is located in the district of Chiriquí Grande in the province of Bocas del Toro, outside the Comarca to the northwest. The complainants point out that these communities form part of Annex Areas to the Comarca Ngöbe-Buglé, which were to be demarcated and legally recognized as Indigenous territory per Law 10 (1997) but for which no demarcation has yet occurred. The current CAO compliance investigation focuses on the Indigenous communities inside the Comarca and those outside the Comarca in the Norte de Santa Fé region, based on the CAO Assessment Report which identified only these two complainant groups. However, based on CAO's preliminary analysis, the consultation requirement for affected Indigenous groups outside the Comarca in Chiriquí Grande appears to be similar to those in Norte de Santa Fé.

The complainants raise concerns regarding the process that has been established for gaining FPIC for the PLIV project from impacted Indigenous Peoples. They assert that project preparation activities to date have fallen short of national law and IFC standards. Complainants from both groups are also concerned about what they perceive as a lack of access to information about the project, including the route of the transmission line and its potential impacts. Based on past experiences with other projects, they fear they will not receive benefits from the project.

Members of the Indigenous communities living within Comarca Ngöbe-Buglé raise a series of specific concerns regarding the FPIC process. They claim that ETESA has been engaging exclusively with government-recognized Comarca authorities, who they state do not properly represent their communities. They also assert that ETESA is making decisions about the project without considering the voices of community representatives who oppose it. They claim that ETESA is not engaging in consultations with communities, and that the project presentations were carried out in Spanish using modes of communication that were not culturally appropriate for Indigenous communities, and without use of local Indigenous languages. They claim they have not received any documents about the project, and that all information about the project has been provided verbally. They also raise concerns that the project fails to comply with IFC commitments to foster the equitable participation of women in the consultation process.

Members of the Indigenous communities living outside the Comarca in the Norte de Santa Fé region claim that they have not been consulted on the PLIV project at all, although they assert that they are impacted. Similar to the situation of the Indigenous communities in the Norte de Santa Fé region, the complainants claim that the lack of legal recognition of the Indigenous territory in Chiriquí Grande has led to the exclusion of these Indigenous communities from consultation on the PLIV project.

ETESA states that it has been conducting an FPIC process since December 2017 with representatives of the Ngöbe and Buglé appointed by the Comarca authorities to two commissions. ETESA notes its commitment to comply with FPIC requirements in accordance with national law and international standards, including IFC's Performance Standards.

The IFC Advisory Services Project

IFC agreed to serve as transaction advisor to ETESA for the PLIV project in June 2017. The Advisory Services project formally commenced with the signing of a Financial Services Advisory Agreement between IFC and ETESA in September 2017. The Agreement provides that IFC will advise ETESA in accordance with the IFC Performance Standards. The Agreement also confirms ETESA's commitment to applying the Performance Standards in developing the PLIV project.

ETESA ran a bidding process for the PLIV project from late 2018 to mid-2019, however, this process did not lead to the selection of a successful bidder. At the time of writing this report, ETESA was in the process of preparing to bid the PLIV project for a second time. IFC agreed to provide support to the second bidding process under a second Financial Services Advisory Agreement that was approved by the Government of Panama in May 2021.

When serving as a transaction advisor for a Public-Private Partnership, such as the PLIV project, IFC typically supports a client to evaluate and bid out a project to the private sector. This role can include providing support to a client in relation to technical aspects of project development, such as environmental and social risk assessment, among other roles.

In this case, IFC's role involves the provision of technical, legal, and financial due diligence, including environmental and social (E&S) scoping for the transmission line, to inform the development of a transaction structure and the tendering of the project to a private-sector partner. Relevant to the issues raised in the complaint, IFC provided the following written advice to ETESA:

- a. An inception report and preliminary stakeholder map (see Figure 2) which were completed in December 2017 and April 2018, respectively; and
- b. Terms of reference (TOR) for the Environmental and Social Impact Assessment (ESIA) for the PLIV project and associated management plans, including a stakeholder engagement plan, an Indigenous Peoples community development plan, and a plan for project-related land acquisition, which were completed in July 2018.

IFC's ongoing advisory role in relation to the bidding of the PLIV project includes supporting ETESA in relation to the conduct of the ESIA and associated stakeholder consultations, in order to ensure compliance with the Performance Standards.

As of the time of writing this report, IFC's Advisory Services project remained active. The bidding documents, including the TOR for the ESIA and associated plans as well as the PPP contract, had been prepared under the first Agreement, and IFC was revising these documents under the new Agreement. The second bidding process had not been launched, and as such, a private-sector partner for the project had not yet been selected.

FPIC Activities Undertaken by the Client in the Course of IFC's Advisory Services Project

In December 2017, as part of the FPIC process for the PLIV project, the client commenced consultations with selected government-recognized representatives of Comarca Ngöbe-Buglé (see Figure 5 of report). This process was designed to obtain consent to conduct the ESIA and detailed project studies in the Comarca and was referred to by IFC as the "*preliminary FPIC process*." However, the scope of the preliminary FPIC process expanded. As a result, in addition

to authorizing the conduct of the ESIA and detailed studies, the consultations resulted in agreements on key issues related to the development of the transmission line. These included agreements on the alignment of the transmission line within the area of the Comarca and an approach to benefit sharing. A subsequent phase of the FPIC process (described as the “*primary FPIC process*”), designed to obtain consent for the construction of the PLIV project itself, was foreseen to take place after IFC’s AS project concluded. However, following the second IFC Advisory Services Agreement, ETESA will conduct the ESIA prior to the signing of the PPP contract, with IFC providing quality control and support for the stakeholder engagement and FPIC consultations that will be carried out as part of the ESIA.

IFC Requirements

The key compliance requirement for an IFC Advisory Services project of this type is that IFC provides advice “consistent with the Performance Standards” (Sustainability Policy, para. 39). Two IFC Performance Standards (PS) are specifically relevant to the issues raised by the complainants.

PS1 (Assessment and Management of Environmental and Social Risks and Impacts) establishes requirements for stakeholder engagement and consultation. This includes requirements for stakeholder engagement and disclosure of information.

Following PS1, stakeholder engagement should be preceded by stakeholder analysis, which identifies who may be impacted by a project, with a focus on vulnerable and disadvantaged groups. The stakeholder engagement process should then proceed according to a stakeholder engagement plan designed to achieve inclusive consultation and informed participation of affected communities.

PS7 (Indigenous Peoples) establishes requirements related to the identification and management of project impacts on Indigenous Peoples. PS7 was designed considering that “Indigenous Peoples may be more vulnerable to the adverse impacts associated with project development...[including] loss of identity, culture, and natural resource-based livelihoods” (para. 1). PS7 provides for culturally appropriate stakeholder engagement and the establishment of FPIC when a project impacts land or natural resources that are traditionally owned or under customary use of Indigenous Peoples.

FPIC is a principle that pertains specifically to Indigenous Peoples and allows them to give or withhold consent to a project that may affect them or their territories. Where a project involves FPIC, the process of engagement with Indigenous Peoples requires detailed stakeholder mapping, information disclosure, consultation, and negotiation of benefit-sharing arrangements, with a view to achieving consent (see Box 2 in report for further detail).

CAO Compliance Investigation

This CAO compliance investigation was initiated in January 2020.

The terms of reference for this compliance investigation require CAO to assess whether IFC’s Advisory Services project was carried out in accordance with relevant IFC E&S requirements. This includes assessing whether IFC’s advice in relation to E&S issues was consistent with the requirements of Performance Standards 1 and 7.

In assessing whether IFC’s advice was “consistent with the Performance Standards,” CAO considers whether IFC’s advice was compatible with relevant requirements of the Performance Standards as a framework for good international industry practice, in the context of the project, its stage of development, and IFC’s role as transaction advisor. The scope of the investigation

also includes developing an understanding of the immediate and underlying causes of any non-compliance.

Following transitional arrangements established as part of the approval of the CAO Policy in June 2021, this compliance investigation follows the CAO Policy.

Given COVID-19-related travel restrictions, CAO was not able to conduct a field visit as part of this compliance investigation. The investigation is based on a review of project documentation and interviews with IFC staff and the complainants. While CAO reached out to ETESA including with IFC's assistance, ETESA advised that discussions with ETESA and other government stakeholders were not possible due to pandemic-related scheduling conflicts.

CAO Findings

This investigation identifies a number of positive contributions of IFC's Advisory Services project in terms of moving the PLIV project towards alignment with the requirements of PS1 and PS7. However, it also concludes that there were important respects in which IFC's advice was not consistent with the Performance Standards as relevant to the issues raised by the complainants.

Positive contributions of the Advisory Services project

As relevant to the issues raised in the complaint, CAO's investigation finds that IFC's Advisory Services project supported a partial alignment of the PLIV project with IFC's Performance Standards in the following respects:

- a. The legal agreements between IFC and ETESA included a commitment for ETESA to align the design of the PLIV project with IFC's E&S requirements.
- b. IFC encouraged ETESA to commence the FPIC process early in the project development process, which ETESA did.
- c. IFC developed TOR for the project ESIA and associated plans that were generally aligned with Performance Standards requirements for stakeholder engagement and benefit sharing (with some important exceptions as discussed below).

Non-compliance findings

With respect to the issues raised in the complaint, there are two key respects in which IFC's advice to ETESA did not meet the standard of being "consistent with the Performance Standards," as required by the Sustainability Policy. These relate to: (1) a lack of relevant advice in relation to the need for stakeholder analysis and engagement planning to inform the design of the preliminary FPIC process that ETESA commenced in December 2017 and (2) provision of advice that was only partially consistent with the Performance Standards in relation to the design of the primary FPIC process. Each of these non-compliance findings is elaborated below.

1. IFC did not provide advice consistent with the Performance Standards in relation to the need for stakeholder analysis and engagement planning before ETESA started the preliminary FPIC process.

IFC's internal Advisory Services project approval documentation noted that ETESA would need to develop a stakeholder engagement plan and initiate stakeholder engagement as soon as possible during the project development phase for the PLIV project. However, IFC did not follow through on this by advising ETESA on the need for a stakeholder engagement plan and associated stakeholder analysis as part of the preparation for the preliminary FPIC process.

At the time ETESA initiated the preliminary FPIC process in December 2017, IFC's advice was documented in its Inception Report for the Advisory Services project, which was delivered the same month. The Inception Report advised that the preliminary FPIC process could proceed,

without recommending that ETESA first conduct a stakeholder analysis or develop a stakeholder engagement plan. The Inception Report recommended a stakeholder engagement plan only for consultations as part of the project ESIA, which would be prepared post-bidding.

IFC's advice to proceed with the preliminary FPIC process and to develop a stakeholder engagement plan only for the ESIA consultations was contrary to the PS1 requirement for the client to "develop and implement a Stakeholder Engagement Plan that is scaled to the project risks and impacts and development stage" (para. 27). As described in IFC's Good Practice Handbook on Stakeholder Engagement (2007), stakeholder engagement is an iterative process that should involve stakeholder analysis and the preparation of a formal stakeholder engagement plan in advance of consultations for more complex projects. This type of analysis and engagement planning was particularly important given known contextual risks and challenges associated with consultations with Indigenous groups in the project area.

Absent appropriate stakeholder analysis and engagement planning, the preliminary FPIC process proceeded in a manner that was not fully aligned with IFC E&S requirements under PS1 and PS7, as follows:

- a. The Indigenous Peoples of the Norte de Santa Fé region and other Indigenous communities outside the Comarca in the Annex Areas, although located in the project's area of influence and potentially affected by the project, were not included in the preliminary FPIC process. These communities do not live in a government-recognized Indigenous territory (Comarca) but meet the criteria for being identified as Indigenous Peoples under PS7 (para. 5). IFC's lack of advice in relation to these groups was inconsistent with PS7, which requires the application of PS7 to all Indigenous communities affected by the project (para. 6). This includes requirements for FPIC when a project has potential impacts on lands traditionally owned by, or under the customary use of, Indigenous Peoples (PS7, paras. 11, 13, and 14), regardless of whether a territorial claim of an Indigenous group is formally recognized by government (PS7, para. 13).
- b. The preliminary FPIC consultations were conducted with government-recognized representatives of Comarca Ngöbe-Buglé (namely, the delegates' Regional Congress of Ño Kribo). This led to the exclusion of affected communities and traditional Indigenous authorities (such as those of the mass traditional congresses and caciques), who are documented as holding high levels of legitimacy and influence in the Comarca. IFC's lack of advice on the need to consult beyond the formal representatives of the Comarca was inconsistent with Performance Standards requirements to "verify that [community representatives consulted] do in fact represent the view of the Affected Communities and that they can be relied upon to faithfully communicate the results of consultations to their constituents" (PS1, para. 27; see also PS7, GN36 on the need to include both formal and traditional leaders in the consultation processes).
- c. There was a lack of attention to ensuring that the preliminary FPIC process was conducted in a culturally appropriate manner, including disclosure of information and relevant documents in local Indigenous languages. IFC's lack of advice in relation to this issue was inconsistent with the requirement that engagement with Indigenous Peoples be conducted "in a culturally appropriate manner" (PS7, para. 10) and "in a culturally appropriate local language(s)" (PS1, para. 30).
- d. There was limited involvement of Indigenous women in the preliminary FPIC process, with women representing only two of the 19 Comarca delegates appointed to the negotiation commissions. IFC did not provide any advice on the need to conduct the preliminary FPIC consultations in a manner that was gender inclusive. IFC's lack of advice on this issue was inconsistent with the requirement that consultations be held in a manner that captures

women's views and reflects women's different concerns and priorities, as required by PS1 (para. 31).

IFC's lack of advice in relation to the need for stakeholder analysis and engagement planning before the start of the FPIC process is of particular concern given the scope of these "preliminary" consultations, which covered substantive issues such as project location and benefit sharing that would normally be part of the ESIA process.

2. IFC's advice in relation to the primary FPIC process, as contained in the terms of reference for the PLIV project ESIA prepared by IFC, was not fully consistent with Performance Standards requirements.

The terms of reference (TOR) for the PLIV project ESIA were a key output of IFC's Advisory Services project. The TOR for the ESIA included the design of the *primary* FPIC process for the PLIV project, as well as TOR for a stakeholder engagement plan, an Indigenous Peoples community development plan, and a plan for project-related land acquisition. These TOR were produced by IFC's consultant and submitted to ETESA as part of the bidding package for the PLIV project in July 2018, seven months after ETESA commenced the preliminary FPIC process (see Figure 2 in report).

As noted above, elements of the TOR that relate to consultation and benefit sharing are partially aligned with Performance Standards requirements. However, there are important aspects of these TOR, as developed by IFC, that are inconsistent with PS1 and PS7 requirements for inclusive and culturally appropriate consultation with Indigenous Peoples. The shortcomings in these TOR replicated key gaps in the preliminary FPIC process as outlined above, in particular: (a) the lack of participation of Indigenous Peoples outside the Comarca, in particular those of the Norte de Santa Fé region and in the Annex Areas, in the primary FPIC process; (b) a continued focus on consultations with regional government-recognized Comarca authorities, to the exclusion of traditional authorities and other community representatives, such as those of the mass traditional congresses and the caciques; (c) a lack of recognition of the importance of bottom-up consultations to reflect decision-making processes at the community level; (d) insufficient provision for the involvement of women in the consultation process; and (e) a lack of specificity on the need to disclose information in local Indigenous languages throughout the project cycle.

Related Harm

A CAO compliance investigation is expected to include findings regarding any harm that may be related to IFC non-compliance. Harm is defined as "[a]ny material adverse environmental and social effect on people or the environment resulting directly or indirectly from a Project or Sub-Project. Harm may be actual or reasonably likely to occur in the future" (CAO Policy, p. iv).

In this case, CAO finds that IFC non-compliance with the Sustainability Policy, as outlined above, has contributed to harm to project-affected people, including the complainants. Specifically, shortcomings in IFC's advice have contributed to the following outcomes, contrary to the requirements of PS1 and PS7, to date:

- a. The exclusion of the Indigenous Peoples of the Norte de Santa Fé region and of the Annex Areas from the FPIC process;
- b. The exclusion of traditional authorities in the Comarca from the consultation process; and
- c. A lack of culturally appropriate and gender-inclusive consultations, including lack of access to project information in Indigenous languages.

Considering the gaps in IFC's advice and ETESA's conduct of the FPIC process to date, the PLIV project has not met, nor is it on track to meet, IFC's requirements for engagement with Indigenous Peoples, including requirements for consent of impacted Indigenous communities, mitigation of

E&S impacts, and benefit sharing. As a result, the Indigenous Peoples potentially affected by the project are vulnerable to the potential adverse impacts that PS7 is designed to avoid, including “loss of identity, culture, and natural resource-based livelihoods” (para. 1). Effective consultation will be important to mitigating these types of impacts, as well as managing risks of project-related conflict.

Underlying Causes

CAO’s investigation has identified the following underlying causes for the deficiencies in IFC’s advice to the client in relation to Indigenous Peoples issues.

The non-compliances identified in IFC’s advice emerge significantly from IFC not advising the client to: (a) undertake a stakeholder analysis and engagement planning at the onset of its engagement with the client prior to ETESA’s commencement of the FPIC process and (b) course correct by addressing the oversights at the time of developing the TOR for the ESIA in order to put the FPIC process on track to meet PS7 requirements.

An underlying cause for these non-compliances was the focus of the IFC project team on preparing the bidding documents for the PLIV project (including the TOR for the ESIA) as the key deliverable of its Advisory Services project, while neglecting to monitor actual developments on the ground. This focus led IFC to not engage sufficiently with the client’s initial FPIC consultations that were ongoing while IFC was working on the bidding documents. It also resulted in IFC’s failure to advise on the need to align these consultations with the Performance Standards requirements.

Further contributing to the shortcomings in IFC’s advice was an acceptance of ETESA’s assurances that the initial FPIC consultations would proceed in a manner that was consistent with national law, without analysis of gaps between the national legal framework and the requirements of the Performance Standards. This led to the exclusion of the Indigenous groups outside the government-recognized territory of the Comarca from the FPIC process, and the focus, within the Comarca, on consultations with government-recognized representatives.

Recommendations

CAO’s recommendations, as outlined below, serve to achieve consistency of IFC’s advice with the Performance Standards and enhance the socio-cultural and environmental viability of the project. These recommendations consider IFC’s ongoing role as ETESA’s transaction advisor for the PLIV project, particularly in relation to the ESIA, and associated stakeholder engagement and consultation processes. The recommendations also take into account ETESA’s commitment to align the PLIV project with the Performance Standards as set out in the legal agreement. As of November 2021, ETESA had yet to complete the bidding process for the PLIV project, meaning that IFC can still revise the TOR for the ESIA and associated plans in collaboration with ETESA.

At the project level, CAO makes the following recommendations to IFC:

1. Advise ETESA on corrective actions needed to *address shortcomings in the FPIC consultations* conducted to date, considering the requirements of the Performance Standards. Key areas requiring attention include:
 - a. Initiating consultations to obtain the Free, Prior, and Informed Consent (FPIC) of impacted Indigenous communities outside the Comarca, in particular, those of the Norte de Santa Fé region and the Annex Areas in Bocas del Toro province, as relevant;
 - b. Stakeholder analysis, including identification of potentially affected Indigenous communities (both in and outside Comarca Ngöbe-Buglé) in the project’s area of

- influence, considering potential impacts on land as well as natural and cultural resources under traditional ownership or customary use;
- c. Development of a stakeholder engagement plan that reflects the results of the stakeholder analysis and takes into account both formal and customary governance structures and decision-making processes, as well as measures for inclusive and culturally appropriate consultation processes; and
 - d. Revisiting the agreements already made with Comarca representatives during the preliminary FPIC process as necessary, based on the outcomes of the consultation process outlined in (c) above.
2. Revise the TOR for the ESIA and the associated stakeholder engagement, community development, and compensation plans prepared by IFC to ensure full consistency with the requirements for FPIC under national law, as well as for PS1 and PS7, considering the concerns raised by the complainants as identified in this report.
 3. Provide ongoing advice to ETESA during the ESIA, including stakeholder engagement and implementation of the primary FPIC process, consistent with national law as well as PS1 and PS7.

To address the underlying causes of the non-compliance findings in this investigation, CAO recommends that IFC review its procedures and practices as applied to PPP Advisory Services:

4. Provide guidance to staff on the scope of IFC's role when a client implements project development activities with E&S risks or impacts (such as FPIC or land acquisition) during the Advisory Services engagement. This guidance should include monitoring and reviewing of ongoing client project development activities for consistency with the Performance Standards to provide timely and accurate advice to the client on aligning such project development activities with the Performance Standards.
5. Incorporate the need for contextual risk analysis for Advisory Services projects in IFC's E&S Review Procedures. IFC currently has guidance on the need for contextual risk analysis in draft form; however, it would be advantageous to formalize this for use in future Advisory Services projects.

Conclusion

This CAO compliance investigation has documented areas in which IFC's advice to ETESA in relation to the PLIV project was consistent with the requirements of the Performance Standards, and other areas in which IFC's advice fell short of this standard. CAO concludes that IFC's failure to provide advice consistent with the Performance Standards has the potential for adverse impacts on the ability of Indigenous Peoples to protect their territory and customary lands, as well as the related natural and cultural resources, from possible encroachment and loss. Of particular concern, CAO notes the exclusion of Indigenous communities from the Norte de Santa Fé region and those from the Annex Areas in the Bocas del Toro province from the FPIC process, as well as the conduct of consultations in the Comarca without adequate inclusion of traditional authorities.

This report includes recommendations to IFC on how to address CAO's non-compliance findings through the provision of additional corrective advice to ETESA.

This investigation also highlights challenges in IFC Advisory Services projects, where project development activities with material E&S risks and impacts are carried out by the client during the period of IFC's Advisory Services engagement. In this context, CAO recommends updates at the level of IFC procedures and practices, which could address the underlying causes of the non-compliances identified.

In response to this investigation, IFC will prepare a Management Action Plan to be approved by its Board following consultation with the complainants. CAO will monitor effective implementation of the Management Action Plan (CAO Policy, para. 140).

Overview of CAO's Compliance Process

The Office of the Compliance Advisor Ombudsman (CAO) is the independent recourse and accountability mechanism for the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA). CAO reports directly to the Boards of Directors of IFC and MIGA and is fully independent of IFC/MIGA management.

CAO carries out its work in accordance with the IFC/MIGA Independent Accountability Mechanism Policy (“the CAO Policy”).¹ Through the exercise of its dispute resolution, compliance, and advisory functions, CAO’s mandate is to:

- Facilitate the resolution of complaints from people who may be affected by IFC and MIGA projects or sub-projects in a manner that is fair, objective, and constructive;
- Enhance the environmental and social (E&S) outcomes of IFC and MIGA projects or sub-projects; and
- Foster public accountability and learning to enhance the environmental and social performance of IFC and MIGA and reduce the risk of harm to people and the environment.²

In carrying out its mandate, CAO facilitates access to remedy for project-affected people in a manner that is consistent with the international principles related to business and human rights included within the Sustainability Framework.

A compliance investigation determines whether IFC/MIGA has complied with its E&S policies and whether there is harm related to any IFC/MIGA non-compliance, following a systematic and objective process of obtaining and evaluating evidence.

Where CAO finds non-compliance and related harm, CAO makes recommendations for IFC/MIGA to consider when developing a Management Action Plan (MAP) for approval by the Board. When there is a Board-approved MAP, CAO conducts a compliance monitoring process and reports on the effective implementation of any corrective actions approved as part of the MAP.

CAO has no authority with respect to judicial processes. CAO is not a judicial or legal enforcement mechanism, nor is it a substitute for courts or regulatory processes. CAO’s analyses, conclusions, and reports are not intended or designed to be used in judicial or regulatory proceedings or for purposes of attributing legal fault or liability.

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

¹ The CAO Policy, which supersedes and replaces in its entirety the CAO Operational Guidelines and CAO Terms of Reference, became effective on July 1, 2021. Though commenced under the Operational Guidelines, this CAO compliance investigation was completed under the CAO Policy. The CAO Policy is available at: <https://bit.ly/CAO-Policy>.

² Ibid., para. 7.

Acronyms

| | |
|-----------|---|
| ACD | Alianza para la Conservación y el Desarrollo |
| AS | Advisory Services |
| CAO | Office of the Compliance Advisor Ombudsman (IFC and MIGA) |
| CDP | Community Development Plan |
| CIEL | Center for International Environmental Law |
| COVID-19 | Coronavirus disease 2019 |
| E&S | Environmental and Social |
| ESDD | Environmental and Social Due Diligence |
| ESIA | Environmental and Social Impact Assessment |
| ESRAM | Environmental and Social Risk Allocation Memo |
| ESRP | Environmental and Social Review Procedures |
| ETESA | Empresa de Transmisión Eléctrica, S.A. |
| FASA | Financial Advisory Services Agreement |
| FN | Footnote |
| FPIC | Free, Prior, and Informed Consent |
| GN | Guidance Notes (which correspond to the Performance Standards) |
| GoP | Government of Panama |
| IFC | International Finance Corporation |
| IUCN | International Union for Conservation of Nature |
| MAP | Management Action Plan |
| MIGA | Multilateral Investment Guarantee Agency |
| MODETEAB | Movimiento por la Defensa de los Territorios y Ecosistemas de Bocas del Toro |
| NGO | Non-governmental Organization |
| PLIV | Panama Transmission Line IV |
| PPP | Public-Private Partnership |
| PS | Performance Standards (IFC) |
| PS1 | Performance Standard 1: Assessment and Management of Environmental and Social Risks and Impacts |
| PS7 | Performance Standard 7: Indigenous Peoples |
| ROW | Right-Of-Way |
| SEP (SPP) | Stakeholder Engagement Plan (Stakeholder Participation Plan) |
| TOR | Terms of Reference |

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1 Background

1.1 IFC Advisory Services Project

The complaint centers on an IFC Advisory Services (AS) project to support Empresa de Transmisión Eléctrica, S.A. (ETESA, “the client”), a state-owned Panamanian transmission company. The purpose of the AS project, approved in June 2017, is to assist the client in structuring and tendering a public-private partnership (PPP) for the financing, construction, and operation of Panama Transmission Line IV (PLIV).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 the Panama III substation in the east.



Figure 1. Map showing Comarca Ngöbe-Buglé and the adjacent Norte de Santa Fé region in the province of Veraguas

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

The AS project formally commenced in September 2017, following the signing of a Financial Advisory Services Agreement (FASA) between IFC and ETESA. The AS project resulted in two bids for construction of the transmission line, which were submitted in April 2019. However, in early May 2019, the bid evaluation committee declared the process to be invalid, because neither of the bidders met the mandatory minimum requirements.⁵ In early May 2019, presidential

³ IFC, Summary of Advisory Services Project Information, Nov. 2017. Available at: <https://bit.ly/IFC-ASPI-PLIV>.

⁴ Ibid.

⁵ Chandiramani, 2019.

elections were held in Panama and there was a change in government. A new president took office on July 1, 2019, appointing new members to the Board of Directors and management team of ETESA.⁶

With the passing of Panama's Private-Public Partnership (PPP) law in September 2019, the IFC AS project team engaged with the client's new management team. IFC negotiated a new FASA to re-tender the PLIV project. The new FASA was approved by the Government of Panama (GoP) in May 2021. As of the writing of this investigation report, the IFC AS project remains active. While the bidding documents have been prepared, including the TOR for the ESIA and associated plans, the second request for proposals for the PPP of the PLIV project has yet to be published.

1.2 Complaint and CAO Assessment

1.2.1. Summary of the complaint

In June 2018, CAO received a complaint⁷ filed by the Ngäbe, Buglé, and Campesina Territorial Organization of the Northern Region of Santa Fé de Veraguas (*Organización Territorial Ngäbe, Buglé y Campesina de la Región Norte de Santa Fé 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*).⁸ These organizations filed on behalf of Indigenous communities inside a government-recognized Indigenous territory, Comarca Ngöbe-Buglé (the Comarca),⁹ as well as those living in the Norte de Santa Fé region of the province of Veraguas, outside the Comarca.¹⁰

In submitting the complaint, 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, DC.

The complainants raise concerns regarding the process that has been established for gaining Free, Prior, and Informed Consent (FPIC)¹¹ for the PLIV project from impacted Indigenous Peoples. Complainants from both groups are also concerned about what they perceive as a lack

⁶ Pichel, 2019.

⁷ Complaint to CAO, June 2018. Available at: <https://bit.ly/PLIV-01>.

⁸ A note on the orthography of the Indigenous Peoples' name Ngäbe/Ngöbe. Upon consultation with the representatives of the complainants, the preferred spelling seems to be "Ngäbe" (as one of the complainants group's name indicates). However, given that the national legal documentation (Carta Orgánica and Law 10/1997) uses "Ngöbe," and upon suggestion by the complainant representatives, "Ngöbe" will be used throughout this report.

⁹ A Comarca is a semi-autonomous territory recognized by the state, over which Indigenous Peoples possess collective land rights and administrative authority. In Panama, each Comarca has independent political representation as an administrative entity (Inspection Panel, 2010). Comarca Ngöbe-Buglé was established in 1997 per Law 10/1997, and their charter (Carta Orgánica) was adopted by Executive Decree 194 in 1999, which specifies the governance structure and establishes relations between the GoP and the traditional authorities.

¹⁰ During the Factual Review and Comment process for this report, the complainants clarified that they represent an additional group of Indigenous communities. This group is located in the district of Chiriquí Grande in the province of Bocas del Toro, outside the Comarca to the northwest. The complainants point out that these communities form part of Annex Areas to the Comarca Ngöbe-Buglé, which were to be demarcated and legally recognized as Indigenous territory per Law 10 (1997) but for which no demarcation has yet occurred. The current investigation focuses on the Indigenous communities inside the Comarca and those outside the Comarca in the Norte de Santa Fé region, based on the CAO Assessment Report which identified only these two complainant groups. However, the PLIV transmission line is mapped as crossing the district of Chiriquí Grande, and a preliminary review suggests that CAO's analysis of the need for PS7-consistent engagement with impacted Indigenous groups in the Norte de Santa Fé region may equally apply to those in Chiriquí Grande.

¹¹ Per PS7 (para. 12 and GN25) and building on requirements for Informed Consultation and Participation (ICP) (PS1, para. 31), Free, Prior, and Informed Consent (FPIC) refers to a mutually accepted consultation process based on good-faith negotiation between a project developer (or government entity) and Indigenous Peoples, with evidence of agreement as the outcome of negotiations.

Of access to information about the project, including the route of the transmission line and its potential project impacts. Based on past experiences with other projects, they fear they will not receive benefits from the project.

Members of the Indigenous communities living within the Comarca raise a series of specific concerns regarding the FPIC process. They claim that ETESA has been engaging exclusively with government-recognized Comarca authorities, who they state do not properly represent their communities (see also section 1.6.1).¹² They also assert that ETESA is making decisions about the project without considering the voices of community representatives who oppose it. They claim that ETESA is not engaging in consultations with communities, and that the project presentations were carried out in Spanish using modes of communication that were not culturally appropriate for Indigenous communities, and without use of local Indigenous languages. They claim they have not received any documents about the project, and that all information about the project has been provided verbally. They also raise concerns that the project fails to comply with IFC commitments to foster the equitable participation of women in the consultation process.

Members of the Indigenous communities living outside the Comarca in the Norte de Santa Fé region claim that they have not been consulted on the PLIV project at all, although they assert that they are impacted. Similar to the situation of the Indigenous communities in the Norte de Santa Fé region, the complainants claim that the lack of legal recognition of the Indigenous territory in Chiriquí Grande has led to the exclusion of these Indigenous communities from consultation on the PLIV project.

1.2.2 Summary of the IFC client's response

ETESA states that it has been conducting an FPIC process since December 2017, engaging with representatives of the Ngöbe and Buglé appointed by the Comarca authorities to two commissions.¹³ The goal of the process, as explained by ETESA, is to make the 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 these consultations with the support of the GoP Vice Ministry for Indigenous Affairs and the Ministry of Environment, who introduced them to the Directive Council of the Regional Congress of Ño Kribo, which is part of the formal governance structure of the Comarca. In March and June 2018, the plenary of the Regional Congress of Ño Kribo designated two commissions to discuss with ETESA the routing, social benefits, and environmental aspects of the transmission line.

ETESA noted that the commissions are disseminating information about the PLIV project and making announcements about the informational meetings in the communities that are within the project's area of influence. ETESA states that concerns voiced in these meetings have been relayed to them.

During the Factual Review and Comment phase for this report, in relation to the issue of using culturally appropriate languages during consultations, ETESA noted that they had Ngöbe and

¹² During Factual Review and Comment, the complainants emphasized their view that the FPIC process to date has not followed due process established by national law. They assert that regional authorities do not have exclusive jurisdiction over FPIC processes and cannot enter into negotiations on behalf of the whole of the Comarca, which are required to achieve FPIC for the PLIV project. They further assert that FPIC processes must involve and gain approval of the General Congress and the General Cacique. However, a detailed analysis of these aspects of the application of national law to the FPIC process is beyond the scope of this CAO compliance investigation. While CAO did not conduct an analysis of these legal arguments as part of the compliance investigation, it is required for IFC to ensure that its advice to ETESA in relation to the FPIC process is consistent with Panamanian law. As result, IFC should consider these legal concerns raised by the complainants when advising ETESA on the FPIC process.

¹³ CAO, Assessment Report, April 2019. Available at: <https://bit.ly/PLIV-01>.

Buglé translators at all of the preliminary FPIC meetings. However, CAO has not seen evidence for this claim.

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

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.

1.3 Compliance Appraisal and Investigation Scope

In January 2020, CAO published a compliance appraisal report in relation to the complaint. The appraisal identified questions concerning IFC compliance as well as the potential for related adverse impacts on communities. As such, CAO determined that a compliance investigation was warranted.¹⁴

The purpose of the CAO compliance function is to carry out reviews of IFC's compliance with E&S policies, assess related harm,¹⁵ and recommend remedial actions where appropriate. In accordance with the IFC/MIGA Independent Accountability Mechanism Policy (CAO Policy), effective July 1, 2021, this report presents investigation findings with respect to compliance, non-compliance, and any related harm, and includes context, evidence, and reasoning to support CAO's findings and conclusions regarding the underlying causes of any non-compliance identified. This report also includes recommendations for IFC to consider in the development of a Management Action Plan relating to the remediation of project-level non-compliance and related harm, and steps needed to prevent future non-compliance, as relevant in the circumstances.¹⁶

As outlined in terms of reference (TOR) issued in January 2020, this compliance investigation considers whether IFC's advice to ETESA in relation to the PLIV project was provided in accordance with applicable IFC policies, procedures, and standards for AS projects. In particular, the investigation considers whether IFC's advice in relation to E&S issues was consistent with the requirements of:

Performance Standard 1, as related to stakeholder engagement and consultation as part of the E&S assessment process generally; and

Performance Standard 7, as related to Indigenous Peoples, particularly concerning stakeholder analysis and engagement planning, including identification of affected Indigenous communities, information disclosure activities, consultation, representation, and the establishment of FPIC.¹⁷

In reaching findings of compliance or non-compliance, CAO assesses whether there is evidence that IFC applied relevant E&S requirements, considering the sources of information available at the time the decisions were made. CAO does not make findings and conclusions with the benefit

¹⁴ CAO, Compliance Appraisal Report, January 2020. Available at: <https://bit.ly/PLIV-01>.

¹⁵ Harm is defined in the CAO Policy as "[a]ny material adverse environmental and social effect on people or the environment resulting directly or indirectly from a Project or Sub-Project. Harm may be actual or reasonably likely to occur in the future" (p. iv).

¹⁶ CAO Policy, para. 120c. Available at: <https://bit.ly/CAO-Policy>.

¹⁷ CAO, Terms of Reference for Compliance Investigation of IFC, January 2020. Annex A of Appraisal Report. Available at: <https://bit.ly/PLIV-01>.

of hindsight.¹⁸ CAO is also mindful of IFC's role in relation to an AS project and the E&S standards as they apply to IFC AS projects, as distinct from investment projects.

1.4 Investigation Methodology

In conducting this investigation, CAO staff worked with an external expert and undertook the following activities:

- Reviewed IFC's documentation of the AS project and other project-related materials;
- Conducted interviews with IFC project staff and consultants;
- Carried out discussions with complainant representatives regarding logistics for a possible field visit and background information related to Comarca Ngöbe-Buglé;
- Reviewed academic and public literature related to Indigenous Peoples in Panama, Comarca Ngöbe-Buglé, and prior consultation processes with Indigenous communities in the area; and
- Engaged with national and international experts and scholars who have worked in the area with the Ngöbe and Buglé in Panama.

Due to travel restrictions related to the COVID-19 pandemic, an investigation field visit was not possible. CAO recognizes the importance of hearing the affected communities' voices and discussing the substance of the complaint with the complainants in a culturally appropriate way. For this reason, CAO explored, together with the complainant representatives, alternative means of communication with affected community members, including an initial request to postpone the investigation until a site visit was possible. After careful consideration, CAO decided that the risks to the health and well-being of the community members and complainant representatives were too high, especially given the particular vulnerability of the Indigenous communities in rural and remote areas. CAO was able to engage with representatives of the complainants on a limited basis, virtually and individually. These discussions provided an opportunity to clarify background questions about the Comarca; however, detailed discussions in relation to the substance of the complaint were not possible. In finalizing this report, given the protracted duration of COVID-19-related travel restrictions, CAO weighed the importance of providing the complainants an opportunity to discuss their concerns in a culturally appropriate way and the importance of providing a determination in relation to IFC's E&S performance concerning the issues raised in their complaint in a timely manner.

Over the course of the investigation, CAO reached out to ETESA, including with IFC's assistance. However, ETESA advised that discussions with ETESA and other government stakeholders were not possible due to pandemic-related scheduling conflicts.

CAO engaged an expert consultant to advise on this compliance process (see Annex C).

1.5 Timeline of Key Events

The timeline below shows the AS phases and the relevant events that occurred in relation to the AS and the complaint.

¹⁸ CAO Policy, para. 116.

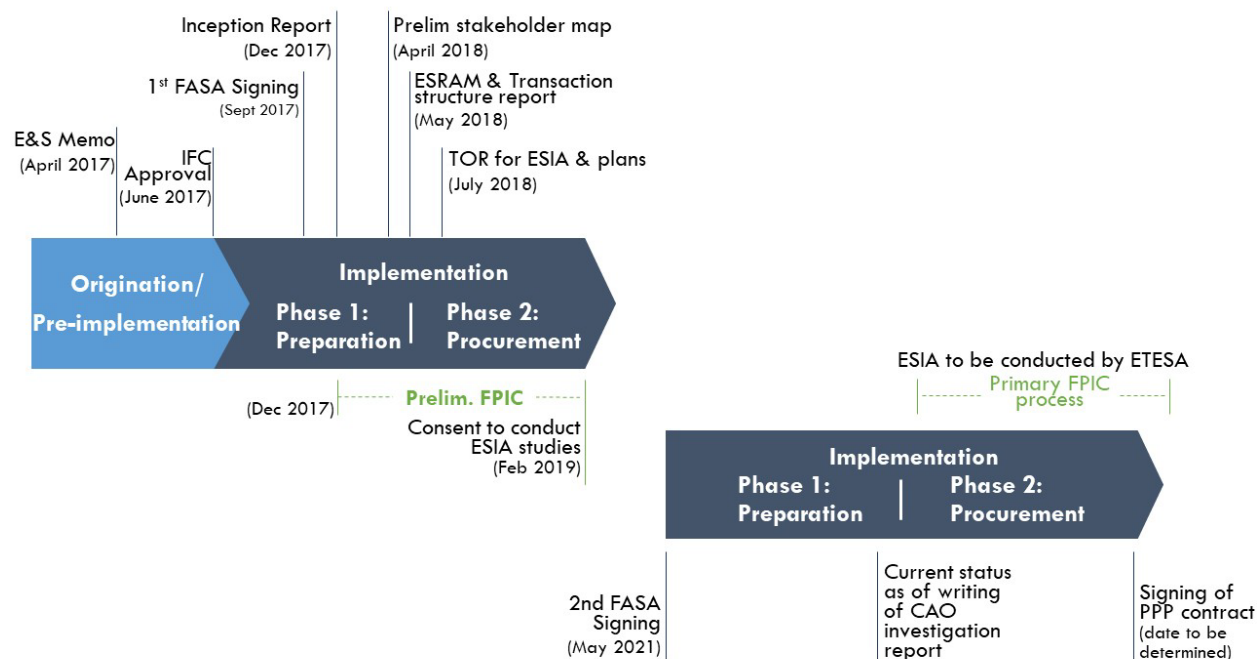


Figure 2. Timeline of key events in relation to the AS project cycle

1.6 Background Information

1.6.1 Socio-political background of Comarca Ngöbe-Buglé

Comarca Ngöbe-Buglé, the largest and most populous collective Indigenous territory in Panama, was established in 1997 (see Figure 1). Its governance structure is highly complex, due to the social and political organization of the Ngöbe and Buglé peoples, which is characterized by diversity and segmentation. There exist multiple sources of legitimate authority that often stand in competition with each other. Leadership and representative structures can be fluid. As a consequence, decision-making processes that go beyond the local community level in Comarca Ngöbe-Buglé are complex and subject to tensions.¹⁹ Several characteristics of the social and political organization of the Comarca relevant to the complaint are discussed below.

Tensions between communities and higher levels of decision making. The legitimacy of higher-level authorities is dependent on their capacity to represent the interests of communities, facilitate collective decision making, and effectively promote those decisions to outside actors. The local community level persists as a key sphere for decision making in the Comarca on issues ranging from land use to investment projects. This frequently results in tensions between local and higher levels of governance (see Box 1).²⁰ The size of the Ngöbe and Buglé territories, the difficulty of transportation and communication resulting from the Comarca's geography, and the sizeable population all contribute to challenges in ensuring political representation of communities at higher levels of governance in the Comarca.

¹⁹ Bort & Young, 1985, 2001; Fuentes Córdoba, 2018; Inspection Panel, 2010; Jordan-Ramos, 2010; and Wickstrom, 2003.

²⁰ Bort & Young, 1985, 2001; Fuentes Córdoba, 2018; Jordan-Ramos, 2010; Roquebert León, 2018; Smith, Holland, Michon, Ibáñez & Herrera, 2017; and Wickstrom, 2003.

Differentiation between parallel vertical authority structures. The Comarca’s Organic Charter²¹ establishes three parallel pillars with five different levels of governance²² (Box 1 and Figure 3). The three pillars comprise two types of “traditional authorities”—congresses and caciques (chiefs), which correspond to the governance system of the Ngöbe and Buglé that emerged in the 1960s. Also present are “official” authorities” (shaded orange in Figure 3), which are part of the Panamanian state’s formal administrative system.

| Box 1. The five levels of the authority structures in Comarca Ngöbe-Buglé | |
|---|--|
| General | Corresponds to the Comarca as a whole. Only the Governor is appointed by GoP. |
| Regional | Equivalent to the provinces of the state administrative system; in Comarca Ngöbe-Buglé, there are three regions—Ño Kribo, Nedrini, and Kodridi. |
| District | In Comarca Ngöbe-Buglé, there are nine districts. The traditional authorities are the local congresses and local caciques (chiefs), and the official authorities are the municipal mayors. |
| Corregimientos | There are 70 <i>corregimientos</i> . The traditional authorities are the <i>jefes inmediatos</i> , with no authorities in the Congress pillar below the district level. The official authorities are the <i>corregidores</i> . |
| Communities | The traditional authorities are the <i>voceros</i> , in addition to other forms of community leadership. |

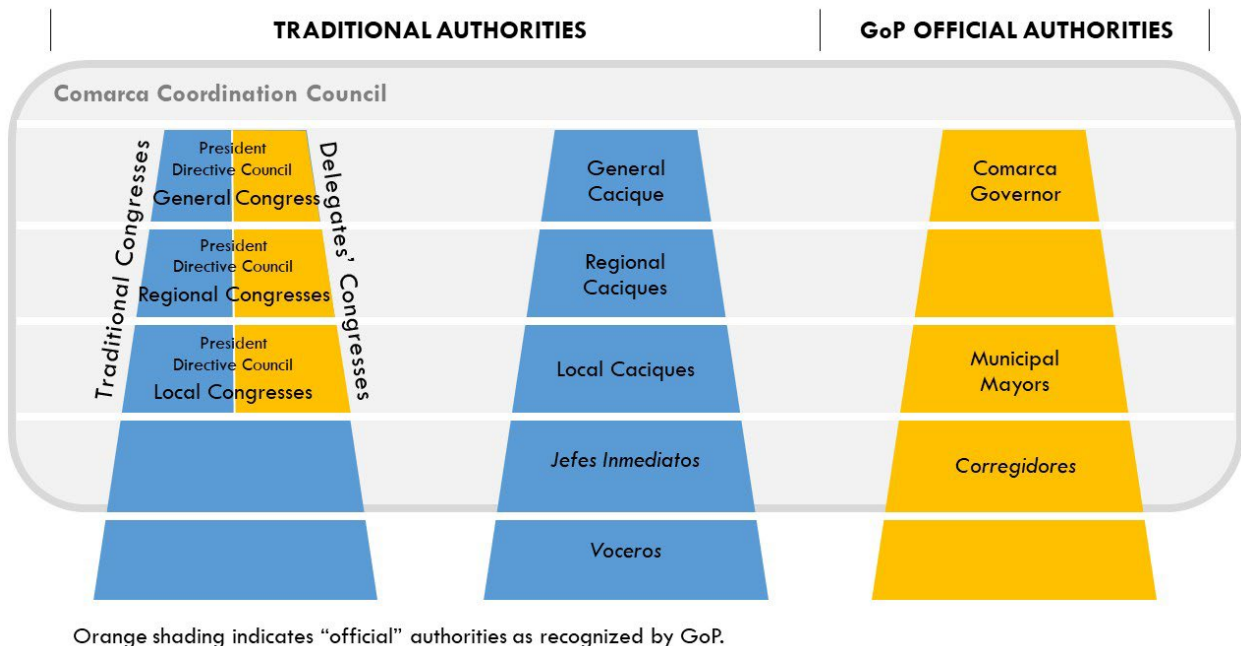


Figure 3. Governance structure of Comarca Ngöbe-Buglé

²¹ Ministerio de Gobierno y Justicia, Decreto Ejecutivo No. 194, 1999.

²² Asamblea Legislativa. Ley No. 10, 1997. Comarca Ngöbe-Buglé is established with this law.

The Organic Charter also establishes the Comarca Coordination Council (Consejo de Coordinación Comarcal), which serves as an overarching forum to coordinate and consult on issues that concern the Comarca as a whole. Its members include the presidents of the local, regional, and general congresses; the local, regional, and general caciques; the Comarca governor; the mayors; and the *corregidores*.

Distribution of responsibilities between the congresses, the caciques, and official authorities is not clearly defined in the Comarca's Organic Charter. As a result, there is often competition over the limits of responsibilities. This has resulted in tensions, particularly in relation to decision-making processes concerning external investment projects.²³ This includes tensions between traditional and official authorities, between the congresses and the caciques, and between congresses and their directive councils.

Fragmentation of authority structures. The Comarca's governance structure has become more complex in recent decades through increasing fragmentation of established authority structures. Since 2006, parallel congresses have emerged due to conflicts and power struggles. In 2010, these were formalized by GoP Executive Decree 537, which changed the procedures for election of members of the congresses.²⁴ Thus, the 2011 elections led to the parallel existence of the "delegates' congresses" and the "mass traditional congresses"²⁵ (see Figure 3). While the GoP only recognizes the legitimacy of the delegates' congresses, evidence suggests that the traditional congresses hold at least equal levels of legitimacy among the Comarca's population.²⁶ This is particularly relevant to this current case, as the preliminary FPIC process conducted by ETESA focused on the delegates' congress (i.e., delegates' Regional Congress of Ño Kribo). In April 2016, the Supreme Court declared Executive Decree 537 invalid and revoked the decree.²⁷ As elections for the new congresses had already taken place in March 2016, at the time of the preliminary FPIC process for the PLIV project in 2018, there continued to exist parallel traditional and delegates' congresses in the Comarca.

Informal sources of leadership and representation. There are important informal sources of leadership with legitimate representation that do not correspond to formal authority positions. These include: charismatic leadership, such as spiritual leaders called *sukias*, elders, and former authorities; the Mama Tata movement; and broad forums of authorities that emerged in the context of mobilizations against investment projects, coalescing authorities at different levels and from different pillars of Comarca governance.²⁸

*Ethnic distinctions between the Ngöbe and Buglé.*²⁹ Although the Ngöbe and Buglé Indigenous groups share common cultural characteristics and coexist within the same Comarca, they also exhibit important distinctions. These distinctions are relevant given that a significant share of the population of the project-affected area is Buglé, particularly in the district of Santa Catalina-Bledeshia in the eastern part of the Comarca. Of particular relevance are the following issues:³⁰

- The use of mutually incomprehensible languages, Ngöbere and Buglere.
- Geographical distribution: While the majority of communities potentially affected by the project in the Santa Catalina-Bledeshia district are Buglé, the majority of the population of the district capital Santa Catalina are Ngöbe. The difficulty of communication and transportation within the Comarca means that political representation and decision-

²³ Bivin Ford, 2015; and Jordan-Ramos, 2010.

²⁴ Ministerio de Gobierno y Justicia, Decreto Ejecutivo No. 537, 2010.

²⁵ Cansari & Gaussett, 2013.

²⁶ Cansari & Gaussett, 2013; and Jordan-Ramos, 2010.

²⁷ Corte Suprema de Justicia, 2016.

²⁸ Gjording, 1991; Jordan-Ramos, 2010; and Young, 2007, 2011.

²⁹ Smith, 2005.

³⁰ Smith, 2003, "Indigenous Settlement Patterns."

making processes are somewhat more inclusive of communities that live in or close by urban centers, in this case the Ngöbe. This constitutes an additional challenge to the representation of Buglé communities in the stakeholder engagement processes for the PLIV project.

- Political organization and representation. While the Buglé of the Comarca do participate in the Comarca's formal governance structure, including the local, regional, and general congresses, there is also a parallel governance structure restricted to the Buglé, the Buglé General Congress. As a result, both the Congresses of Comarca Ngöbe-Buglé and the Buglé General Congress are relevant for the decision-making processes of the Buglé.

1.6.2 The Indigenous communities of Norte de Santa Fé (outside the Comarca)

The existence of Indigenous communities³¹ in the Norte de Santa Fé region (see Figure 1) outside the Comarca is well-documented.³² Academic research, including ongoing participatory research with the Indigenous Peoples of the Norte de Santa Fé region, documents Indigenous identity and customary use of territory, as well as shared cultural traits with Indigenous communities of the Comarca.³³ Approximately half of the customary territory of the Ngöbe and Buglé peoples, as well as a sizeable proportion of their population, are reported to have been excluded from the Comarca when it was created in 1997.³⁴ The debates and negotiations preceding the creation of Comarca Ngöbe-Buglé in 1997 indicate that the Norte de Santa Fé region was claimed as an integral part of the Ngöbe and Buglé customary territory. Several maps point to territorial claims that date to at least the 1980s, including the map featured in the publication of Law 10/1997 in the official state newspaper,³⁵ as well as a map of customary Indigenous territories in Central America produced with the support of the International Union for Conservation of Nature (IUCN) in 2016.³⁶

The overarching political organization of the Indigenous communities in the Norte de Santa Fé region is the Ngöbe, Buglé, and Campesino Local Congress. This Local Congress has been affiliated with the Regional Congress of Kodridi since the early 1980s. After the exclusion of the Norte de Santa Fé region from the Comarca in 1997, its representatives have continued to participate in meetings of the Regional Congress of Kodridi for at least a decade. They currently also participate in the Buglé General Congress.

Video and media materials, dated as early as 2003, posted online by the Buglé and Ngöbe of the Norte de Santa Fé region, as well as other public statements, show their claims to Indigenous identity, their demand for formal recognition of their customary territory as a comarca, and a systematic pattern of rejection of outside projects on their lands, including the PLIV project.³⁷

Census data from 2010 show Indigenous communities in the Norte de Santa Fé region, which has the highest proportion of Indigenous Peoples in the province of Veraguas (approximately 6,500 of 9,000 Indigenous Peoples in Veraguas).³⁸

³¹ The majority identify as Ngöbe and Buglé Indigenous Peoples. In addition, there is a group identifying as Campesinos (peasants) who also claim Indigenous identity and a share of them speak an Indigenous language. In public statements, members of these populations generally refer to themselves as *indígenas* or *originarios*, the most common terms used in Panama to refer to Indigenous identity.

³² See the Socio-cultural Assessment (World Bank, 2018) produced for the Panamá Indigenous Peoples Integral Development Plan as well as the Inspection Panel's investigation report (2010) related to the Land Administration Project in Panama.

³³ Massaro & Myette, 2017; and Smith 2003, "Participatory Mapping," 2005.

³⁴ Fuentes Córdoba, 2018; Jordan-Ramos, 2010; Smith et al., 2017; Wickstrom, 2003; and Young, 2007.

³⁵ Asamblea Legislativa, Ley No. 10, 1997, p.155.

³⁶ See also INSTEAD, n.d. and Bilbao, 2017, Section 2.

³⁷ See, for example, Schnoor, n.d.

³⁸ Couture-Guillet & Nouvel-Zurcher, 2019; Davis, 2015; Municipio de Santa Fe, 2017.

Finally, in January 2013, Ngöbe and Buglé authorities from both inside and outside the Comarca sent a petition to the United Nations' Special Rapporteur on the rights of Indigenous Peoples. In this petition, they raised the issue of encroachment on the lands of Ngöbe, Buglé, and Campesinos of the Norte de Santa Fé region.³⁹ In response, the Special Rapporteur noted in his 2014 report on Panama that one of the primary concerns for Indigenous Peoples in Panama is the lack of recognition of Indigenous territories outside of the comarcas.⁴⁰

1.7 IFC's Origination and Implementation of the AS

1.7.1 Pre-mandate review and approval of the IFC AS project

The IFC Advisory Services (AS) project team conducted a pre-mandate environmental and social (E&S) mission in early 2017, meeting with several Panamanian government agencies (see Figure 4 below). Based on the review, the IFC team assigned a high overall E&S risk rating⁴¹ to the AS project. IFC identified a series of potentially significant E&S risks and impacts associated with the project, along with a proposed mitigation approach. This was documented in an E&S Memo (April 2017) in accordance with the procedures.

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 international financial institutions regarding lessons learned about stakeholder engagement and FPIC from their work with Indigenous Peoples communities in the Annex Areas of Comarca Ngöbe-Buglé.⁴²

IFC management approved the project in June 2017.

1.7.2 Scope of the Advisory Services project

The scope of the AS was agreed between IFC and the client in September 2017 and is set out in a Financial Advisory Services Agreement (FASA). The FASA provides that IFC will advise ETESA in accordance with the IFC Performance Standards. The FASA also confirms ETESA's commitment to applying the Performance Standards in developing the PLIV project.

The original FASA expired in December 2018. After the Panamanian presidential elections in May 2019, there was a change in government and the new president appointed a new CEO and management team for ETESA.

A new FASA was agreed and approved by GoP in May 2021.

1.7.3 IFC's implementation of the Advisory Services

The implementation of the AS comprised two phases,⁴³ as shown in Figure 4 below:

- (1) Phase 1 (Preparation): This phase consists of technical, legal, and financial due diligence, including E&S scoping for the PLIV project, to inform the development of a transaction structure. Under the first FASA, IFC prepared the E&S Risk Allocation Memo (ESRAM), which informed the transaction structure report. IFC presented written advice relevant to the issues raised in the complaint in the form of an inception report and a preliminary

³⁹ Congreso General, 2013.

⁴⁰ UN Human Rights Council, 2014.

⁴¹ 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.

⁴² FMO-DEG, 2015.

⁴³ CAO, Assessment Report, April 2019.

stakeholder map (see Figure 2). Currently, IFC is reviewing the ESRAM and preparing a new transaction structure compatible with the newly enacted PPP law and its regulations.

- (2) Phase 2 (Procurement): This phase consists of support for the tender process, including project promotion, elaboration of the bidding documents including the concession contract, and evaluation of bids. In this phase, under the first FASA, IFC prepared the terms of reference (TOR) for the ESIA and associated management plans, including a stakeholder engagement plan, an Indigenous Peoples community development plan, and a plan for project-related land acquisition. Following the first FASA, the ESIA and associated management plans were designed to be completed by the private-sector partner who was selected to build and operate the PLIV project. However, under the new FASA, ETESA will conduct the ESIA and associated stakeholder engagement, with IFC support to align implementation with the Performance Standards.

As of the time of writing this investigation report, the Advisory Services project was in Phase 1 under the second FASA. The bidding documents, including the TOR for the ESIA and associated plans, as well as the PPP contract, had been prepared under the first FASA, and IFC was revising these documents under the new FASA.

Both FASAs are described in more detail and analyzed below in section 2.2.2.

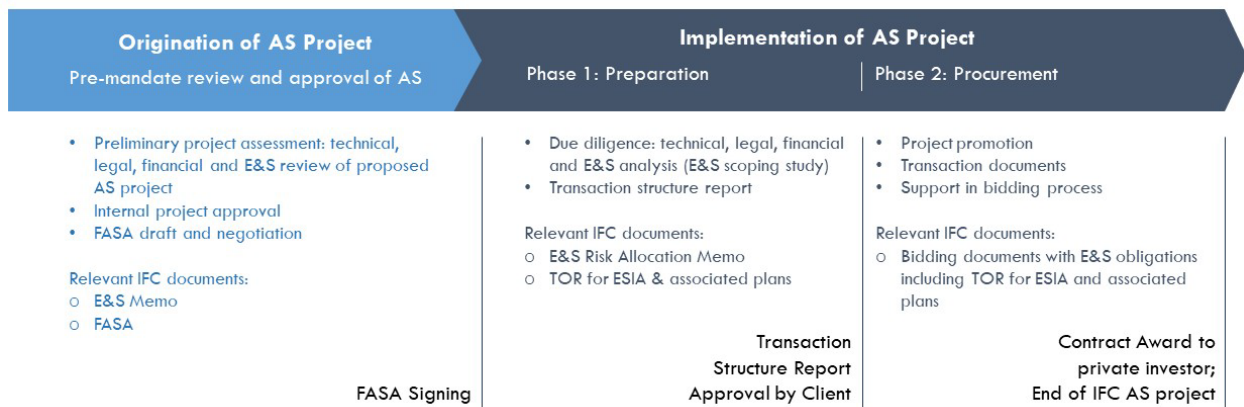


Figure 4. IFC’s Advisory Services project life cycle, showing key E&S documents at each stage

1.8 Summary of Client Stakeholder Engagement Actions during Implementation of the IFC Advisory Services Project

Central to the complaint and the compliance investigation are the consultations carried out by the client in Comarca Ngöbe-Buglé as part of the FPIC process for the PLIV project (see Box 2). These consultations took place during implementation of IFC’s AS (see Figure 2). As set out in IFC’s pre-mandate documentation (i.e., E&S Memo), IFC acknowledged that the PLIV project would need FPIC, given that the proposed alignment of the transmission line traverses land subject to traditional ownership and customary use by the Ngöbe and Buglé. In this context, IFC observed that ETESA should develop a stakeholder engagement plan and initiate stakeholder engagement as soon as possible during the project development phase.

Box 2. Free, Prior, and Informed Consent (FPIC): Overview of requirements

FPIC is a principle that applies to Indigenous Peoples and allows them to give or withhold consent to a project that may affect them or their territories. Where a project requires FPIC, the process of engagement with Indigenous Peoples requires detailed stakeholder mapping, information disclosure, consultation, and negotiation of benefit-sharing arrangements, with a view to achieving consent.

Following PS7, FPIC is required if the client proposes to locate a project on “*natural resources on lands traditionally owned by, or under the customary use of, Indigenous Peoples, and adverse impacts can be expected*” (para. 14).

The need for FPIC should be considered early in the project cycle (during the screening phase), followed by an assessment of project impacts on Indigenous Peoples which records all customary land use and any potential adverse impacts on such use, including uses that are not formally recognized by the state (PS7, GN42).

FPIC should result in: (i) a mutually accepted process based on the principles of Informed Consultation and Participation and (ii) evidence of agreement between the parties as the outcome of the negotiations (PS7, para. 12). The FPIC process should consider measures to minimize impacts on Indigenous territories, as well as benefit-sharing arrangements (para. 14).

Consistent with advice from IFC’s E&S consultant, the client divided consultations on the PLIV project with potentially affected populations of Comarca Ngöbe-Buglé into two stages (Figure 5):

Stage 1 – Preliminary FPIC: Conducted during the lifecycle of IFC’s AS project, aimed at obtaining authorization by authorities of Comarca Ngöbe-Buglé for the start of the detailed design studies and Environmental and Social Impact Assessment (ESIA).

Stage 2 – Primary FPIC: To be conducted as part of the ESIA process, aimed at achieving consent for the project itself and accompanying measures for mitigation and compensation of E&S impacts. Per the original FASA, the primary FPIC consultations were foreseen to take place after IFC’s AS project concluded. However, per the second FASA, ETESA will conduct the ESIA prior to the signing of the PPP contract and IFC will provide support in the stakeholder engagement and FPIC consultations.

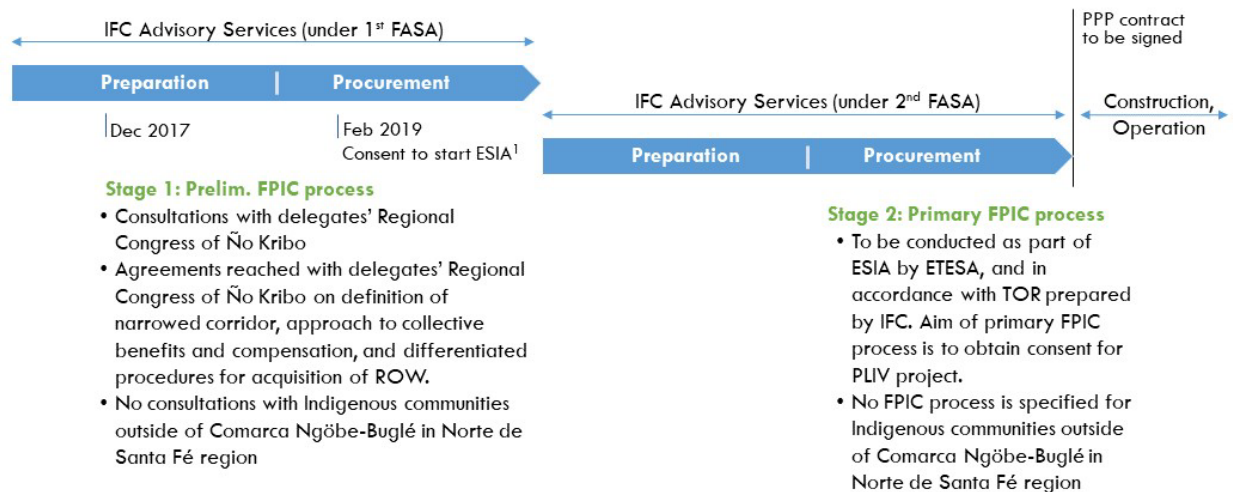


Figure 5. FPIC process for the PLIV project along a timeline of the IFC AS

During the first stage of the process, ETESA conducted consultations with the delegates' Regional Congress of Ño Kribo. These consultations were expressly conceptualized as being part of a process to obtain Free, Prior and Informed Consent (FPIC).⁴⁴ As such, the first stage of consultations with the Comarca was referred to by IFC as "the preliminary FPIC process."

Direct consultations with project-affected communities to obtain consent for the PLIV project were foreseen only for the second stage of the FPIC process. This process, referred to as the "primary FPIC process," was envisaged to take place alongside the ESIA, after contracting the private-sector partner responsible for building and operating the transmission line.

The preliminary FPIC process started in December 2017 with a meeting with the President of the delegates' Regional Congress of Ño Kribo and community members of Kankintú. The process consisted of meetings with both the plenary of the Regional Congress and two commissions that were established by agreement between the Regional Congress and ETESA to facilitate the preliminary FPIC process. The two commissions were: (a) a Technical Rapprochement Commission (Comisión Técnica de Acercamiento) and (b) a Special Negotiation Commission (Comisión Especial de Negociación). These commissions consisted of delegates of the Regional Congress and ETESA personnel.⁴⁵

From March to June 2018, the Rapprochement Commission discussed project alignment, compensation, and environmental issues during four meetings. The Special Negotiation Commission met twice in June and July 2018, focusing on the issue of compensation and projects benefiting the Comarca.

A series of informational meetings were also held with other stakeholders: with the General Congress of Comarca Ngöbe-Buglé in May 2018, as well as with the population of two district capitals in February 2018 and 18 communities in August 2018. While the formal objective of the preliminary FPIC process was to obtain consent for the start of detailed project studies, in practice its scope became broader.

During this process, agreements were reached with the delegates' Regional Congress of Ño Kribo on key issues related to the development of the transmission line. Among the key E&S mitigation measures agreed with the Regional Congress during the preliminary FPIC process were: (a) the definition of a narrowed corridor for the transmission line to avoid areas of high social and environmental sensitivity; (b) an approach to collective benefit sharing and compensation that builds on existing instruments for the Comarca's development; and (c) special procedures for acquisition of the project right-of-way in the Comarca.

With these agreements in place, in February 2019 a plenary meeting of the delegates' Regional Congress of Ño Kribo granted ETESA consent to initiate detailed project and ESIA studies.⁴⁶

⁴⁴ Comisión de Acercamiento Ñokribo-ETESA, David & Ciudad de Panamá, 2018.

⁴⁵ In an extraordinary congressional session of the Regional Congress of Ño Kribo on March 1, 2018, delegates voted to re-purpose a previously created commission and rename it the Comisión Técnica de Acercamiento (Technical Rapprochement Commission). The Directive Council designated five commission members, the President of the Regional Congress designated two members, and the plenary designated eight members. Mayors of the four districts of the Ño Kribo Region were also included. Of the 19 commission members, only two of the representatives were women. (Congreso Extraordinario Regional Ño Kribo, 2018). The Special Negotiation Commission was ratified by the plenary of the Regional Congress on June 15, 2018.

⁴⁶ Congreso Extraordinario Regional Ño Kribo, 2019.

2 Analysis and Findings

2.1 Applicable IFC Policies and Procedures

IFC's engagement with the client was initiated in the context of its 2012 Policy on Environmental and Social Sustainability ("the Sustainability Policy")⁴⁷ and Performance Standards (PS),⁴⁸ 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).

Through its advisory activities, IFC intends to "promote broad uptake of good environmental and social performance in business decisions and operations" (Sustainability Policy, para. 16). The key E&S compliance 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, see also para. 39).

When considering a new AS project, IFC conducts E&S due diligence as part of the general pre-approval review of the project (Sustainability Policy, para. 38). For higher-risk AS projects, this includes the assignment of an IFC E&S specialist to the project team and the preparation of an E&S memo containing an analysis of E&S risks and measures, to achieve consistency with IFC Sustainability Framework requirements (ESRP 11.2.2).⁴⁹

IFC monitors implementation of an AS project 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 (Sustainability Policy, 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 potential E&S risks around a proposed AS project. This AS project was approved and supervised under the most recent ESRP for Advisory Services projects (June 2011).

Over the past decade, IFC has made a series of procedural changes to the way it manages E&S risk in AS. 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;⁵⁰ (b) clarification that IFC's environmental and social due diligence (ESDD) will be preparatory in nature and not extend to conducting an ESIA for a project;⁵¹ 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.⁵²

In this case, two Performance Standards (PS) are particularly relevant to the review and implementation of the AS, as well as to the issues raised by the complainants (see Box 3).

⁴⁷ IFC, Policy, 2012.

⁴⁸ IFC, Performance Standards, 2012.

⁴⁹ IFC, 2011.

⁵⁰ IFC, 2013.

⁵¹ IFC, IFC Management response, 2018.

⁵² Ibid.

PS1 (Assessment and Management of Environmental and Social Risks and Impacts) establishes requirements for stakeholder engagement and consultation. This includes requirements for stakeholder engagement and disclosure of information.

Following PS1, stakeholder engagement should be preceded by stakeholder analysis, which identifies who may be impacted by a project, with a focus on vulnerable and disadvantaged groups. The stakeholder engagement process should then proceed according to a stakeholder engagement plan designed to achieve inclusive consultation and informed participation of affected communities.

PS7 (Indigenous Peoples) establishes requirements related to the identification and management of project impacts on Indigenous Peoples. PS7 was designed considering that “Indigenous Peoples may be more vulnerable to the adverse impacts associated with project development...[including] loss of identity, culture, and natural resource-based livelihoods” (para. 1). PS7 provides for culturally appropriate stakeholder engagement and the establishment of FPIC when a project impacts land or natural resources that are traditionally owned or under customary use of Indigenous Peoples.

FPIC is a principle that pertains specifically to Indigenous Peoples and allows them to give or withhold consent to a project that may affect them or their territories. Where a project involves FPIC, the process of engagement with Indigenous Peoples requires detailed stakeholder mapping, information disclosure, consultation, and negotiation of benefit-sharing arrangements, with a view to achieving consent (see Box 2 above).

Box 3. IFC Performance Standards requirements relevant to the complaint

PS1: Assessment and Management of Environmental and Social Risks and Impacts

- “**Stakeholder engagement** is an ongoing process that may involve, in varying degrees, the following elements: **stakeholder analysis and planning, disclosure and dissemination of information**, consultation and participation...The nature, frequency, and level of effort of stakeholder engagement may vary considerably and will be commensurate with the project’s risks and adverse impacts, and the project’s phase of development” (PS1, para. 25).
- Stakeholder analysis and engagement. “Clients should **identify the range of stakeholders** that may be interested in their actions...” (PS1, para. 26).
- “The process of stakeholder identification includes...(iii) **identifying legitimate stakeholder representatives**, including elected officials, non-elected community leaders, leaders of informal or traditional community institutions, and elders within the Affected Community (PS1, GN95).
- “The client will develop and implement a **Stakeholder Engagement Plan** that is **scaled to the project risks and impacts and development stage**, and be tailored to the characteristics and interests of the Affected Communities” (PS1, para. 27).
- “When the stakeholder engagement process depends substantially on community representatives, the client will make every reasonable effort to **verify that such persons do in fact represent** the views of Affected Communities” (PS1, para. 27).
- “The client will provide Affected Communities with **access to relevant information** [and “relevant documents” (FN26)] on: (i) the purpose, nature, and scale of the project; (ii) the duration of proposed project activities; (iii) any risks to and potential impacts on such communities and relevant mitigation measures; (iv) the envisaged stakeholder engagement process...” (PS1, para. 29).
- “Effective consultation is a two-way process that should: (i) **begin early** in the process of identification of environmental and social risks and impacts...; (ii) be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is **in a culturally appropriate local language(s) and format** and is understandable to Affected Communities; (iii) focus **inclusive engagement** on those directly

affected as opposed to those not directly affected... The client will tailor its consultation process to the **language preferences of the Affected Communities, their decision-making process, and the needs of disadvantaged or vulnerable groups**" (PS1, para. 30).

- "The consultation process should (i) capture **both men's and women's views**, if necessary through separate forums or engagements, and (ii) **reflect men's and women's different concerns and priorities** about impacts, mitigation mechanisms, and benefits, where appropriate" (PS1, para. 31).

PS7: Indigenous Peoples

- PS7 "applies to communities or groups of Indigenous Peoples who maintain a collective attachment...to distinct habitats or ancestral territories and the natural resources therein" (PS7, para. 6).
- "The client will undertake an engagement process with the Affected Communities of Indigenous Peoples as required in Performance Standard 1. This engagement process includes stakeholder analysis and engagement planning, disclosure of information, consultation, and participation, **in a culturally appropriate manner**...this process will: Involve Indigenous Peoples' representative bodies and organizations..., as well as members of the Affected Communities of Indigenous Peoples" (PS7, para 10).
- "Designing a process to achieve the **FPIC of Affected Communities of Indigenous Peoples** should, inter alia, take account of the following...(ii) As with many communities, communities of Indigenous Peoples may be affected by **issues related to governance, leadership and representativeness. Assessment of these issues will inform the engagement and negotiation** process. Where **administrative and traditional systems recognize different leaders**, where leadership is known to be highly politicized and/or only marginally representative of the affected population or if there are multiple groups representing different interests, **FPIC should rely on identification, recognition and engagement of greater numbers or representativeness** of stakeholder sub-groups" (PS7, GN36 (ii)).
- "[T]he client will **obtain the FPIC of the Affected Communities of Indigenous Peoples** in the [following] circumstances...[i]f the client proposes to locate a project on...**lands traditionally owned by, or under the customary use of, Indigenous Peoples**, and adverse impacts can be expected" (PS7, paras. 11 and 14).
- "While **Indigenous Peoples may not possess legal title to these lands** as defined by national law, their use of these lands, including seasonal or cyclical use, for their livelihoods, or cultural, ceremonial, and spiritual purposes that define their identity and community, can often be substantiated and documented" (PS7, para. 13).

2.2 Compliance Analysis

This section provides a compliance analysis of IFC's advice to its client throughout the life cycle of the Advisory Services, considering whether this advice was consistent with the Performance Standards as required. In assessing whether IFC's advice was "consistent with the Performance Standards" CAO considers whether IFC's advice was compatible with relevant requirements of the Performance Standards as a framework for good international industry practice, in the context of the project, its stage of development, and IFC's role as transaction advisor.

Documentation that includes IFC's advice to the client, and other key documentation related to the AS project, is presented and analyzed in chronological order, focusing on the issues raised by the complainants (see Box 4). The document titles italicized below represent written outputs of the IFC Advisory Services project and thus constitute IFC's formal advice to the client. The other documents listed here provide relevant background to IFC's advisory engagement with ETESA.

Box 4. IFC advice and other relevant documents, by phase of IFC AS project (italicized documents represent IFC’s formal advice to the client)

Pre-approval Review

E&S Memo Internal IFC document that outlines E&S risks and associated mitigation measures for the proposed AS project. This is presented to IFC management for consideration before the mandate is signed. This memo contains IFC observations on key E&S advice to be given to the client.

AS Implementation – Preparation

Financial Advisory Services Agreement (FASA) Legal agreement between IFC and the client. Outlines scope of the AS project and establishes IFC’s PS as the reference point for IFC’s advice.

E&S Risk Allocation Memo (ESRAM) An internal IFC document that features preliminary E&S obligations for both the client and the winning bidder to be included in the PPP contract. It is presented to IFC management for consideration and informs the transaction structure report presented to the client.

Inception Report Prepared by IFC’s E&S consultant and shared with the client, notes preliminary observations for the E&S scoping study, including a preliminary list of stakeholders and engagement strategy for Comarca Ngöbe-Buglé.

Preliminary Stakeholder Map Prepared by IFC’s communications consultant. Not intended as input for the preliminary FPIC process, but as part of IFC’s input into the ESIA documentation.

Letters from complainant group Three letters from the complainants sent to IFC and the World Bank between October 2017 and April 2018, together with responses. Provide information on IFC’s approach to the AS project and the specific concerns raised by the complainants.

AS Implementation – Procurement

Terms of Reference (TOR) for ESIA and associated plans Establish parameters for E&S studies and plans to be developed and implemented by the winning bidder. Included in bidding documents. Relevant TOR are those for the ESIA and three annexes: (1) Compensation plan for land acquisition, resettlement, and establishment of the right-of-way; (2) Stakeholder Participation Plan; and (3) Ngöbe-Buglé Community Development Plan.

Pre-approval review of the IFC Advisory Services Project

E&S Memo (April 2017)

Key points in E&S Memo

- IFC identified the need to advise the client that: (a) the client should initiate stakeholder engagement “as soon as possible” and develop a stakeholder engagement plan (SEP) “as soon as feasible;” and (b) the PLIV project will be required to obtain FPIC per PS7.
- Contextual E&S risk associated with the AS project was not assessed at this point.

CAO analysis

- CAO notes that IFC’s observation that the client should develop a SEP and initiate stakeholder engagement as soon as possible was broadly consistent with PS1 (para. 27).
- CAO has not seen evidence of delivery of this advice to the client.

- CAO identified significant contextual risk factors related to consultation processes and Comarca Ngöbe-Buglé that were relevant to the preparation of the AS project. These were not considered in the E&S Memo.

The E&S memo is an internal IFC document that outlines E&S risks and associated mitigation measures for the proposed AS project. This is presented to IFC management for consideration before the mandate is signed. The E&S memo contains IFC observations on key E&S advice to be given to the client.

Based on the ESRP, for standalone AS projects that are assigned a high E&S risk rating, as in this case, an E&S specialist is assigned to provide recommendations on the design of E&S good practices for the AS project. The E&S Memo should contain “an analysis of the risks... [and] specific ameliorative measures required to close observed gaps [with the Sustainability Framework requirements]” (ESRP 11.2.2).

IFC’s E&S Memo for the PLIV AS was finalized in April 2017.

The E&S Memo identified the PLIV project as having potentially significant impacts on Indigenous Peoples, given that the proposed transmission line passes through lands belonging to the Ngöbe and Buglé peoples. It also noted potential opposition to the project given past opposition by Indigenous communities to hydropower developments in the area.

The E&S Memo identified the following specific advice to the client as necessary in the context of the AS project:

- The client should initiate stakeholder engagement “as soon as possible” and develop a stakeholder engagement plan “as early as feasible” in the PLIV project development process, considering the potentially significant adverse impacts on affected communities and expected high scrutiny of the project.
- An E&S scoping study would be conducted by an IFC-hired E&S consultant to identify key E&S impacts and risks, as well as gaps between national environmental and social legislation and IFC PS. It would recommend mitigation measures to support the development of the project in line with IFC PS and good international industry practice. The E&S scoping study would inform the ESIA terms of reference to be prepared by IFC’s E&S consultant.
- The PLIV project should obtain Free, Prior, and Informed Consent (FPIC) following PS7, because it passes through lands belonging to the Ngöbe-Buglé Indigenous Peoples.

The E&S Memo also noted that screening of contextual risks that may impact the transaction was ongoing and would be further assessed during the E&S Due Diligence (i.e., E&S scoping study) phase of the AS.

CAO analysis: The E&S Memo outlined key E&S issues, defining next steps, including the preparation of an E&S scoping study to be conducted by an IFC consultant. The scoping study was expected to provide an analysis of E&S risks and impacts along with recommendations for mitigation measures. Given the complexities and risks associated with conducting consultations with Indigenous communities in the area, the observation that ETESA should develop a stakeholder engagement plan and initiate stakeholder engagement as “soon as possible” was broadly consistent with PS1 (para. 27), which requires development of “a Stakeholder Engagement Plan scaled to the project risks and impacts and development stage.” It should be noted that the E&S Memo is an IFC internal document and not advice to the client. CAO has not seen evidence of delivery of this advice to the client, as provided for in the E&S Memo.

During the CAO investigation, several significant contextual risk factors related to investment projects in the area of the proposed transmission line were identified, particularly in relation to

engagement with Indigenous Peoples and the FPIC process (see Box 5). These were not considered in the E&S Memo.

Box 5. Contextual risks related to consultation processes and Comarca Ngöbe-Buglé

Several important contextual risk factors were identified during the CAO investigation, particularly in relation to consultation processes and Comarca Ngöbe-Buglé.

- Failure of past consultation processes⁵³ with the Ngöbe and Buglé, both inside and outside of the Comarca: A key source of controversy was the recurrent focus of consultations on higher-level authorities (i.e., Regional or General Congresses, directive councils, and Caciques), with limited representativity among project-affected communities, and the exclusion of the latter from consultations.⁵⁴ Rejection of consultation processes and resulting agreements has regularly translated into broader opposition to the proposed projects themselves. Between 2008 and 2017, the Ngöbe and Buglé from inside and outside the Comarca, with the support of NGOs, have filed petitions and complaints related to investment projects developed in their territories with five international organizations.⁵⁵
- Well-documented history of widespread opposition to investment projects that affect Ngöbe and Buglé territories: Mobilizations, roadblocks, and other tactics of protest have been highly effective in delaying and blocking the implementation of such projects. They have occasionally spilled over into violent conflict.⁵⁶
- Legacy issues of past projects managed by ETESA that pass through the Comarca, i.e., Transmission Line III and Transmission Line Fortuna–Changuinola: At the time of the preliminary FPIC process for the PLIV project, payment of compensation for land acquisition for past projects had not been concluded and not all agreements with project-affected communities had been complied with by ETESA.⁵⁷ These issues were repeatedly raised by delegates of the Regional Congress of No Kribo during consultation meetings of the PLIV project. For project opponents, they were also a key reason for rejecting the PLIV project.
- Evidence of the existence of Ngöbe and Buglé in the Norte de Santa Fé region, who had been systematically excluded from consultations for past investment and conservation projects: They had started to assertively oppose such projects in the years preceding the PLIV project, claiming their rights to be the subject of FPIC processes (see Section 1.6.2).

2.2.2 AS implementation—preparation stage

FASA (September 2017, revised May 2021)

Key points in FASA

- Both the initial and revised FASA state that IFC will advise the client in a manner consistent with the IFC PS.

CAO analysis

- Both the initial and the revised FASAs are compliant with IFC requirements for AS projects per the Sustainability Policy (para. 4).

The Financial Advisory Services Agreement (FASA) outlines the scope of the AS project as agreed between IFC and the client.

⁵³ During Factual Review and Comment, the complainants pointed out that the lack of consultations in several cases has had significant consequences, including physical displacement without compensation.

⁵⁴ Bivin Ford 2015; Cansari & Gaussett, 2013; FMO-DEG, 2014; Gjording, 1991; Jordan Ramos, 2010; Nakoneczny & Whysner, 2010; Roquebert León, 2018; Simms & Moolji, 2011.

⁵⁵ FMO-DEG, 2014; IACHR, 2009; Inspection Panel, 2009; UNDP-SECU, 2017; and UN Human Rights Council, 2009, 2014.

⁵⁶ Cansari & Gaussett, 2013; Jordan Ramos, 2010.

⁵⁷ CAO, Assessment Report, April 2019.

The FASA for the AS project provides that IFC would hire consultants to conduct due diligence, including full technical, legal, financial, and E&S due diligence (ESDD) as preparation for the bidding process. IFC's ESDD included the conduct of an E&S scoping study. The scoping study was envisaged as an input into terms of reference (TOR) for E&S studies and consultations required by national law and in accordance with IFC PS to complete the PLIV ESIA, which would be carried out by the winning bidder. These TOR, also to be prepared by the IFC consultant, would form part of the E&S provisions in the bidding documents.

Following a standard IFC template, the FASA states that IFC will advise the client in a manner consistent with the PS and that ETESA intends to apply the PS to the project. The FASA also includes an exit clause should IFC determine that it is no longer possible to advise the client consistent with the PS. The FASA does not include more detailed E&S commitments for the client.

The original FASA expired in December 2018. After the Panamanian presidential elections in May 2019, there was a change in government and the new president appointed new members to the Board of Directors and management team for ETESA.⁵⁸

A new FASA was agreed and approved by the GoP in May 2021. The 2021 FASA is generally aligned with the 2017 FASA, with some relevant differences. With regard to the ESDD process, the new FASA provides details on additional support that IFC will provide relating to the PPP contract, the TOR for the ESIA in the bidding documents, and the ESIA, including:

- Reviewing the existing E&S recommendations which have been drafted by IFC for the PPP contract;
- Validating the specifications of the TOR for the ESIA and associated plans developed by the IFC E&S consultant to ensure PS and national law compliance;
- Reviewing and validating the ESIA, which will be conducted by ETESA (or their consultant), to ensure compliance with national law and IFC PS; and
- Collaborating with and supporting the client in the design and elaboration of the stakeholder participation plan and communications plan, as well as in the consultation process, to ensure client consideration of commitments with Indigenous Peoples, both inside and outside the Comarca.

CAO analysis: CAO notes that both the initial and the revised FASAs are compliant with IFC requirements for AS projects per the Sustainability Policy (para. 4).

The new FASA reflects the client's ongoing commitment to applying the PS in the design and realization of the PPP transaction. As explained by IFC, the new FASA also reflects IFC's commitment to addressing issues raised in the CAO complaint by: (a) reviewing and validating the ESIA for compliance with IFC and national legal standards, and (b) supporting the client to develop a stakeholder engagement plan for Indigenous communities in and outside the Comarca.

Inception Report (December 2017)

Key points in IFC's Inception Report

- Notes that the client established an engagement strategy with Comarca Ngöbe-Buglé through a meeting with the GoP Vice Ministry of Indigenous Affairs, per national law. Notes that consultations will start with the General Congress and Regional Congress in December 2017.
- Recommends FPIC consultations to be conducted in two phases: pre-bidding and post-bid. Affirms consultations focusing on the General Congress and Regional Congress to be appropriate.

⁵⁸ Pichel, 2019.

CAO analysis

- IFC’s consultant provided advice to proceed with the preliminary FPIC process without recommending the development of a commensurate stakeholder engagement plan (SEP) and associated stakeholder analysis (inconsistent with PS1, para. 27).
- IFC did not provide advice on the development of a SEP and associated stakeholder analysis prior to starting the preliminary FPIC consultations (inconsistent with PS1, para. 25, and PS7, para. 10, GN36(ii)). Without appropriate stakeholder analysis and planning, the preliminary FPIC process proceeded in a manner that was not fully aligned with the PS, as follows:
 - a. The preliminary FPIC consultations were conducted with government-recognized representatives of the Comarca, leading to the significant exclusion of traditional Indigenous Comarca authorities, who hold high levels of legitimacy and influence in the Comarca (inconsistent with PS7, para. 10);
 - b. IFC’s lack of advice on this issue was inconsistent with PS requirements to verify representativity of the community representatives consulted (inconsistent with PS1, para. 27); and
 - c. There was a lack of attention to ensuring that the preliminary FPIC process was conducted in a culturally appropriate and gender-inclusive manner, including disclosure of information in local Indigenous languages (inconsistent with PS1, paras. 30 and 31).
- IFC did not provide advice on the need for early consultations with affected communities (in addition to engagement with the formal governance structures of the Comarca). This was inconsistent with PS1 (para. 30), which requires consultation with affected communities to begin “early in the process of identification of E&S risks and impacts.” including during the scoping process (see PS1, GN104).
- A lack of advice in relation to the need for an early SEP and associated stakeholder analysis also contributed to the exclusion of the Indigenous Peoples in the Norte de Santa Fé region outside the Comarca from the preliminary FPIC process, and a lack of consideration of the FPIC requirements to these groups (inconsistent with PS7, paras. 13–14).

The Inception Report was the IFC E&S consultant’s first report, prepared as part of the E&S scoping process.⁵⁹ It is based on a preliminary review of documentation and legislation, in addition to meetings with IFC and IFC’s communications consultant, ETESA, and various GoP officials. It summarizes key E&S issues and presents a preliminary gap identification with respect to IFC PS.

The Inception Report includes preliminary observations on the proposed alignment of the transmission line and a preliminary list of relevant stakeholders. The report highlights specific stretches of the transmission line that require special consideration. This includes the stretch in Veraguas between vertexes 25 and 33, which overlaps with the Norte de Santa Fé region. The report describes this section as consisting of largely pristine areas, some of which provide continuity with nationally protected areas of natural habitats. There is no mention of Indigenous Peoples in this area or that Indigenous Peoples claim this region as their territory.

The report notes that IFC’s consultant verified the adequacy of the preliminary stakeholder list during a site reconnaissance visit in November 2017. In the stakeholder list, traditional authorities of Comarca Ngöbe-Buglé are included as a stakeholder group, identifying the following: General

⁵⁹ Initially, a final report of the E&S scoping study was expected. However, IFC confirmed with CAO that, in lieu of a final report, the findings of the scoping study were incorporated directly into the bidding documents and the TOR for the ESIA and associated plans.

Congress, Regional Congresses of Kankintú and Kusapín,⁶⁰ Local Congresses of Kankintú and Kusapín, and community leaders.

The report notes that the client established a strategy for engagement with the Ngöbe-Buglé Indigenous group through a meeting with the Vice Ministry of Indigenous Affairs, namely, to initiate consultations with the General Congress of the Comarca and the Regional Congress of Kankintú [sic.] in early December 2017. The report affirms that the strategy is in line with national law⁶¹ with respect to consultations with Indigenous Peoples groups, which requires a timely FPIC process to be conducted by the GoP jointly with the Indigenous group's traditional authorities. No further details are provided about this engagement strategy and no SEP is presented.

The report notes that the IFC consultant discussed with IFC and ETESA lessons learned from the social conflicts associated with the Barro Blanco hydropower project in the Ngöbe-Buglé territory. One of the main lessons, as described in the Inception Report, was that the Barro Blanco project relied too much on top-down consultation leading to agreements with the General Congress and Regional Congress, without ensuring local community support. The Inception Report notes opposition to the Barro Blanco project that emerged in that context. The report further notes that stakeholder engagement with the Ngöbe and Buglé is highly complex and warrants an engagement strategy that goes beyond standard national requirements for ESIA consultation procedures.⁶²

As a result, the report recommends engagement with the Ngöbe and Buglé be conducted in two phases: the pre-bidding stage and the post-bidding stage. The report suggests that the consultations during the pre-bidding stage be preliminary. It affirms that consultations focusing on the General and Regional Congresses would be appropriate, noting that information disclosure should take place with local communities. For the consultations in the post-bidding/ESIA stage, the report recommends that the winning bidder develop and implement a Stakeholder Engagement Plan (SEP) that is specific to the Ngöbe-Buglé group, taking a bottom-up approach. Following this approach, consultations would begin at the local community level, continuing to the regional level once local community support is attained, and then at the level of the General Congress.

The report also mentions that some level of agreement should be reached with the General Congress and Regional Congresses during the pre-bidding stage.

CAO analysis: While the Inception Report was an early output of IFC's AS project, it is important because it represented the state of IFC's advice to ETESA at the time the client initiated the preliminary FPIC process in December 2017. As documented in the Inception Report, IFC's E&S consultant was aware of the significant risks and challenges associated with consultations with Indigenous communities in the Comarca through a review of past projects. However, the consultant advised to proceed with the preliminary FPIC process without recommending the development of a commensurate stakeholder engagement plan (a stakeholder engagement plan was recommended only for consultations in the ESIA stage). This advice was contrary to the PS1 requirement for the client to "develop and implement a Stakeholder Engagement Plan that is scaled to the project risks and impacts and development stage" (para. 27) and contrary to IFC's earlier observation that the client should develop a Stakeholder Engagement Plan "as early as feasible" in the PLIV project development process.

The focus on engagement with Comarca representatives at this point was also inconsistent with PS1 (para. 30), which requires consultation *with affected communities* to begin "early in the

⁶⁰ The Inception Report erroneously notes "Regional Congresses of Kankintú and Kusapín" but this should be Regional Congress of Ño Kribo.

⁶¹ Asamblea Nacional. Ley No. 37, 2016.

⁶² Ministerio de Economía y Finanzas. Decreto Ejecutivo No. 123, 2009.

process of identification of E&S risks and impacts,” including during the scoping process (see PS1, GN104). In addition, IFC’s lack of advice on this issue was inconsistent with PS1 to “verify that such persons do in fact represent the views of Affected Communities and that they can be relied upon to faithfully communicate the results of consultations to their constituents” (para. 27).

Despite inclusion of a preliminary list of relevant E&S stakeholder groups in the Inception Report, there was no advice to complete stakeholder analysis as a required step in preparation for the soon-to-begin consultations with authorities of Comarca Ngöbe-Buglé. This was contrary to the PS1 requirement for the client to “identify the range of stakeholders that may be interested in their actions” and “identify the Affected Communities” to which adverse E&S impacts are likely (para. 26). This was further inconsistent with the PS7 requirement for a culturally appropriate stakeholder engagement process, including stakeholder analysis and planning, that involves “Indigenous Peoples’ representative bodies and organizations...as well as members of the Affected Communities of Indigenous Peoples” (PS7, para. 10). In designing a process to achieve FPIC, Guidance Note (36 (ii)) for PS7 specifies the need for an assessment of issues related to governance, leadership and representativeness, particularly where there are administrative and traditional systems recognizing different leaders, as is the case in Comarca Ngöbe-Buglé.

IFC’s lack of documented advice on the need for early stakeholder analysis and engagement planning contributed to a number of shortcomings in the preliminary FPIC process, for example:

- a. A focus on consultations with GoP-recognized higher-level authorities, namely the delegates’ Regional Congress, as a result excluding the participation of traditional Indigenous institutions and authorities such as the mass traditional congresses and caciques, which hold at least equal levels of legitimacy among the Comarca’s population; and
- b. A lack of attention to ensure that the preliminary FPIC process was conducted in a gender-inclusive and culturally appropriate manner, including appropriate disclosure of information and relevant documents in local languages.

IFC’s advice in relation to these issues was inconsistent with the requirement that gender-inclusive engagement with Indigenous Peoples be conducted “in a culturally appropriate manner...[involving] Indigenous Peoples’ representative bodies and organizations...as well as members of the Affected Communities of Indigenous Peoples” (PS7, para. 10; also PS1, paras. 26, 30, and 31; PS1, GN95) and “in a culturally appropriate local language(s)” (PS1, para. 30; also PS7, GN19 and Law 37/2016, art. 4.7). Given that the preliminary FPIC process depended substantially on community representatives, IFC’s advice was also inconsistent with the requirement to “verify that such persons do in fact represent the view of the Affected Communities and that they can be relied upon to faithfully communicate the results of consultations to their constituents” (PS1, para. 27).

IFC’s lack of advice on the design of the preliminary FPIC process was of particular importance given the scope of the consultations, which covered substantive issues such as project location and benefit sharing, which would normally be part of the ESIA process.

A lack of advice in relation to the need for stakeholder analysis and an early Stakeholder Engagement Plan also contributed to the exclusion of the Indigenous Peoples in the Norte de Santa Fé region and in the Annex Areas outside the Comarca from the preliminary FPIC process, and a lack of consideration of the FPIC requirements to these groups. This was inconsistent with PS7 requirements to apply FPIC when a client “proposes to locate a project on...on lands traditionally owned by, or under the customary use of, Indigenous Peoples” (para. 14), even though “Indigenous Peoples may not possess legal title to these lands as defined by national law” (PS7, para. 13).

Preliminary Stakeholder Map (April 2018, revised February 2019)

Key points in Preliminary Stakeholder Map

- IFC notes the preliminary stakeholder map was not prepared to inform the preliminary FPIC process, but rather as input for the TOR for the ESIA.
- The initial stakeholder map included a section on Comarca Ngöbe-Buglé. Indigenous communities outside the Comarca were only included in the revised stakeholder map, which mentions that the Indigenous communities outside the Comarca are not in the project's area of influence.

CAO analysis

- While not intended to inform the preliminary FPIC process, the preliminary stakeholder map was the only available stakeholder analysis documented at the time the preliminary FPIC process was conducted.
- The preliminary stakeholder map was insufficient for undertaking consultation as part of an FPIC process.

The preliminary stakeholder map consists of stakeholder mapping and influence analysis as an input for a communications strategy for the PLIV project. It was prepared by IFC's communications consultant. IFC explained to CAO that this stakeholder map was not intended as input for the preliminary FPIC process, but rather as part of IFC's advice to ETESA ahead of the ESIA. The preliminary Stakeholder Map was presented in April 2018. A revised Stakeholder Map was presented in February 2019.

In total, 73 key stakeholders were identified, which were classified into 10 categories: (i) internal actors and public; (ii) government and authorities; (iii) Comarca Ngöbe-Buglé; (iv) private sector and trade associations; (v) electricity market and regional organizations; (vi) political organizations; (vii) labor unions and consumer organizations; (viii) environmental NGOs; (ix) academia and international community; and (x) media. A description of the interests or motivations of each stakeholder as well as a proposed engagement strategy was included.

The section on Comarca Ngöbe-Buglé comprises six of the 39 pages of the full document. In the Comarca section, the following stakeholders are identified: General Congress of Comarca Ngöbe-Buglé and its Directive Council; Regional Congress of Ño Kribo; local congresses in the Ño Kribo region; local, regional, and general caciques; natural community leaders; communities; religious leaders including those for Mama Tata; social organizations and movements in the Comarca such as the Coordinator for the Defense of Natural Resources and Rights of the Ngöbe, Buglé, and Campesino Peoples; and student movements.

The stakeholder map identifies several challenges for conducting consultations in the Comarca. These include profound internal divisions, such as the existence of parallel General Congresses; a lack of local support for the Directive Council formally recognized by the GoP; challenges to the legitimacy of the authorities of the Regional Congress of Ño Kribo; the disputed character of recent elections for caciques; and the rejection by local communities where consultation processes were not seen as legitimate.

Of relevance to the current investigation, the February 2019 revision of the stakeholder map notes that representatives of Indigenous communities located outside the Comarca have manifested concern and opposition to the project. The updated stakeholder map also notes that representatives of these groups demand to be taken into consideration given that the project will impact them negatively; however, the stakeholder map states they are not in the project's area of influence.

CAO analysis: While the stakeholder map was not prepared to inform the preliminary FPIC process, it was the only available stakeholder analysis documented while the preliminary FPIC

process was ongoing. PS1 requires stakeholder engagement, including stakeholder analysis and planning, to “be commensurate with the project’s risks and adverse impacts, and the project’s phase of development” (PS1, para. 25). Relevant to the issues raised in the complaint, CAO appreciates that the stakeholder map contained substantial information and analysis on the decision-making processes of Indigenous communities in the Comarca. Nonetheless, it had a number of shortcomings which meant that it did not provide sufficient basis to undertake consultation activities required under FPIC, in particular:

- a. Gaps in the identification of relevant stakeholder categories in the Comarca, importantly the existence of parallel traditional Congresses at the regional and local levels, as well as the Buglé General Congress, in which the Ngöbe, Buglé, and Campesino Local Congress of the Norte de Santa Fé Region participate;
- b. Lack of depth in the identification of Indigenous stakeholders (i.e., roles and decision-making processes within the Comarca governance structure, conflicts and competing claims of legitimacy between the different categories of authorities, as well as how decision-making processes play out within this disputed context);
- c. Lack of verification of representativity of the delegates’ Regional Congress of Ño Kribo, important given that the preliminary FPIC process was focused on representatives rather than directly on affected communities;
- d. Lack of depth in analysis on the nature of challenges for conducting consultations in the Comarca and their implications for the PLIV project consultations; and
- e. Failure to identify the Indigenous Ngöbe, Buglé, and Campesino communities in the Norte de Santa Fé region as project stakeholders in 2018, and in 2019 the determination that these groups were outside the project’s area of influence, without supporting analysis.

Complainant Letters (October 2017–April 2018)

Key points in Complainant Letters to IFC and World Bank

- The Local Cacique representing Ngöbe, Buglé, and Campesino Indigenous Peoples of the Norte de Santa Fé region, party to the complaint, sent three letters to IFC and the World Bank between October 2017 and April 2018.
- Issues raised in the letters include: a request for information about the PLIV project, claim of a right to participate in the project as Indigenous Peoples, and a request for a meeting with IFC.
- IFC response consists of a description of consultations conducted in Comarca Ngöbe-Buglé and refers the Local Cacique to the delegates of Comarca Ngöbe-Buglé.
- IFC did not provide any advice to its client to adjust its approach to the preliminary FPIC process.

CAO analysis

- CAO notes that IFC was aware of claims regarding project impacts and the need for consultation with Indigenous Peoples in the Norte de Santa Fé region. However, IFC did not adjust its advice to the client regarding the approach to the preliminary FPIC process, which continued to focus exclusively on representatives from within the Comarca.

The Local Cacique representing Indigenous Ngöbe, Buglé, and Campesino people of the Norte de Santa Fé region, who is party to the complaint, sent three letters to the World Bank and IFC between October 2017 and April 2018. IFC sent one letter in response to the February 2018 letter.

An *October 2017 letter* invited World Bank staff to participate in the Ordinary Session of the Local Council of Traditional Authorities and Leaders, with the objective of learning more about the PLIV project. The letter states the need for the communities to express themselves with their own words, noting that they have not been heard and are not able to go to the World Bank offices.

The World Bank country head for Panama responded to the *October 2017 letter*. The response notes that the project is receiving technical assistance from IFC. It states that IFC is very open to finding an opportunity to hear from the Local Cacique, together with the company, as soon as possible. It refers the Local Cacique to IFC and copies IFC on the response.

IFC did not contact the Local Cacique in response to the *October 2017 letter*.

A *February 2018 letter* addressed to IFC from the Local Cacique notes that the Indigenous communities in Norte de Santa Fé lack clear and precise information about the PLIV project and lack participation, which the letter notes is an indisputable right of the original inhabitants for projects that directly impact at a large scale. The Cacique requests a meeting with IFC to learn more about the project.

IFC responded to the February 2018 letter in March the same year, stating that:

- The ETESA technical team has presented information about the project in the four districts of the Ño Kribo Region in Comarca Ngöbe-Buglé. The dates and locations of the meetings are included.
- The plenary of the Congress approved the creation of commissions constituted by delegates, professionals, academics, and local and traditional authorities of the four districts to work with the technical team of ETESA and IFC. IFC advised that the commissions would define the possible route of the transmission line and the sites to avoid, and conduct the environmental impact studies. IFC also advised that they would determine the social priorities of the community and present a report at the next ordinary session of the Congress in May 2018.
- It is the intention of ETESA and IFC to launch the project with the full respect of Comarca regulations, Panamanian laws, and international standards of quality and E&S aspects, including FPIC with the Ño Kribo Region communities.
- The Cacique should contact the delegates that represent the district of Santa Catalina-Bledeshia for information about the project and the process that has been carried out to date.

In an *April 2018 letter* responding to IFC, the Local Cacique formally requests a meeting with IFC. The Cacique notes that the Indigenous communities of Norte de Santa Fé require a clear and precise approach that takes into consideration direct participation of the communities, which has not yet taken place. They are waiting to hear from IFC and the company about the procedure for participation. The Cacique adds that, in the Norte de Santa Fé region, the Ngöbe, Buglé, and Campesinos Indigenous population numbers more than 6,000 with the right to expression and prior and informed decision.

IFC did not respond to the *April 2018 letter*.

According to IFC's E&S consultant, the claims made by the Local Cacique were discussed with the Vice-Ministry of Indigenous Affairs regarding whether the Norte de Santa Fé region was included in the Annex Areas as defined in the law that established Comarca Ngöbe-Buglé, or whether there were any other formally registered customary territorial claims in the region. The Vice-Ministry's response was negative in both instances. In addition, IFC's E&S consultant analyzed satellite images of the preferred two-kilometer corridor for the proposed transmission line in the Norte de Santa Fé region. Having identified only isolated homes and limited agricultural production, IFC's E&S consultant concluded that the PLIV project would not affect Indigenous Peoples in Norte de Santa Fé. As a result of the analysis, IFC maintained that consultations with Indigenous Peoples of the Norte de Santa Fé region were not required during the preliminary FPIC process.

In response to these communications, IFC did not provide any advice to its client to adjust its approach to the preliminary FPIC process.

CAO Analysis: While the correspondence with the Local Cacique from the Norte de Santa Fé region does not constitute advice to the client, it provides insight in relation to IFC's approach concerning the engagement of Indigenous groups outside the Comarca at the time of the preliminary FPIC process.

The first letter by the Local Cacique was sent to the World Bank prior to the start of the preliminary FPIC process. While the World Bank responded to the Local Cacique by referring him to IFC, there is no indication that IFC responded or reached out to the Cacique at this point. This was a missed opportunity to hear from a representative of the Indigenous communities in the Norte de Santa Fé region and address his concerns prior to the start of the preliminary FPIC process.

By the time the Local Cacique sent his second letter in February 2018, the preliminary FPIC process had already started. In this letter, he made clear his view that the Indigenous communities which he represents are impacted and have the right to participate. He also requests information about the project.

CAO finds that IFC's response to the Local Cacique's claims to be included in the consultations was inconsistent with PS7 in the following respects:

- a. IFC's response referring a Local Cacique from outside the Comarca to the delegates from a neighboring district within Comarca Ngöbe-Buglé suggests a lack of understanding of the representative structures for communities within the Comarca versus those outside. This is inconsistent with PS7 requirements for culturally appropriate engagement that involves "Indigenous Peoples' representative bodies and organizations" (para. 10).
- b. IFC's focus on whether the Local Cacique represented a group that had formally registered customary territorial claims was inconsistent with the PS7 requirement to consider project impacts on "lands traditionally owned by, or under the customary use of, Indigenous Peoples" even though these may not be formally recognized by the state (paras. 13 and 14).
- c. IFC's assessment that the project was unlikely to impact communities in the Norte de Santa Fé region based on a preliminary review of satellite imagery suggests a focus on residential and intensive agricultural land use. This was inconsistent with PS7 requirements to consider a broad variety of potential Indigenous Peoples land use, "including seasonal or cyclical use, for their livelihoods, or cultural, ceremonial, and spiritual purposes..." (para. 13), which would not have been detected through analysis of satellite images.⁶³

As a result, though aware of claims regarding project impacts and the need for consultation with Indigenous Peoples in the Norte de Santa Fé region, IFC did not adjust its advice to the client regarding the approach to the preliminary FPIC process, which continued to focus exclusively on representatives from within the Comarca.

E&S Risk Allocation Memo (ESRAM) (May 2018)

Key points in ESRAM

- Mentions Indigenous communities located outside Comarca Ngöbe-Buglé in the municipality of Santa Fé, noting that the client had not visited them during the preliminary FPIC process.
- Notes criticisms of ongoing FPIC process by environmental NGOs.

⁶³ Massaro & Myette, 2017; and Smith, "Participatory Mapping," 2003, 2005.

- Concludes that the ongoing FPIC process with Indigenous communities in Comarca Ngöbe-Buglé has been mutually satisfactory to date, with no groups in the Comarca opposing the PLIV project.

CAO analysis

The ESRAM:

- Recommends measures to align the PLIV project with relevant PS requirements, including the development of a Stakeholder Engagement Plan for the ongoing FPIC process.
- Contains the first mention in IFC's project documentation of the existence of Indigenous Peoples communities outside Comarca Ngöbe-Buglé, specifically in the Norte de Santa Fé region; however, no analysis is provided in relation to claims that these peoples should be included in the FPIC consultations.
- The ESRAM does not reference two public statements and a letter from authorities in Comarca Ngöbe-Buglé opposing the PLIV project. CAO has not seen any evidence that IFC provided any advice to the client regarding the concerns raised in these statements.

As the second point at which E&S risks and mitigation measures are presented to IFC management for consideration, the ESRAM summarizes key E&S due diligence findings, including project E&S risks, and recommends next steps for the client. The document outlines E&S obligations for the client and the winning bidder to be included in the PPP contract. The results of the IFC's E&S consultant's E&S scoping activities informed the ESRAM. This document is presented to management, and subsequently informs the transaction structuring report presented to the client.

The ESRAM was finalized in May 2018.

Two of the key project E&S risks that are highlighted in the Executive Summary of the ESRAM are relevant to this investigation. One concerns the FPIC process with Ngöbe-Buglé Indigenous Peoples, and the other, land acquisition. The document further notes that the engagement approach takes into account lessons learned from another development project in the Comarca.

The document notes that 35 percent of the land required for the transmission line project is communal and titled to Indigenous Peoples. This corresponds to the length of the project in the Comarca (approximately 112 km) and does not include the length of the project in the Norte de Santa Fé region (approximately 56 km). Generally speaking, while physical displacement is noted to be unlikely, the ESRAM states that affected people, including the Indigenous Peoples in Comarca Ngöbe-Buglé as well as private property holders, will lose access to resources. It notes that failure to reach mutually acceptable land acquisition agreements with any of the affected people could lead to conflicts and delays. Ongoing consultations with the Regional Congress and General Congress are summarized as mutually satisfactory to date. The document mentions that there are Indigenous communities located outside the Comarca in the Norte de Santa Fé region of the province of Veraguas, but that the client had not visited them during the preliminary FPIC process.

The ESRAM states that, based on information from E&S scoping and the preliminary stakeholder map, no groups in the Comarca reject the PLIV project. Some criticism of the ongoing consultation process with Indigenous Peoples is noted, but this is described as coming from a limited number of environmental NGOs. These NGO criticisms are identified as a contextual risk.

Recommendations in the ESRAM include: (a) general alignment of the PLIV project with national legislation and IFC PS, which should be reflected in the TOR for the ESIA to be included in the bidding documents; (b) inclusion of E&S obligations in the PPP contract regarding stakeholder engagement and FPIC in compliance with national law, PS, and the ESIA TOR; and (c) confirmation with ETESA of consent from the Regional Congress of Ño Kribo to conduct design

and ESIA studies, as well as agreement by the General Congress of Comarca Ngöbe-Buglé on key criteria for a satisfactory ESIA. IFC recommended a Stakeholder Engagement Plan specifically for the Ngöbe-Buglé, taking a bottom-up approach and building on the preliminary FPIC process.

CAO analysis: The ESRAM recommends measures to align the PLIV project with relevant PS requirements, including the development of an SEP for the ongoing FPIC process. However, there are also key gaps in the analysis.

Prepared after commencement of the preliminary FPIC process, the ESRAM is generally positive in relation to the ongoing consultation process for the project, concluding that no groups in the Comarca reject the PLIV project. However, by the time the ESRAM was written in May 2018, there were two public statements and a letter from authorities in the Comarca stating that they reject the PLIV project. One is a “pronouncement to public opinion,” dated March 11, 2018, stating that the district of Kankintú in the Ño Kribo Region of Comarca Ngöbe-Buglé rejects the PLIV project due to a lack of written information; it was signed by five traditional authorities. This statement was accompanied by a letter dated March 21, 2018, and both were sent to IFC and ETESA. The other is Resolución 33, dated May 8, 2018, from the 5th General Assembly of the New Order of the Mama Tata Church, which states that the “majority of the population has categorically rejected [the PLIV project].”⁶⁴

The ESRAM does not reference these statements, and CAO has not seen any evidence that IFC provided any advice to the client regarding the concerns raised in these statements. This was a missed opportunity to address issues of information disclosure, including potential issues of access to project information (see PS1, para. 29 and FN26) and whether the delegates of the Regional Congress were communicating the results of the consultations to their constituents (see PS1, para. 27). The ESRAM does remark on criticisms raised by NGOs regarding the preliminary FPIC process. However, no details are provided, and no advice is included to engage with such criticisms.

Further, CAO notes that the ESRAM contains the first mention in IFC’s project documentation of the existence of Indigenous Peoples communities outside the Comarca, specifically in the Norte de Santa Fé region. However, no analysis is included regarding the application of PS7 and FPIC to these populations. The ESRAM also omits reference to the 2017–2018 correspondence (discussed above) from a community leader in the Norte de Santa Fé region asserting to be impacted by the project and raising concerns regarding their exclusion from the ongoing consultation processes.

2.2.3 AS implementation—procurement stage

Terms of Reference for E&S Studies (July 2018)

As part of the bidding documents, IFC’s E&S consultant developed a series of terms of reference (TOR) establishing the requirements for the E&S studies and plans for the PLIV project. The TOR that contain requirements for stakeholder analysis, consultations, FPIC, stakeholder engagement, and information disclosure are those for the ESIA and three of its annexes, namely: (1) a Compensation Plan for land acquisition, resettlement, and establishment of the right-of-way; (2) a Stakeholder Participation Plan; and (3) a Ngöbe-Buglé Community Development Plan. The full ESIA and associated plans are envisaged as being developed by the successful private sector bidder for the project. As a result, none of these documents had progressed past the TOR stage at the time of writing.

⁶⁴ Asamblea General de la Iglesia Orden Nueva de Mama Tata, 2018.

Each TOR is described and analyzed separately below.

Key points in TOR for ESIA

- The Stakeholder Participation Plan (SPP) required under the ESIA process should complement the consultation process already started with Comarca Ngöbe-Buglé.
- No requirements specified concerning information disclosure in Indigenous languages.
- No reference to engagement with Indigenous communities outside Comarca Ngöbe-Buglé.

Key points in TOR for Compensation Plan

- PS7 applies only to negotiations for right-of-way in Comarca Ngöbe-Buglé.
- Definition of an approach to collective benefits and compensation for impacts on Indigenous lands that are collective. This approach is noted to apply specifically for Comarca Ngöbe-Buglé, but not for Indigenous Peoples outside the Comarca.

Key points in TOR for Stakeholder Participation Plan (SPP)

- The SPP is applicable to all project-affected communities and stakeholders and should be in accordance with national law and PS1.
- FPIC requirements apply to Indigenous communities in Comarca Ngöbe-Buglé and a differentiated strategy for communication and consultation should be developed for the Comarca, following procedures and mechanisms defined during the preliminary FPIC process.
- No reference to Indigenous communities outside Comarca Ngöbe-Buglé.

Key points in TOR for Ngöbe-Buglé Community Development Plan (CDP)

- Refers exclusively to the Indigenous populations in Comarca Ngöbe-Buglé.
- Measures to prevent, mitigate, and manage E&S impacts on the Ngöbe-Buglé, as well as social development and compensation projects to be defined during the primary FPIC process to be conducted as part of the ESIA.
- Include a series of measures to implement the PLIV project in a culturally appropriate way for Indigenous Peoples.
- Negotiated sum agreed during the preliminary FPIC process to be included as a requirement in the bidding documents.

CAO analysis

- Aspects of TOR that are consistent with the PS:
 - a. Provisions for stakeholder mapping and analysis, as well as stakeholder engagement planning and information disclosure.
 - b. Aligning development projects as well as collective compensation and benefits with existing development priorities of Comarca Ngöbe-Buglé, in addition to including a negotiated sum for compensation in the bidding documents.
- Aspects of TOR that are inconsistent with the PS:
 - a. Application of PS7 and FPIC is exclusive to Indigenous communities in Comarca Ngöbe-Buglé.
 - b. Ngöbe, Buglé, and Campesinos living in the Norte de Santa Fé region outside Comarca Ngöbe-Buglé meet the criteria for Indigenous Peoples under PS7 but are not considered and their exclusion is not explained.
 - c. Winning bidder to conduct the primary FPIC process during the ESIA process using the same approach taken in the preliminary FPIC process (raising concerns regarding focus on consultations with state-recognized Comarca authorities, potential exclusion of traditional Indigenous authorities).

- d. Lack of specificity regarding gender inclusion in consultations with Indigenous Peoples at each stage of the project.
- e. No requirements to disclose information in local languages throughout the project cycle.

TOR for ESIA (July 2018)

The TOR for the ESIA outline the requirements and provide detailed guidance on the necessary components for an ESIA that is compliant with national law and the Performance Standards.

The TOR note that the ESIA process requires the development and implementation of a Stakeholder Participation Plan (SPP) that is in accordance with national law and PS1 requirements for informed consultation and participation. In addition, it notes that the SPP must be compatible and complementary to the consultation process already started with Comarca Ngöbe-Buglé by ETESA, following national law (Law 10/1997 and Law 37/2016) and PS7 requirements. It notes that any previous agreements made with the Comarca authorities and communities during the pre-bidding consultation process must be observed. The TOR lists the National Congress [sic., should refer to the General Congress] of Ngöbe-Buglé, Regional Congress of Ño Kribo, and Local Congresses of Kankintú and Kusapín as the Comarca authorities from which approval and/or consent would be needed. Upon conclusion of the ESIA, the TOR states that the General Congress should approve the project.

The TOR also notes that information about key actors, i.e., the stakeholder map, prepared during the pre-bidding stage, may be shared with the contractor. No requirements are specified in relation to information disclosure in Indigenous languages. The TOR for the ESIA does not include any reference to engagement with Indigenous Peoples outside the Comarca.

TOR for Compensation Plan for land acquisition, resettlement, and establishment of the right-of-way

The TOR for the Compensation Plan for land acquisition, resettlement, and establishment of the right-of-way (ROW) are based on Panamanian law (Law 6/1997) as well as PS5 requirements. The TOR note that no resettlement is foreseen.

The TOR describe the impacted land as follows: 35 percent of the preferred route falls within Comarca Ngöbe-Buglé; 31 percent are lands of the National Authority of Land Administration (ANATI); natural reserves comprise 24 percent; and there is a lack of information for the remaining 10 percent. The Norte de Santa Fé region, which is not identified by name, falls under the description as an area with forest cover consisting of primary and secondary growth and within protected areas.

The TOR state that PS5 is relevant to the entire project area concerning land acquisition and negotiation of compensation, and that PS7 applies to negotiations for ROW exclusively in the Comarca.

The TOR state that collective compensation is required for impacts to Indigenous lands that are collective, referencing specifically Comarca Ngöbe-Buglé. The TOR comment that the collective negotiation has started formally with ETESA and the Regional Congress of Ño Kribo, accompanied by the Vice Ministry of Indigenous Affairs. Consultation on and dissemination of the Compensation Plan must follow national law and international requirements, including PS7. The TOR include Comarca-specific measures, such as: collective compensation for collective lands, consultation with community leaders if roads surpass the ROW limits, and a requirement that the installation of camps and lodging be consulted and authorized by regional and local authorities. Given that Indigenous Peoples outside the Comarca are not mentioned, only individual compensation would be applicable to the Indigenous Peoples of the Norte de Santa Fé region.

TOR for Stakeholder Participation Plan

The TOR for the SPP outline the relevant national legal requirements and international norms, such as PS1, that frame the stakeholder consultation and communication activities for the PLIV project. The SPP is applicable to the entire project, noting that the proposed transmission line route crosses lands subject to traditional property and customary use by Indigenous communities.

In accordance with national law (Executive Decree 123) and PS1, the SPP aims to ensure adequate participation of all project-affected communities and stakeholders. FPIC is referenced in relation to the Indigenous communities in Comarca Ngöbe-Buglé, but not Indigenous communities outside the Comarca. The TOR provide for the SPP to include differentiated consultation processes for Comarca Ngöbe-Buglé, based on the communication process defined during the preliminary FPIC engagement. Similarly, a separate grievance mechanism is required for the Comarca, for which procedures are to be established and approved by the Regional Congress. Specific reference is made to national law (Law 10/1997, Law 37/2016, and Law 41/1998), along with PS7.

Among the list of 20 categories of project-affected stakeholders are authorities and representative entities of Comarca Ngöbe-Buglé, as well as academics and specialists in the Comarca. However, there is no reference to Indigenous populations outside the Comarca.

For the construction phase, the TOR include requirements to take into account gender considerations when considering groups to consult. They also note that dissemination of information regarding the consultations and grievance mechanism must be conducted in a language that is adequate and accessible to the population.

TOR for Ngöbe-Buglé Community Development Plan

The TOR for the Ngöbe-Buglé Community Development Plan (CDP) is framed as equivalent to an Indigenous Peoples Plan⁶⁵ and is based on national law (Law 10/1997 and Law 37/2016), as well as PS7 and its Guidance Notes (PS7, GN, Annex A “Indigenous Peoples Plan”). In the TOR, the Ngöbe-Buglé community refers exclusively to the Indigenous Peoples populations in Comarca Ngöbe-Buglé.

The TOR foresee the CDP as a “living document” that will evolve in accordance with agreements made through the ongoing process with communities in and authorities of Comarca Ngöbe-Buglé. The TOR state that the CDP will consolidate all the measures of prevention, mitigation, and management foreseen for Comarca Ngöbe-Buglé, as well as the social development and compensation projects in the Comarca, including compensation to the community for the use of the territory as established during the primary FPIC process.

The TOR require that the development and social compensation projects related to the PLIV project fit within the Strategic Plan for the Integral Development of Comarca Ngöbe-Buglé 2014–2029 (*Plan Estratégico de Desarrollo Integral de la Comarca Ngöbe-Buglé - PEDC*), which was an existing plan that was agreed between the GoP and the leadership of Comarca Ngöbe-Buglé, and coordinated by the General Congress. Ultimately, the authorities of Comarca Ngöbe-Buglé, in conjunction with the GoP and ETESA, will select the community projects to be implemented.

The TOR also include a series of measures to implement the PLIV project in a culturally appropriate way for Indigenous Peoples. These include, for example:

⁶⁵ An Indigenous Peoples Plan (IPP) outlines time-bound actions to minimize and/or compensate for adverse impacts in a culturally appropriate manner, and is developed with the informed consultation and participation of FPIC of the affected communities of Indigenous Peoples (PS7, para. 9, and PS7, GN13).

- Requirements for worker accommodation to be in worker camps in locations agreed with authorities of Comarca Ngöbe-Buglé;
- The need for a project code of conduct applicable inside Comarca Ngöbe-Buglé;
- Procedures to manage complaints, based on conflict resolution procedures of Comarca Ngöbe-Buglé, in relation to the implementation of development projects in Comarca Ngöbe-Buglé; and
- A participatory monitoring mechanism for E&S impacts inside Comarca Ngöbe-Buglé during project construction and operation.

As explained by IFC, an agreed sum for community development activities and compensation for the Indigenous communities of the Comarca was included as a requirement in the bidding documents, thereby significantly reducing the risk that the contractor would dilute benefits to the Comarca during PLIV project implementation. This sum was negotiated as part of the preliminary FPIC process.

CAO analysis: In the TOR for the ESIA and associated plans, IFC provided advice consistent with the PS with regard to important aspects of the development of a Stakeholder Participation Plan and the Ngöbe-Buglé Community Development Plan, as part of the ESIA process.

The provisions in the TOR for stakeholder mapping and analysis, as well as stakeholder engagement planning and information disclosure, are generally aligned with the PS1 requirements for informed consultation and participation (PS1, paras. 25–31). The TOR also note that the SPP must be compatible with and complementary to the consultation process already started with Comarca Ngöbe-Buglé, observing previous agreements made with the Comarca authorities in relation to the transmission line’s alignment, definition of an approach to collective benefits, and procedures for acquisition of right-of-way in the Comarca. Specific requirements for planning of the second stage of the FPIC process are limited in the TOR, because the shape of the future consultation processes with the Comarca were to be established through the preliminary FPIC process. This can be considered good practice.

Aligning development projects as well as collective compensation and benefits with existing development priorities of the Comarca, and including a negotiated sum for these processes in the bidding documents, can be considered good practice and consistent with the PS requirement for “culturally appropriate and sustainable development benefits” (PS7, para. 18).

While providing important guidance to the client on the development of the PLIV project consistent with the PS, the following elements of the TOR were inconsistent with IFC’s PS requirements for stakeholder engagement in projects affecting Indigenous Peoples.

CAO notes that the TOR direct the contractor to conduct the primary FPIC process during the ESIA process using the same approach taken during the preliminary FPIC process. The preliminary FPIC process was characterized by a focus on the delegates’ Regional Congress of Ño Kribo, with limited inclusion of the General Congress. This is inconsistent with the requirement for inclusive engagement with Indigenous Peoples to be conducted “in a culturally appropriate manner...[involving] Indigenous Peoples’ representative bodies and organizations...as well as members of the Affected Communities of Indigenous Peoples” (PS7, para. 10; also PS1, GN95; PS1, para. 30). A continued focus on consultations with state-recognized Comarca authorities risks excluding traditional Indigenous authorities (such as the traditional congresses and caciques at the different levels), both at the higher levels as well as sub-regionally. Traditional authorities hold high levels of legitimacy among the Comarca population. Further, the approach to consultation provided for in the TOR does not adequately reflect traditional decision-making processes that take place at the community level (see PS7, GN16). Prior advice from IFC regarding the importance of bottom-up consultations with the affected Indigenous communities is not well-reflected in the TOR.

While the TOR contain reference to the participation of women in consultations, no details are provided on addressing specific challenges of achieving gender inclusion in consultations with Indigenous Peoples at each stage of the project. Thus, CAO finds that IFC's advice regarding inclusive engagement is not fully consistent with the PS1 requirement for consultation to "(i) capture both men's and women's views, if necessary through separate forums or engagements, and (ii) reflect men's and women's different concerns and priorities about impacts, mitigation mechanisms, and benefits, where appropriate" (para. 31).

The TOR include detailed and appropriate instructions for information disclosure, including during the preparation of the ESIA, that are generally consistent with PS1. However, the TOR do not specify the need to disclose information in local languages throughout the project cycle. In this respect the TOR are not consistent with PS1 requirements for information disclosure, including access to relevant documents (PS1, para. 29 and FN26) in "using Indigenous languages where appropriate" (PS7, GN19; also PS1, para. 30, and PS7, para. 10).

Thus, CAO finds that IFC's advice regarding the engagement process for the primary FPIC process with Comarca Ngöbe-Buglé was not fully consistent with the PS1 (para. 30) and PS7 (para. 10) requirements for inclusive and culturally appropriate consultation.

IFC's advice recognizes in general terms that the project will need FPIC following PS7, because it passes through lands belonging to the Ngöbe-Buglé Indigenous Peoples. However, IFC's advice on the application of PS7 has focused exclusively on the Comarca, the territory of the Ngöbe and Buglé as formally recognized by the Government of Panama. The Ngöbe, Buglé, and Campesinos living in the Norte de Santa Fé region outside the Comarca also meet the criteria for Indigenous Peoples under PS7. However, IFC has not provided advice to ETESA on the application of PS7 to these communities, and in particular, how these communities should be included in the consultation, FPIC, benefit-sharing processes, and differentiated implementation measures that are envisaged as part of the project. This is inconsistent with PS7, which requires the application of PS7 to all Indigenous communities affected by the project (PS7, para. 6), and in particular the application of FPIC when a project impacts lands traditionally owned by, or under the customary use of, Indigenous Peoples and adverse impacts can be expected (PS7, paras. 11, 13, and 14). These provisions apply regardless of whether a territorial claim of an Indigenous group is formally recognized by government (PS7, para. 13). Further, this is inconsistent with the requirement to "minimize, restore, and/or compensate for these impacts in a culturally appropriate manner" (PS7, para. 9).

3 Summary of Findings

This investigation identifies a number of positive contributions of IFC's Advisory Services project in terms of moving the PLIV project towards alignment with the requirements of PS1 and PS7. However, it also concludes that there were important respects in which IFC's advice was not consistent with the Performance Standards as relevant to the issues raised by the complainants.

3.1 Positive Contributions of the AS Project

Following the 2012 Sustainability Policy, IFC was required to provide ETESA with advice "consistent with the Performance Standards" and to work with ETESA to "achieve positive improvements in environmental and social performance...[and]...move towards greater consistency with the Performance Standards" (para. 39). IFC provided this standard of advice in relation to some important aspects of the PLIV project.

1. The legal agreements between IFC and ETESA included a commitment for ETESA to align the design of the PLIV project with IFC's E&S requirements.

The initial Financial Advisory Services Agreement (FASA) agreed between IFC and ETESA in September 2017 properly reflects IFC's E&S standards, and is compliant with IFC requirements for AS projects (Sustainability Policy, para. 4). The 2021 FASA reflects the client's ongoing commitment to applying the PS in the design of the PLIV project. The 2021 FASA also reflects IFC's commitment to address issues raised by the CAO complaint by: (a) reviewing and validating the ESIA for compliance with IFC and national legal standards, and (b) supporting the client to develop a stakeholder engagement plan for Indigenous communities in and outside the Comarca.

2. IFC encouraged ETESA to commence the FPIC process early in the project development process, which ETESA did.

Prior to commencing the AS project, IFC appropriately documented an analysis of project E&S risks, along with specific measures to align project development with the Performance Standards. This included acknowledgement that the project would need FPIC from the Ngöbe-Buglé Indigenous Peoples (consistent with PS7).

In this context, IFC encouraged ETESA to start the FPIC process early in the project development process. IFC also worked with ETESA to achieve improvements in the preliminary FPIC process, which ETESA started with authorities of Comarca Ngöbe-Buglé in December 2017. Positive aspects of the preliminary FPIC process included: (a) the initiation of consultations early in the PLIV project life cycle; (b) the iterative character of the consultations; (c) early engagement on the substance of key project characteristics, such as project alignment, E&S impacts, and compensation measures; (d) negotiation of collective benefits for the Comarca; (e) inclusiveness of the consultation process that engaged the plenary of the Regional Congress (in contrast to only the directive council in past consultations); and (f) participation of government decision makers in the consultations.

While the objective of the preliminary FPIC process was to achieve consent to start detailed project studies, including the ESIA, the issues actually covered during the preliminary FPIC process were more substantive in nature. ETESA and the Comarca representatives reached agreements on issues such as: (a) a narrowed corridor for the transmission line's alignment; (b) the definition of an approach to collective benefits sharing, including a negotiated fixed sum in the bidding documents; and (c) procedures for acquisition of the project right-of-way. As a result, the preliminary FPIC process formed an important part of the overall stakeholder engagement process for the PLIV project.

3. IFC developed TOR for the project ESIA and associated plans that were generally aligned with Performance Standards requirements for stakeholder engagement and benefit sharing (with some important exceptions as discussed below).

IFC also provided advice to ETESA in relation to the primary FPIC process for the PLIV project in the form of terms of reference (TOR) for the ESIA and associated plans. In these TOR, IFC provided advice partially consistent with the PS with regard to the development of a Stakeholder Participation Plan (SPP), a Ngöbe-Buglé Community Development Plan, and a Compensation Plan for land acquisition, resettlement, and establishment of the right-of-way. The provisions in the TOR for stakeholder mapping and analysis, as well as stakeholder engagement planning and information disclosure, are generally consistent with the PS1 requirements for informed consultation and participation (albeit with some important exceptions as discussed below) (PS1, paras. 25–31). Aligning development projects as well as collective compensation and benefits with existing development priorities of the Comarca was consistent with PS7 (para. 18), and including a negotiated sum for such projects in the bidding documents, can be considered good international industry practice.

3.2 Non-compliance Findings

With respect to the issues raised in the complaint, there are two key respects in which IFC's advice to ETESA did not meet the standard of being "consistent with the Performance Standards," (para. 4) as required by the Sustainability Policy. These relate to: (1) a lack of relevant advice in relation to the need for stakeholder analysis and engagement planning to inform the design of the preliminary FPIC process, which ETESA commenced in December 2017; and (2) provision of advice that was only partially consistent with the Performance Standards in relation to the design of the primary FPIC process. Each of these non-compliance findings is elaborated below.

1. IFC did not provide advice consistent with the Performance Standards in relation to the need for stakeholder analysis and engagement planning before ETESA started the preliminary FPIC process.

IFC's internal Advisory Services project approval documentation noted that ETESA would need to develop a stakeholder engagement plan (SEP) and initiate stakeholder engagement as soon as possible during the project development phase for the PLIV project. However, IFC did not follow through on this by advising ETESA on the need for a SEP and associated stakeholder analysis as part of the preparation for the preliminary FPIC process.

At the time ETESA initiated the preliminary FPIC process in December 2017, IFC's advice was documented in its Inception Report for the Advisory Services project, which was delivered the same month. The Inception Report advised that the preliminary FPIC process could proceed, without recommending that ETESA first conduct a stakeholder analysis or develop a stakeholder engagement plan. The Inception Report recommended a SEP only for consultations as part of the project ESIA, which would be prepared post bidding. IFC's advice to proceed with the preliminary FPIC process and to develop a stakeholder engagement plan only for the ESIA consultations was contrary to the PS1 requirement for the client to "develop and implement a Stakeholder Engagement Plan that is scaled to the project risks and impacts and development stage" (para. 27). As described in IFC's Good Practice Handbook on Stakeholder Engagement (2007), stakeholder engagement is an iterative process that should involve stakeholder analysis and the preparation of a formal stakeholder engagement plan in advance of consultations for more complex projects. This type of analysis and engagement planning was particularly important given known contextual risks and challenges associated with consultations with Indigenous groups in the project area.

Absent appropriate stakeholder analysis and planning, the preliminary FPIC process proceeded in a manner that was not fully aligned with IFC E&S requirements under PS1 and PS7, as follows:

- a. The Indigenous Peoples of the Norte de Santa Fé region and other Indigenous communities outside the Comarca in the Annex Areas, although located in the project's area of influence and potentially affected by the project, were not included in the preliminary FPIC process. These communities do not live in a government-recognized Indigenous territory (Comarca) but meet the criteria for being identified as Indigenous Peoples under PS7 (para. 5). IFC's lack of advice in relation to these groups was inconsistent with PS7, which requires the application of PS7 to all Indigenous communities affected by the project (para. 6). This includes requirements for FPIC when a project has potential impacts on lands traditionally owned by, or under the customary use of, Indigenous Peoples (PS7, paras. 11, 13, and 14), regardless of whether a territorial claim of an Indigenous group is formally recognized by government (PS7, para. 13).
- b. The preliminary FPIC consultations were conducted with government-recognized representatives of Comarca Ngöbe-Buglé (namely, the delegates' Regional Congress of Ño Kribo). This led to the exclusion of affected communities and traditional Indigenous authorities (such as those of the mass traditional congresses and caciques), who are documented as holding high levels of legitimacy and influence in the Comarca. IFC's lack of advice on the need to consult beyond the formal representatives of the Comarca was inconsistent with PS requirements to "verify that [community representatives consulted] do in fact represent the view of the Affected Communities and that they can be relied upon to faithfully communicate the results of consultations to their constituents" (PS1, para. 27; see also PS7, GN36 on the need to include both formal and traditional leaders in the consultation processes).
- c. There was a lack of attention to ensuring that the preliminary FPIC process was conducted in a culturally appropriate manner, including disclosure of information and relevant documents in local Indigenous languages. IFC's lack of advice in relation to this issue was inconsistent with the requirement that engagement with Indigenous Peoples be conducted "in a culturally appropriate manner" (PS7, para. 10), and "in a culturally appropriate local language(s)" (PS1, para. 30).
- d. There was limited involvement of Indigenous women in the preliminary FPIC process, with women representing only two of the 19 Comarca delegates appointed to the negotiation commissions. IFC did not provide any advice on the need to conduct the preliminary FPIC consultations in a manner that was gender inclusive. IFC's lack of advice on this issue was inconsistent with the requirement that consultations be held in a manner that captured women's views and reflected women's different concerns and priorities, as required by PS1 (see para. 31).

IFC's lack of advice in relation to the need for stakeholder analysis and engagement planning before the start of the FPIC process is of particular concern given the scope of these "preliminary" consultations, which covered substantive issues such as project location and benefit sharing that would normally be part of the ESIA process.

2. IFC's advice in relation to the primary FPIC process, as contained in the terms of reference for the PLIV project ESIA prepared by IFC, was not fully consistent with Performance Standards requirements.

The terms of reference (TOR) for the PLIV project ESIA were a key output of IFC's Advisory Services project. The TOR for the ESIA included the design of the *primary* FPIC process for the PLIV project, as well as TOR for a stakeholder participation plan, an Indigenous Peoples community development plan, and a plan for project-related land acquisition. These TOR were produced by IFC's consultant and submitted to ETESA as part of the bidding package for the

PLIV project in July 2018, seven months after ETESA commenced the preliminary FPIC process (see Figure 2).

As noted above, elements of the TOR that relate to consultation and benefit sharing are partially aligned with Performance Standards requirements. However, there are important aspects of these TOR, as developed by IFC, that are inconsistent with PS1 and PS7 requirements for inclusive and culturally appropriate consultation with Indigenous Peoples. The shortcomings in these TOR replicated key gaps in the preliminary FPIC process as outlined above, in particular: (a) the lack of reference to the Indigenous Peoples outside the Comarca, in particular those of the Norte de Santa Fé region and in the Annex Areas, in the design of the primary FPIC process; (b) a continued focus on consultations with government-recognized Comarca authorities, to the exclusion of traditional authorities and other community representatives, such as those of the mass traditional congresses and the caciques; (c) a lack of recognition of the importance of bottom-up consultations to reflect decision-making processes at the community level; (d) insufficient provision for the involvement of women in the consultation process; and (e) a lack of specificity on the need to disclose information in local Indigenous languages throughout the project cycle.

3.3 Related Harm

A CAO compliance investigation is expected to include findings regarding any harm that may be related to IFC non-compliance. Harm is defined as “[a]ny material adverse environmental and social effect on people or the environment resulting directly or indirectly from a Project or Sub-Project. Harm may be actual or reasonably likely to occur in the future” (CAO Policy, p. iv).

In this case, CAO finds that IFC non-compliance with the Sustainability Policy, as outlined above, has contributed to harm to project-affected people, including the complainants. Specifically, shortcomings in IFC’s advice have contributed to the following outcomes, contrary to the requirements of PS1 and PS7 to date:

- a. The exclusion of the Indigenous Peoples of the Norte de Santa Fé region and the Annex Areas from the FPIC process;
- b. The exclusion of traditional authorities in the Comarca from the consultation process; and
- c. A lack of culturally appropriate and gender-inclusive consultations, including lack of access to project information in Indigenous languages.

Considering the gaps in IFC’s advice and ETESA’s conduct of the FPIC process to date, the PLIV project has not met, nor is it on track to meet, IFC’s requirements for engagement with Indigenous Peoples, including requirements for consent of impacted Indigenous communities, mitigation of E&S impacts, and benefit sharing. As a result, the Indigenous Peoples affected by the project are vulnerable to the potential adverse impacts that PS7 is designed to avoid, including “loss of identity, culture, and natural resource-based livelihoods” (para. 1). Effective consultation will be important for mitigating these types of impacts, as well as managing risks of project-related conflict.

3.4 Underlying Causes

CAO’s investigation has identified the following underlying causes for the deficiencies in IFC’s advice to the client in relation to Indigenous Peoples issues.

The non-compliances identified in IFC’s advice emerge significantly from IFC not advising the client to: (a) undertake a stakeholder analysis and engagement planning at the onset of its engagement with the client, prior to ETESA’s commencement of the FPIC process; and (b) course

correct by addressing the oversights at the time of developing the TOR for the ESIA in order to put the FPIC process on track to meet PS7 requirements.

An underlying cause for these non-compliances was the focus of the IFC project team on preparing the bidding documents for the PLIV project (including the TOR for the ESIA) as the key deliverable of its Advisory Services project, while neglecting to monitor actual developments on the ground. This focus led IFC to not engage sufficiently with the client's initial FPIC consultations that were ongoing while IFC was working on the bidding documents. It also resulted in IFC's failure to advise on the need to align these consultations with the PS requirements.

Further contributing to the shortcomings in IFC's advice was an acceptance of ETESA's assurances that the initial FPIC consultations would proceed in a manner that was consistent with national law, without analysis of gaps between the national legal framework and the requirements of the Performance Standards. This contributed both to the exclusion of the Indigenous groups outside the government-recognized territory of the Comarca from the FPIC process and the focus, within the Comarca, on consultations with government-recognized representatives.

4 Remedial and Preventative Recommendations for IFC's Consideration in the Development of Its Management Action Plan

The CAO Policy provides that:

Where CAO finds non-compliance and related Harm, CAO **makes recommendations for IFC/MIGA to consider when developing a Management Action Plan (MAP)**. Recommendations may relate to the remediation of Project- ... level non-compliance and related Harm, and/or steps needed to prevent future non-compliance, as relevant in the circumstances (para. 113, bold highlight not in original).

CAO's recommendations, as outlined below, serve to achieve consistency of IFC's advice with the Performance Standards and enhance the socio-cultural and environmental viability of the project. These recommendations consider IFC's ongoing role as ETESA's transaction advisor for the PLIV project, particularly in relation to the ESIA, and associated stakeholder engagement and consultation processes. The recommendations also take into account ETESA's commitment to align the PLIV project with the Performance Standards as set out in the legal agreement. As of November 2021, ETESA has yet to complete the bidding process for the PLIV project, meaning that IFC can still revise the TOR for the ESIA and associated plans in collaboration with ETESA.

At the project level, CAO makes the following recommendations to IFC:

1. Advise ETESA on corrective actions needed to *address shortcomings in the FPIC consultations* conducted to date, considering the requirements of the Performance Standards. Key areas requiring attention include:
 - a. Initiating consultations to obtain the Free, Prior, and Informed Consent (FPIC) of impacted Indigenous communities outside the Comarca, in particular those of the Norte de Santa Fé region and the Annex Areas in Bocas del Toro province, as relevant;
 - b. Stakeholder analysis, including identification of potentially affected Indigenous communities (both in and outside Comarca Ngöbe-Buglé) in the project's area of influence, considering potential impacts on land as well as natural and cultural resources under traditional ownership or customary use;
 - c. Development of a stakeholder engagement plan that reflects the results of the stakeholder analysis and takes into account both formal and customary governance structures and decision-making processes, as well as measures for inclusive and culturally appropriate consultation processes; and
 - d. Revisiting the agreements already made with Comarca representatives during the preliminary FPIC process as necessary, based on the outcomes of the consultation process outlined in (c) above.
2. Revise the TOR for the ESIA and the associated stakeholder engagement, community development, and compensation plans prepared by IFC to ensure full consistency with the requirements for FPIC under national law, as well as for PS1 and PS7, considering the concerns raised by the complainants as identified in this report.
3. Provide ongoing advice to ETESA during the ESIA, including stakeholder engagement and implementation of the primary FPIC process, consistent with national law as well as PS1 and PS7.

To address the underlying causes of the non-compliance findings in this investigation, CAO recommends that IFC review its procedures and practices as applied to PPP Advisory Services:

4. Provide guidance to staff on the scope of IFC's role when a client implements project development activities with E&S risks or impacts (such as FPIC or land acquisition) during the Advisory Services engagement. This guidance should include monitoring and reviewing of ongoing client project development activities for consistency with the Performance Standards, to provide timely and accurate advice to the client on aligning such project development activities with the Performance Standards.
5. Incorporate the need for contextual risk analysis for Advisory Services projects in IFC's E&S Review Procedures. IFC currently has guidance on the need for contextual risk analysis in draft form; however, it would be advantageous to formalize this for use in future Advisory Services projects.

5 Conclusion

This CAO compliance investigation has documented areas in which IFC's advice to ETESA in relation to the PLIV project was consistent with the requirements of the Performance Standards, and other areas in which IFC's advice fell short of this standard. CAO concludes that IFC's failure to provide advice consistent with the Performance Standards has the potential for adverse impacts on the ability of Indigenous Peoples to protect their territory and customary lands, as well as the related natural and cultural resources, from possible encroachment and loss. Of particular concern, CAO notes the exclusion of Indigenous communities from the Norte de Santa Fé region and those from the Annex Areas in the Bocas del Toro province from the FPIC process, as well as the conduct of consultations in the Comarca without adequate inclusion of traditional authorities.

This report includes recommendations to IFC on how to address CAO's non-compliance findings through the provision of additional corrective advice to ETESA.

This investigation also highlights challenges in IFC Advisory Services projects, where project development activities with material E&S risks and impacts are carried out by the client during the period of IFC's Advisory Services engagement. In this context, CAO recommends updates at the level of IFC procedures and practices that could address the underlying causes of the non-compliances identified.

In response to this investigation, IFC will prepare a Management Action Plan to be approved by its Board following consultation with the complainants. CAO will monitor effective implementation of the Management Action Plan (CAO Policy, para. 140).

Annex A: CAO Non-Compliance Findings

CAO Non-Compliance Findings

1. IFC did not provide advice consistent with the Performance Standards in relation to the need for stakeholder analysis and engagement planning before ETESA started the preliminary FPIC process.
2. IFC's advice in relation to the primary FPIC process, as contained in the terms of reference for the PLIV project ESIA prepared by IFC, was not fully consistent with Performance Standards requirements.

Annex B: CAO Recommendations

| Project-level Recommendations |
|---|
| <ol style="list-style-type: none"> 1. Advise ETESA on corrective actions needed to address shortcomings in the FPIC consultations conducted to date, considering the requirements of the Performance Standards. Key areas requiring attention include: <ol style="list-style-type: none"> a. Initiating consultations to obtain the Free, Prior, and Informed Consent (FPIC) of impacted Indigenous communities outside the Comarca, in particular those of the Norte de Santa Fé region and the Annex Areas in Bocas del Toro province, as relevant; b. Stakeholder analysis, including identification of potentially affected Indigenous communities (both in and outside Comarca Ngöbe-Buglé) in the project’s area of influence, considering potential impacts on land as well as natural and cultural resources under traditional ownership or customary use; c. Development of a stakeholder engagement plan that reflects the results of the stakeholder analysis and takes into account both formal and customary governance structures and decision-making processes, as well as measures for inclusive and culturally appropriate consultation processes; and d. Revisiting the agreements already made with Comarca representatives during the preliminary FPIC process as necessary, based on the outcomes of the consultation process outlined in (c) above. |
| <ol style="list-style-type: none"> 2. Revise the TOR for the ESIA and the associated stakeholder engagement, community development, and compensation plans prepared by IFC to ensure full consistency with the requirements for FPIC under national law, as well as for PS1 and PS7, considering the concerns raised by the complainants as identified in this report. |
| <ol style="list-style-type: none"> 3. Provide ongoing advice to ETESA during the ESIA, including stakeholder engagement and implementation of the primary FPIC process, consistent with national law as well as PS1 and PS7. |
| Systems-level Recommendations |
| <ol style="list-style-type: none"> 4. Provide guidance to staff on the scope of IFC’s role when a client implements project development activities with E&S risks or impacts (such as FPIC or land acquisition) during the Advisory Services engagement. This guidance should include monitoring and reviewing of ongoing client project development activities for consistency with the Performance Standards to provide timely and accurate advice to the client on aligning such project development activities with the Performance Standards. |
| <ol style="list-style-type: none"> 5. Incorporate the need for contextual risk analysis for Advisory Services projects in IFC’s E&S Review Procedures. IFC currently has guidance on the need for contextual risk analysis in draft form; however, it would be advantageous to formalize this for use in future Advisory Services projects. |

Annex C: Expert Consultant

This report was prepared with technical inputs from an expert consultant (until October 2020), Dr. Michael Kent. Dr. Kent is a social anthropologist who has conducted extensive research with Indigenous peoples and Afro-descendent social movements in Latin America. He has managed social safeguards and risk in high-complexity projects, and associated grievances, at the Inter-American Development Bank and the World Bank. He has expertise in issues related to Indigenous Peoples, resettlement, consultations, and social impact assessments. He holds a PhD and post-doctorate in Social Anthropology from the University of Manchester in the United Kingdom.

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