



May 10, 2019
Office of the Compliance Advisor Ombudsman (CAO)

COMPLIANCE INVESTIGATION REPORT

Reventazón HPP (IFC Project # 31383)

Costa Rica

Complaints 01 and 02

CAO Investigation of IFC's Environmental and Social Performance in Relation to its Investment in the Reventazón HPP, Costa Rica

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

Overview of CAO's Compliance Process

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

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

CAO's approach to its compliance mandate is set out in its *Operational Guidelines* (March 2013).

When CAO receives an eligible complaint, it first undergoes an assessment to determine how CAO should respond. If CAO's compliance function is triggered, CAO will conduct an appraisal of IFC's/MIGA's involvement in the project and determine whether an investigation is warranted. CAO's 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/themselves of a project's E&S performance. 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 the institution's environmental and social (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; and
- A failure by IFC/MIGA to address E&S issues as part of the appraisal or supervision resulted in outcomes contrary to the desired effect of the policy provisions.

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

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 host countries.

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, after which it is made public on CAO's website (www.cao-ombudsman.org).

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.

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

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Acronyms

| Acronym | Definition |
|---------|---|
| CAO | Office of the Compliance Advisor Ombudsman (IFC and MIGA) |
| E&S | Environmental and Social |
| EHS | Environmental, Health and Safety |
| EIA | Environmental Impact Assessment |
| EIB | European Investment Bank |
| ESAP | Environmental and Social Action Plan |
| ESIA | Environmental and Social Impact Assessment |
| ESMS | Environmental and Social Management System |
| ESRS | Environmental and Social Review Summary |
| ESRP | Environmental and Social Review Procedures |
| GM | Grievance Mechanism |
| IAM | Independent Accountability Mechanism |
| IDB | Inter-American Development Bank |
| ICE | Instituto Costarricense de Electricidad |
| IESMC | Independent Environmental and Social Consultant |
| IFC | International Finance Corporation |
| MICI | Independent Consultation and Investigation Mechanism of the IDB |
| MIGA | Multilateral Investment Guarantee Agency |
| OP | Operational Policies of the IDB |
| PHR | Proyecto Hidroeléctrico Reventazón |
| PRCV | Plan de Restitución de Condiciones de Vida |
| PS | Performance Standards (IFC) |
| RCA | Resettlement Completion Audit |
| RPF | Resettlement Policy Framework |
| SBBD | Barbilla Destierro Biological Sub Corridor |
| SII | Summary of Investment Information |

Executive Summary

This compliance investigation report responds to two complaints regarding the environmental and social impacts of the Reventazón Hydropower Project in Costa Rica, developed by IFC's client, the *Instituto Costarricense de Electricidad* (ICE).

The project comprises the construction and operation of a dam and a 305.5 MW hydroelectric power plant on the Reventazón river, located 8 kilometers southwest of the city of Siquirres. The Project design includes the construction of a 130-meter high dam, a 6.9 km² reservoir, a 700-meter long diversion tunnel, and hydroelectric generation facilities. In addition, the construction of the project required about 20 km of new internal access roads, a 1.8 km long transmission line, spoils disposal and construction materials extraction sites, and a construction camp. Project construction started in 2009 and the project has been in operation since 2016. Total project cost was expected to be in the order of US\$1.4 billion. IFC's investment consists of a US\$100 million A Loan which was approved in November 2012. The remaining debt financing for the project was provided by the Inter-American Development Bank (IDB) and a group of international institutional investors.

Two separate complaints were received by CAO in September and December 2016 from landowners neighboring the project, and whose land was partially expropriated by the company for the needs of the project. The complaints relate to the land acquisition process conducted by the company, the value paid during expropriation, as well as environmental impacts, including increased risks of landslides in the area and GHG emissions resulting from vegetation that was not cleared before filling of the reservoir. The complaints also allege that the project has not complied with IFC's disclosure, consultation and grievance handling requirements, and the second complaint raised additional concerns about loss of access to water sources on the expropriated portion of the complainants' property.

While the complaints raised concerns related to a broad range of environmental and social impacts, CAO's October 2017 compliance appraisal report concluded that this investigation would only consider: (a) IFC's review and supervision of the project's approach to land acquisition, particularly as relates to landowners that were categorized as non-vulnerable, and (b) related issues of consultation, disclosure of information, and grievance handling.

"Non-vulnerable" landowners accounted for 69% (43 out of 62) of the households affected by the land acquisition process for the project. CAO found that the acquisition of land from these families was a source of significant potential impact and required the client to apply Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS5).

CAO's investigation acknowledges IFC's request to its client, at pre-investment review stage, to halt land acquisitions until a Land Acquisition and Involuntary Resettlement Framework (RPF) compliant with the requirements of PS5 was developed. IFC's decision to require a full Livelihoods Restoration Plan (*Plan de Restitución de Condiciones de Vida*, PRCV) as a condition of disbursement was consistent with the requirements of the Sustainability Framework.

Yet, during its pre-investment review, IFC did not identify potential compliance issues associated with project acquisition of land from non-vulnerable landowners. These included the company's approach to these landowners, which favored the use of legal expropriation proceedings over negotiated settlements. Further, IFC did not ensure that the PS5 requirement for compensation at full replacement cost mentioned in the RPF, was supported by adequate methodology to be operationalized for the project.

PS5 compliance issues persisted during project supervision. IFC was aware that the company was relying on expropriation for the majority of the non-vulnerable landowners but did not question this approach in the context of PS5's preference for negotiated settlements. IFC was aware that the company had increased the size of its land take due to geological concerns but did not seek assurance that this was done in a way that reflected PS5 requirements to minimize the impacts of land acquisition. IFC was also aware of concerns regarding the company's approach to land valuation, leading to potential under-compensation, as reported by the project's independent environmental and social monitoring consultant (IESMC). However, IFC did not ensure that the company's valuation methodology was consistent with PS5 requirements.

A Resettlement Completion Audit (RCA) provided a final opportunity for IFC to identify and correct any non-compliance with PS5 requirements. The RCA, completed in April 2018, identified concerns regarding land acquisition from non-vulnerable landowners. In particular, the RCA noted a lack of baseline data in relation to non-vulnerable landowners, lack of support in reestablishing livelihoods for these households, and the potential for under-compensation. IFC argued that there was insufficient information for the RCA to reach conclusions of non-compliance. In this context, IFC reported to CAO that it would monitor the outcomes of the remaining court cases and consider what action might be required at a later date. At the time of writing this report, IFC was in the process of reviewing information provided by the company to determine whether fifteen affected families were misclassified as non-vulnerable.

On the balance of available evidence, including the results of contested expropriation cases, the findings of the IESMC and the results of the RCA, CAO finds that IFC lacks assurance that all displaced landowners were compensated for loss of assets at full replacement cost and provided with other assistance to help them improve or at least restore their livelihoods as required by PS5. In line with Performance Standard 5, a household level review of compensation paid and livelihood impacts of the company's resettlement program on non-vulnerable households is required. In case compensation at full replacement cost is not met, IFC would be expected to work with the client to ensure supplemental compensation and support as necessary to meet PS5 requirements.

An underlying cause of the non-compliance identified in this report was IFC's focus on the resettlement impacts of the project on vulnerable households, at the expense of ensuring compliance in relation to the (in this case larger) group of households deemed non-vulnerable. Given this issue, and the broader environmental risks associated with the project, IFC did not provide adequate review or supervision of project resettlement impacts on households deemed non-vulnerable. The IFC Sustainability Framework provides for a risk-based approach to E&S impacts with a focus on those who are poor or vulnerable. However, this does not mean that households deemed non-vulnerable fall outside the framework. The objectives of PS5 and the requirement for compensation at full replacement cost apply equally to vulnerable and non-vulnerable households.

In light of the findings of this report, CAO will keep this investigation open for monitoring, and will issue a monitoring report no later than one year after publication of this investigation. CAO will monitor the situation until actions taken by IFC assure CAO that non-compliance findings are addressed.

1. Background

1.1. The Project

1.1.1 The Investment

The Reventazón Hydropower Project (“Reventazón HPP”, or “the project”) comprises the construction and operation of a dam and a 305.5 MW hydroelectric power plant on the Reventazón river, located 8 kilometers southwest of the city of Siquirres in Costa Rica. The Project design includes the construction of a 130-meter high dam, a 6.9 km² reservoir, a 700-meter long diversion tunnel, and hydroelectric generation facilities. In addition, the construction of the project required about 20 km of new internal access roads, a 1.8 km long transmission line, spoils disposal and construction materials extraction sites, and a construction camp.¹ Project construction started in 2009 and the project has been in operation since 2016.

The Reventazón HPP is the third hydroelectric project of the *Instituto Costarricense de Electricidad* (“ICE” or “the company”) on the Reventazón river. ICE is an autonomous state-owned company dedicated to the provision of power and telecommunication services in Costa Rica.² Total project cost was expected to be in the order of US\$1.4 billion. As disclosed, IFC’s investment consists of a US\$100 million A Loan which was approved by the IFC Board in November 2012.³ The remaining debt financing for the project was provided by the Inter-American Development Bank (IDB) and a group of international institutional investors, including a €61 million allocation from the European Investment Bank (EIB) through the Central American Bank for Economic Integration (CABEI).

1.1.2 Environmental and Social Considerations

The project was categorized A by IFC because of potential significant and irreversible impacts on the Mesoamerican Biological Corridor, which is considered critical habitat, on the ecological integrity of the Reventazón river, and on the complex and ecologically sensitive downstream Reventazón – Parismina – Tortuguero hydro-biological system.^{4,5}

Biodiversity issues were considered by the lenders’ due diligence to represent a major challenge for this project. As noted in IFC’s project disclosure, the project is located within the Volcanica Central Talamanca Biological Corridor (CBVC-T), one of the most important areas for ecological connectivity in Mesoamerica. Within the CBVC-T lies the Barbilla Destierro Biological Sub Corridor–Path of the Jaguar (SBBT), an important corridor for movement and genetic flow of jaguar and their prey between the protected areas, and north and south American populations. IFC’s due diligence concluded that (a) the terrestrial corridor area (CBVC-T and SBBT) qualifies as critical habitat per criterion 5 of para. 16 of PS6;⁶ and (b) the aquatic environment qualifies as natural habitat per para. 13 of PS6.^{7,8}

Therefore, the lenders required the client to develop a Biodiversity Action Plan, which would contain actions to ensure, over time, net positive gain in critical habitat in relation to key evolutionary processes (PS6 criteria 5), as well as to design and implement an aquatic offset to

¹ IFC, Summary of Investment Information, Reventazón HPP, June 2012 - <https://goo.gl/dNbKZd>

² *Ibid.*

³ *Ibid.*

⁴ Per IFC’s 2012 Sustainability Policy, a project is categorized A when it involves “business activities with potential significant adverse environmental or social risks and/or impacts that are diverse, irreversible, or unprecedented.” (para. 40)

⁵ IFC, Environmental and Social Review Summary, Reventazón HPP, June 2012 - <https://goo.gl/g4W5AP>

⁶ PS6, para. 16, criterion 5 states that “areas associated with key evolutionary processes” qualify as critical habitat.

⁷ PS6, para. 13: “Natural habitats are areas composed of viable assemblages of plant and/or animal species of largely native origin, and/or where human activity has not essentially modified an area’s primary ecological functions and species composition.”

⁸ IFC, Environmental and Social Review Summary, Reventazón HPP, June 2012 - <https://goo.gl/g4W5AP>

assure no-net biodiversity loss in natural habitat. Subsequent monitoring of the client's implementation of the BAP has been an important focus of the lenders' supervision of the project.

The project also involves a large land acquisition and resettlement program, requiring the acquisition of 136 properties covering approximately 2,000 hectares of land. Land acquired included a buffer zone that was deemed necessary for the implementation of the BAP in relation to the terrestrial corridor, and to better manage the reservoir's geological risks.

1.2. Complaints and CAO Assessment

1.2.1. Reventazón-01 Complaint

In September 2016, CAO received a complaint ("the Reventazón-01 complaint") filed by a family and two business partners who are landowners neighboring the project (referred to as "the Reventazón-01 complainants" in this report). The complainants form a group of owners of the six different farms that constituted the Lancaster Lagoons Farm located near the project. Land belonging to the Lancaster Lagoons Farm was partially expropriated to be part of the future buffer zone for the project. Two water bodies, which each cover about five hectares of the Lancaster Lagoons Farm, were declared wetlands by the Government of Costa Rica in 1994. The map below shows the location of the Lancaster Lagoons and the project's footprint.

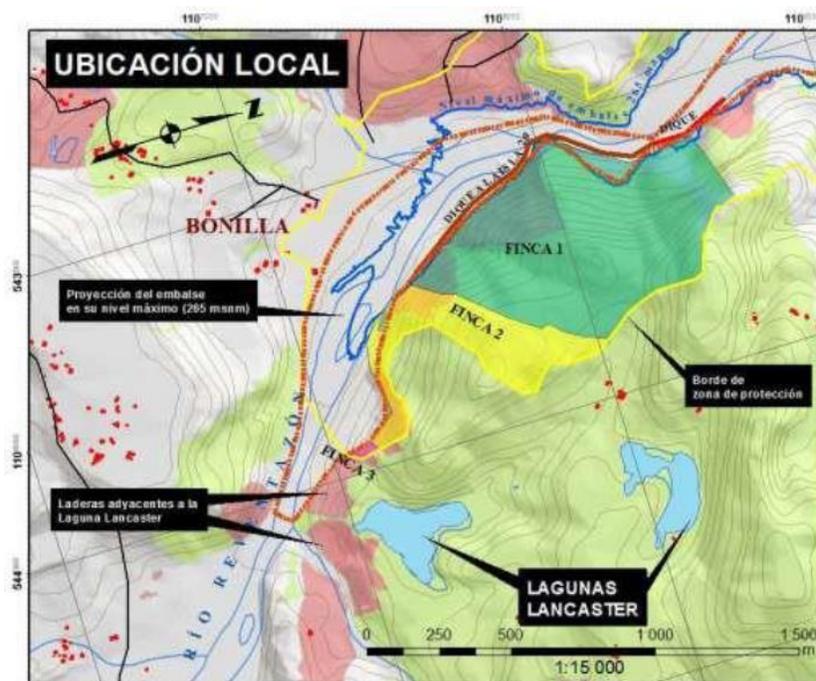


Figure 1 – Limit of the PHR concession (red line), maximum operation level of the reservoir (blue line) and location of slopes endangered by landslides (red patches) (source Fichtner 2016).

The complainants' concerns can be summarized as follows:

- **Land acquisition and expropriation process:** the complainants claim that the company was not willing to enter into land price negotiations, which led to an expropriation process. They allege that the company did not consider real market values in the land acquisition process, and that the biological and environmental value of their land, infrastructure assets (roads and irrigation system), as well as restricted access to the rest of their property were not taken into account.
- **Impacts on biodiversity:** the complainants claim that their property, as habitat for species in danger of extinction, as a migratory route for species of the Barbilla-Destierro Biological Sub-

Corridor, and as the only biological unit at the critical “tail” of the reservoir, will be negatively impacted by the project. They further allege that once the company expropriated their properties, it proceeded to fence them, which hinders or limits movements for migratory species. They claim that such action goes against the purpose of the expropriation of their land, which was to create an environmental buffer zone and reestablish migratory routes for in-transit species.

- Risks of landslides: the complainants claim that the risks of landslides on their property have increased in recent years, due to alleged illegal excavation conducted by the client, with potential impacts to the Lancaster Lagoons.
- Greenhouse gases (GHG) emissions: the complainants express concern about impacts due to GHG emissions from the project reservoir. They allege that the company did not meet its commitment in the project Environmental and Social Impact Assessment (ESIA) to remove vegetation in the area to be flooded.

The complainants substantiated their concerns with research conducted at their request by an academic with expertise in natural sciences from the Department of Biology at the University of Costa Rica, with the contribution of geologists, environmentalists, environmental economists, and other professionals.

1.2.2. Reventazón-02 Complaint

CAO received a second complaint regarding the project in December 2016 (“the Reventazón-02 complaint”) from a family which owns land neighboring the project that was partially expropriated by the company (referred to as “the Reventazón-02 complainants” in this report). The concerns raised in the complaint are similar to those raised in the Reventazón-01 complaint. These relate to the land acquisition process, the value paid during expropriation, as well as environmental impacts, including increased risk of landslides in the area and GHG emissions resulting from vegetation that was not cleared before filling of the reservoir. The complainants also raise concerns about loss of access to water sources on the expropriated portion of their property.

According to CAO’s June 2017 Assessment Report,⁹ the complainants’ main claim is that when their land was partially expropriated, they were prevented from accessing water sources that were previously part of their land, and on which they depended to raise cattle and carry out small-scale dairy production. According to the complainants, they had installed a system to pump water and irrigate their land, and this system was impacted by the expropriation, leaving them with no access to water and diminished livelihood opportunities.

1.2.3. Company’s Perspective

As noted in CAO’s Assessment Reports,¹⁰ ICE reported that they have conducted studies which refute all the issues raised by the complainants, and offered opinions of competent authorities at the national level rejecting all the arguments presented in the complaints.

According to ICE, 90 percent of the landowners accepted the price offered by the company and 10 percent of the landowners did not. At the time of the CAO Assessment Reports, national courts were in the process of ruling on those cases. The company noted that it conducted an individual analysis of each impacted family to understand better their level of vulnerability and, as a result of this analysis, determined that the complainants were not vulnerable, as they did not use the land for productive purposes, or used it occasionally but did not economically depend on it.

From the company’s perspective, the project has complied with all contractually required environmental and social commitments, including compliance with the lenders’ E&S standards.

⁹ CAO Assessment Report, Reventazón-02, June 2017 - <https://goo.gl/Q1NrYR>

¹⁰ CAO Assessment Report, Reventazón-01, March 2017 (<https://goo.gl/Ji4zvS>) and Reventazón-02, June 2017 (<https://goo.gl/Q1NrYR>)

ICE stated that the project has received international recognition for due diligence. In their view, some examples of the unique efforts undertaken include contracting the services of (a) a panel of expert consultants to help during the construction phase and to advise on impacts regarding biodiversity, (b) construction and environmental supervisors, and (c) an independent engineer.

1.2.4. Complaints to Other Development Banks

CAO notes that similar complaints were sent by the Reventazón-01 complainants to MICI and the EIB-CM, the independent accountability mechanisms (“IAMs”) of the IDB and the EIB, respectively. In responding to the complaint, MICI concluded that a compliance investigation was warranted in relation to the issues raised by the complainants, excluding those related to land acquisition, as they were under judicial review in the national courts.¹¹ However, the Board of the IDB determined that no compliance investigation should be conducted. With this decision, the MICI process in relation to the Reventazón-01 complaint ended and the case was closed. In responding to the EIB complaint, EIB-CM concluded that the complainant’s allegations concerning the assessment of risks of environmental damage required technical assessment, in the context of a compliance investigation.¹² The EIB-CM’s compliance investigation is ongoing.

The Reventazón-02 complainants also sent a complaint to MICI. As a result of a series of dialogues facilitated by MICI, in April 2018, the company, the complainants, and the IDB Group reached an agreement to provide a comprehensive solution that allows the restoration of access to water for animal troughs and irrigation of the complainants’ property.¹³ In August 2018, the parties agreed on a work plan that operationalizes the commitments signed in April. The work plan details the general conditions and other technical aspects of the construction works aimed at restoring access to water, and contains an estimated schedule of activities that must be carried out by the parties.¹⁴ At the time of writing this report, MICI and the complainants reported to CAO that the construction of the infrastructure agreed on as part of the work plan was in progress but not yet completed.

1.2.5. CAO Compliance Appraisal

CAO’s assessments for both complaints concluded with the company’s decision that the complaints be referred to CAO’s compliance function for an appraisal of IFC’s performance on the environmental and social review and supervision of the project.

In its October 2017 compliance appraisal report,¹⁵ CAO identified a number of compliance questions relating to the adequacy of IFC’s application of Performance Standard 5 (PS5) which were considered relevant to the issues raised by the complainants and the project’s land acquisition process more generally. CAO identified questions as to whether the full replacement cost and livelihoods restoration requirements of PS5 were properly applied to the project. The CAO appraisal noted that the provision of compensation at full replacement cost and the commitment to livelihood restoration are important requirements of PS5, which if not properly implemented generate substantial concerns regarding E&S outcomes. Noting both the issues raised by the complainants and the potential for adverse impacts on households whose land was acquired more generally, CAO found that a compliance investigation in relation to the land acquisition related aspects of the complaints was required.

While recognizing the importance of issues related to biodiversity, landslides and GHG emissions as raised in the complaints, CAO’s compliance appraisal noted that these were not the primary

¹¹ MICI, Recommendation for Compliance Review and Terms of Reference, MICI-BID-CR-2016-110, February 2017 – <https://goo.gl/BNKrKB>

¹² EIB-CM, CA CCFL Reventazón Hydropower – <https://goo.gl/iYEhfA>

¹³ MICI, Case page MICI-BID-CR-2017-0125, Power Sector Development Program 2012-2016 (Reventazón Hydroelectric Project) - <https://goo.gl/34VGHR>

¹⁴ *Ibid.*

¹⁵ CAO, Compliance Appraisal Report, Reventazon-01 & 02, October 2017 – <https://goo.gl/4zGUi3>

areas of alleged adverse impact on the complainants. CAO acknowledged measures taken by IFC at appraisal and during supervision to ensure project compliance with its E&S requirements in relation to these issues. CAO also noted that these issues would be subject to independent review as part of the EIB-CM compliance investigation of the project. CAO's appraisal stated that, should EIB-CM make findings related to the project's environmental impacts that are not addressed in ongoing supervision, it would be open to CAO to raise these issues with IFC at a later point. In these circumstances, CAO determined that these issues would not be covered as part of the CAO compliance investigation.

1.3. CAO Investigation Process

1.3.1. Scope of CAO Investigation

The scope of this investigation is defined in Terms of Reference (TOR) issued by CAO in November 2017.¹⁶

As outlined in the TOR, this compliance investigation considers whether IFC's review and supervision of the project provided assurance that:

1. the project's approach to land acquisition was consistent with the requirements for provision of compensation at full replacement cost and other benefits to displaced persons under PS5; and
2. affected landholders had access to a recourse mechanism designed to resolve resettlement related disputes in an impartial manner as provided for by PS5.

As in all cases, the scope of the investigation includes developing an understanding of the immediate and underlying causes for any non-compliance identified by the CAO.

In considering IFC's E&S performance in relation to this investment, 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's compliance mandate is focused on IFC's E&S performance. In accordance with CAO's Operational Guidelines, this report documents investigation findings with respect to IFC's compliance with relevant requirements and adverse environmental and/or social outcomes, including the extent to which these are verifiably related to the project.

1.3.2. Methodology

From November 2017 to March 2018, the CAO investigation team, including CAO staff and an independent expert, reviewed IFC's documentation of the investment and gathered information through interviews with IFC staff with direct knowledge and responsibilities for the project, and through a field visit to Costa Rica in February 2018.

The CAO team met with:

- The two groups of complainants;
- The IFC project team;
- The project's independent E&S monitoring consultant staff; and
- Company management and staff on site at Reventazón HPP and in San José, Costa Rica.

Relevant secondary materials were provided by some of the interviewees.

¹⁶ CAO, Terms of Reference for Compliance Investigation of IFC, Reventazon-01 & 02, November 2017 – <https://goo.gl/h8u7P1>

CAO's independent expert specializes in the management of social performance of infrastructure and extractive projects in Latin America. He has extensive experience in the application of IFC Performance Standards, including the design, implementation, and review of social management systems as well as resettlement and livelihood restoration processes.

2. IFC's E&S Review and Supervision of the Project

This compliance investigation originates from two complaints that raised a broad range of environmental and social issues. However, the scope of the investigation is limited to, and its findings center on, IFC's actions regarding the project's approach to acquiring land from property owners classified as 'non-vulnerable', as well as the project's approach to livelihoods restoration for these landowners. Related to these issues, the investigation also considers the project's approach to disclosure and consultation related to the land acquisition and livelihoods restoration process, and its grievance mechanism for landowners.

This section describes IFC's appraisal and supervision of the project in relation to these issues.

2.1. IFC's Pre-Investment E&S Review of Land Acquisition and Livelihoods Restoration Issues

IFC's appraisal of the project was initiated in early 2012.¹⁷ Throughout the E&S review process, IFC worked in collaboration with the IDB to agree with the company on actions required to fulfil both IFC and IDB policies and standards.

In March 2012, as per the guidance of IFC's Access to Information Policy (AIP) on early disclosure for projects with potential significant adverse E&S risks and/or impacts,¹⁸ IFC disclosed several assessments and management plans which had been completed as part of the project environmental and social impact assessment (ESIA) process.¹⁹ These documents included the project's original Environmental Impact Assessment (EIA) prepared by the client in 2008, and complementary environmental studies prepared by a consortium of international consultants in 2011 at the request and with the financing of the IDB.²⁰

2.1.1 Early identification of compliance gaps regarding land acquisition

During their appraisal of the project, IFC and IDB developed a draft environmental and social action plan (ESAP) to be implemented by the client, including a number of actions to be completed prior to IFC presenting the project to its Board for approval. The lenders' early E&S review identified implementation discrepancies in the project's initial land acquisition process vis-à-vis IFC's Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS5) and IDB's Operational Policy on Involuntary Resettlement (OP-710). To address these gaps, the lenders requested that the client halt acquisitions until a Land Acquisition and Involuntary Resettlement Framework (or Resettlement Policy Framework, RPF) in form and content acceptable to the

¹⁷ IFC, Early Disclosure, Reventazón Trust, March 2012 - <https://goo.gl/9xP2kT>

¹⁸ IFC Access to Information Policy, para. 36: "For projects or investments with potential significant adverse environmental or social risks and/or impacts, disclosure of the ESIA should occur early in the environmental and social assessment process. For these projects, IFC will also endeavor to provide access to the draft ESIA prepared by the client even before IFC has completed, or in some cases even started, the review of its investment."

¹⁹ IFC, Early Disclosure, Reventazón Trust, March 2012 - <https://goo.gl/9xP2kT>

²⁰ IDB, Project CR-T1074: Reventazón Hydroelectric Project Complementary Environmental Studies – <https://goo.gl/Mk1HU8>

lenders was prepared. This was a condition of IFC's Board approval. A preliminary RPF was prepared by the company in early 2012 and disclosed by IFC.²¹

The RPF confirms a number of gaps between IDB and IFC policies and standards, and the process that had been taking place under national law until acquisitions were halted. In particular, with regard to how compensation is determined, the RPF notes some differences between national and international standards, as under national law transaction costs are not covered, and land valuations are limited to the land taken rather than the affected assets, properties, and livelihoods. The RPF also identifies the need for a vulnerability assessment of affected landowners, in line with PS5 requirements. The RPF further recommends that:

- Negotiated settlements should be used to the extent possible to acquire the land needed;
- Livelihood restoration assistance is limited to vulnerable households, and vulnerability is largely defined with respect to the socio-economic situation of the affected people;
- Cash compensation packages should meet replacement value for loss of assets and economic activities, as well as transaction costs; and
- Expropriation procedures, namely the special expropriation law for ICE (law 6313), shall be used in case that no agreement can be reached – see below for further information on ICE's expropriation process.

Law of Acquisitions, Expropriations and Constitution of Easements of the Costa Rican Electricity Institute (ICE, in Spanish) (Law 6313, January 4, 1979)²²

Property declared by ICE as being of public interest is subject to expropriation in accordance with ICE's law of expropriation (Law 6313). In such cases, ICE orders an appraisal of the property by one of its expert appraisers. The appraiser independently evaluates the land, its crops, constructions, tenants, leases, commercial rights, deposits, and any other assets that may be subject to compensation. The valuation only considers actual and permanent damages to the property, not future or expected ones.

Once the appraisal value is presented to a landowner, the landowner is given eight business days to accept the offer. At that point, regardless of the landowner's decision, ownership of the property is transferred to the expropriator, ICE (Art. 7). ICE must deposit the amount of the appraisal value within three months of the start of judicial proceedings (Art. 12).

The timing of the property transfer and deposit of the appraisal value differs to that required by Costa Rican general expropriation law which is not specific to ICE (Law 7495).²³ According to Law 7495, once a judicial expropriation process is initiated, the amount of the appraisal value must be deposited prior to possession of the expropriated property (Art. 28).

2.1.2 Disclosure of IFC's Environmental and Social Review Summary

IFC's environmental and social review summary (ESRS) of the project, disclosed in June 2012, gives further information on IFC's review of the project's compliance with PS5.²⁴ It indicates that since 2009 and as of May 2012, ICE had acquired 61% of the total land required at the time for the placement of main civil works, upgrading of access roads, and construction of project facilities (camps, mechanic shops, etc.) through a process that was in line with Costa Rican practices and regulations. The project was expected to require the acquisition of approximately 2,000 ha of land belonging to 56 land owners. The ESRS reported that, out of the 56 affected land owners, 40 were businesses, absent tenants, or governmental institutions which were expected to be subject to marginal impacts. The remaining 16 land owners were noted to present mid-to-high levels of

²¹ *Marco Estratégico de Restitución o Mejora de las Condiciones de Vida*, 2012 – Accessible under “Client Documentation”: <https://goo.gl/g4W5AP>

²² Ley de Adquisiciones, Expropiaciones y Servidumbres del ICE – <https://goo.gl/M38ydf>

²³ Reforma integral de la ley N° 7495, Ley de Expropiaciones N° 9286 – <https://goo.gl/N54gJX>

²⁴ IFC, Environmental and Social Review Summary, Reventazón HPP, June 2012 – <https://goo.gl/g4W5AP>

vulnerability and to depend on the affected lands for their livelihood. At the time of IFC's appraisal, ICE had initiated judicial expropriation processes for approximately 25% of the properties already acquired due to disagreements on valuation.²⁵

The ESRS notes the discrepancies mentioned above between the company's practices and IFC's PS5 requirements. It states that, "as a condition of IFC investment the objectives, principles, and compensation packages defined in the [RPF] will be further validated and negotiated through consultations with the affected families and workers and resulting actions will be documented in a time-bound Resettlement and Livelihood Restoration Plan (*Plan de Restitución de Condiciones de Vida*, PRCV)."²⁶ It further sets a requirement for the PRCV to "include provisions for ongoing monitoring and a completion audit of the resettlement activities demonstrating compliance with IDB's and IFC's resettlement standards and policies or, if necessary, identifying any remaining gaps and corresponding corrective actions."²⁷ The requirement for an ex-post Resettlement Completion Audit to be completed was included in the final ESAP, disclosed with the ESRS.²⁸ IFC reported to CAO that the purpose of the PRCV, and monitoring therefrom, was to define compensation and livelihoods restoration measures focused only on the landowners that were considered to present mid-to-high levels of vulnerability.

The ESRS notes that the RPF includes a socio-economic analysis of affected people and criteria of social vulnerability for physical and/or economic displacement, and defines provisions to ensure: (a) land-for-land compensation whenever feasible, (b) legal assistance to secure land tenure, (c) reestablishment of access to public services, (d) social, economic, and technical assistance for restoring/improving productive activities and social support networks, (e) engagement with affected people and grievance mechanisms, and (f) monitoring and ex-post evaluation arrangements. The ESRS states that the company's resettlement strategy includes replacement values and inclusion of all resettlement-related costs, as well as integral assistance for physical relocation when necessary. It also states that the RPF provides the elements to manage any unforeseen displacement that may result from additional land acquisition required.²⁹

2.2. Approval and Pre-Disbursement Supervision

2.2.1 IFC Approval of the Investment

In November 2012, the proposed investment was presented to the IFC Board, and a US\$100 million A Loan was approved.^{30,31} The requirement to develop a Livelihoods Restoration Plan³² consistent with IDB and IFC standards, covering all affected households, was not included in the disclosed ESAP,³³ however, it was agreed as a condition of disbursement in legal agreements.

2.2.2 Development of a Grievance Mechanism for the project

A project-level Grievance Mechanism (GM) was developed in January 2013. The GM categorizes complainants in two groups: (1) property owners and redundant workers, and (2) community members. The GM framework provides for the possibility to involve community members in the resolution process, and/or resort to a third party if complainants disagree with the process or the initial investigation conducted by ICE in response to a complaint. The GM envisages that, in case

²⁵ *Ibid.*

²⁶ *Ibid.*

²⁷ *Ibid.*

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ IFC, Summary of Investment Information, Reventazón HPP, June 2012 - <https://goo.gl/dNbKZd>

³¹ The IDB had previously approved a first investment of \$250 million in the Reventazón HPP, in June 2012. See IDB, Project CR-L1049 : Power Sector Development Program 2012-2016 (Reventazón Hydroelectric Project) - <https://goo.gl/aw9orR>

³² *Plan de Restitución o Mejora de las Condiciones de Vida* (PRCV)

³³ IFC, Environmental and Social Review Summary, Reventazón HPP, June 2012 - <https://goo.gl/q4W5AP>

no agreement is reached after both parties have presented their position, and after the investigation process is completed, ICE has the obligation to inform complainants about the option of involving a third party to help resolve their case. Resorting to a third party is possible in the following cases:

- The complainant does not trust the data and analysis presented by the company;
- The complainant does not agree with the procedures followed by ICE;
- The complainant does not agree with the scope and process of public participation conducted by ICE.

Once an agreement is found in response to a complaint, the GM has provisions for community participation in the monitoring of the implementation of agreed actions.

2.2.3 Appointment of an Independent E&S Monitoring Consultant

In 2013, the company contracted an Independent Environmental and Social Monitoring Consultant (IESMC) in charge of monitoring the project's E&S performance against the lenders requirements, and reporting directly to the lenders. The scope of work of the IESMC included: (a) assessing the project's compliance with IDB and IFC E&S requirements; (b) assessing the status of implementation of the ESAP; (c) identifying any new risks or impacts; and (d) propose corrective actions for any non-compliance identified.

The IESMC was expected to complete quarterly reviews of the project's performance, and to coordinate any recommendations with the company and the lenders.

The IESMC's first monitoring report, in October 2013, noted that a preliminary PRCV was submitted to the lenders in April 2013 and pending final approval. The IESMC reported that 52 complaints had been submitted by landowners in the past eight months, and that most were related to property valuation. It recommended that the company carry out property valuation with the participation of the landowners, clearly listing every productive plant, pasture and asset to ensure valuation at replacement cost. Additionally, the IESMC noted company reports that some additional land may have to be acquired to manage landslides risks in the reservoir area.

Loan agreements executed in December 2013, marked IFC's commitment to financing the project. The loan agreements confirmed that the project was to be implemented in accordance with the IFC Performance Standards, and an agreed ESAP. The requirement for the company to develop a Resettlement Policy Framework and Land Acquisition and Involuntary Resettlement Plan in form and content acceptable to the lenders was also included in the loan agreements.

2.2.4 Development of a Livelihoods Restoration Plan

After a site visit in January 2014, IFC acknowledged receipt of the PRCV and deemed its content satisfactory. Building on the principles developed in the RPF, the PRCV outlines measures aimed at assuring compliance with the requirements of IFC's PS5 and IDB's OP-710. To this end, the PRCV introduces the following:

- (a) Baseline assessment of affected landowners and redundant workers, and vulnerability categorization (high vulnerability, medium vulnerability, no vulnerability). While the focus of the PRCV is on landowners with mid-to-high level of vulnerability, it mentions that non-vulnerable landowners would be eligible for direct negotiations with ICE in compliance with local legislation, and cash compensation for loss of land and economic impacts.
- (b) Compensation offered is required to meet standards of full replacement value, which is expected to consider all costs incurred by the land acquisition process, including value of the land, cultivated features present on the property, infrastructure (equipment, buildings, electrical installations, paths, etc.), and transaction costs for the landowner.

- (c) Commitment to verify that the remaining property of partly affected properties is sufficient to maintain livelihoods.
- (d) The process of consultation and disclosure of information to affected landowners puts an emphasis on public information sessions on the content of the PRCV, individual visits and support throughout the process, and an open line of communication.
- (e) Possibility to submit complaints through the project's GM. While the GM categorizes complainants owning land separately, the grievance handling process is the same for all complaints and does not contain aspects specific to land-related complaints.
- (f) Monitoring of livelihoods restoration measures for vulnerable groups.
- (g) Ex-post audit of the implementation of livelihoods restoration measures as set out in the PRCV. The audit is expected to be carried out prior to the termination of the project, and result in the identification of corrective actions if necessary.

2.2.5 Assessment of geological risks and expansion of the land acquisition program

While IFC considered the first version of the PRCV satisfactory, IFC later required that the client amend the PRCV to reflect additional land acquisition required for the project, as a larger buffer zone was deemed necessary to manage risks of landslides, following a preliminary geological risk assessment. Completed in May 2013, this assessment recommended the purchase of additional land as a preventive measure, due to the characteristics (size, volume, movement) and susceptibility of landslides after reservoir filling.

A final assessment on the Geotechnical Stability Risk of Reservoir Slopes was completed in October 2013. It identified a number of sites susceptible to landslides where significant geological changes were expected once the reservoir was filled. This final study recommended the purchase of additional land to prevent impacts on people and properties around the reservoir's critical areas, and to ensure proper management of identified risks.

Thereafter, the company amended the PRCV to reflect additional land required to expand the buffer zone. In March 2014, a preliminary assessment of new families impacted by the expanded buffer zone was prepared. It noted that both previously affected landowners, and newly affected families, would be impacted by the expanded footprint.

The second monitoring report completed by the IESMC in March 2014 identifies the requirement for the company to submit the updated version of the PRCV to the lenders by mid-2014. While the conclusions of the geological study and consequent need for additional land acquisition are presented in the IESMC report, the methodology and content of the geological study are not discussed by the IESMC and were not inquired about by IFC.

After clearance of the first version of the PRCV (with the understanding that necessary amendments would be completed in due course), as well as additional environmental studies that were agreed as conditions of disbursement, a first disbursement was approved by IFC in March 2014.

2.3. IFC's Post-Disbursement Supervision

In the course of 2014, the company continued its process of land acquisition, while carrying out the additional socioeconomic assessments required by the lenders regarding newly affected landowners following the expansion of the area to be acquired.

2.3.1 Identification of challenges to the successful implementation of the PRCV

In June 2014, the IESMC raised concerns regarding delays in the implementation of the PRCV. In addition to delays, the IESMC identified difficulties in applying the concept of replacement value

as required by the lenders, and in coming up with innovative solutions to ensure satisfactory family-tailored livelihoods restoration measures.

In November 2014, the company submitted an updated version of the PRCV to the lenders, including landowners newly affected following the expansion of the area to be acquired. The PRCV was considered acceptable to the lenders. Following its quarterly visit, the IESMC noted significant progress in the land acquisition process, while also noting discontent from some of the affected landowners regarding land prices offered and/or paid by the company.

The IESMC further raised issues around access to water sources in private properties that were partially acquired for the project, urging the company to identify technically feasible water-source replacement solutions for five affected landowners.

2.3.2 Requests from the lenders to expedite negotiations and complete land acquisition prior to reservoir filling

June 2015 supervision records show that IFC had acknowledged concerns raised by the IESMC related to the acquisition of a number of properties, which were delayed due to: (a) landowners disagreements over property appraisal and prices offered by the company; and (b) ongoing legal processes. Subsequently, the company was requested by the IESMC and the lenders to expedite negotiations and resolve legal issues in order to take possession of all necessary properties prior to reservoir filling.

In August 2015, following up on the issue of water access for partially affected properties, the company conducted additional assessments, which concluded that three affected properties required corrective actions to secure water sources for productive activities. The IESMC considered that the company provided solid technical evidence to support the conclusion that two of the five landowners were not affected. It further reported that one of the landowners (also CAO's Reventaon-02 complainant) had not accepted the solution proposed by the company.

The IESMC reported that by October 2015, eighteen properties representing 13% of all properties needed for the project were or would be under expropriation, including eleven expropriations due to disagreements over compensation offered by the company and/or the extent of land take required for the buffer zone.

As of November 2015, all lands in the reservoir area required for the project were acquired, allowing for the reservoir filling to be initiated.

2.3.3 Submission of a complaint letter to the lenders and attempts for resolution

The Reventazón-01 complainants sent a letter to the IDB in February 2016, which was shared with IFC, outlining concerns in relation to negative impacts of the project on their properties. The IESMC reported that the company had not previously informed the lenders and the IESMC about this grievance, although it had been aware of the issues raised by the complainants since 2013. The IESMC also noted that the two reports on land acquisition submitted by the client in the second half of 2015 did not mention this property as being undergoing expropriation. The IESMC recommended that the client provide: (a) technical assessment of alleged damages in all private properties associated to reservoir filling and riverbed works; and (b) full records of grievance management and responses to complaints.

The IESMC, along with IFC and IDB staff, visited the complainants' Lancaster farms in April 2016. The IESMC subsequently requested information documenting the company's response to the complainants' claims. Considering the resolution of this claim as being outside of its scope of monitoring, and given the limited information provided by the company, the IESMC recommended that a mediated solution be sought through an independent third party.

Subsequently, the lenders required the company to submit additional information, which became conditions of final disbursement for the lenders, including: (a) data and records about the complainants' case; (b) evidence of initial efforts towards resolution of the case; and (c) a framework for future management plan for the biodiversity buffer zone, which included the complainants' properties to be expropriated.

After the company submitted additional information in response to the lenders' requests in May 2016, the lenders asked the IESMC to review this information against the lenders' requirements, prior to approving a final disbursement. This review addressed the following issues:

- (a) whether the process followed by the company regarding the acquisition of the complainants' land was consistent with the requirements of the RPF, particularly related to the requirement to finalize all negotiations before taking possession of the land;
- (b) whether the interactions with the complainants were consistent with the principles and processes described in the Grievance Mechanism Framework;
- (c) whether the management of land acquisition processes related to the buffer zone was considered as part of the biodiversity management plan.

The IESMC reviewed the information provided and issued a certificate of compliance in May 2016 that included the following recommended actions to ensure compliance with the ESAP:

- (a) ICE will continue to work with affected parties towards the resolution of outstanding complaints and grievances regarding property and land damages due to project construction and reservoir filling;
- (b) By the end of Q2 2016, ICE and the lenders shall coordinate a meeting with the Reventazón-01 complainants to discuss related environmental matters at the tail end of the Reventazón reservoir;
- (c) By the end of Q3 2016, ICE shall submit to the lenders and the IESMC a Biodiversity Management Plan for the buffer zone that includes the *Laguna Lancaster*. The plan shall be aligned with the *Plan Maestro para Mitigar los Efectos del Proyecto Hidroeléctrico Reventazón sobre la Conectividad y Funcionalidad del Subcorredor Barbilla – Destierro (SBBD)*.

After delivery of the certificate of compliance, IFC proceeded to a final disbursement in May 2016.

In response to the Reventazón-01 complainants' concerns, IDB contracted a facilitator in May 2016 to meet with the complainants and try to find a resolution to the dispute.³⁴ The facilitator submitted a diagnosis report to the lenders in July 2016, concluding that a dialogue between the company and the complainants was possible.

2.3.4 Submission of the complaints to CAO

In spite of initial steps taken towards setting ground rules for a dialogue between the company and the complainants, the process was not successful. The client notified the complainants that, as a state-owned enterprise, it was not legally allowed to engage in a dialogue around land prices as long as an expropriation process handled by the Costa Rican courts was ongoing. Thereafter, the complainants notified the lenders that they were withdrawing from the mediation, and the Reventazón-01 complaint was filed with CAO in September 2016.³⁵

Thereafter, the lenders followed up with the complainants, noting that they were still willing to facilitate a dialogue between ICE and the complainants around a number of issues raised in the complainants letter, such as strategies for conservation and management of the area of the tail

³⁴ While the facilitator was hired by IDB through its Technical Cooperation facility, IFC provided input to the Terms of Reference of the facilitator, as well as ensured supervision of the process along with the IDB.

³⁵ CAO, Reventazón-01 case page. Complaint available under "View Documents" – <https://goo.gl/aQ488R>

of the reservoir. However, the lenders noted that they did not have competence in relation to land pricing in this case, as this issue was the subject of ongoing judicial processes.

The Reventazón-02 complaint was filed with CAO in December 2016, raising issues similar to those from the first complaint, as well as issues regarding restricted access to water.³⁶ This additional issue had been monitored by the IESMC and the lenders since 2015. After the complaint was sent to CAO, the lenders requested the company to provide an update and further information on the status of the negotiation process with the complainants, as well as corrective actions taken or contemplated to restore access to water resources on their property. In its initial response to the lenders, the company noted that, according to its records and visits to the site, the complainants did not initially report water sources to be affected, and no pipes, tanks or other infrastructures were identified on the land to be acquired. The company indicated that the complainants' water source, which they believe had been installed after the expropriation process was initiated, was not in use for productive purposes.

2.3.5 Concerns regarding the application of PS5 requirements

Following the complaints to CAO and acknowledging issues around the land acquisition process, the IESMC indicated to the lenders that management of land acquisition had been a weak link of the project and was aggravated by a lack of complete information from the company to the lenders and the IESMC. IFC reported to CAO that it had been aware of this issue throughout the process, as demonstrated in its supervision record. Thereafter, IFC sent a request to the IESMC inquiring about the extent of compliance with PS5 in the case of the Reventazón-01 complainants, as well as more general application of the requirements of PS5 for compensation at replacement value. Responding to this request in January 2017, the IESMC provided the following observations:

- The IESMC first noted that it is primarily IFC's responsibility to interpret PS5, and that the IESMC would therefore give their own opinion on the matter.
- The lenders insisted that cases under expropriation were a matter internally treated by the company in accordance with national regulations, and therefore fell out of the IESMC scope of monitoring.
- Under PS5, any person affected by land acquisition in IFC-financed projects should be able to walk out of land acquisition negotiations with resources that allow them a mechanism for replacement of lost land in similar conditions. This is the meaning and objective of the replacement value concept, and applies to all affected landowners.
- Market values are not necessarily equivalent to replacement values. For example, in this case, replacement values were affected by the development of the project, due to new demand for large amounts of land, improvement of roads, upgraded services that increase property values, etc.
- Lands that are located in an important buffer zone of a protected area, as well as lands with native forest and planted secondary forest, which have ecological value and produce environmental goods and services, do have an inherent value. These lands, while difficult to monetize, deserve special consideration in the land valuation process.

IFC confirmed to CAO that valuation of land at full replacement value, as per the requirement of PS5, had been a challenge for this project, as there was no history of land prices in the area. According to IFC, this is why it was important to have a functioning GM in place. IFC noted that it considered the project GM to be effective as many land-related grievances were resolved through it. IFC further noted that the focus of its supervision was on vulnerable groups, and whether their livelihoods were affected. Per the vulnerability assessment completed in the PRCV, the complainants to CAO were not considered vulnerable.

³⁶ CAO, Reventazón-02 case page. Complaint available under "View Documents" – <https://goo.gl/E2uSPc>

In its February 2017 update to the lenders, the IESMC reported that a total of 36 properties went through expropriation (26% of all acquired properties), including 12 for which the company was granted full property rights, the remaining 24 being undergoing legal processes. The land acquisition process was expected to be completed by the end of 2017.

2.3.6 Preparation of a Resettlement Completion Audit

The IESMC reported that, as required by the ESAP, a preliminary Resettlement Completion Audit (RCA) was prepared by the company in September 2016. It indicated that, while the preliminary RCA provided information to document the land acquisition and livelihoods restoration process and results, it had limitations in terms of its scope compared to IFC and IDB requirements. First, the preliminary RCA was carried out by company employees, while the IESMC considered that a requirement of PS5 is for a completion audit to be undertaken by an independent expert.³⁷ Secondly, the IESMC noted that the preliminary RCA was centered on the five families relocated under full assistance from the company, but missed other affected landowners (a total of 134 properties, belonging to 62 landowners, were acquired). Further, it did not contain an assessment of project-related land acquisition and/or restrictions in land use. The IESMC recommended that the lenders work with the company to define terms of reference for a more comprehensive RCA by an independent external auditor.

An independent expert was selected jointly by the lenders and the company in July 2017. The terms of reference (ToR) for the RCA laid out the following objectives:

- (a) Determine whether the objectives of the RPF for the project have been met, and whether the process followed for land acquisition and resettlement was consistent with the PRCV, and IFC/IDB standards;
- (b) Evaluate and document the full restoration and/or improvement of livelihoods of the population that was physically or economically displaced by the land acquisition program;
- (c) Close the monitoring process by the lenders and the IESMC of the land acquisition and livelihoods restoration program of the project; or
- (d) In case of non-compliance, define remedial actions to be implemented by the company to ensure the full restoration of the living conditions of families and landowners who, at the time of the RCA, had not yet recovered their livelihoods.

According to the ToR, the RCA was expected to cover the period 2010-2016, meaning both pre- and post-approval of project financing by IFC and IDB. While the scope of the RCA was expected to cover all landowners with medium to high level of vulnerability, as well as redundant workers, it was not expected to cover non-vulnerable landowners.

In August 2017, a draft RCA was completed and submitted to the lenders and the company for their review and comments. After identifying what the lenders considered shortcomings, a number of iterations on the report took place over several months.

The RCA was revised, and a final version was submitted to the lenders in April 2018. The lenders acknowledged receipt of the final version of the RCA, though IFC reported to CAO that they did not agree with some of its content. The RCA drew a number of conclusions regarding the project's performance, among which:

- (a) The requirement to maintain or improve living conditions of all the people affected does not only apply to those classified as vulnerable, but to all affected people. Guidance from the lenders may have led the company to confuse two separate requirements: fair

³⁷ Performance Standard 5, para. 15: "The completion audit will be undertaken by qualified resettlement professionals once the agreed monitoring period is concluded. ... It may be necessary for the client to commission an external completion audit of the Resettlement Action Plan or Livelihood Restoration Plan to assess whether the provisions have been met, depending on the scale and/or complexity of physical and economic displacement associated with a project."

compensation for assets on the one hand, and special attention to vulnerable groups on the other hand.

- (b) While the land acquisition and livelihoods restoration process was carried out in a manner consistent with the RPF and the lenders requirements for groups categorized as medium and high levels of vulnerability, the RCA identified potential non-compliances with respect to the application of the lenders policies to non-vulnerable groups:
- no socio-economic baseline data was gathered for this group of landowners, which possibly resulted in misclassification of vulnerable landowners as non-vulnerable;
 - lack of assistance other than cash compensation to these landowners;
 - cash compensation offered to non-vulnerable landowners might have been below replacement values or not allowed them to fully restore affected economic activities; and
 - some economic impacts might not have been compensated for.
- (c) The definition of the extent of land required for the reservoir took place in two stages, which had a major impact on one landowner, who was first informed that the company would take part of their farms, and was later informed that 100% of their land would be acquired.
- (d) Although the company formally assured affected families that they have the right not to accept the valuation of their property, in practice, the only way to exercise that right was through judicial action.
- (e) While the company collected data on complaints, it reveals little about the nature of complaints and how they were resolved.

On the basis of these conclusions, the RCA provided a number of recommendations to the lenders to ensure that compliance gaps identified in the RCA would be addressed, including:

- (a) The lenders should request that the company conduct a review to determine if the affected families, particularly those in the non-vulnerable category, could, with the compensation received, restore their standards of living. In case some landowners suffer difficulties due to the land acquisition and resettlement process, the company should provide additional compensation – either in cash or another form of assistance.
- (b) The notion of vulnerability should be applied in a broader sense to include households where there is a risk that cash compensation is not sufficient to restore pre-project living standards.

2.3.7 IFC's response to the conclusions of the RCA

In a statement to CAO, IFC provided an opinion on the RCA and proposed next steps, outlining that the lenders' acknowledgement of the RCA does not constitute endorsement of all its findings and recommendations. Relevant to this compliance investigation, IFC noted the following:

- (a) IFC agrees with the RCA's findings that the requirements for land acquisition, compensation, resettlement, and livelihoods restoration of vulnerable families were complied with.
- (b) In relation to non-vulnerable landowners, IFC considers that there is not enough information to assess whether or not there was a compliance breach with client obligations under the loan documentation and PS5.
- (c) Any determination of additional cash compensation to non-vulnerable landowners should be defined by the courts. The lenders, via a corrective action plan, could ask ICE to use best efforts to assess the gap, and ensure to provision funding to cover any additional liabilities/lawsuits from non-vulnerable landowners that decide to contest proposed compensation via national courts, and in special cases provide in-kind compensation if needed to achieve the objectives of the lender's policies.

- (d) Based on the outcomes of many court cases, the lenders acknowledge that there could have been instances where the principle of replacement value was not adequately met.
- (e) Based on the IESMC and the lenders' monitoring, it is possible that some families may have been misclassified as non-vulnerable, and thus the lenders via a corrective action plan may request the company to gather further information on these potentially misclassified vulnerable families, and determine if additional compensation and assistance is needed.
- (f) The lenders disagree with the RCA's findings that the RPF should not have been approved; that the vulnerability criteria used did not meet international standards; that offering only cash compensation to non-vulnerable landowners did not meet the lenders' standards; and that socioeconomic assistance should have been provided equally to vulnerable and non-vulnerable groups.
- (g) The lenders believe that the process followed for the project meets key requirements of their policies related to: (1) focus on loss of livelihoods, relocation, and living conditions; (2) focus on vulnerable groups; and (3) efforts commensurate with risk.
- (h) Given that a majority of cases brought to the courts by non-vulnerable landowners were ruled in favor of the complainants, who were awarded significant increases over the original values paid by the company, the lenders consider that local courts are well qualified to enforce the legal and RPF requirements for cash compensation to meet replacement values.

In July 2018, IFC reached out to the client on behalf of the lenders, proposing a Corrective Action Plan to be agreed on with the company. The proposed actions were expected to be completed in order to fulfill ESAP requirements for the project's construction phase. In particular, the actions to be undertaken included a review by the client, with the support of the IESMC, of baseline information and vulnerability classification of fifteen families that were identified in the RCA as potentially misclassified.

After conversations with the client, IFC and the other lenders decided to treat these proposed actions as part of the lenders' regular supervision. In March 2019, the company submitted an update to the lenders with information regarding each of the fifteen families potentially misclassified or with pending issues and/or information gaps.

At the time of writing this report, IFC was in the process of reviewing the information submitted by the company, before determining whether further follow-up and monitoring was required.

3. CAO Compliance Analysis and Findings

The previous section of this report described IFC's pre-investment review and supervision of the project as it relates to the issues being investigated. This section provides CAO's analysis and findings about IFC's performance.

This compliance investigation identified several shortcomings with regards to IFC's efforts to ensure proper assessment and management of land acquisition as relates to non-vulnerable property owners, which are detailed below. These involve:

- Avoiding the use of expropriation
- Assessing land prices
- Minimizing the extent of land take
- Ensuring adequate baseline assessments
- Consultation and disclosure of information
- Access to a grievance and redress mechanism

It is important to emphasize that this analysis does not extend to households that were classified as vulnerable. CAO acknowledges IFC's and the company's work to make improvements in managing land acquisition and resettlement with households identified as vulnerable. IFC's involvement in the project led the company to delay its land acquisition process while it improved its approach with vulnerable households. A land-for-land approach was adopted, and baseline collection methodologies, grievance management and monitoring activities, were improved. This was a significant advance for the company, however CAO's compliance review did not assess IFC and the company's compliance with PS5 requirements for vulnerable groups.

3.1. Applicable IFC Policy and Performance Standards

As set out in its Operational Guidelines (2013),³⁸ CAO conducts investigations of IFC's E&S performance by ensuring compliance with IFC policies, Performance Standards, guidelines and procedures (para 4.3).

IFC's commitment to sustainable development is articulated in its Sustainability Framework and includes IFC's Policy on Environmental and Social Sustainability (the "Sustainability Policy"); the IFC Performance Standards (PS), which an IFC client is expected to meet throughout the life of an IFC investment; and the Access to Information Policy (AIP). IFC's E&S appraisal and supervision requirements are further elaborated in its Environmental and Social Review Procedures (ESRP).

IFC's investment in Reventazón HPP was made in the context of the 2012 Sustainability Framework. The investment was approved under ESRP version 8 (May 2012) and supervised under subsequent versions of the ESRP. CAO has analyzed IFC's performance against the requirements of the above framework.

The Sustainability Policy sets out IFC's high level commitments in the following terms, emphasizing the importance of the mitigation hierarchy when applying the Performance Standards:

Central to these requirements is the application of a mitigation hierarchy to anticipate and avoid adverse impacts on workers, communities, and the environment, or where

³⁸ CAO Operational Guidelines, 2013 - <https://goo.gl/XDr6pN>

avoidance is not possible, to minimize, and where residual impacts remain, compensate/offset for the risks and impacts, as appropriate. (para. 6)

According to the Performance Standards and the Sustainability Policy, IFC's responsibility for E&S oversight commences prior to making an investment in a company and continues throughout the period of an investment. 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 Sustainability Policy and Performance Standards. As required by the 2012 Sustainability Policy, IFC's E&S review should be "appropriate to the nature and scale of the activity" and "commensurate to the level of environmental and social risks and/or impacts" (para. 6). In conducting the E&S review, IFC considers the E&S risks as assessed by the client and the level of E&S capacity of the client, as well as its commitment to manage these risks. IFC also considers the client's "track record" in relation to E&S issues.³⁹ A central principle of the Sustainability Policy is that "IFC will only finance investment activities that are expected to meet the requirements of the Performance Standards within a reasonable period of time" (para. 22).

Following approval and investment, IFC monitors the project to ensure compliance with the conditions in the investment agreements and applicable IFC policies and standards. As set out in the ESRP, "the purpose of supervision is to obtain information to assess the status of project's compliance with the PS and other specific E&S requirements agreed at commitment; to assess the current level of E&S risk; to provide advice to clients on how to address critical E&S issues."⁴⁰ The 2012 Sustainability Policy further states that "if the client fails to comply with its environmental and social commitments as expressed in the legal agreements and associated documents, IFC will work with the client to bring it back into compliance, and if the client fails to reestablish compliance, IFC will exercise its rights and remedies, as appropriate" (para. 24).

Requirements for project related land acquisition to be conducted in accordance with IFC Performance Standard 5 were referenced in the ESRS, the ESAP, the loan agreements and the company's resettlement planning documentation as reviewed and approved by the lenders. The main objective of PS5 is to avoid, or if not possible, minimize adverse social and economic impacts from land acquisition. This is accomplished by:

- Developing a Resettlement Action Plan and/or Livelihood Restoration Plan for projects involving physical or economic displacement (paras. 19, 25)
- Avoiding expropriation and encouraging the use of negotiated settlements (para. 3);
- Considering feasible alternative project designs to avoid or minimize physical or economic displacement (para. 8);
- Collecting appropriate socioeconomic baseline data (para. 12);
- Compensating for loss of assets at replacement cost (para. 20);
- Providing additional assistance and opportunities to improve, or at least restore, income-earning capacity, production levels, and standards of living to economically displaced persons whose livelihoods or income levels are adversely affected. (para. 20); and
- Providing access to a grievance mechanism including a recourse mechanism designed to resolve disputes in an impartial manner (para. 11).

³⁹ ESRP 3, para.3.2.3, version 1, April 2006.

⁴⁰ ESRP 6, para.1, version 7, April 2013.

3.2. Approach to Land Acquisition and Livelihoods Restoration (1/4): Negotiation Process and Expropriation

| Issues raised by the complainants | IFC Requirements |
|---|---|
| <ul style="list-style-type: none"> Claim that the company relied on expropriation instead of a seeking a negotiated settlement | <ul style="list-style-type: none"> “To help avoid expropriation and eliminate the need to use governmental authority to enforce relocation, clients are encouraged to use negotiated settlements” (PS5, para. 3) “The client will take possession of acquired land and related assets only after compensation has been made available” (PS5, para. 9) “In cases where affected persons reject compensation offers that meet the requirements of PS5 and, as a result, expropriation or other legal procedures are initiated, the client will explore opportunities to collaborate with the responsible government agency” (PS5, para. 13) “The client will identify and describe government resettlement measures. If these measures do not meet the relevant requirements of this Performance Standard, the client will prepare a Supplemental Resettlement Plan that ... will address the relevant requirements of this Performance Standard” (PS5, para. 31) |

CAO Analysis and Findings

IFC’s pre-investment review did not identify the risk of the company’s reliance on expropriation with non-vulnerable landowners. IFC’s review relied on the company’s indication that it had not made significant use of expropriation in its most recent projects, and that expropriations had not been necessary in the initial land agreements for the Reventazón HPP. However, at the time of IFC’s pre-investment review, there was evidence that the company had already used expropriation and could be expected to rely on its continued use:

- The company was operating under a law specifically created for ICE on expropriation (Costa Rican Law 6313). Unlike other expropriation processes in Costa Rica, according to this law, ICE can receive and maintain possession of land during judicial appeals, giving it significant leverage over landowners.
- While under ICE’s law on expropriation the company was making offers to landowners before initiating expropriation process, landowners had only 8 days to accept or decline the offer, without opportunities for negotiation.
- By the time of IFC Board approval in November 2012, 8 expropriation cases were already underway, and by the time IFC committed to the investment in December 2013, a total of 20 cases were undergoing expropriation (more than half of the final total of 36 expropriation cases).

ICE’s reliance on expropriation with non-vulnerable landowners increased as construction advanced and pressure grew to secure land prior to filling the reservoir. This steady increase was documented by the IESMC, growing from 10 properties in April 2015 to 36 properties in December 2016. The expropriation of these 36 properties impacted 15 of 43 non-vulnerable landowners (35%).

Even as concerns in other areas (such as land prices, extent of land take, etc. – described below) became more apparent from the IESMC, IFC did not question the underlying use of expropriation while land was being acquired. In practice, from April 2015 onwards, emphasis was maintained on the need to expedite land acquisition using legal processes to take possession of as many properties as possible prior to filling the reservoir. The company was specifically encouraged to pursue negotiation instead of expropriation in only one case involving a vulnerable household. The use of expropriation rather than negotiation in cases involving non-vulnerable landowners, was not questioned. The terms of reference prepared for the post-completion audit (RCA) did not provide for a review of the company's efforts to avoid expropriation for non-vulnerable households.

CAO finds that IFC's review overlooked the risk that the company would rely on the continued use of expropriation to complete its land acquisition program at the expense of negotiating settlements. IFC's review also lacked an analysis of ICE's expropriation law against the requirements of PS5, as required by PS5 paras 30-31. Of particular concern were the provisions of national law that allowed ICE to take possession of land in advance of paying compensation, and without an opportunity given to reach negotiated settlements (cf. PS5 paras 3 and 9). CAO further finds that, despite a growing recourse to expropriation as project construction and the land acquisition process advanced, IFC did not take action to encourage the avoidance of expropriation as required by PS5, para. 3.

3.3. Approach to Land Acquisition and Livelihoods Restoration (2/4): Land Pricing

| Issues raised by the complainants | IFC Requirements |
|---|---|
| <ul style="list-style-type: none"> Allegation that the company did not consider real market values in the land acquisition process Inadequate compensation due to inadequate asset inventory Loss of water source, negatively affecting livelihood | <ul style="list-style-type: none"> “When displacement cannot be avoided, the client will offer displaced communities and persons compensation for loss of assets at full replacement cost and other assistance to help them improve or restore their standards of living or livelihoods ... Compensation standards will be transparent and applied consistently to all communities and persons affected by the displacement.” (PS5, para. 9) “Economically displaced persons whose livelihoods or income levels are adversely affected will also be provided opportunities to improve, or at least restore, their means of income-earning capacity, production levels, and standards of living” (PS5, para. 28) |

CAO Analysis and Findings

While CAO acknowledges IFC’s decision to halt the land acquisition process until a PS5-compliant RPF was prepared, IFC did not ensure that the company’s methodology offered compensation at full replacement cost for non-vulnerable landowners. Specific issues regarding the company’s approach to the calculation of land prices included:

- The company appraised land according to a calculated “best land use” instead of its actual use.
- The company did not value a property’s access to water facilities, if that water was not in use.
- No compensation for costs associated with low liquidity of land markets in the area was envisaged.
- No compensation for impacts on remaining properties was envisaged (e.g. loss of physical access, access to water, use of sawmill, etc.).
- The appraisal methodology risked undervaluation due to uncertainty in market prices, which was important given the lack of comparable transactions in the area.

IFC’s initial decision to defer to the company’s expertise in setting price may have been reasonable, however, as the process advanced the IESMC reported on significant indications that full replacement costs were not being met:

- In October 2013, the IESMC indicated that there had been 52 complaints from affected landowners during the previous eight months. The IESMC noted that the main complaints included that property valuation prices were considered insufficient to buy replacement land.
- In March 2014, the IESMC identified that the company: (a) maintained a dismissive attitude with regard to local inflation and increase of property values due to the demand for land for construction and operation of the project; and (b) focused on formalities around property valuation instead of focusing on replacement cost.
- At the same time, the IESMC identified significant delays in identifying suitable land replacement for the vulnerable households, a relevant factor indicating the additional costs that non-vulnerable households would face in identifying adequate replacement land.

- In April 2015, the IESMC began highlighting the issue of expropriation specifically, and indicated that landowners' rejection had been based on the prices offered by the company.
- IESMC reports to the lenders continued to cite these reasons as the use of expropriation expanded.

Despite growing evidence of issues with land valuation, IFC did not insist that the company review its valuation methodology to ensure compensation for loss of assets at full replacement cost. Only those landowners who decided to contest the company's offers in court received additional compensation. Outcomes of cases that were resolved in court show that the courts recognized significant underpayment among most of the landowners who took the initiative to reject the company's offer. For the 20 cases that have been resolved (after an average wait of over 3 years) at the time of writing this report, courts awarded a mean increase in compensation of 33% above the company's offer, as shown in the chart below.

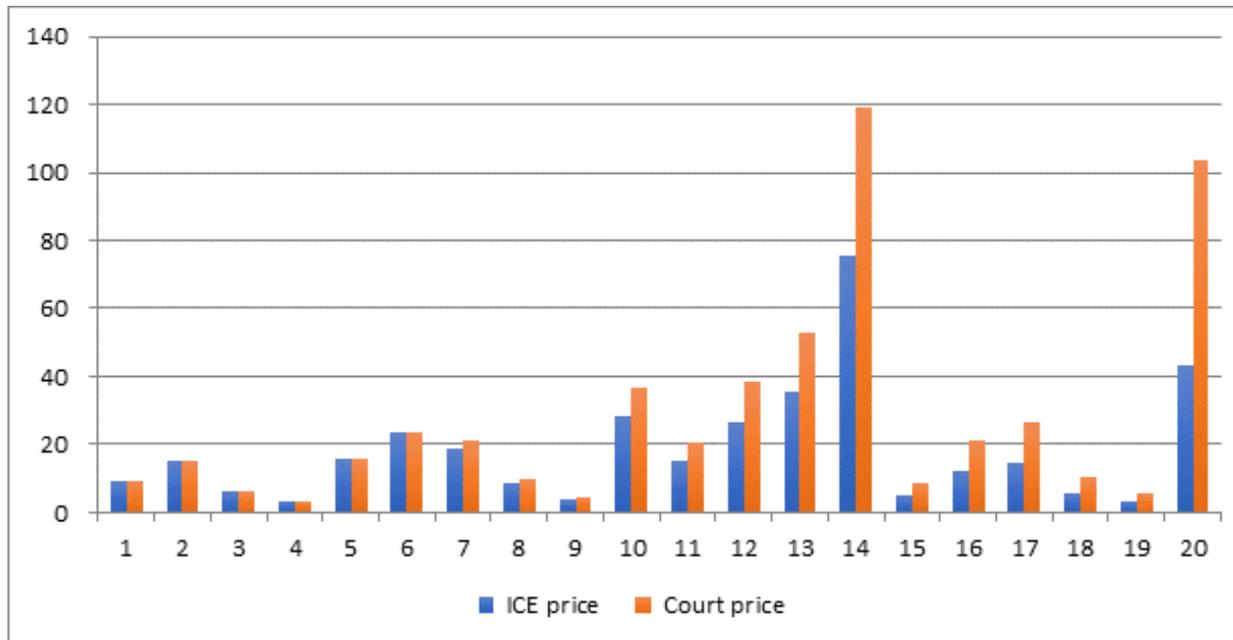


Figure 1: Price Paid in Millions of Costa Rican Colones for 20 concluded expropriations (Source: Procuraduría General de la República de Costa Rica; CAO)

In no case did the courts rule that the company overpaid the former landowners. CAO also notes that the courts, applying national law, may not consider all elements of a PS5-compliant “full replacement cost” standard in their compensation calculations, such as impacts on remaining property (e.g. loss of access to water or impact on related businesses), or costs associated with searching for land in an illiquid market.

According to an ex-post survey with non-vulnerable households carried out in 2017 by the company, 21 of 29 families surveyed (72%) reported that the value offered was not sufficient to replace lost assets. Some commented that the land sold were operational farms, and the transitional cost to convert purchased land into productive land was not taken into consideration.

Further, the April 2018 RCA confirmed that cash compensation offered to non-vulnerable landowners might have been below replacement values and not allowed them to fully reinstate the affected economic activity; and that some economic impacts might not have been compensated for. IFC has not insisted on actions to address these concerns.

CAO finds that IFC did not ensure that the land pricing methodology developed in the RPF and PRCV met PS5 requirement for “compensation for loss of assets at full replacement cost and other assistance” (para. 9). While additional forms of assistance were envisaged for vulnerable landowners, the company’s approach to land pricing for non-vulnerable groups relied on estimations of market land values and contrary to the objectives of PS5, IFC did not ensure that the methodology used included replacement value and additional assistance designed to ensure that displaced landowners were not left worse off.

CAO further finds that, as the land acquisition program advanced, and despite concerns being raised about under-compensation by affected landowners, the IESMC, and the RCA, IFC did not require its client to implement corrective actions to ensure that affected landowners classified as non-vulnerable would be compensated for loss of assets at full replacement cost as per PS5, para. 9. This gives rise to a risk of systemic under-compensation contrary to the requirements of PS5.

3.4. Approach to Land Acquisition and Livelihoods Restoration (3/4): Extent of Land Take

| Issues raised by the complainants | IFC Requirements |
|---|--|
| <ul style="list-style-type: none"> • Claim that the extent of land take goes beyond reservoir slopes and is greater than needed for geological stability purposes • Allegation that the company did not provide adequate feedback to landowners justifying the extent of land take • Alleged lack of access to remnant land due to lost access to road and irrigation networks | <ul style="list-style-type: none"> • “The client will consider feasible alternative project designs to avoid or minimize physical and/or economic displacement” (PS5, para. 8) • “For projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation (ICP) process [that] involves [an] in-depth exchange of views and information, and an organized and iterative consultation, leading to the client’s incorporating into their decision-making process the views of the Affected Communities on matters that affect them directly” (PS1, para. 31) |

CAO Analysis and Findings

The initial land acquisition plan for the project was prepared based on a 50-meter buffer zone for the reservoir. Then in September 2013, the company informed the lenders that, additional land would be needed to manage geological risks, significantly increasing the total land required for the project. The company indicated that the extension would affect 7 new households in addition to increasing the impact on some landowners already affected.

While the initial 50-meter buffer zone was clearly defined in the original project design and communicated to landowners, it is not clear what actions were taken to assess social impacts when the geological buffer zone was expanded. Landowners did not appear to have any involvement beyond negotiating minor boundary adjustments. The company demonstrated a reluctance to share the justification of the geological buffer zone with external stakeholders, and indicated to CAO that it did not seek to provide feedback from landowners regarding the extent of the additional area to be acquired.

This issue extended to include several cases. In May 2016, the IESMC indicated that despite its limited access to information, it had identified that at least three property owners were considering legal action due to irregularities in the expropriation process for reasons including unclear justification for delineation of boundaries and the extent of land taken by the company.

CAO finds that when the company sought additional land for the management of geological risks, IFC did not ensure that land take was minimized as required by the objectives of PS5 and para. 8. In particular, IFC did not assure itself that the company informed and incorporated feedback from affected landowners to define the extent of land required following the expansion of the geological buffer zone (cf. PS1, para. 31).

3.5. Approach to Land Acquisition and Livelihoods Restoration (4/4): Baseline Data

| Issues raised by the complainants | IFC Requirements |
|--|--|
| <ul style="list-style-type: none"> • Claim inadequate compensation due to inadequate asset inventory • Alleged lack of assistance to restore livelihoods | <ul style="list-style-type: none"> • “Where involuntary resettlement is unavoidable, either as a result of a negotiated settlement or expropriation, [the client will carry out] a census ... to collect appropriate socio-economic baseline data to identify the persons who will be displaced by the project, [and] determine who will be eligible for compensation and assistance” (PS5, para. 12) |

CAO Analysis and Findings

In resettlement planning, baseline data is required to identify displaced persons and provide a measure for the restoration of socio-economic standards and livelihoods.⁴¹

CAO recognizes that IFC made an initial request for its client to halt land acquisition until a PS5-compliant Livelihoods Restoration Plan (PRCV) was developed, including a socio-economic assessment of affected households and categorization of their level of vulnerability. This was in line with PS5 requirement for an IFC client to “[pay] particular attention to impacts on the poor and vulnerable” (para. 8). However, the April 2018 RCA confirmed that limited socio-economic baseline data was gathered for landowners categorized as non-vulnerable.

CAO finds that IFC did not ensure that the company collected appropriate baseline data given the need to (a) apply vulnerability criteria to all affected landowners; and (b) identify and manage impacts of land acquisition on all affected landowners. Following identification of this issue in the RCA, IFC required the company to collect additional data regarding fifteen potentially misclassified families. At the time of writing this report, this process has not yet been completed.

⁴¹ Guidance Note 35 to IFC PS5 indicates that “the socio-economic standards and livelihoods of the affected population should ideally be measured against the baseline conditions of the population prior to resettlement and improved or at least restored to pre-project levels”.

3.6. Consultation and Disclosure of Information

| Issues raised by the complainants | IFC Requirements |
|--|--|
| <ul style="list-style-type: none"> • Claim that limited information on the land acquisition process was provided. • Claim that the company lacks transparency and accessibility regarding its land valuation process, and that unreasonable time to make an informed decision on the price offered by the project was given. | <ul style="list-style-type: none"> • “The client will undertake a process of consultation ... based on prior disclosure ... of relevant, transparent, objective, meaningful and easily accessible information ... [in a format that is] understandable to affected communities” (PS1, para. 30). • “For projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation (ICP) process [that] involves [an] in-depth exchange of views and information, and an organized and iterative consultation, leading to the client’s incorporating into their decision-making process the views of the Affected Communities on matters that affect them directly” (PS1, para. 31) • “Disclosure of relevant information and participation of Affected Communities [by the client] will continue during the planning, implementation, monitoring, evaluation of compensation payments, livelihood restoration activities, and resettlement” (PS5, para. 10) • Disclosure "should take place sufficiently early to enable people to have sufficient time to consider their options" (PS5, GN28) |

CAO Analysis and Findings

As explained by the company, proposed land purchase prices were disclosed and explained to non-vulnerable landowners in a single meeting. If an offer was rejected in this first meeting, the company started preparation for expropriation. The company’s next contact with the landowner would be to give formal notification of an 8-day window to reconsider the offer before initiating expropriation procedures. The company took no additional measures to explain the proposed prices to landowners that were classified as non-vulnerable, including those who had not completed basic education. The company indicated that, if landowners had difficulties understanding documentation, they could hire lawyers to explain it to them.

In May 2016, the IESMC reported to the lenders its finding that the company was not providing written valuations to landowners who rejected the initial offer, or who wanted their lawyers to review the valuation.

The complainants reported to CAO that the company’s approach to land acquisition, including short timeframes, limited provision of information, and lack of room for negotiation, was intimidating.

CAO finds that IFC did not ensure that the company’s land acquisition process met the consultation and disclosure requirements of PS1 or PS5. IFC did not have assurance that the process was transparent or understandable without a lawyer. IFC also lacked assurance that the timeframes for land acquisition provided by the company allowed non-vulnerable landowners sufficient time to consider their options prior to making a decision.

3.7. Grievance Mechanism

| Issues raised by the complainants | IFC Requirements |
|---|---|
| <ul style="list-style-type: none"> • Claim that grievance mechanism procedures and timelines are unclear, particularly related to land issues • Claim that no opportunity was given to discuss or negotiate land-related issues as part of the GM | <ul style="list-style-type: none"> • “The client will establish a grievance mechanism to receive and facilitate resolution of concerns and grievances. ... It should seek to resolve concerns promptly, using an understandable and transparent consultative process, ... and at no cost.” (PS1, para. 35). • The grievance mechanism “will allow the client to receive and address specific concerns about compensation and relocation, ... including a recourse mechanism designed to resolve disputes in an impartial manner” (PS5, para. 11). |

CAO Analysis and Findings

IFC identified weaknesses in the project's Grievance Mechanism (GM) during its pre-investment review. Thereafter, the company improved its GM and it was understood that the revised GM would apply to all grievances, including those related to land acquisition. However, the revised GM had weaknesses in that it: (a) did not include impartial review of land valuations; and (b) it still required that ex-landowners pay some legal costs associated with lost appeals, thus contravening the requirement of compensation at full replacement cost (which includes transaction costs).

In May 2016, the IESMC reported that the company was not handling complaints related to expropriations through the GM, and that such complaints were being managed separately through the company's legal department. The company did not attempt to resolve complaints from non-vulnerable landowners regarding land take or price, rather considering that they should be handled by the courts. IFC did not identify this as an issue that needed to be addressed, and concluded that expropriation cases fell outside the IESMC's scope of monitoring.

CAO finds that IFC did not ensure that grievances about compensation for land acquired from non-vulnerable landowners were addressed through a Grievance Mechanism as required by PS5. Even after the IESMC reported on inadequate management of grievances, there is no evidence that IFC required the company to manage complaints in a manner consistent with PS5 requirements for a recourse mechanism designed to resolve disputes in an impartial manner (cf. para. 11). This led to significant delays in the resolution of complaints regarding compensation from non-vulnerable landowners, who were required to go through lengthy court proceedings. While CAO notes that the majority of non-vulnerable complainants secured increased compensation from the courts, the lack of an impartial recourse mechanism applying PS5 standards meant that awards did not necessarily reflect PS5 requirements for compensation at full replacement cost.

4. Conclusion and Observations

This compliance investigation report responds to two complaints regarding the environmental and social impacts of the Reventazón HPP in Costa Rica, developed by IFC's client, the *Instituto Costarricense de Electricidad* (ICE). While the complaints raised concerns related to a broad range of environmental and social impacts, this investigation only considers: (a) IFC's review and supervision of the project's approach to land acquisition, particularly as relates to landowners that were categorized as non-vulnerable, and (b) related issues of consultation, disclosure of information, and grievance handling.

The 2016 complaints from local residents assert that the Reventazón HPP's approach to land acquisition did not meet the requirements of IFC Performance Standard 5 (PS5) regarding compensation and additional assistance to affected landowners, minimization of land take, and that this led to unfair expropriation processes. The complaints also allege that the Reventazón HPP has not complied with IFC's disclosure, consultation and grievance handling requirements.

"Non-vulnerable" landowners accounted for 69% (43 out of 62) of the households affected by the land acquisition process for the project. CAO found that the acquisition of land from these families was a source of significant potential impact and required the client to apply Performance Standard 5 on Land Acquisition and Involuntary Resettlement (PS5).

CAO acknowledges IFC's request to its client, at pre-investment review stage, to halt land acquisitions until a Land Acquisition and Involuntary Resettlement Framework (RPF) compliant with the requirements of PS5 was developed. IFC's decision to require a full Livelihoods Restoration Plan (PRCV) as a condition of disbursement was consistent with the requirements of the Sustainability Framework.

Yet, during its pre-investment review, IFC did not identify potential compliance issues associated with project acquisition of land from non-vulnerable landowners. These included the company's approach to these landowners, which favored the use of legal expropriation proceedings over negotiated settlements. Further, IFC did not ensure that the PS5 requirement for compensation at full replacement cost mentioned in the RPF, was supported by adequate methodology to be operationalized for the project.

PS5 compliance issues persisted during project supervision. IFC was aware that the company was relying on expropriation for the majority of the non-vulnerable landowners, but did not question this approach in the context of PS5's preference for negotiated settlements. IFC was aware that the company had increased the size of its land take due to geological concerns, but did not seek assurance that this was done in a way that reflected PS5 requirements to minimize the impacts of land acquisition. IFC was also aware of concerns regarding the company's approach to land valuation, leading to potential under-compensation, as reported by the IESMC. However, IFC did not ensure that the company's valuation methodology was consistent with PS5 requirements.

The Resettlement Completion Audit (RCA) provided a final opportunity for IFC to identify and correct any non-compliance with PS5 requirements. The RCA, completed in April 2018, identified concerns regarding land acquisition from non-vulnerable landowners. In particular, the RCA noted a lack of baseline data in relation to non-vulnerable landowners, lack of support in reestablishing livelihoods for these households, and the potential for under-compensation. IFC argued that there was insufficient information for the RCA to reach conclusions of non-compliance. In this context, IFC reported to CAO that it would monitor the outcomes of the remaining court cases and consider

what action might be required at a later date. As at the time of writing this report, IFC was in the process of reviewing information provided by the company to determine whether fifteen affected families were misclassified as non-vulnerable.

On the balance of available evidence, including the results of contested expropriation cases, the findings of the IESMC and the results of the RCA as outlined above, CAO finds that IFC lacks assurance that all displaced landowners were compensated for loss of assets at full replacement cost and provided with other assistance to help them improve or at least restore their livelihoods as required by PS5. In line with Performance Standard 5, a household level review of compensation paid and livelihood impacts of the company's resettlement program on non-vulnerable households is required. In case compensation at full replacement cost is not met, IFC would be expected to work with the client to ensure supplemental compensation and support as necessary to meet PS5 requirements.

An underlying cause of the non-compliance identified in this report was IFC's focus on the resettlement impacts of the project on vulnerable households, at the expense of ensuring compliance in relation to the (in this case larger) group of households deemed non-vulnerable. Given this issue, and the broader environmental risks associated with the project, IFC did not provide adequate review or supervision of project resettlement impacts on households deemed non-vulnerable. The IFC Sustainability Framework provides for a risk-based approach to E&S impacts with a focus on those who are poor or vulnerable. However, this does not mean that households deemed non-vulnerable fall outside the framework. The objectives of PS5 and the requirement for compensation at full replacement cost apply equally to vulnerable and non-vulnerable households.

In light of the findings of this report, CAO will keep this investigation open for monitoring, and will issue a monitoring report no later than one year after publication of this investigation. CAO will monitor the situation until actions taken by IFC assure CAO that non-compliance findings are addressed.

Annex: Summary of CAO Findings

| |
|--|
| Approach to Land Acquisition and Livelihoods Restoration |
| <i>Negotiation Process and Expropriation</i> |
| CAO finds that IFC's review overlooked the risk that the company would rely on the continued use of expropriation to complete its land acquisition program at the expense of negotiating settlements. IFC's review also lacked an analysis of ICE's expropriation law against the requirements of PS5, as required by PS5 paras 30-31. Of particular concern were the provisions of national law that allowed ICE to take possession of land in advance of paying compensation, and without an opportunity given to reach negotiated settlements (cf. PS5 paras 3 and 9). CAO further finds that, despite a growing recourse to expropriation as project construction and the land acquisition process advanced, IFC did not take action to encourage the avoidance of expropriation as required by PS5, para. 3. |
| <i>Land Pricing</i> |
| CAO finds that IFC did not ensure that the land pricing methodology developed in the RPF and PRCV met PS5 requirement for "compensation for loss of assets at full replacement cost and other assistance" (para. 9). While additional forms of assistance were envisaged for vulnerable landowners, the company's approach to land pricing for non-vulnerable groups relied on estimations of market land values and contrary to the objectives of PS5, IFC did not ensure that the methodology used included replacement value and additional assistance designed to ensure that displaced landowners were not left worse off. CAO further finds that, as the land acquisition program advanced, and despite concerns being raised about under-compensation by affected landowners, the IESMC, and the RCA, IFC did not require its client to implement corrective actions to ensure that affected landowners classified as non-vulnerable would be compensated for loss of assets at full replacement cost as per PS5, para. 9. This gives rise to a risk of systemic under-compensation contrary to the requirements of PS5. |
| <i>Extent of Land Take</i> |
| CAO finds that when the company sought additional land for the management of geological risks, IFC did not ensure that land take was minimized as required by the objectives of PS5 and para. 8. In particular, IFC did not assure itself that the company informed and incorporated feedback from affected landowners to define the extent of land required following the expansion of the geological buffer zone (cf. PS1, para. 31). |
| <i>Baseline Data</i> |
| CAO finds that IFC did not ensure that the company collected appropriate baseline data given the need to (a) apply vulnerability criteria to all affected landowners; and (b) identify and manage impacts of land acquisition on all affected landowners. Following identification of this issue in the RCA, IFC required the company to collect additional data regarding fifteen potentially misclassified families. At the time of writing this report, this process has not yet been completed. |

Consultation and Disclosure of Information

CAO finds that IFC did not ensure that the company's land acquisition process met the consultation and disclosure requirements of PS1 or PS5. IFC did not have assurance that the process was transparent or understandable without a lawyer. IFC also lacked assurance that the timeframes for land acquisition provided by the company allowed non-vulnerable landowners sufficient time to consider their options prior to making a decision.

Grievance Mechanism

CAO finds that IFC did not ensure that grievances about compensation for land acquired from non-vulnerable landowners were addressed through a Grievance Mechanism as required by PS5. Even after the IESMC reported on inadequate management of grievances, there is no evidence that IFC required the company to manage complaints in a manner consistent with PS5 requirements for a recourse mechanism designed to resolve disputes in an impartial manner (cf. para. 11). This led to significant delays in the resolution of complaints regarding compensation from non-vulnerable landowners, who were required to go through lengthy court proceedings. While CAO notes that the majority of non-vulnerable complainants secured increased compensation from the courts, the lack of an impartial recourse mechanism applying PS5 standards meant that awards did not necessarily reflect PS5 requirements for compensation at full replacement cost.