



CAO COMPLIANCE

CAO Investigation of IFC

November 3, 2017

**CAO Investigation of IFC/MIGA Social and Environmental Performance in relation to:
Bujagali Energy Ltd and World Power Holdings, Uganda**

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

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Executive Summary

The Bujagali Hydropower Project ("the project") is a 250 MW run-of-the-river hydroelectric generation plant located at Dumbbell Island on the Nile River in the Republic of Uganda. The project is owned and operated by Bujagali Energy Limited (BEL or "the client"). The project was built between 2007 and 2012 by an engineering, procurement and construction (EPC) contractor, Salini Costruttori ("the EPC contractor"), and its subcontractor, Boschcon Civil and Electrical Construction Limited ("the subcontractor"). The construction of the dam and associated facilities was a large and complex undertaking involving a workforce of almost 3,000 during periods of peak activity.

This compliance investigation was initiated in response to two complaints about labor and working conditions on the Bujagali construction site. In March 2011, CAO received the first complaint (Bujagali-04) from a group of the EPC contractor's former employees who claim to have been seriously injured during project construction. CAO received the second complaint (Bujagali-06) from a group representing 360 workers claiming to have been underpaid and otherwise mistreated while employed by the subcontractor.

The parties to the Bujagali-04 case engaged in a CAO-facilitated dispute resolution process. Of the 93 complaints from workers who claimed to have been injured on the work site, 55 were transferred to Uganda's Medical Arbitration Board, 19 were resolved through CAO mediation, 9 were settled between the EPC contractor and the former employees, and 3 went to court. The remaining complaints were transferred to the CAO compliance function for appraisal. The parties to the Bujagali-06 case also agreed to participate in a CAO-facilitated dispute resolution process, but were unable to reach a resolution. As a result, this complaint was also referred to the CAO compliance function. CAO's compliance appraisal of the Bujagali-04 and Bujagali-06 complaints, published in April 2015, concluded that the complaints raised issues that required an investigation of IFC's compliance with its environmental and social (E&S) requirements.

IFC does not finance projects that cannot be expected to meet its E&S requirements, known as the Performance Standards. As detailed in this investigation report, CAO has made several non-compliance findings in relation to IFC's application of the Performance Standards to the Bujagali Hydropower Project that are relevant to the issues raised in the complaints.

Making these findings, CAO notes certain limitations to the investigation methodology based on the information available. This investigation was undertaken after construction of the project was complete. As a result, field verification of the safety situation on the construction site was not possible. Access to primary OSH documentation from the EPC contractor was also limited.

In these circumstances, and considering that CAO's compliance mandate is focused on IFC's performance, CAO limits its findings to whether IFC complied with its requirements in relation to the appraisal and supervision of the project as relates to OSH and labor issues. CAO does not make findings in relation to merits of the specific allegations made by the complainants regarding the actions of the contractor or the subcontractor.

IFC's Pre-Investment Review of the Project

Prior to investing in a project IFC conducts a review of project E&S risks and impacts. Early IFC screening of the project identified occupational safety and health (OSH) as an area of risk. To address these risks, the project's social and environmental assessment (SEA) required the client to develop labor-related action plans that met the requirements of IFC's Performance Standard 2:

Labor and Working Conditions (PS2). A key requirement of PS2 in relation to OSH issues is that the client “will provide workers with a safe and healthy working environment” in accordance with good international industry practice. IFC also required that the client extend its labor and OSH standards to employees of the EPC contractor and its subcontractors.

While IFC’s scoping of OSH and labor issues for the Bujagali project was positive, CAO finds that IFC did not possess or have access to OSH and labor competence that was sufficient to evaluate the capacity of the client or the EPC contractor to apply the provisions of PS2 to a project of this scale and technical complexity. IFC did not ensure that the labor-related plans of the client and the EPC contractor received appropriate technical review, and an initial OSH audit as required by IFC’s OSH Guidelines was not conducted. IFC’s review also lacked attention to the country context in relation to labor and OSH risks—particularly in relation to the regulatory capacity of national agencies.

In this context, CAO concludes that IFC’s pre-investment review of the project was not commensurate to risk. As a result, IFC did not have assurance the OSH management systems put in place for construction of the project were consistent with good international industry practice as required by PS2.

IFC’s Supervision of the Project

During project implementation IFC is required to monitor the client’s compliance with its Performance Standards and other agreed E&S requirements. If a client fails to comply with its E&S commitments, IFC is committed to working with the client to bring it back into compliance. If the client fails to reestablish compliance, IFC investment agreements provide for legal remedies which should be used as appropriate.

IFC monitored the Bujagali project on the basis of a range of information. This included reviewing the client’s quarterly E&S reports, the EPC Contractor’s monthly construction monitoring reports, reports of the external panel of environmental and social experts, reports from an independent engineer, as well as participation in joint lenders’ site supervision visits. However, none of these reporting structures included specialist OSH or labor expertise.

While noting work related fatalities in 2007 and 2008, IFC supervision reports from the commencement of construction in 2007 to 2009 are characterized by a confidence that the client’s OSH systems were functioning well and that worker health and safety followed good industry practice. Two work related fatalities and a sharp increase in the injury rate on site in 2010 led to increased focus on OSH issues in IFC supervision documentation. From 2011 onwards, however, OSH issues were again less of a concern as construction wound down and reported injury rates fell.

In relation to project supervision, CAO notes that annual audits of project OSH performance as mandated by IFC’s OSH Guidelines were not required. In the absence of regular audits, IFC was over reliant on the client’s self-reporting and impressions from site visits to determine compliance. Issues around the client’s capacity to manage OSH risks on the construction site became particularly important in 2009 when the lenders advised that the EPC contractor should immediately increase equipment and personnel to compensate for earlier delays in construction. While the increase in personnel and equipment had clear OSH implications, CAO finds no indication that IFC considered whether the project had in place appropriate measure to assess and manage this added risk to workers.

CAO also finds that IFC lacked assurance that the client was investigating or reviewing the causes of workplace accidents. Four work related fatalities were reported during construction. Lost time injuries as reported by the EPC contractor, numbered 461. However, in none of these cases did IFC document a review of an accident investigation report, a root cause analysis, or a report on measures necessary to prevent reoccurrence as required by the IFC Guidelines for Occupational Health and Safety. Reporting of near misses as required by the IFC Guidelines was absent. In this context, CAO finds that IFC lacked assurance that the causes of work related injuries were being analyzed and mitigated appropriately. Further, CAO finds that IFC lacked assurance that the project was meeting its requirements to provide workers with a safe and healthy working environment in accordance with good international industry practice.

Key grievances of the Bujagali-04 complainants relate to the process for attaining compensation for work related injuries. They allege that the compensation paid was insufficient and that the process for achieving compensation took too long. In relation to these complaints, CAO finds that IFC did not consider whether national systems for the provision of workers' compensation could be relied upon to provide injured workers with access to appropriate compensation as required under the Sustainability Framework. More specifically, CAO notes that IFC did not consider the levels of compensation provided for under Ugandan law, or the capacity of the national institutions for assessing compensation claims in a timely manner. Uganda's ratification of the International Labor Organization (ILO) Workmen's Compensation (Accidents) Convention, 1925 (No. 17) was relevant in this context but not considered. Similarly, relevant but not considered was ILO commentary (from the period 1966 to 2014) that consistently identified discrepancies between Uganda's workers' compensation law, which limits the amount of compensation payable to a sum equal to 60 months' earnings (in the case of injury leading to death or total permanent incapacity), and the Convention, which provides for payment of benefits in the form of periodical payments without time limits in case of death or permanent incapacity. In this context, CAO is concerned that the workers who died or sustained permanent incapacity due to their work on the project were not provided with appropriate compensation.

The Bujagali-06 complainants were employed by the subcontractor to perform construction related tasks under the EPC contract. This complaint raises a range of concerns about labor issues, including unpaid wages and benefits dating back to 2007. The Bujagali-06 complainants also raise concerns regarding workplace accidents, non-payment of workers' compensation, and the use of racially-discriminatory language by management of the subcontractor. In relation to these complaints, CAO notes that, IFC had on paper commitments that PS2 requirements would be extended to all workers engaged in the construction of the project including employees of the EPC contractor and its subcontractors. However, IFC lacked assurance that these requirements were being implemented at the level of the sub-contractor. IFC became aware of the Bujagali-06 complaints in April 2009 when the complainants wrote a letter outlining their concerns to the World Bank Group however, IFC considered that its labor requirements did not apply to these workers. As a result, the adverse impacts claimed by the employees of the subcontractor (unpaid wages and uncompensated injuries) were not considered during supervision.

Given the above findings of non-compliance, CAO will keep this investigation open and monitor IFC's response. CAO expects to publish its first monitoring report no later than 12 months from the date of publication of this report.

About CAO

CAO's mission is to serve as a fair, trusted, and effective independent recourse mechanism and to improve the environmental and social accountability of the private sector lending and insurance members of the World Bank Group, the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Agency (MIGA).

CAO (Office of the Compliance Advisor Ombudsman) is an independent post that reports directly to the President of the World Bank Group. CAO reviews complaints from communities affected by development projects undertaken by IFC and MIGA.

CAO's compliance function oversees investigations of the environmental and social performance of IFC and MIGA, particularly in relation to sensitive projects, to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC/MIGA involvement, with the goal of improving IFC/MIGA environmental and social performance.

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

Acronyms

AESNP	AES Nile Power Ltd.
AFD	Agence Française de Développement
AfDB	African Development Bank
AMR	Annual Monitoring Report
BEL	Bujagali Energy Limited
BEMC	Bujagali Environmental Monitoring Committee
BTOR	Back to Office Report
BWI	Building Workers International
CAO	Office of the Compliance Advisor Ombudsman
CEACR	ILO Committee of Experts on the Application of Conventions and Recommendations
COD	conditions of disbursement
DEG	Deutsche Investitions-und Entwicklungsgesellschaft
E&S	Environmental and Social
EIB	European Investment Bank
EPC	Engineering, Procurement and Construction
ESAP	Environmental and Social Action Plan
ESMP	Environmental and Social Management Program
ESRR	Environmental and Social Risk Rating
ESRS	Environmental and Social Review Summary
ESRP	Environmental and Social Review Procedure
FMO	Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V.
FNP	Full Notice to Proceed
GIIP	Good International Industry Practice
GoU	Government of Uganda
HPP	Hydropower Project
HSMP	Health and Safety Management Plan
IDA	International Development Association
IFC	International Finance Corporation
ILO	International Labor Organization
IPN	Inspection Panel (World Bank)
IPS	Industrial Promotion Services Consortium
IRM	Investment Review Meeting
KfW	Entwicklungsbank – German Development Bank
LFMP	Labor Force Management Plan
LNTP	Limited Notice to Proceed
MAB	Medical Arbitration Board
MIGA	Multilateral Investment Guarantee Agency
OHSAS	Occupational Health and Safety Assessment Series
OSH	Occupational Safety and Health
PoE	Panel of Experts
PPE	Personal Protective Equipment
PROPARCO	Société de Promotion et de Participation pour la Coopération Economique
PS	IFC Performance Standards
PS1	IFC Performance Standard 1: Social and Environmental Assessment

PS2	IFC Performance Standard 2: Labor and Working Conditions.
PS3	IFC Performance Standard 3: Pollution Prevention and Abatement
PS4	IFC Performance Standard 4: Community Health, Safety and Security
PS5	IFC Performance Standard 5: Land Acquisition and Involuntary Resettlement
PS7	IFC Performance Standard 7: Indigenous Peoples
SEA	Social and Environmental Assessment
SEAP	Social and Environmental Action Plan
SEMS	Social and environmental Management System
SHA	Shareholders Agreement
SPI	Summary of Proposed Investment
SSV	IFC Site Supervision Visit
TOR	Terms of Reference
UBWU	Uganda Building Workers Union
WBG	World Bank Group

1. Overview of the CAO Compliance Process

CAO's approach to its environmental and social (E&S) compliance function is set out in its Operational Guidelines (March 2013).

When CAO receives an eligible complaint, the complaint first undergoes an assessment to determine how CAO should respond. If the CAO compliance function is triggered, CAO will conduct an appraisal of IFC's/MIGA's involvement in the project, and determine if an investigation is warranted. The CAO compliance function can also be triggered by the World Bank Group President, the CAO Vice President, or senior management of IFC/MIGA.

CAO compliance investigations focus on IFC/MIGA, and how IFC/MIGA assured itself of the E&S performance of an IFC/MIGA project. The purpose of a CAO compliance investigation is to ensure compliance with policies, standards, guidelines, procedures, and conditions for IFC/MIGA involvement, and thereby improve E&S performance.

In the context of a CAO compliance investigation, at issue is whether:

- The actual E&S outcomes of a project are consistent with or contrary to the desired effect of the IFC/MIGA policy provisions; or
- A failure by IFC/MIGA to address E&S issues as part of the appraisal or supervision resulted in outcomes that are contrary to the desired effect of the policy provisions.

In many cases, in documenting and verifying the performance of the project and implementation of measures to meet relevant requirements, it is necessary to review the actions of the IFC/MIGA client and verify outcomes in the field.

CAO's compliance function oversees investigations of the environmental and social performance of IFC and MIGA. CAO has no authority with respect to judicial processes. CAO is neither a court of appeal nor a legal enforcement mechanism, nor is CAO a substitute for international court systems or court systems in the countries where IFC/MIGA operates.

Upon finalizing a compliance investigation, IFC/MIGA is given 20 working days to prepare a public response. The compliance investigation report, together with any response from IFC/MIGA, is then sent to the World Bank Group President for clearance. It is then made public on the CAO website.

In cases where IFC/MIGA is found to be out of compliance, CAO keeps the investigation open and monitors the situation until actions taken by IFC/MIGA assure CAO that IFC/MIGA is addressing the noncompliance. CAO will then close the compliance investigation.

2. Background

2.1 Investment

The Bujagali Hydropower Project (“the project”) consists of the development, construction, and maintenance of a run-of-the-river hydropower plant with a capacity of 250 MW. The project is located in the Republic of Uganda on the Nile River, at Dumbbell Island, approximately 8 kilometers downstream of two existing power plants.¹

In 2005, Bujagali Energy Limited (“the client”) was awarded the project by the Government of Uganda. Design and construction of the project were conducted between 2007 and 2012.

In 2008, IFC invested in the project, providing two loans totaling \$130 million. This investment formed part of a finance package, totaling approximately \$900 million, in which several other development finance institutions, along with four commercial banks, also participated.

In parallel, MIGA issued a \$115 million guarantee to World Power Holdings Luxembourg, a subsidiary of Sithe Global Power LLC (USA), covering its investment in the Project against possible breach of contract.

The total cost of the project was expected to be approximately \$750 million, including approximately \$126 million in interest during construction, other financing costs, and reserve accounts.² Other investors in the project included, the International Development Association (IDA), a public sector arm of the World Bank Group, which provided \$115 million in partial risk guarantee to support commercial financing for the project.³ The European Investment Bank (EIB), African Development Bank (AfDB), Deutsche Investitions-und Entwicklungsgesellschaft (DEG), Société de Promotion et de Participation pour la Coopération Economique (PROPARCO), KfW Entwicklungsbank – German Development Bank, Agence Française de Développement (AFD) and Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V. (FMO) (the “lenders”) also provided financial support for the project.

The client was required to engage an engineering, procurement and construction contractor to build the dam. Salini Costruttori (“the EPC contractor”) was engaged in this capacity. The EPC contractor engaged Boschcon Civil and Electrical Construction Limited (“the subcontractor”) to undertake work on the Bujagali dam site and to build a camp to house construction staff as required under the EPC contract. During the period of the dam construction, the EPC contractor employed up to 3,000 workers at any one time.

2.2 Complaints

Between March 2011 and April 2013, CAO received two complaints from former employees of the EPC contractor and subcontractor.⁴ The complaints raise concerns about the adequacy of compensation provided for injuries and disabilities, occupational safety and health (OSH) issues, and unpaid wages and benefits. A brief description of each complaint is provided below.

The first of these complaints was brought by a group of former employees of the EPC contractor, who filed a complaint with CAO on behalf of themselves and more than 30 other workers in March

¹ Further details about the project can be found on the IFC website - <https://goo.gl/Slgpmr> (accessed May 2017).

² IFC. December 2006. Summary of Proposed Investment. <https://goo.gl/Slgpmr> (accessed May 2017).

³ World Bank. April 2007. Project Appraisal Document. <http://goo.gl/35YUI5> (accessed May 2017).

⁴ Details of the complaints (Bujagali-04 & 06) can be found on the CAO website: Bujagali-04 Complaint: <http://goo.gl/I9Mzyq>; Bujagali-06 Complaint: <http://goo.gl/477liJ> (accessed May 2017).

2011 (*the Bujagali-04 complaint*). The complainants allege that they suffered serious injuries, leading to permanent partial incapacity as a result of their employment on the construction of the project. They claim that they were not adequately compensated for their injuries. During CAO's assessment of the complaint, the number of individual complaints under the Bujagali-04 complaint rose to 93. The complainants, the client and the EPC contractor agreed to participate in a CAO-facilitated dispute resolution process. Of the 93 complaints, 55 were referred to Uganda's Medical Arbitration Board (MAB), 19 were resolved through CAO mediation, nine were settled directly between the EPC contractor and their former employees and three went to court.⁵ Six unresolved complaints were transferred to the CAO compliance function for appraisal.

Further details of the injuries the complainants allege to have sustained while working on the construction site were provided to CAO in the course of the compliance investigation. Workers that the CAO team met near the project site in January 2017 provided medical and insurance documentation in support of their claims. These included:

- (a) A construction worker who claimed to have sustained a deep cut to his leg while operating a machine in the workshop.
- (b) A construction worker who claimed to have suffered a back injury after falling from a height while trying to fix a jammed machine. He claims to have suffered a back injury requiring surgery. He claims to suffer from continued pain and limited mobility.
- (c) A construction worker who claims to have been hit on the head by a piece of falling timber causing him to fall to the ground. He claims to have sustained head injuries including a concussion which caused seizures leading to a permanent partial incapacity to work.
- (d) A construction worker who claims that he sustained an injury to his mouth and right eye when a nut flew off a pressure gun he was using. He claims this resulted in permanent loss of sight in one eye.
- (e) A food service worker who claims she was injured in a car accident on the way to work while she was being driven in the company shuttle. She claims that the car went off road and ran into a wall leading her to suffer trauma injuries to her back, legs and chest.
- (f) A carpenter (now deceased) whose family claim that he lost sight in one eye after being struck by a nail that flew up and pierced his eye while he was working. His family claims that he was taken to the hospital and treated, but lost sight in one eye.

Workers also raised concerns regarding the compensation they received for injuries. Concerns related to the adequacy of compensation paid and the transparency of the process by which compensation was assessed. The second complaint was brought in April 2013 by an informal group of more than 300 former employees of the subcontractor (*the Bujagali-06 complaint*).⁶ This complaint raised a range of concerns about labor issues, including unpaid wages and benefits dating back to 2007. The Bujagali-06 complainants also raised concerns regarding workplace accidents, non-payment of workers' compensation, and the use of racially-discriminatory language by management. Following the CAO assessment, the Bujagali-06 complainants, the subcontractor, and the Ugandan Ministry of Gender and Labor agreed to participate in a CAO-facilitated dispute resolution process. In November 2014, CAO brought the dispute resolution

⁵ CAO. November 2013. Conclusion Report – Bujagali Energy 04. <https://goo.gl/D69RTY> (accessed May 2017).

⁶ CAO. November 2014. Conclusion Report – Bujagali Energy 06. <https://goo.gl/i0VkJLe> (accessed May 2017).

process to a close as the parties were unable to reach consensus on how to move forward. In accordance with CAO's Operational Guidelines, this complaint was also referred to the CAO compliance function for appraisal. Additional details in relation to the Bujagali-06 complaint are provided in section 4.2.2.

In April 2015, CAO issued a compliance appraisal, which concluded that IFC's E&S performance in relation to the issues raised by the Bujagali 04 and 06 complainants merited further inquiry.⁷

2.3 Historical Background to the Project

The development of the Bujagali Hydropower Project was initiated by the Government of Uganda (GoU) and AES Nile Power Ltd., (AESNP) in 1998. In 2001, the boards of the International Development Association (IDA) and IFC approved a program of financial support for the project.⁸

At the same time, several NGOs voiced opposition to the project and filed complaints with the Inspection Panel for the World Bank (IPN) and with CAO. This led to an IPN investigation,⁹ and a CAO assessment process.¹⁰

In 2003, citing financial difficulties, AESNP withdrew from the original project. As a result, GoU, with the assistance of the World Bank, initiated an international bidding process to identify a new private sector sponsor for the project. In 2005, the Industrial Promotion Services (Kenya) Ltd consortium, a member of the Aga Khan Group was selected as the project sponsor. In April 2005, Sithe Global and GoU joined the consortium sponsoring the project.¹¹

⁷ CAO. April 2015. Appraisal Report of IFC's investment in Bujagali Energy Ltd. <http://goo.gl/7ZQR0c> (accessed May 2017).

⁸ World Bank. November 2001. Project Appraisal Document for the Bujagali Project I. <https://goo.gl/d0qQzu> (accessed May 2017).

⁹ Inspection Panel Investigation Report, May 23 2002 - <https://goo.gl/kJPUwL> (accessed May 2017).

¹⁰ CAO Assessment Report - Bujagali 02, September 2011 - <https://goo.gl/9lqhXI> (accessed May 2017).

¹¹ World Bank. April 2007. Project Appraisal Document for the Bujagali Project. <https://goo.gl/mVXImd> (accessed May 2017).

2.4 Project Timeline

Date	Milestones, Events, and Documents
1998	
	Government of Uganda initiates the development of the Bujagali Hydropower Project with AES Nile Power Ltd. (AESNP)
2001	
	Board of IFC and International Development Association (IDA) approve financial support to the project
2003	
	Citing financial difficulties AESNP withdraws from the project
2005	
April	Government of Uganda announces selection of Industrial Promotion Services (IPS) consortium (a member of the Aga Khan Group) as the sponsor for the project
July	E&S review of Bujagali project commences
2006	
March	IFC meets to review Burnside SEA delivered to lenders
March	Joint lenders' site-visit to Kampala and Jinja
May	Back to Office Report (BTOR) for site-visit to Uganda
December	IFC discloses Summary of Proposed Investment (SPI) and Environmental and Social Review Summary (ESRS) disclosed on the IFC website
December	IFC discloses Social and Environmental Assessment (SEA) disclosed on the IFC website
2007	
February	The independent engineer submits the final draft of its report to IFC for review
February	IFC reviews the environmental and social issues around the proposed investment
March	IFC reviews and considers the proposed investment
April	IFC gives E&S clearance to the project
April	IFC, along with the World Bank and MIGA, presents the proposed investment to the Board of the World Bank Group
April	Project receives Board approval
April	First report of the Panel of Experts (PoE)
June	IFC enters into loan agreement for the project with Bujagali Energy Limited (BEL or the client)
June	MIGA issues a \$115 million guarantee coverage to World Power Holdings (project sponsor) for its equity in the project
June	Limited Notice to Proceed (LNTP) given to the EPC contractor to commence initial construction activities
July	Salini sub-contractor Boschcon commences project-related construction works
November	Lenders' E&S staff review and comment on the E&S plans—the Labor Force Management Plan (LFMP) for the client and the EPC contractor and the Health and Safety Management Plan (HSMP) for the EPC contractor
December	Full Notice to Proceed (FNP) given to the EPC contractor for construction activities of the project
2008	
January	IFC makes its first disbursement into the project
January	Second report of the PoE
March	Second joint lenders' supervision visit
May	Salini terminates contract with Boschcon
July	Third report of the PoE
October	IFC visits the project site as part of the joint review mission of the World Bank Group (WBG) and African Development Bank (AfDB)
October	Traffic accident at Bujagali site
November	Third joint lenders' supervision visit

Date	Milestones, Events, and Documents
November	Fatal accident of a worker engaged in refueling operations
2009	
January	Fourth report of the PoE
March	Bujagali Environmental Monitoring Committee (BEMC) is established
April	World Bank Group receives complaint from Boschcon workers at the World Bank Group office in Kampala
April	Fourth joint lenders' supervision visit
July	Accident at Bujagali switchyard – two Salini workers injured
July	Fifth report of the PoE
2010	
February	Fatal vehicular accident at site
February	Accident occurs off site
March	Fatal vehicular accident on site
April	Sixth report of the PoE
August	Complainant claim (Bujagali-04): Worker is injured on site after a metallic pipe falls on his head
August	Complainant claim (Bujagali-04): Worker suffers injury by being hit on the head with a steel bar on site
August	Seventh report of the PoE
October	Complainant claim (Bujagali-04): Worker is injured on site from timber that falls on his head
November	Complainant claim (Bujagali-04): Worker suffers fractured shoulder by falling clamp on site
November	Fifth joint lenders' supervision visit
2011	
March	Former workers submit a complaint at CAO
April	Sixth joint lenders' supervision visit
May	CAO dispute resolution process commences
May	Eighth report of the PoE
May	Complainant claim (Bujagali-04): Worker suffers from chemical conjunctivitis after cement dust falls in his eyes while grinding the ceiling of the spillway on site
July	Medical Arbitration Board (MAB) begins hearing workers' compensation cases
November	Seventh joint lenders' supervision visit
2012	
January	MAB stops hearing cases due to a lack of funds
January	Ninth report of the PoE
May	Eighth joint lenders' supervision visit
July	MIGA amended its guarantee to World Power Holdings (project sponsor) to increase coverage by \$5.3 million
August	Construction of the hydropower plant is completed and the dam goes fully online
September	Tenth report of the PoE
2013	
April	Boschcon workers submit complaint to CAO with issues similar to those raised in complaint to World Bank Group at the World Bank Group office in Kampala in April 2009
November	MAB recommences hearings
November	CAO dispute resolution process concludes
2014	
August	MIGA issues guarantees totaling \$9.5 million to Absa Bank Ltd (South Africa) and Standard Chartered Bank (UK) to provide coverage in relation to their swap agreement with BEL
2016	
June	MIGA proposes issuing a guarantee to cover an investment of up to \$330 million by SN Power in the project

3. Investigation Framework

3.1 Scope of a Compliance Investigation

The focus of this compliance investigation is on IFC and how IFC assured itself of the environmental and social performance of an IFC project at appraisal and during supervision.

As set out in the Terms of Reference (TOR) for this investigation, this compliance investigation considers whether IFC's investment in the project was appraised, structured and supervised in accordance with applicable IFC policies, procedures and standards. It also considers whether IFC requirements as applied to this project provided an adequate level of protection.

Given the issues raised in the complaints, this investigation addresses the following issues in particular:

- a. Whether IFC's pre-investment due diligence adequately considered issues relating to OSH and workers' compensation; and
- b. Whether IFC adequately supervised the project in relation to OSH issues and incidents, compensation for workplace injuries and claims regarding non-payment of wages.¹²

3.2 Methodology

This investigation was conducted by CAO in accordance with its Operational Guidelines (2013), with inputs from external experts with knowledge of OSH and labor issues.

The investigation team reviewed a range of relevant documentation and conducted informational interviews with representatives of IFC and the client. CAO visited the project site and met with representatives of both complainant groups in January 2017.

Representatives of the EPC contractor declined offers to speak with CAO in the context of this compliance process. The subcontractor was contacted and provided CAO with relevant information in writing.

In considering the adequacy of IFC's E&S performance in relation to this project, CAO has been conscious not to expect performance at a level that requires the benefit of hindsight. Rather, the question is whether there is evidence that IFC applied relevant requirements considering sources of information available at the time.

CAO also notes certain limitations to the investigation methodology based on the information available. This investigation was undertaken after construction of the project was complete. As a result, field verification of the safety situation on the construction site was not possible. Access to primary OSH documentation from the EPC contractor was also limited.

IFC did not maintain an organized central repository of relevant documentation in relation to the project. Rather, CAO learned that much relevant documentation was kept outside IFC's central filing system (for example in emails or in personal files of staff). Other relevant documentation was not retained by IFC and had to be requested from the client. As a result, this compliance investigation has been conducted on the basis of the documentation as archived by IFC and additional documentation as available.

¹² CAO. May 2016. Terms of Reference for compliance investigation of IFC. <https://goo.gl/OHHhh7> (accessed May 2017).

In these circumstances, and considering that CAO's compliance mandate is focused on IFC's performance, CAO limits its findings to whether IFC complied with its requirements in relation to the appraisal and supervision of the project as relates to OSH and labor issues. CAO does not make findings in relation to merits of the specific allegations made by the complainants regarding the actions of the contractor or the subcontractor.

3.3 Applicable Standards

As set out in its Operational Guidelines (2013), CAO oversees investigations of IFC's environmental and social performance by ensuring compliance with IFC policies, Performance Standards, guidelines, procedures, and requirements whose violation might lead to adverse environmental and/or social outcomes (para 4.3).

IFC's investment in the Bujagali Hydropower Project was made under its 2006 Policy on Social and Environmental Sustainability ("the Sustainability Policy") and Performance Standards (PS), together referred to as the Sustainability Framework.¹³

In addition to the Performance Standards, the project documentation references IFC's Guidelines for Occupational Health and Safety (2003).¹⁴

MIGA's Policies on Environmental Assessment and Disclosure were also applied to the project. MIGA's E&S requirements at the time of investment did not include a specific labor standard. As such, this investigation focuses on the application of the Performance Standards by IFC. MIGA's Policy on Environmental and Social Sustainability (2013) provides that MIGA may rely on IFC's E&S due diligence and supervision when IFC is also involved in a project.¹⁵

IFC implements the commitments set out in the Sustainability Policy through its Environmental and Social Review Procedures (ESRP), which are updated periodically. The investment was approved under ESRP version 1.0,¹⁶ and supervised under subsequent updated versions of the ESRP.

¹³ IFC. 2006. Sustainability Framework. <http://goo.gl/PXmGlk> (accessed on May 2017).

¹⁴ IFC. 2003. Guidelines for Occupational Health and Safety. <http://goo.gl/SFKBJS> (accessed May 2017).

¹⁵ MIGA Policy on Environmental and Social Sustainability, October 2013, para 6 - <https://goo.gl/APDPo2> (accessed May 2017).

¹⁶ IFC. 2006. ESRP v. 1.0.

4. Analysis and Findings

4.1 IFC's Pre-Investment Review of the Project

At the pre-investment stage, IFC reviews the E&S risks and impacts of a proposed investment and agrees with the client on measures to mitigate these risks in accordance with the Performance Standards. For the purpose of this compliance investigation, a key question is whether IFC's review of OSH, workers' compensation and labor-related issues was commensurate to risk.

Summary of Findings:

IFC did not possess or have access to labor and OSH competence that was sufficient to evaluate the capacity of the client or the EPC contractor to apply the provisions of PS2 for a construction project of this scale and technical complexity.

IFC did not ensure that the SEA provided adequate assessment of labor and OSH risks—particularly assessment of country and project specific OSH risks during construction.

IFC did not ensure that the labor and OSH related plans of the client and the EPC contractor received appropriate technical review.

IFC did not assess the client's capacity to effectively monitor and manage the OSH performance of the EPC contractor.

IFC did not ensure that the (Occupational) Health and Safety Management Plan (HSMP) of the EPC contractor was developed following an initial OSH audit.

IFC did not consider whether national requirements for workers' compensation provided injured workers with access to appropriate compensation as required under the Sustainability Framework.

IFC's pre-investment review of the project in relation to OSH and labor issues was not commensurate to risk. As a result, IFC did not have assurance the project could meet the labor and OSH related requirements of the PS over a reasonable period of time.

4.1.1 Review of Client's E&S Assessment

This section considers the adequacy of IFC's E&S due diligence prior to approval of the project. This includes IFC's identification of and response to project E&S risks and impacts. It also includes IFC's review of the client and EPC contractor E&S plans, which took place between approval of the project in April 2007 and first disbursement in January 2008.

Requirements

General requirements

Central to IFC's articulation of its development mission are "its efforts to carry out its investment operations and advisory services in a manner that 'do no harm' to people or the environment."¹⁷ More specifically, IFC states that the negative impacts of the projects it finances should be "avoided where possible, and if these impacts are unavoidable... reduced, mitigated or compensated for appropriately".¹⁸ This commitment is reflected in Performance Standard 1, which

¹⁷ IFC. 2006. Sustainability Policy, Para 8.

¹⁸ *Ibid.*

states that the client will “avoid or where avoidance is not possible, minimize, mitigate or compensate for adverse impacts on workers, affected communities and the environment.”¹⁹

Prior to making an investment, IFC reviews the E&S risks and impacts of a project. The key question at this stage is whether IFC’s review was “appropriate to the nature and scale of the project, and commensurate with the level of E&S risks and impacts.”²⁰

IFC bases its E&S review on three factors: (a) the client’s E&S assessment; (b) the client’s commitment and capacity to manage these risks; and (c) the role of third parties (such as contractors) in meeting IFC E&S requirements.²¹ This review helps IFC ascertain whether the project can be expected to meet the Performance Standards.²²

As set out in PS1, the client’s E&S assessment should consider all relevant E&S risks and impacts of the project, including those identified in PS2 through PS8. Issues related to labor, health, and safety are mentioned specifically.²³ The assessment should consider national legal requirements as well as host country obligations under international law.²⁴ The general standard for a PS1 compliant E&S assessment is that it be “adequate, accurate and objective.”²⁵ In cases, where the client’s assessment does not meet the requirements of PS1, IFC requires the client to undertake additional assessment or, where appropriate, commission assessment by external experts.²⁶

On the basis of its review, IFC prepares and publishes an Environmental and Social Review Summary (ESRS), which describes the main environmental and social risks and impacts of the project. Any specific mitigation measures and actions necessary for the project to comply with the Performance Standards are required to be included in an Environmental and Social Action Plan (ESAP) which is agreed with the client and published as part of the ESRS.²⁷ Measures included in the ESAP are intended to reflect the outcomes of consultation on the E&S risks and impacts of the project.²⁸ Consultation around the development of the E&S Assessment and any risk mitigation measures should also be based on prior disclosure of relevant information.²⁹

Following completion of the E&S review, IFC decides whether the project can be funded. IFC is committed not to finance any new business activity that cannot be expected to meet the requirements of the Performance Standards over a reasonable period of time.³⁰

Requirements related to labor and working conditions

As noted above, the Performance Standards require the assessment of labor related risks and impacts as part of a client’s E&S assessment process. PS2 establishes particular requirements relevant to labor and working conditions.³¹ IFC Guidance Notes on the implementation of PS2 provide that IFC may require a labor assessment as part of its due diligence in countries, sectors or firms where there have been issues with one or more of the requirements of PS2.³² PS2

¹⁹ IFC. 2006. Sustainability Policy, para 1.

²⁰ *Ibid*, para. 13.

²¹ *Ibid*, para. 15; Performance Standard 1, para 6.

²² *Ibid*, para. 15.

²³ IFC. 2006. Performance Standard 1, para. 4.

²⁴ *Ibid*.

²⁵ *Ibid*, para. 7.

²⁶ IFC. 2006. Sustainability Policy, para. 15.

²⁷ IFC. 2006. ESRP v.1.0.

²⁸ IFC. 2006. Performance Standard 1, para. 16.

²⁹ *Ibid*, para. 21.

³⁰ IFC. 2006. Sustainability Policy, para. 17.

³¹ IFC. 2006. Performance Standard 2.

³² IFC. 2007. Guidance Note 2 – Labor and Working Conditions, G4.

requires that the client engage with worker representatives, such as unions.³³ The Guidance Notes also provide that clients should engage with workers and with representatives of workers' organizations in the preparation of a labor assessment.³⁴ Similar requirements are present in Ugandan law, specifically the Occupational Safety and Health Act, which provides that employers shall develop OSH systems in "consultation with a workers' organization" including consultation on the role of the workers organization in implementation of the system.³⁵

Relevant to the specific issues raised in the complaints, a key requirement of PS2 is that "the client will provide reasonable working conditions and terms of employment that, at a minimum, comply with national law" (para. 8). PS2 further states that "the client will provide the workers with a safe and healthy work environment" and "will take steps to prevent accidents, injury, and disease arising from, associated with, or occurring in the course of work by minimizing, so far as reasonably practicable, the causes of hazards" (para. 16).

In relation to OSH issues under PS2 (para. 16), IFC clients are required to meet standards of "good international industry practice" (GIIP) in addition to national legal requirements.³⁶

The requirements of PS2 apply not only to the client's direct employees but also to "non-employee workers" who are engaged by "contractors or other intermediaries" to perform work directly related to core functions essential to the client's products or services for a substantial duration" (para. 17). With respect to non-employee workers, PS2 states that the client should use commercially reasonable efforts to: (i) ascertain that these contractors or intermediaries are reputable and legitimate enterprises; and (ii) require that these contractors or intermediaries apply key requirements of PS2 (*Ibid.*).

In addition to PS2, IFC's documentation notes that its Guidelines for Occupational Health and Safety (2003) applied to the project.³⁷ The Guidelines provide more detailed OSH requirements while at the same time anticipating that supplementary guidance would be needed for high risk activities including construction. The Guidelines require a certifiable OSH management system that is appropriate to the nature and scale of the project. To inform the design of the OSH management system, an OSH audit is required. Annual audits of the adopted system are also required. In terms of scope, the Guidelines require that IFC clients should ensure that their contractors and subcontractors follow comparable practices.

IFC's Pre-Investment E&S Review of the Project

IFC conducted its E&S review of the project between July 2005 and April 2007. This was a large, complex project and IFC E&S staff dedicated significant time to the review process. This included reviewing project documentation as well as one field visit to the project site in Uganda.³⁸

³³ IFC. 2006. Performance Standard 2, para. 10.

³⁴ IFC. 2007. Guidance Note 2 – Labor and Working Conditions, G5.

³⁵ Occupational Safety and Health Act (2006) Art. 17.

³⁶ GIIP is defined in the Performance Standards as "the exercise of that degree of skill, diligence, prudence and foresight that would reasonably and ordinarily be expected from skilled and experienced professionals engaged in the same type of undertaking under the same or similar circumstances globally."

³⁷ IFC. 2003. Environmental Guidelines for Occupational Health and Safety. <https://goo.gl/6LZ59f> (accessed May 2017).

³⁸ IFC. December 2006. Environmental and Social Review Summary (ESRS) for Bujagali Energy Ltd. <https://goo.gl/SIqpmr> (accessed May 2017).

IFC disclosed an Environmental and Social Review Summary (ESRS) in December 2006. The ESRS stated that this was a Category A project having significant potential E&S risks.

The ESRS discussed the application of PS2 to the project, noting that the client would comply with Ugandan labor law, in particular Employment Act (2006) and the Occupational Safety and Health Act (2006). In this context, IFC noted that it would review the client's draft Human Resource Policy and procedures prior to the start of construction.

The ESRS noted that the client would use EPC contractors to build the hydropower dam and associated facilities and that the EPC contractor would be required to apply the same labor standards as the client. The ESRS stated that the client would "monitor the performance of its contractors with respect to [labor] standards" and that "the EPC contract [would] contain provisions to ensure that [the client] can enforce those provisions."³⁹ The ESRS further provided that "IFC [would] review the relevant EPC contract to ensure that these provisions are met, and will also review [the client's] monitoring of compliance with the provisions." Finally, the ESRS stated that the EPC contract would "specify occupational health and safety commitments to be observed by the EPC contractor and subcontractors, as well as monitoring responsibilities."⁴⁰

Further details regarding the project's approach to the management of labor related risk were contained in the SEA, which was disclosed by IFC together with the ESRS.

Social and Environmental Assessment (2006)

The team that prepared the SEA included an international labor specialist and the report discussed labor related issues.⁴¹

The SEA noted that between 600 and 1,500 workers would be required during the peak construction phase, including those employed by the EPC contractor and its subcontractors.⁴² The need for accommodations for construction workers, including new purpose built housing, was to be addressed as part of the EPC contract.⁴³

The SEA identified occupational health and safety as a particular risk given the country context and the nature of the project, noting that "fatal accidents have occurred at several construction projects in Uganda due to poor safety management policy and practice."⁴⁴

To mitigate the labor related risks associated with construction, the SEA provided that:

The contract and terms of reference to be agreed between BEL and the EPC contractor will specify labor and occupational health and safety commitments to be observed by the contractor and subcontractors, as well as responsibilities for monitoring the implementation of these commitments, which will lie primarily with the EPC contractor.⁴⁵

³⁹ IFC. December 2006. Environmental and Social Review Summary (ESRS) for Bujagali Energy Ltd. <https://goo.gl/Slgpmr> (accessed May 2017).

⁴⁰ *Ibid.*

⁴¹ R. J. Burnside International Ltd. December 2006. Bujagali Hydropower Project: Social and Environmental Assessment (SEA), p. 11. <https://goo.gl/Slgpmr> (accessed May 2017).

⁴² *Ibid* p. 219.

⁴³ *Ibid* p. 220.

⁴⁴ *Ibid* p. 417.

⁴⁵ *Ibid* p. 418.

The SEA further provided that:

BEL is committed to establishing its own procedures and reviewing the EPC contractor's procedures, and assessing the performance of both parties on these issues, including ensuring that subcontractors' contracts commit them to compliance with relevant labor and health and safety legislation and guidelines.⁴⁶

The SEA also set out the key features of the client's Labor Force Management Plan (LFMP) which was to:

...contain the human resource policies and procedures to be put in place by BEL in relation to its own staff, and also the commitments it will require of the EPC contractor and its subcontractors in relation to human resource management and compliance with labour standards during the construction phase.⁴⁷

The LFMP was expected to cover a range of labor related issues including human resources policies, terms of employment, and workplace safety as required by PS2.

In addition, the SEA required that the EPC contractor develop its own LFMP to ensure that labor standards were respected during construction. As specified in the SEA, the EPC contractor was expected to:

Assume primary responsibility for day-to-day monitoring of the implementation of labour standards requirements placed by project financiers on the Project Proposer (BEL) ... both in [relation to] the direct and indirectly-employed workforce (namely, subcontracted labour).⁴⁸

Relevant to the issues raised in the complaints, this included specific requirements for the EPC contractor to:

- take into account the capacity of subcontractors to achieve sound labor management in its assessment of potential subcontractors.⁴⁹
- inform BEL—and thereafter the project financiers—of all serious accidents that take place in relation to the project;⁵⁰ and,
- provide BEL—and thereafter the project financiers—with sample copies of pay slips for direct and subcontracted workers indicating payment of wages and social security contributions.⁵¹

In addition, the EPC contractor was required to develop a Health and Safety Management Plan (HSMP) which met both national and international standards.⁵²

Relevant Ugandan law cited in the SEA included the Employment Act (2006), the Workers' Compensation Act (2000), the Labour Unions Act (2006), the Occupational Safety and Health Act (2006) and the Labour Disputes (Arbitration and Settlement) Act (2006).⁵³

⁴⁶ Bujagali Hydropower Project: SEA, p. 418. <https://goo.gl/Slgpmr> (accessed May 2017).

⁴⁷ *Ibid*, p. 480. <https://goo.gl/Slgpmr> (accessed May 2017).

⁴⁸ *Ibid*, p. 482.

⁴⁹ *Ibid*.

⁵⁰ *Ibid*, p. 483.

⁵¹ *Ibid*.

⁵² *Ibid*.

⁵³ *Ibid*, p. 20.

Review of the EPC Contract

BEL commenced procurement for the EPC contract prior to IFC's approval of the project. During this period, the lenders commissioned a review of the project by a consultant engineer ("the independent engineer"). The final draft of the independent engineer's report was submitted to IFC in February 2007. As explained by IFC, the independent engineer provided an added level of review in relation to E&S issues. There is no indication that the team assigned to the review by the independent engineer included, or was required to include, technical expertise in relation to OSH or labor issues.

The independent engineer's review noted that the SEA required the development of LFMPs by the client and the EPC contractor. However, it contained no additional analysis in relation to these issues. More generally, the independent engineer noted that payments under the contract were not linked to the implementation of the social or environmental plans required under the SEA, raising concerns that this may leave the client with limited leverage vis-à-vis the EPC contractor in relation to these commitments. The independent engineer did not comment on the past OSH performance of the selected EPC contractor as part of this exercise.

Approval of the project

On April 2, 2007, IFC provided environmental and social clearance for the project, allowing it to proceed for Board approval.

The environmental and social clearance set out a series of requirements to be incorporated into the investment agreement. It included recommended covenants requiring the project to be constructed in accordance with IFC's E&S requirements and the specific mitigation and management measures set out in the SEA. It also set out conditions of disbursement to be incorporated in IFC's investment agreement. Relevantly, these included the submission of all EPC contractor plans required by the SEA as condition of 1st disbursement.

On this basis, the project was submitted to IFC's Board and approved on April 19, 2007.

Financing agreement

IFC entered into a loan agreement for the project in June 2007. The loan agreement required compliance with IFC's Performance Standards (2006) and Guidelines for Occupational Health and Safety (2003). It also required compliance with all Action Plans as set out in the SEA. More specifically, the financing agreement included an E&S Action Plan setting out actions that the client agreed to undertake.

Prior to disbursement of the loan, this required the client to complete a staffing plan (including the position of a health and safety coordinator).

In addition, prior to giving notice to proceed with construction, the client was required to complete staffing of the E&S implementation team, and finalize all EPC contractor action plans to the lenders' satisfaction.

Review of client and EPC contractor plans

The client gave the EPC contractor notice to proceed with initial construction activities in June 2007. This included earthworks and excavation for the dam, river diversion and construction of the expatriate workers housing site. Full notice to proceed was issued in December 2007.

In November 2007, staff of the lenders reviewed and commented on the E&S plans of both the client and the EPC contractor. Relevantly, the lenders reviewed the LFMPs for both the client and the EPC Contractor as well as the HSMP of the EPC contractor. The EPC contractor's more detailed Health Safety and Environment procedures were not reviewed. In December 2007, the client reported that both the client and the EPC contractor plans had been approved by the lenders.⁵⁴ In relation to labor issues, limited comments were provided. Of relevance to this investigation, IFC staff approved the plans as submitted while noting that a detailed review of the EPC contractor's Health and Safety Management Plan had not been undertaken.

Engagement with unions

Working with Building Workers International (BWI), the local Uganda Building Workers Union (UBWU) decided to organize Bujagali construction workers in mid-2007, prior to the commencement of construction of the project. As reported by the unions there were initial challenges in engaging with the client and the EPC contractor. Subsequently, however, the union reported that they were able to meet with management of the client and the EPC contractor. As a result, it was possible to organize the work site and UBWU reported that shop stewards and safety representatives were appointed. This included establishment of a health and safety committee with worker participation. Official recognition of the union followed in October 2007 and a collective bargaining agreement was signed in December 2007.⁵⁵ CAO found no discussion of the requirement to involve unions in OSH planning in IFC's E&S review documentation.

Discussion and Findings

IFC's pre-investment E&S review was conducted on the basis of the client's SEA. The SEA identified risks relevant to the issues raised by the Bujagali 04 and 06 complainants in general terms. These included the potential for workplace injuries, which the SEA noted as a particular risk given the country context and the nature of the project.⁵⁶ The SEA also noted the importance of extending PS2 protections to workers engaged in construction through the EPC contractor and its subcontractors.⁵⁷

IFC's approach to the management of these risks was to establish framework requirements for the development of relevant action plans by the client and the EPC contractor, which the lenders would later review and approve. These requirements were reflected in the loan agreement with the client. IFC thus established a broad framework for compliance with its E&S requirements.

At the same time, CAO finds that IFC's pre-investment E&S review was less than commensurate to risk in the following respects:

First, IFC did not possess or have access to labor and OSH competence that was sufficient to evaluate the capacity of the client or the EPC contractor to apply the provisions of PS2 for a project of this scale and technical complexity.

Second, IFC did not ensure that the SEA provided adequate assessment of labor and OSH risks. While relevant risks were identified in broad terms, the SEA lacked analysis necessary to support

⁵⁴ BEL. March 2007. Social and Environmental Quarterly Monitoring Report No. 1, p. 5. <https://goo.gl/HWDesS> (accessed May 2017).

⁵⁵ Fiona Murie. 2009. 'BWI Strategies to promote decent work through procurement: The example of the Bujagali Dam project in Uganda.' GURN, ILO.

⁵⁶ Bujagali Hydropower Project SEA, p. 417.

⁵⁷ *Ibid*, pp.480-483.

the development of appropriate action plans. Relevant to the issues raised in the complaints, IFC's review lacked attention to: (a) the regulatory capacity of national agencies in relation to OSH and labor issues;⁵⁸ (b) challenges related to "prevailing labor safety culture"⁵⁹ which the client and the EPC contractor would need to address; (c) risks associated with the use of an EPC contractor and associated loss of site OSH control by the client; and (d) Ugandan legislation making provision for collective representation of workers on OSH related issues.

Third, IFC did not ensure that the labor-related plans of the client and the EPC contractor received appropriate technical review. IFC reviewed these plans, but a detailed review of the EPC contractor's Health and Safety Management Plan was not undertaken. IFC did not ensure that the client developed an (Occupational) Health and Safety Management Plan (HSMP) or Systems Manual documenting its policies and procedures for managing the EPC contractor's performance on site. It is further not evident that IFC considered whether their staff assigned to review these plans had sufficient technical expertise to provide advice to the client in relation to the development of OSH and labor plans for a construction project of this size and complexity. In these circumstances, CAO finds that IFC did not have assurance that the plans as presented reflected good international industry practice as required by PS2.⁶⁰

Fourth, IFC did not undertake an analysis of the EPC contractor's Health and Safety Management Plan against the requirements of PS2 or the IFC Guidelines for Occupational Health and Safety. This is relevant given the fact that EPC contractor's Health and Safety Management Plan made no reference to IFC's standards. Further, IFC did not apply the requirement that the OSH management system "be designed following a competent OSH audit to review the project, its organization and environment," or that the adequacy of the system be subject to annual audit.⁶¹ CAO also notes the lack of an agreed framework for monitoring and reporting on OSH performance against "established performance criteria."⁶² In particular, CAO notes the absence of an agreed framework for reporting on serious OSH incidents and near misses, including their root causes and measures to prevent recurrence. A framework for reporting against host country regulatory compliance requirements as specified in the IFC Guidelines was similarly absent. Application of these requirements would have been of particular importance in ensuring that the EPC contractor's OSH management system was tailored to the needs of the project and consistent with good international industry practice as required by PS2.

Fifth, IFC's review of the labor related plans of the client and the EPC contractor was insufficient to provide assurance of consistency with national law. While the client and EPC contractors' LFMPs referenced relevant national statutes, there is no evidence that these plans were reviewed

⁵⁸ ILO. 1990-2014. Committee of Experts on the Application of Conventions and Recommendations (CEACR): Observations on the Application of the Workmen's Compensations (Accidents) Convention 1925 in Uganda. <https://goo.gl/wNkJ4W> (accessed May 2017); ILO. 2013. Technical Memorandum: Uganda Labor Administration and Inspection Need Assessment <https://goo.gl/BY6JHz> (accessed on May 2017).

⁵⁹ IFC. 2003. Environmental Guidelines for Occupational Health and Safety, p. 11 - <https://goo.gl/6LZ59f> (accessed May 2017).

⁶⁰ IFC. 2006. Performance Standard 2, para 16.

⁶¹ IFC. 2003. Environmental Guidelines for Occupational Health and Safety, p. 2.

⁶² *Ibid*, p. 13.

for completeness or consistency by someone with expertise in Ugandan labor law.⁶³ The EPC contractor's HSMP was notable for its lack of reference to relevant statutes.

Sixth, IFC did not ensure that the client had in place systems to effectively monitor and oversee the OSH performance of the EPC contractor in accordance with GIIP. While IFC required that the client submit a staffing plan which included a Health and Safety Coordinator, structures for supervision of the EPC contractor's OSH performance were not elaborated. The development of robust structures for ensuring compliance with lender requirements was particularly important given concerns regarding the OSH track record of the EPC contractor noted during the review process.

Seventh, IFC did not consider whether national requirements for workers' compensation provided injured workers with access to appropriate compensation as required under the Sustainability Framework.⁶⁴ The SEA and the LFMPs of the client and EPC contractor are limited to statements that the Ugandan Workers' Compensation Act (2000) would apply. However, neither the SEA nor IFC's review considered the adequacy of compensation provided for under Ugandan law, or the functioning of the process for achieving compensation. Uganda's ratification of the International Labor Organization (ILO) Workmen's Compensation (Accidents) Convention, 1925 (No. 17) was relevant in this context but is not mentioned in the SEA.⁶⁵ Similarly relevant but not mentioned in the SEA is ILO commentary (from the period 1966 to 2014) that consistently identified discrepancies between Uganda's workers' compensation law, which limits the amount of compensation payable to a sum equal to 60 months' earnings (in the case of injury leading to death or total permanent incapacity), and the Convention, which provides for payment of benefits in the form of periodical payments without limit of time in such cases (see Annex C).

In light of the discussion above, CAO finds that IFC did not have assurance the project could meet the labor and OSH related requirements of the Performance Standards over a reasonable period of time.

⁶³ Occupational Health and Safety Act (2006), Labour Disputes (Arbitration and Settlement) Act (2006), Labour Unions Act (2006), Minimum Wages Advisory Boards and Wages Council (1957), The Employment Act (2006), Workers' Compensation Act (2000).

⁶⁴ IFC. 2006. Sustainability Policy Para 8, Performance Standard 1, para 14.

⁶⁵ ILO. 1925. C017 – Workmen's Compensation (Accidents) Convention (No. 17). <https://goo.gl/Y198Nc> (accessed May 2017).

4.2 IFC's Supervision of the Project

This section covers IFC's supervision of the investment from its first disbursement in January 2008 through 2016. It considers whether IFC obtained sufficient information to assess the status of project's compliance with the Performance Standards and other E&S requirements agreed with the client at commitment. It also considers whether IFC responded appropriately to the issues raised by the Bujagali 04 and Bujagali 06 complainants.

Summary of Findings:

IFC did not possess or have access to labor and OSH competence sufficient to monitor the application of its labor and OSH requirements to a construction project of this scale and technical complexity.

IFC did not establish agreed OSH performance criteria for the client or the EPC contractor or ensure that client reporting provided necessary performance and measurement data to assess the EPC contractor's site OSH performance.

IFC's Site Supervision Visits did not provide sufficient OSH compliance data regarding the EPC contractor's site performance or the client's capacity to monitor overall project OSH performance.

Other project monitoring reports such as the Panel of Experts reports and the reports produced by the independent engineer had insufficient OSH focus to effectively supplement the client's own reporting or IFC's lack of direct supervision of OSH issues.

IFC neither received regular OSH management system audits nor commented on their absence.

IFC neither received nor commented on the absence of regular root-cause analyses of OSH incidents on the construction site.

IFC did not assure itself that the Bujagali-04 complaints received appropriate compensation for workplace injuries.

IFC erred in deciding that the Bujagali-06 complainants were not covered by its E&S requirements. As a result, allegations that construction of the project had significant adverse effects on employees of the subcontractor were not addressed.

In these respects, IFC's supervision was not sufficient to assess whether project labor and OSH performance met the specific requirements of IFC's Guidelines for Occupational Health and Safety or good international industry practice as required by PS2.

4.2.1 General supervision

Requirements:

IFC is required to monitor clients' E&S performance throughout the life of an investment.⁶⁶ Project supervision is conducted on the basis of site visits and annual monitoring reports (AMRs) submitted by the client. IFC is required to develop and retain information needed to assess the status of the client's compliance with the Performance Standards and other agreed E&S requirements.

If a client fails to comply with its E&S commitments as provided by the Performance Standards read together with any Action Plans or other legal provisions agreed with IFC, IFC's works with

⁶⁶ IFC. 2007. ESRP v.2, para. 6.1.10.

the client to bring it back into compliance. If material compliance gaps are identified, supplemental corrective actions should be agreed. If the client fails to reestablish compliance, IFC exercises remedies as appropriate.⁶⁷

IFC supervision requirements are linked to client requirements to establish a Management Program that is commensurate to project risks and impacts (PS1, para. 14). As defined by PS1, the client's Management Program should ensure that sufficient human and financial resources are provided to "achieve effective and continuous social and environmental performance" (para. 17). The Management Program should allow monitoring of client compliance against IFC and applicable legal requirements and include measurable indicators of performance that are the subject of "systematic data collection and analysis" (paras. 14 & 25). Where mitigation measures and actions are identified as necessary for the project to comply with E&S requirements, the client should develop time-bound Action Plans to address these (para. 16). The Management Program should also support ongoing consultation and disclosure (paras. 19–23 and 26). The client is required to use dynamic mechanisms, such as, inspections and audits, to verify compliance and progress towards the desired outcomes (para 24).

IFC's Guidelines for Occupational Health and Safety (2003) include specific reporting requirements including a comprehensive summary of:

- "Host country regulatory compliance;"
- "...OSH performance monitoring, and records of occurred occupational accidents, incidents and diseases" including "evaluation of findings and actions taken or planned due to the number and type of accidents observed;"
- "...an assessment of the degree of fulfilment of the previous year's OSH objectives and action plans for improvement;" and
- "...revisions to the OSH Management System; revised quantitative objectives; action plans for technical improvements; and planned training activities" (p.9).

IFC's Guidelines for Occupational Health and Safety also require the client to investigate all reported occupational accidents, dangerous occurrences and near misses.⁶⁸ In the case of serious incidents or fatalities related to the project, the client is required to inform IFC.⁶⁹ In such cases, the ESRPs provide that IFC will "follow up with the client to ensure that the root cause of the incident is being investigated and appropriate corrective action is taken to prevent recurrence."⁷⁰

While reviewing the client's AMRs, IFC must ensure that the information provided is adequate.⁷¹ If not, IFC requests additional information in order to assess the client's performance against the requirements of the investment agreement and IFC Performance Standards.⁷² IFC reviews reports of serious incidents and accidents to confirm whether they were reported in accordance

⁶⁷ Summarized from IFC. 2006. Sustainability Policy, para. 26, and IFC ESRP 5 (Managing Eventualities in Investment Projects) and IFC ESRP 6 (Direct Investments: Supervision).

⁶⁸ IFC. 2003. Environmental Guidelines for Occupational Health and Safety, p. 9. <https://goo.gl/6LZ59f> (accessed May 2017).

⁶⁹ *Ibid*, Figure 3, p. 9 - <https://goo.gl/6LZ59f> (accessed May 2017).

⁷⁰ IFC. 2006. ESRP v1.0, para. 6.2.5 (2006).

⁷¹ *Ibid*, para. 6.2.3.

⁷² *Ibid*, para. 6.2.4.a.

with legal agreements, to determine whether a consistent pattern emerges and whether follow-up action is required with the client.⁷³

When IFC and MIGA are involved in a project, MIGA's Policy on Environmental and Social Sustainability (2013) provides that MIGA may rely on the and use IFC's environmental standards, E&S due diligence and/or monitoring.⁷⁴

IFC supervision of the project:

General supervision

IFC monitored project E&S performance by reviewing information received from a number of sources including:

- the client's social and environmental reports (quarterly)
- the EPC Contractor's construction monitoring reports (monthly),
- reports of the panel of environmental and social experts (biannual), and
- implementation progress reports from the independent engineer (biannual).

IFC also participated in biannual joint lenders missions to the project site which were documented in the form of back to office reports.

According to its usual practice, MIGA agreed that IFC would take the lead on E&S supervision of the project and relied on monitoring information provided by IFC.

Over the course of supervision, MIGA also processed an amendment to the original guarantee for the project to increase the coverage for equity and issued two new contracts of guarantee to cover swaps. In 2012, MIGA amended its original guarantee to World Power Holdings Luxembourg, one of the existing sponsors for the project, to include an additional \$5.3 million of coverage.⁷⁵ In 2014 MIGA issued additional guarantees totaling \$9.5 million to Absa Bank Limited of South Africa and Standard Chartered Bank of the United Kingdom, two of the existing senior lenders for the Project.⁷⁶ In 2016, MIGA disclosed a potential guarantee of up to \$330 million to cover SN Power's equity investment in the Project. This would translate into ca. \$210 million additional MIGA cover to an existing Project, though at the time of writing this report the transaction had not been completed.⁷⁷

MIGA's board paper for the amended guarantee of 2012 does not mention the active Bujagali complaints with CAO. MIGA's board paper for the 2014 guarantees mentions the active Bujagali cases with CAO's dispute resolution function. MIGA's conclusion, based on IFC supervision, was that the project was in compliance, and as a result no significant E&S concerns were raised. Nevertheless, legal agreements for these transactions include E&S conditions beyond those found in the 2007 guarantee agreement.

⁷³ *Ibid*, para. 6.2.4.

⁷⁴ MIGA. 2013. Policy on Environmental and Social Sustainability, para 6,

⁷⁵ MIGA. July 2012. Summary of Proposed Guarantee to Bujagali Energy Ltd. <http://goo.gl/NBKBYV> (accessed May 2017).

⁷⁶ MIGA. August 2014. Summary of Proposed Guarantee to Bujagali Energy Ltd. <http://goo.gl/dmbsWz> (accessed May 2017).

⁷⁷ MIGA. June 2016. Summary of Proposed Guarantee to Bujagali Energy Ltd. <http://goo.gl/HvHh5Z> (accessed May 2017),

MIGA's board paper for the proposed 2016 guarantee notes the Bujagali labor cases and that they had been transferred to CAO's compliance function. The 2016 Board paper does not mention CAO's April 2015 decision to refer these cases for compliance investigation.

Supervision of occupational safety and health issues

Supervision of OSH issues during construction of the project can be broken into a number of phases based on overall OSH project site performance.

Supervision reports from the commencement of construction in 2007 to 2009 are characterized by a confidence that the client's OSH systems were functioning well. For example, the panel of experts report (July 2008) noted good workplace safety measures and a low number of accidents.⁷⁸ IFC's annual review of project E&S performance for 2008 concluded similarly that worker health and safety followed good industry practice. On site fatalities in 2007 and 2008 do not appear to have raised lender concerns about the EPC contractor's OSH systems.

In 2010, however, two workplace fatalities and an increase in the injury rate on site, led to increased focus on OSH issues in the lenders supervision documentation. The fatalities coincided with an increase in the construction workforce to almost 3,000 workers, significantly more than the 1,000 workers envisaged in the EPC contractor's HSMP as reviewed by IFC in 2007. As reported by IFC, the EPC contractor needed to increase the number of workers on site to meet an accelerated work schedule which was put in place after delays in the completion of early construction activities. Following the 2010 fatalities, the panel of experts noted that compliance with OSH measures such as use of personal protective equipment (PPE) appeared to have decreased.⁷⁹

The client advised the lenders that both fatalities were the result of workers not following procedures, but that the EPC contractor was taking measures to reduce the chance of similar accidents happening in the future. The client reported that, these included: additional training, dissemination of lessons from previous accidents; and taking disciplinary action against workers found to be in breach of OSH regulations. At the same time IFC noted that the client had assured them that even with an accelerated work schedule, its priorities were still "safety, quality, schedule" in that order. The lenders were also advised that the EPC contractor had conducted a safety audit on the basis of which OHSAS 18001 certification was achieved. Nevertheless, IFC's annual E&S review for 2010 reported that lost time accidents continued to climb towards the end of the year. In this context, IFC noted that the effectiveness of measures to reduce the accident rate was something to follow up on during the next mission.

Concerns regarding non-use of PPE were also recorded in documentation produced by the Government-led Bujagali Environmental Monitoring Committee (BEMC) following an October 2010 supervision mission. In relation to the issue of workers' compensation, BEMC observed that the EPC contractor had required an injured worker to have the extent of his incapacity reassessed by a doctor affiliated with their insurer, a practice that BEMC noted was not permitted under Ugandan law.

From 2011 onwards, OSH issues were again less of a concern for IFC as construction wound down as a result of which reported injury rates fell significantly. Also, as noted in IFC's E&S review

⁷⁸ Panel of Environmental and Social Experts Report, June 2008, p. B. <https://goo.gl/ctvKrW> (accessed May 2017),

⁷⁹ Panel of Environmental and Social Experts Report. August, 2010. <https://goo.gl/pjXok1> (accessed May 2017).

for 2011, the EPC Contractor improved fire and life safety conditions on the site in response to concerns raised by their insurer.

While, the number of construction related injuries subsided at this point, complaints regarding compensation persisted. In April 2011, IFC informed the lenders that former workers of the EPC contractor had submitted a complaint claiming inadequate compensation for injuries suffered on site. IFC assured the lenders that it was working with the client and the EPC contractor to follow-up on these complaints, noting at the same time the EPC contractor's view that the claims were without merit.

In 2011, the parties to CAO's Bujagali-04 dispute resolution process agreed on a framework to resolve the concerns in relation to compensation for injuries by referring cases to Uganda's Medical Arbitration Board (MAB), which was considered to be the appropriate mechanism under Ugandan law. As described in CAO's dispute resolution completion report, when CAO received the complaint in March 2011, "the MAB was suffering operational challenges, including limited funding and a substantial backlog of cases."⁸⁰ IFC noted that by November 2011, the MAB had heard about 20 of 30 scheduled cases. In January 2012, IFC noted that the MAB had again stopped hearing cases due to a lack of funds. From January 2012 onwards, IFC's supervision documentation provides no further information on the status of the compensation claims against the EPC contractor. As reported in CAO's November 2013 dispute resolution Conclusion Report, the MAB finally settled 55 of the 93 workers' compensation complaints submitted to CAO. Of the remaining cases, 19 were settled through CAO mediation, nine were settled directly with the EPC contractor, three went to court and seven remained unresolved. Of the seven, CAO's dispute resolution function officially transferred six of the remaining cases to CAO compliance.

Issues related specifically to the Bujagali-06 complaint are handled separately in section 4.2.2 below.

Discussion and findings:

As outlined above, IFC's supervision considered OSH and labor issues. Large volumes of client and EPC contractor reporting were available for lender review. Regular Site Supervision Visits provided additional information on client E&S performance. Nevertheless, CAO finds that IFC's supervision was not sufficient to assess whether the project was implementing an OSH management system that met the PS2 standard of providing workers with a safe and healthy working environment in accordance good international industry practice.⁸¹ This occurred for a number of reasons:

First, IFC did not possess or have access to labor and OSH competence, that was sufficient to monitor the application of its labor and OSH requirements to a construction project of this scale and technical complexity. IFC staff responsible for reviewing project's E&S performance were required to engage with large volumes of reporting on a range of issues. IFC did not resource the supervision process in a manner that was commensurate to the scale and complexity of the labor and OSH issues raised by the project. In this context, labor and OSH issues did not receive necessary technical oversight.

Second, IFC did not prescribe a reporting format that corresponded to its labor and OSH requirements. A framework for reporting against national OSH compliance requirements was

⁸⁰ CAO. November 2013. Conclusion Report – Bujagali Energy 04. - <https://goo.gl/D69RTY> (accessed May 2017).

⁸¹ IFC. 2006. Performance Standard 2, para 16.

similarly absent. Reporting was inconsistent across time, and discrepancies in the OSH data the client presented were indicative of problems in compiling and managing information. As a result, client reporting was not sufficient to determine compliance with IFC standards or national law.

Third, IFC did not mandate annual OSH audits as required by its Guidelines for Occupational Health and Safety. As a result, IFC lacked verified data on implementation of OSH management practices during construction. In the absence of regular audits, IFC was over reliant on the client's reporting and impressions from site visits to determine compliance. When the client reported that the EPC contractor underwent an OSHAS 18001 certification audit in 2010, IFC did not document a review of the audit report or follow up to ensure that non-conformities were addressed and closed out.

Fourth, IFC did not review the client's capacity to supervise the EPC contractor's OSH performance. The client was required to hire a health and safety coordinator and monitor the EPC contractor's OSH performance, however, IFC's supervision did not provide a basis to assess the client's effectiveness in this role. This issue became particularly important in 2009 when the lenders advised that the EPC contractor should immediately increase equipment and personnel to compensate for earlier delays in construction. While the increase in personnel and equipment had clear OSH implications, CAO finds no indication that IFC considered whether the project had in place appropriate measure to assess and manage this added risk to workers.

Fifth, alternative sources of verification of the client's E&S performance were insufficient. Alternative sources of verification included the panel of experts and the independent engineer. However, neither of these groups were required to include specialist OSH or labor expertise. As a result, their contribution to oversight in relation to OSH and labor issues was limited. Other potential sources of information, such as consultation with workers and union representatives were not structured into the reporting or supervision processes.

Sixth, IFC did not assure itself that the client was investigating or reviewing the causes of accidents and near misses as required. Four work related fatalities were reported during construction. Lost time injuries as reported by the EPC contractor, numbered 461. However, in none of these cases did IFC document a review of an accident investigation report, a root cause analysis, or a report on measures necessary to prevent reoccurrence as required by the IFC Guidelines for Occupational Health and Safety. Reporting of near misses as required by the IFC Guidelines was absent.

CAO has also considered IFC's supervision as relevant to the workers' compensation paid to the Buajgali-04 complainants. As noted in section 4.1.1 above, CAO finds that IFC did not consider whether the project was applying an approach to workers' compensation that met its requirement for appropriate compensation. Additional issues that arose in this respect during supervision, included delays in the provision of compensation and allegations that reassessment of worker injuries was being required by the EPC contractor's insurance company in violation of Ugandan laws.

4.2.2 Specific issues raised by the Bujagali 06 complaints

This section deals with specific issues raised by the Bujagali-06 complainants. These complaints require separate attention as they come from employees of a subcontractor as opposed to employees of the EPC Contractor.

Particulars of the complaint

The Bujagali-06 complaint was lodged by employees of a Ugandan construction company, Boschcon Ltd (the subcontractor). The subcontractor was engaged by the EPC contractor to carry out site installation works at the dam site. The subcontractor was also responsible for constructing a residential camp to be used by the EPC contractor international staff.

The Bujagali-06 complainants make a number of allegations regarding labor-related issues. These include:

- a. That workers were not paid for work carried out over a period of up to two months immediately prior to the termination of the contractual relationship between the EPC contractor and the subcontractor;
- b. That workers were systemically underpaid compared to workers employed by the EPC contractor doing the same or similar tasks;
- c. That subcontractor did not have human resources practices that met national legal requirements, covering for example the issuance of employment contracts and the issuance of pay slips;
- d. That workers were required to sign employment contracts without having an ability to read through them and understand them;
- e. That the subcontractor did not provide pay for overtime worked;
- f. That the subcontractor made improper deductions from workers' pay when work was not available due to reasons beyond the workers' control;
- g. That the subcontractor made improper deductions from workers' pay for the provision of personal protective equipment and tools that should have been provided by the employer;
- h. That health and safety conditions for the subcontractor workers were not adequate and leading to serious workplace injuries;
- i. That workers who were injured while working for the subcontractor were not paid workers' compensation and did not receive adequate medical care.

Background to the complaint:

Additional background to the Bujagali-06 complaint is provided in a judgment deciding a civil dispute between the subcontractor and the EPC contractor.⁸² As set out in the court judgment, the EPC contractor engaged the subcontractor to carry out project related construction works commencing in July 2007. In the course of these works, delays arose and in May 2008, prior to completion of the works, the EPC contractor terminated its relationship with the subcontractor.⁸³ The outcome of the lawsuit was that orders for payment of damages were awarded to both the subcontractor (as the original complainant) and the EPC contractor (in relation to a counter claim).

In 2009, the client informed IFC and the lenders of a complaint regarding unpaid wages and benefits received from a group of workers employed by the subcontractor. IFC's 2009 supervision documentation notes the view that these workers did not fall under the category of non-employee workers as defined in PS2, and therefore, that the client was not responsible for resolving the issue. Nevertheless, IFC noted that the client was working with the subcontractor to address the issue. IFC's 2009 supervision documentation indicates that the workers' complaints against the

⁸² Boschcon Civil and Electrical Engineering Construction Co. (U) Ltd v Salini Costruttori SPA [2012] UGCOMMC 133 (7 November 2012) - <https://goo.gl/h7Q7Tj> (accessed on May 19, 2017).

⁸³ *Ibid.*

subcontractor had been referred to the district labor board for resolution. The lenders joint supervision documentation from 2010, notes that these issues were under consideration by the district labor board. No further information on this issue is provided in IFC's supervision documentation.

CAO also received background information from the subcontractor. In correspondence with CAO, the subcontractor asserted that the complainants' claims were unsubstantiated and fraudulent.

As noted above, the information available as part of this compliance investigation did not provide a basis for CAO to make findings in relation to merits of the specific allegations made by Bujagali-06 complainants against the sub-contractor. In accordance with CAO's mandate, the section below focuses on whether IFC ensured appropriate application of its requirements to the issues raised by the complainants.

Discussion and findings:

IFC had on paper assurance that its labor standards would be extended to employees of the EPC contractor and its subcontractors.

As noted above, the SEA committed the client to implement a Labor Force Management Plan (LFMP) "to safeguard workers' rights and implement good practice in relation to labor and working conditions."⁸⁴ The SEA provided that the client would comply with PS2 and "require corresponding compliance of its contractors and subcontractors."⁸⁵

This approach is reflected in the client's LFMP which states that it is designed to ensure that the client complies with Ugandan law and meets the requirements of the International Finance Corporation (IFC) Performance Standards related to labor issues. The client LFMP is clear that it applies to both direct employees and subcontractors. More specifically, it provides that requirements similar to those found in its LMFP would be followed by "its EPC contractor, and its subcontractors, who will be responsible for handling labor force issues during the construction phase of the HPP."

The EPC contractor, also prepared a LFMP that was to apply across its entire direct and indirectly-employed workforce at all skill levels. Subcontractors were expressly included in the scope of the EPC contractor's LFMP. Relevant to the issues raised by the Bujagali-06 complainants, the EPC contractor's LFMP provided for the EPC contractor to maintain records of wages and hours worked of each employee including subcontractors. It also required compliance with national law requirements including those regarding the right of workers to receive notice in writing of the particulars of their employment, including wages and working conditions. This LFMP included a commitment to international best practice with regards to labor issues and to "satisfy the requirements of PS2." Further particulars in relation to health and safety were provided in a separate Health and Safety Management Plan (HSMP). The EPC contractor's HSMP was also clear in that it would apply to third party contractors hired as part of the project.

IFC, together with the other lenders to the project, reviewed the EPC contractor's environmental and social plans, including the LFMP, in November 2007. In comments shared with the client, IFC and the lenders noted that the LFMP should be clearer in terms of how compliance with the LFMP

⁸⁴ Bujagali Hydropower Project. December 2006. Social and Environmental Assessment: Main Report, p.480. <https://goo.gl/PahcEx> (accessed May 2017).

⁸⁵ *Ibid.* p. 31.

would be supervised in relation to subcontractors. In response, the client noted that the EPC contractor would have primary oversight responsibility of its subcontractors and that the client would be required to conduct periodic audits to ensure compliance by its subcontractors. Further, the client noted that as the owner of the project, it would monitor the EPC contractor's compliance with its LFMP.

This framework was consistent with IFC's guidance on PS2 implementation which provides that:

*Clients should use commercially reasonable efforts so that they do not benefit from unfair labor practices of contractors and intermediaries. This includes establishing contractual obligations on contractors or intermediaries who supply the non-employee workers to the client; unannounced visits and visual inspections at the worksite; and exercise of due diligence in supervising contractors and intermediaries who supply workers.*⁸⁶

The undertakings outlined above were reflected in the legal agreement between IFC and the client, which provided that the client would ensure subcontractor compliance with the lenders environmental and social requirements including all action plans (which included the LFMP).

IFC did not have assurance that this system was being implemented.

In accordance with the above, the client was expected not only to establish a policy framework for the extension of PS2 to subcontractors, but also to supervise implementation of these requirements. CAO finds no evidence that IFC assured itself that the requirements of the LFMP were being applied to subcontractors involved in the construction of the project. As a result, IFC did not have assurance that subcontractors were meeting minimum requirements related, for example, to the documentation of the employment relationship, the payment of wages, the maintenance of a safe and healthy workplace, or the payment of workers' compensation.

IFC did not require any action from its client in relation to the complaint from employees of the subcontractor.

IFC received a letter of complaint addressed to the World Bank country office in Kampala from the employees of the subcontractor in April 2009. The issues raised in the 2009 complaint to the World Bank are substantively similar to those brought to CAO in April 2013.

As noted above, IFC documentation refers to the complaint following supervision missions in November 2009 and April 2010. In each case, IFC notes the existence of the dispute without suggesting that any action be taken in relation to it. There is no evidence that IFC took any further action in relation to this dispute, either before or after the receipt of the CAO complaint in April 2013.

IFC's response to the issues raised by the employees of the subcontractors was non-compliant.

Given the seriousness and persistent nature of the issues raised in the complaint, CAO finds that IFC's supervision did not meet the required standard. In particular, CAO finds that IFC supervision of the application of PS2 requirements to subcontractors was lacking. Once the complaint came to light, IFC concluded that the issues raised fell outside the scope of its supervision of the project. For reasons outlined above, CAO finds that this conclusion was incorrect. Based on this decision,

⁸⁶ IFC. 2006. Guidance Note 2 - Labor and Working Conditions, G65.

IFC did not work with its client to address possible compliance issues raised by the complaint as required by the Sustainability Policy.⁸⁷ Similarly, IFC did not explore what “commercially reasonable efforts” to address the issues might entail or what remedies may have been appropriate in the circumstances.⁸⁸ As a result, allegations that construction of the project had significant adverse effects on employees of the subcontractor were not addressed.

5. Conclusion

This compliance investigation was initiated following a complaint from 93 workers who claim to have been seriously injured while working on the construction of the Bujagali hydropower project. It also responds to complaints from a group representing 360 workers who claim to have been underpaid and otherwise mistreated while employed on the construction project through a subcontractor.

This compliance investigation has considered whether IFC’s investment in Bujagali Energy Ltd. was appraised, structured and supervised in accordance with applicable IFC policies, procedures and standards. In particular, it has considered:

- (a) Whether IFC’s pre-investment due diligence adequately considered issues relating to Occupational Safety and Health (OSH) and workers’ compensation; and
- (b) Whether IFC adequately supervised the project in relation to OSH issues and incidents, compensation for workplace injuries and claims regarding non-payment of wages.

IFC was aware of labor and OSH-related risks associated with the construction of the project prior to investment. IFC’s approach to the management of these risks was to establish framework requirements for the development of relevant action plans by the client and the EPC contractor, which the lenders would later review and approve. These requirements were reflected in the loan agreement with the client. IFC thus established a broad framework for compliance with its E&S requirements.

Nevertheless, CAO has concluded that IFC’s approach to the review of these issues did not meet the standard of being commensurate to risk. In reaching this finding CAO notes, in particular, that IFC did not possess or have access to labor and OSH competence that was sufficient to evaluate the capacity of the client or the EPC contractor to apply the provisions of PS2 to a construction project of this scale and technical complexity. As a result, IFC did not ensure that the labor and OSH-related plans of the client and the EPC contractor received appropriate technical review.

Similar shortcomings were evident during supervision of the project. Although construction was acknowledged as involving significant OSH and labor related risks, IFC did not resource project supervision accordingly. IFC’s ability to supervise labor and OSH-related issues was constrained by a lack of specialist staff. This was not effectively supplemented by alternative means of oversight. As a result, IFC did not have assurance that labor, health and safety risks associated with the construction of the project were being managed in accordance with its requirements.

CAO also finds that IFC erred in deciding that the employment practices of the subcontractor were beyond the scope of its E&S requirements. As a result, allegations that construction of the project

⁸⁷ IFC. 2006. Sustainability Policy, para 26.

⁸⁸ *Ibid*; IFC. 2006. Performance Standard 2, para 17; IFC. 2007. Guidance Note 2 – Labor and Working Conditions, G65.

had significant adverse effects on employees of the subcontractor were not addressed in the course of IFC's supervision.

Finally, CAO finds that IFC did not consider whether national requirements for workers' compensation provided injured workers with access to appropriate compensation as required under the Sustainability Framework. This finding is relevant both to the Bujagali-04 complaint (where workers raised concerns about the adequacy of compensation and the process for attaining compensation) and to the Bujagali-06 complaint (where the complaint was that workers' compensation was not provided to injured workers).

The underlying causes of the non-compliance findings made in relation to this project should not be seen as reflections on the performance of individual staff members, but rather as shortcomings in IFC's approach to the identification and management of labor and OSH risks of a large scale construction project in a challenging context. The result, however, was that IFC lacked assurance that project outcomes for workers were consistent with the purpose of IFC's Sustainability Policy which requires that adverse impacts be avoided, reduced, mitigated and compensated for appropriately.

Given the above findings of non-compliance, CAO will keep this investigation open and monitor IFC's response. CAO expects to publish its first monitoring report no later than 12 months from the date of publication of this report.

Annex A: Relevant Ugandan Law and International Conventions

Relevant Ugandan Law	Referenced in the SEA	Outdated Reference	Updated in Year
Minimum Wages Boards and Wages Councils Act, 1957	No		
Employment Regulations, 1977	Yes		
Employment Act, 2000	Yes	Yes	2006
Workers' Compensation Act, 2000	Yes		
Labour Unions Act, 2006	Yes		
Labour Disputes (Arbitration and Settlement) Act, 2006	Yes		
The Occupational Safety and Health Act, 2006	Yes		

Relevant ILO Convention	Referenced in SEA	Ratified by Uganda Pre-2006
ILO Convention 14 – Weekly Rest, 1921		Not ratified
ILO convention 17 – Workmen's Compensation (Accidents) Convention, 1925	No	Ratified in June 1963
ILO Convention 81 – Labor Inspection Convention, 1947	No	Ratified in June 1963 (Excluding Part II)
ILO Convention 87 – Freedom of Association and Protection of the Right to Organize Convention, 1948	No	Ratified in June 2005
ILO Convention 98 – Right to Organize and Collective Bargaining Convention 1949	No	Ratified in June 1963
ILO Convention 121 – Employment Injury Benefits, 1964		Not ratified
ILO Convention 139 – Occupational Cancer, 1974		Not ratified
ILO Convention 148 – Working Environment, 1977		Not ratified
ILO Convention 155 – Occupational Health and Safety, 1981		Not ratified
ILO Convention 161 – Occupational Health Services, 1985		Not ratified
ILO Convention 167 – Safety and Health in Construction, 1988		Not ratified
ILO Convention 170 – Chemicals, 1990		Not ratified
ILO Convention 171 – Night Work, 1990		Not ratified
ILO Convention 174 – Prevention of Major Industrial Accidents, 1993		Not ratified

Annex B: Key Workers' Compensation Provisions

Provision	Title	
Workers Compensation Act, 2000		
Section 4(1)	Fatal Injuries	Where the deceased worker leaves any family members who are dependent on his or her earnings, the amount of compensation shall be a sum equal to sixty times his or her monthly earnings, computed in accordance with section 8 subject to a maximum which may be varied by the Minister on the recommendation of the labour advisory board.
Section 4(6)	Fatal Injuries	If the worker is killed as a result of an accident for which the employer has liability under this Act, the dependents (if any) of the deceased may recover from the employer the expenses of medical treatment of the deceased, burial of the deceased and expenses incidental to the medical treatment and burial of the deceased.
Section 5(1)	Permanent Total Incapacity	Except where the terms and conditions of service provide for a higher compensation, where permanent total incapacity results from any injury, the amount of compensation shall be a sum equal to sixty months' earnings.
Section 5(2)	Permanent Total Incapacity	Where an injury under this section is such as to be likely to require the injured worker to have the constant assistance of another person on a permanent basis, then the amount of compensation payable shall be increased by one-quarter.
Section 6(3)	Permanent Partial Incapacity	The Minister on the recommendation of the labour advisory board may, by statutory instrument, increase the amount of compensation payable under this section
Section 7(1)	Temporary Incapacity	Where temporary incapacity, whether total or partial, results from the injury, the compensation shall be either a lump sum or periodic payments as the court may order, having regard to the circumstances in which the accident took place, the probable duration of the incapacity of the worker, the injuries suffered by the worker and the financial consequences for the worker and his or her dependents.
Section 11(2)	Medical Examination and Treatment	The worker shall be entitled to have his or her own medical practitioner or an official of a trade union of which he or she is a member present at the examination, but the attendance shall be at the worker's own expense
Section 12(1)	Agreement as to Compensation	The employer and the worker may, with the written approval of the labour officer, agree that compensation be paid in respect of an injury which would otherwise give rise to a claim under this Act.
Section 12(2)	Agreement as to Compensation	For the purpose of subsection (1), the following requirements shall be complied with— <ol style="list-style-type: none"> 1. the compensation agreed upon shall not be less than the amount payable under this Act; 2. and 2. it shall be for the employer to show that the worker was able to understand the terms of the agreement.
Section 13(1)	Computed Assessment of Disability	If the final assessment of disability made by a medical practitioner after a medical examination, made in accordance with section 11, is disputed by the employer or the worker, the employer or the worker may apply to the labour officer to request that the dispute be referred to the medical arbitration board
Section 13(3)	Computed Assessment of Disability	The decision of the medical arbitration board on the matter shall be final unless a party aggrieved by the decision goes to court.

Employment Act, 2006		
Section 42(3)	Death of an Employee	Where an employee dies while at work, or while travelling to his or her place of work, their employer shall be required to transport the employee's body to a place of burial notified by that employee's next of kin.
The Occupational Safety and Health Act, 2006		
Section 9	Powers of Inspector to Prosecute	An inspector may prosecute or conduct as the case may be before a magistrate's court any charge, information, or other proceeding arising under this Act or in the discharge of his or her duty
Section 16(2)	Safety Committees	The safety representatives shall represent employees on a safety committee
Section 17(1)	Employer to Consult with Workers' Organisations	...an employer shall act in consultation with a workers' organization and this consultation with include – <ul style="list-style-type: none"> 1. consultation on the role of the workers' organization in the practical implementation of measures prescribed under this Act 2. as far as possible, providing close collaboration, at all levels, between the employer and the workers in the application of the measures prescribed under this Act
Section 20	Employer to Provide Alternative Suitable Employment	Where an assignment involves continuous exposure to dangerous emissions or to substances and agents which are harmful to health, and it is certified to be medically inadvisable to continue the exposure, it shall be the duty of the employer to provide the worker concerned with suitable alternative employment
Section 21(1)(a) and (b)	Employer to Supervise Health of Workers	Subject to any conditions determined by the Commissioner, every employer shall provide for the supervision of the health of the workers exposed to or liable to be exposed to occupational hazards due to pollution and other harmful agents in a working environment and this duty shall include – <ul style="list-style-type: none"> (a) a pre-assignment medical examination of workers, before assignment to specific tasks which may involve danger to their health or that of others; (b) periodic medical examinations of workers during employment which involves exposure to a particular hazard to health

Annex C: Adequacy of Workers' Compensation - Ugandan Law and ILO Conventions

The ILO Workers' Compensation (Accidents) Convention, 1925, was ratified by Uganda in June, 1963. Article 5 of the Convention requires compensation for permanent incapacity or fatality compensation to be paid periodically for the remaining life of the incapacitated worker or to the dependents of the deceased worker. It also provides that a total or partial lump sum payment may be made when a "competent authority is satisfied that it will be properly used".

The Ugandan Workmen's Compensation Act (2000) on the other hand, provides for lump sum compensation for permanent total incapacities and fatalities at the equivalent of 60 months' salary. This lump sum is discounted by a percentage, reflecting the loss of earning capacity, in the case of partial permanent incapacity.⁸⁹

ILO commentary on Uganda's implementation of the Workers' Compensation (Accidents) Convention, available at the time of IFC's E&S review, documents concerns regarding the adequacy of the provision of lump sum payments for serious injury or death. The ILO commentary, covering the period 1966 to 2014, is specifically critical of the Ugandan practice of limiting the amount of compensation to 60 months' earnings at most, paid as a lump sum. The ILO commentary notes specifically that this approach is inconsistent with the requirements of Workers' Compensation (Accidents) Convention "which provides in the case of both permanent incapacity and death for the payment of benefits in the form of periodical payments without limit of time."⁹⁰

⁸⁹ Section 5, Workers Compensation Act, 2000.

⁹⁰ ILO. Workmen's Compensation (Accidents) Convention, 1925 (No. 17) - Uganda (Ratification: 1963) - <https://goo.gl/CnMQRI> (accessed on May 19, 2017).

Annex D: Summary of CAO Findings

Pre-Investment Review
IFC did not possess or have access to labor and OSH competence that was sufficient to evaluate the capacity of the client or the EPC contractor to apply the provisions of PS2 for a project of this scale and technical complexity
IFC did not ensure that the SEA provided adequate assessment of labor and OSH risks—particularly assessment of country and project specific OSH risks during construction
IFC did not ensure that the labor and OSH related plans of the client and the EPC contractor received appropriate technical review
IFC did not assess the client's capacity to effectively monitor and manage the OSH performance of the EPC contractor
IFC did not ensure that the (Occupational) Health and Safety Management Plan (HSMP) of the EPC contractor was developed following an initial OSH audit.
IFC did not consider whether national requirements for workers' compensation provided injured workers with access to appropriate compensation as required under the Sustainability Framework
IFC's pre-investment review of the project in relation to OSH and labor issues was not commensurate to risk. As a result, IFC did not have assurance the project could meet the labor and OSH related requirements of the PS over a reasonable period of time
Supervision
IFC did not possess or have access to labor and OSH competence sufficient to monitor the application of its labor and OSH requirements to a construction project of this scale and technical complexity
IFC did not establish agreed OSH performance criteria for the client or the EPC contractor or ensure that client reporting provided necessary performance and measurement data to assess the EPC contractor's site OSH performance
IFC's Site Supervision Visits did not provide sufficient OSH compliance data regarding the EPC contractor's site performance or the client's capacity to monitor overall project OSH performance
Other project monitoring reports such as the Panel of Experts reports and the reports produced by the independent engineer had insufficient OSH focus to effectively supplement the client's own reporting or IFC's lack of direct supervision of OSH issues
IFC neither received regular OSH management system audits nor commented on their absence
IFC neither received nor commented on the absence of regular root-cause analyses of OSH incidents on the construction site
IFC did not assure itself that the Bujagali-04 complaints received appropriate compensation for workplace injuries
IFC erred in deciding that the Bujagali-06 complainants were not covered by its E&S requirements. As a result, allegations that construction of the project had significant adverse effects on employees of the subcontractor were not addressed
<i>In these respects, IFC's supervision was not sufficient to assess whether project labor and OSH performance met the specific requirements of IFC's Guidelines for Occupational Health and Safety or good international industry practice as required by PS2</i>