



HUMAN RIGHTS CLINIC

THE UNIVERSITY of TEXAS SCHOOL of LAW



Swimming Against the Current

**The Teribe Peoples and
the El Diquís Hydroelectric Project
in Costa Rica**

July 2010



This report does not represent the official position of the School of Law or of the University of Texas, and the views presented here reflect only the opinions of the individual authors and of the Human Rights Clinic.

Table of Contents

Acronyms and Abbreviations	1
EXECUTIVE SUMMARY	3
RECOMMENDATIONS.....	7
To the Instituto Costarricense de Electricidad:.....	7
To the Instituto de Desarrollo Agrario:.....	9
To the Costa Rican State/Legislature:.....	9
To the Secretaría Técnica Nacional Ambiental:	10
To the Dirección Nacional de Desarrollo de la Comunidad:.....	11
To the Comisión de Asuntos Indígenas:	11
To the Térraba Asociación de Desarrollo Integral:.....	12
I. INTRODUCTION	13
II. CONTEXT OF <i>EL DIQUÍS</i> : a Story of Repeated Intrusions, Land Loss, Marginalization, and Poverty	15
A. Socioeconomic Context	15
B. Legal Context.....	20
III. <i>PROYECTO HIDROELÉCTRICO EL DIQUÍS</i> : Thirty Years of Contestation.....	31
A. Boruca-Cajón and the move to El Diquís	31
B. El Diquís: New Project, New Name, and New Challenges	34
C. The El Diquís Project: Present Issues and Future Community Concerns.....	37
1. Information	37
D. Current Status of the PHED: Study or Construction?.....	40
1. Community Representation	44
IV. THE HUMAN RIGHTS IMPLICATIONS OF THE <i>PROYECTO HIDROELÉCTRICO EL DIQUÍS</i>	47
A. Information	49
B. Property.....	53
C. Representation.....	57
1. Origins.....	58
2. Current Functioning	60
D. Effective Participation/Consultation/Free, Prior, and Informed Consent.....	64
1. Effective Participation	66
2. Consultation	68
3. Free	72
4. Prior.....	74
5. Informed.....	75
6. Consent	76
7. Environmental and Social Impact Assessment.....	78
APPENDIX I: Letter from the Clinic requesting information from ICE.....	85
APPENDIX II: Letter from ICE declining to provide the requested information	87
APPENDIX III: Flowchart of how to obtain the Environmental License for the PHED	89

Acronyms and Abbreviations

ADI	<i>Asociación de Desarrollo Integral</i>	Association for Integral Development
CONAI	<i>Comisión Nacional de Asuntos Indígenas</i>	National Commission on Indigenous Affairs
DINADECO	<i>Dirección Nacional de Desarrollo de la Comunidad</i>	National Directorate for Community Development
ESIA		Environmental and Social Impact Assessment
EsIA	<i>Estudios de Impacto Ambiental</i>	Environmental Impact Studies
FPIC		Free, prior, and informed consent
HRC		Human Rights Clinic
IDA	<i>Instituto de Desarrollo Agrario</i>	Institute for Agrarian Development
ICC		International Consulting Corporation
ICE	<i>Instituto Costarricense de Electricidad</i>	Costa Rican Institute of Electricity
IDB		Inter-American Development Bank
IIDH	<i>Instituto Interamericano de Derechos Humanos</i>	Inter-American Institute for Human Rights
ILO		International Labour Organization
ITCO	<i>Instituto de Tierras y Colonización</i>	Institute of Lands and Colonization
MINAET	<i>Ministerio de Ambiente, Energía, y Telecomunicaciones</i>	Ministry of Environment, Energy, and Telecommunications
PHED	<i>Proyecto Hidroeléctrico El Diquís</i>	<i>El Diquís</i> Hydroelectric Project
RFP		Request for proposals
SETENA	<i>Secretaría Técnica Nacional Ambiental</i>	National Technical Secretariat for the Environment
USTDA		United States Trade and Development Agency

EXECUTIVE SUMMARY

The Teribe peoples of southern Costa Rica, dispossessed and marginalized by state policies for indigenous representation and land tenure, will lose another 658 hectares of their land if major national electricity and telephone provider, the Costa Rican Institute of Electricity (*Instituto Costarricense de Electricidad*, ICE) goes forward with the *El Diquís* Hydroelectric Project—ICE’s current mega-dam proposal. The *El Diquís* dam is the most recent incarnation of a thirty-year attempt to exploit the region’s untapped hydroelectric power and, if constructed, would be the largest dam of its kind in Central America.

But the size of the dam and number of hectares that would be flooded by its construction do not define the full scope of the loss. The construction and operation of such a large dam within five kilometers of Térraba—the Teribe peoples’ territory, which is one of the twenty-four indigenous territories recognized by the Costa Rican state—would threaten the Teribe peoples’ existence and way of life, as would the creation of a reservoir and the influx of people to construct and operate the dam.

For the Teribe peoples, *El Diquís* represents the Costa Rican state’s most recent attempt to advance projects in the national interest that involve the exploitation of resources on indigenous territory, without providing for the affected indigenous peoples’ full participation in the project. Because the Teribe peoples would be impacted by the dam—and are already affected by preparatory works underway by ICE—they are entitled to international legal protections that require indigenous peoples’ effective participation in the decision making surrounding large infrastructure projects such as the PHED. To participate effectively, the Teribe peoples must receive full access to information about the project’s procedure and content. Furthermore, continuous processes of consultation are necessary, during which ICE should aim to obtain the Teribe peoples’ free, prior, and informed consent to the project. But ICE and other state actors have failed to provide this information, and no mechanism has been in place for the indigenous peoples to exercise their right to consultation. In addition to contributing to a violation of the Teribe peoples’ right to effective participation, this lack of information violates the Teribe peoples’ right to information, recognized under international and domestic law.

The information ICE does release minimizes the potential negative impacts of the PHED on the Teribe peoples, emphasizing instead what it perceives as positive consequences of the project, such as free Internet access for the region. ICE has also declined to provide the Human Rights Clinic access to documents for the preparation of this report, despite compliance with ICE’s requirements for a formal information request. In Térraba, incomplete information also fosters rumors and exacerbates divisions within the community, a situation that ICE, with its economic leverage, can exploit. The resulting fragmentation presents a challenge to the Teribe peoples’ ability to have their voices heard—a problem that has been aggravated by historic structural and political problems with the representation of Costa Rica’s indigenous peoples.

Legal and political institutions for representation in Costa Rica are failing the Teribe peoples during this time of controversy over the proposed hydroelectric project in their territory, and indigenous individuals’ recourse to these institutions has proven unsuccessful. The Costa Rican *Sala IV*, the nation’s constitutional court, has rendered decisions responding to indigenous

individuals' legal actions that refer to the correctly applicable international law but misconstrue the requirements of both international human rights instruments and the Inter-American Court of Human Rights' interpretations of these instruments. Notwithstanding international law to the contrary, the *Sala IV* has concluded that consultation with the Teribe peoples about the PHED is unnecessary until a later phase, after ICE completes feasibility studies.

Political institutions for indigenous representation have also have disserved the Teribe peoples, obstructing their access to the information and resources they need to effectively participate in the decision making process about the *El Diquís* project. The Association for Integral Development (*Asociación de Desarrollo Integral*, ADI) in Térraba, the state-created structure with juridical status as the Teribe peoples' representative, does not provide an adequate and appropriate mechanism for indigenous representation in the territory. To the contrary: the Térraba ADI weakens indigenous representation by stifling dissent, allowing high levels of non-indigenous participation, and driving indigenous peoples into ad hoc, marginalized alternatives.

Despite numerous recognized problems with the Térraba ADI, it remains the sole entity recognized by the Costa Rican state to serve as the legal representative and entity for local self-governance by the Teribe peoples. The ADI is also the entity through which efforts to recover indigenous lands from non-indigenous people must be taken—an important function in Térraba, where illegal incursions and sales of indigenous land have made indigenous individuals minority landholders in their own territory. In view of the high level of land loss by the Teribe peoples to non-indigenous individuals and the substantial participation of the non-indigenous in their ADI, the institutional barriers to land recovery from non-indigenous are sizable. And any national effort to redress the rights violations that occur at the local level are unlikely given numerous problems with the National Commission on Indigenous Affairs (*Comisión Nacional de Asuntos Indígenas*, CONAI), the national indigenous representative entity. A proposed legal reform provides in its abolition of CONAI and ADIs as indigenous governance structures a potential remedy for Costa Rica's violation of indigenous peoples' rights to representation, but the bill's progress towards passage has been lengthy and remains stalled.

Costa Rica has failed to respect and protect the human rights of its indigenous peoples in the areas of information, property, representation, and effective participation in decisions surrounding the PHED. Its national electricity authority, ICE, has not obtained the effective participation of the Teribe peoples as required under international law. Instead, ICE has moved forward with preliminary studies on the *El Diquís* project without the Teribe peoples' effective participation, operating under an incorrect and improper interpretation of international law's requirements. The *Sala IV* supplied ICE with this misinterpretation of international law in its conclusion that ICE has no obligation to consult with indigenous peoples during the feasibility studies. And furthermore, the state-created structures for indigenous governance have thwarted participation by indigenous peoples at a time when robust institutions have been most needed for the consideration and resolution of these issues.

The Costa Rican state has thus engaged in longstanding and comprehensive violations of the rights of its indigenous peoples, both in the context of the *El Diquís* project and more generally. However, with adequate institutional reforms and legal changes, the Costa Rican state stands poised to ensure the realization of the nation's indigenous peoples' rights to information,

property, representation, and effective participation, bringing the state into compliance with its obligations under international law.

The report that follows is a further elaboration of these issues, expanding on both the factual situation in Costa Rica as well as the human rights implications of the present situation. These findings are the result of work by the Human Rights Clinic at the University of Texas School of Law from January to May of 2010, during which period Clinic students communicated with indigenous and human rights organizations in Costa Rica; followed public media related to the project, reviewed documents from the state, from non-governmental organizations, and from international inter-governmental organizations concerning the project; and conducted a fact-finding mission in Costa Rica in February and March 2010. During the mission, three Clinic students, Brandon Hunter, Anjela Jenkins, and Susan Orton, traveled to Costa Rica and met with state actors in San José, members of the Teribe community, and third-party indigenous and non-indigenous individuals, including indigenous rights legal experts, advocates, and indigenous leaders from the same region as Térraba. These three students drafted this report. In assessing this issue, the report concludes in the midst of a continued presence by ICE in the Teribe community, disturbing community members and already impacting the community's way of life. Against this backdrop, the HRC stresses the need for immediate remediation of the present situation, offering recommendations to Costa Rican institutions designed to bring state policy in concordance with its international human rights obligations.

RECOMMENDATIONS

Within the context of the *Proyecto Hidroeléctrico El Diquís*, the Costa Rican state has consistently failed to provide the Teribe indigenous peoples with the protections required by domestic and international law for projects that affect indigenous peoples. In particular, these shortcomings have resulted in violations of the Teribe peoples' rights to information, property, representation, and effective participation. Below, the Clinic offers a series of recommendations to those entities with the capacity to ensure that the human rights violations in Térraba are stopped and that proper remedial measures, including reparations, are undertaken. These recommendations are also intended to serve as models for the future adoption of policies and plans of action for the prevention of similar violations.

To the Government of Costa Rica:

- Develop a plan for the effective participation, consultation, and free, prior, and informed consent of the Teribe peoples for the PHED *prior to its siting*

To the Instituto Costarricense de Electricidad:

Information

- Adopt reasonable and culturally sensitive procedures for ensuring that ICE communications and meetings are timely and accessible to all individuals residing in the Teribe community, regardless of group affiliation
- Dedicate periodic meetings to updating the Teribe peoples of the activities in which ICE is currently engaged, what activities ICE has carried out in Térraba to date, and what the projected plan for operations is
- Ensure that future meetings with the Teribe peoples include regular updates about the activities being carried out by ICE in Térraba and the projected progression and timeline of the PHED
- Maintain a policy of openness and transparency with the Teribe peoples, including making public records about the dates and times of past ICE meetings with members of the Teribe community, as well as information about who is present, and make such information available from this point forward
 - Ensure the availability information about the studies currently underway, including the consulting firms involved in the work and the distribution of work between ICE and the contracted consultants
 - Compile and make publically available a list of files in existence regarding the PHED, a general description of their contents, the classification of the files (whether public or confidential), and the authority to be contacted regarding inquiries of such files
- Prepare preliminary conclusions about the project's potential social, economic, and environmental impacts, based on the study to date regarding the PHED, and disseminate and present promptly to the Teribe peoples

Property

- Coordinate with the Teribe peoples to ensure that the effects of any ongoing ICE activities in Térraba, such as noise and road crews, are minimized

- Work closely with the Institute for Agrarian Development (*Instituto de Desarrollo Agrario*, or IDA) regarding the appropriate compensation due to the Teribe peoples for lands affected by the PHED
- Communicate with the Teribe peoples regarding their concerns about the PHED's effects on their property and ways in which ICE funding might help expedite the processes of reacquisition of land, managed by IDA, within Térraba

Representation

- Clarify the origins of the Linking Commissions, both to the community and the general public, with specific attention to the role ICE might have played in bringing about their existence
- Take positive steps to integrate the Linking Commissions into existing community structures
- Ensure that Linking Commissions are *not* the only community organization with which consultation is held, unless it is shown that the Linking Commissions serves as the legitimate representative of the entire Teribe community

Effective participation/consultation/free, prior, and informed consent

- Develop the means necessary to establish clear lines of communication between the ADI *as well as* other community groups
 - Hold more frequent comprehensive and regular formal meetings with the Teribe peoples, ensuring that the information about the date, time, and place of these meetings is sensitive to the community's scheduling needs and made accessible to all community members
- Clarify to the Teribe peoples what permission, if any, was granted to ICE to undertake activities in Térraba and by whom it was granted
- Cease road construction and other work in community territory until permission from a broad cross-section of the Teribe peoples is formally and publically obtained
- Ensure that any potential benefits related to but not directly flowing from the project—such as schools, roads, and technology access—are not promised to the community contingent on their approval of the PHED
- Ensure that ICE's operations abide by laws governing indigenous territories, such as the prohibition on the sale of alcohol within their boundaries
- Develop a plan for compensating the Teribe peoples for having violated their right to effective participation and consultation *before preliminary studies were begun*
- Provide information to the Teribe peoples about the standards to be used and procedures to be followed in developing the environmental and social impact assessments (ESIAs) for the PHED
- Ensure that the plan of consultation and prior consent includes discussion of fair compensation and benefit-sharing and is culturally sensitive
 - Incorporate community input and concerns into the ESIAs currently in progress
 - Include indigenous custom and community standards into planning and policy related to the construction and operation of the *El Diquís* dam
- Disseminate this plan for effective participation among the Teribe peoples and make it publically available to third parties

To the Instituto de Desarrollo Agrario:

Information

- Promote awareness among the Teribe peoples about the methods for reacquiring indigenous lands alienated by non-indigenous people

Property

- Ensure that IDA no longer holds title to any indigenous lands, except as reasonably necessary to accomplish land transfers to indigenous communities, and that all land is held by the entity legally entitled to hold title to the land (presently the local ADI)
- Develop meaningful procedures for protecting indigenous lands from further alienation by non-indigenous individuals
- Devise a plan to efficiently expel non-indigenous owners from indigenous territories
- Cooperate with other state entities and indigenous communities to establish a more efficient procedure for reacquiring alienated indigenous lands
- Coordinate with other state entities and indigenous communities to develop a method for establishing priorities for the reacquisition of land, incorporating particular attention to those territories with a high proportion of alienated lands and those facing continued loss of land, whether due to alienation, the development of infrastructure projects, or other reasons
- Provide ICE with adequate information to appropriately compensate the Teribe peoples for the loss of land projected to be caused by the PHED

Representation

- Encourage and, to the extent independently feasible, undertake institutional reform that allows a variety of actors other than community ADIs to initiate the process for land reacquisition

To the Costa Rican State/Legislature:

Information

- Reform *in a timely fashion* information laws to ensure that indigenous communities are able to access adequate information about projects that affect them, ensuring the realization of their right to information

Property

- Introduce *in a timely fashion* legislation to modify the existing procedures for buying back alienated indigenous lands from non-indigenous individuals, including the creation of mechanisms alternative to the current ADI recommendation system
- Ensure that procedures are in place for detecting sales of land to non-indigenous individuals and penalizing such processes
- Take steps to establish a permanent fund to use for purchasing back alienated indigenous land, ensuring that the funding is adjusted for inflation and accounts for potential increases in the cost of land due to changes such as infrastructure projects
- Provide necessary oversight to ensure that illegal transfers of land cease

Representation

- Develop and adopt a new legislative framework addressing the rights of indigenous peoples, following ILO 169 as well as the principles of the United Nations Declaration on the Rights

of Indigenous Peoples, and ensuring that it is the product of broad consultation with and consent of indigenous peoples

- Ensure that the new framework creates a mechanism for conflict resolution, allowing indigenous communities to resolve internally divisions regarding their traditional ways of organization and other disputes that may arise
- Make available adequate resources to fund indigenous institutions, such ADIs and CONAI, to promote the remediation of indigenous peoples' societal marginalization

Effective participation/consultation/free, prior, and informed consent

- Develop and make public the mechanisms used for the consultation processes for the *proyecto de ley* to be publically evaluated and potentially used as a model for the design of future processes of effective participation of indigenous peoples
- Increase the flow of funding and other resources to indigenous communities, empowering them, helping close the gap between indigenous communities and the rest of the nation's population
- Ensure that resources are available to indigenous communities, both in and outside of the specific context of consultation, to participate effectively in society
- Develop public policies to address the situation of marginalization of indigenous peoples

To the Secretaría Técnica Nacional Ambiental:

Information

- Modify to the extent possible, or promote the modification of, institutional policy to require greater disclosure by ICE of information to the Teribe peoples before or at the same time it turns in that information to SETENA
- Make publically available more information about the studies currently underway, including the consulting firms involved in the work and the distribution of work between ICE and the contracted consultants
 - Make publically available a list of files in existence regarding the PHED, a general description of their contents, the classification of the files (whether public or confidential), and the authority to be contacted regarding inquiries of such files

Effective participation/consultation/free, prior, and informed consent

- Investigate actively whether the work of a state institution or other third party on indigenous territory is violating the law or the parameters of ESIA policy
 - Adopt a more proactive stance towards the PHED, actively monitoring ICE's progress from both the environmental and social perspectives, rather than awaiting the submission of complaints
- Increase the institution's social content and expertise or coordinate with another institution with competency in the social field to ensure that the social aspect of the ESIA's meets the demands of international law
 - Investigate the possibility of establishing a social licensing scheme, to accompany the periodic environmental licenses ICE must obtain in its works
- Ensure that inputs from the community obtained at the public hearing are considered and incorporated into ICE's modifications of the plan, whether such comments are technical in nature or not

To the Dirección Nacional de Desarrollo de la Comunidad:

Information

- Host regular meetings with community members, regardless of ADI affiliation, in order to gauge popular sentiment about the ADI and its operations
- Clarify and institutionalize the standards to be met by ADIs in order to obtain funding

Property

- Identify communities in critical land situations needing immediate redress
- Encourage ADIs, particularly those in communities with dire land situations, to promote the recovery of land

Representation

- Provide greater oversight of indigenous ADI operation rules and confer with the Teribe peoples about any mechanisms established that may centralize power in the ADI, such as long or unlimited renewable terms for ADI leadership
- Place limitations on the ability of any one individual to hold ADI and CONAI leadership positions simultaneously
- Conduct studies and surveys measuring popular opinion among indigenous communities of their local ADIs

The Human Rights Clinic finds problematic for the human rights of indigenous peoples the existence and power of CONAI and ADIs in Costa Rica and emphasizes that all indigenous peoples should be enabled to select its own form of political organization and representation. While some indigenous communities may be satisfied with the current system and the extent to which their rights are realized through ADIs and CONAI, other communities may not. As such, the HRC emphasizes that the state should create a framework that lets each individual community decide its methods and mechanisms of self-governance. In the event that no reforms to these structures are passed—or in the interim period until such reforms take effect—the HRC makes the following recommendations to help increase the effectiveness and efficiency of the existing organizations, helping bring Costa Rica into compliance with its obligations under international law.

To the Comisión de Asuntos Indígenas:

Representation

- Place limitations on the ability of any one individual to hold ADI and CONAI leadership positions simultaneously

Property

- Identify communities in critical land situations needing immediate redress
- Develop a plan for the recovery of indigenous lands, prioritizing the recovery of land in high-alienation areas and encouraging ADI involvement in promoting the recovery of land
- Coordinate with other state entities and indigenous communities to develop a method for establishing priorities for the reacquisition of land, incorporating particular attention to those territories with a high proportion of alienated lands and those facing continued loss of land, whether due to alienation, the development of infrastructure projects, or other reasons

To the Terraba Asociación de Desarrollo Integral:

Information

- Establish means for diffusion of information about ADI meetings that ensures accessibility to such information by a broad cross-section of community members, rather than just ADI members
- Ensure that community individuals are aware of the range of powers that are vested in ADI for the time being, including the ability to initiate re-acquisitions of land

Property

- Coordinate with other state entities and indigenous communities to develop a method for establishing priorities for the reacquisition of land, incorporating particular attention to those territories with a high proportion of alienated lands and those facing continued loss of land, whether due to alienation, the development of infrastructure projects, or other reasons

Representation

- Affiliate all Teribe individuals who wish to be affiliated, as mandated by the Costa Rican *Sala IV* in 2009

Effective participation/consultation/free, prior, and informed consent

- Ensure that non-ADI members are informed of and included in any meetings with ICE, SETENA, or other institutional representatives

I. INTRODUCTION

Despite being a mere proposal characterized as being in its preliminary phases, the *El Diquís* Hydroelectric Project has already affected the lives of the Teribe, the indigenous peoples of the Térraba territory located Buenos Aires *cantón*, or region, in southern Costa Rica.¹ Each day, convoys of heavy equipment marked with the logo of the Costa Rican Institute of Electricity (*Instituto Costarricense de Electricidad*, ICE) widen dirt paths in Térraba and cover them with rock. Rocks along the path to the town's primary school bear the same logo, spray-painted in orange, indicating where road crews should continue their works.

An earlier, larger proposal called the Boruca-Cajón project would have displaced thousands of indigenous peoples and flooded over 4,000 hectares of indigenous land. This project was rejected after indigenous communities protested against the project and studies revealed the project's massive environmental and social impacts. ICE subsequently proposed the *Proyecto Hidroeléctrico El Diquís* (PHED), the current proposal, as an alternative. Despite being a downsized version of the previous plan, *El Diquís* would be the largest dam of its kind in Central America, and its construction and operation would flood 6,815 hectares to create a reservoir in Costa Rica's largest river basin, around the General River (*Río General*). The project would generate electricity for more than a million users annually.



Figure 1. ICE truck works on road construction in Térraba.

Before undertaking a project like *El Diquís*, which directly impacts indigenous peoples, Costa Rica is required by international human

rights law to ensure that ICE establishes means by which indigenous peoples can effectively participate in the decision making surrounding the project. Such participation should include an appropriate process of consultation that seeks and obtains their free, prior, and informed consent. When major developments projects are carried out, international human rights law requires consultation with and consent of indigenous peoples at the very earliest stages of the planning process, *before* activities surrounding these projects are taken that may have profound and

¹ Although some sources use the terms Térraba and Teribe interchangeably, this report will use the term Térraba to denote the territory where the Teribe live, while the term Teribe will be used to refer to the peoples themselves. Furthermore, variations on the project name will appear in this report, including *El Diquís*, the mega-project, *Proyecto Hidroeléctrico El Diquís*, and PHED.

irreversible effects for indigenous communities. Nevertheless, Costa Rica has not undertaken these processes as ICE argues that there is no need to do so until feasibility studies are finished. This position has received the endorsement of the *Sala IV*, the nation's constitutional court.

Costa Rica is not fulfilling its international obligations to conduct good faith consultation with the Teribe peoples. ICE's actions already impact indigenous land, yet the Costa Rican constitutional court has concluded that consultation is not yet required. ICE points to meetings with affected communities and published materials that discuss the scope and anticipated impact of *El Díquis* as meeting its current obligations. Not only are current activities already producing an impact on the daily life of the Teribe peoples but waiting until the completion of feasibility studies would be tantamount to denying the right of indigenous peoples to be consulted and give consent. Once the feasibility studies are concluded, the site for the PHED will be already decided, making the indigenous peoples' input inconsequential.

This report describes how the *Proyecto Hidroeléctrico El Díquis* brings to the fore numerous structural problems in Costa Rican law and politics concerning the human rights of the Teribe peoples. The report integrates the viewpoints of community members, government officials, and representatives of non-governmental organizations (NGOs) in order to explore how the project's current and potential developments have serious implications for the rights to information, property, representation, and effective participation of the Costa Rican indigenous peoples affected by the project. These rights are informed by and affect indigenous peoples' right to effectively control traditional territory through institutions chosen by indigenous peoples. The report also provides an evaluation of the Costa Rican government's compliance with its obligations under international human rights law in these areas and makes recommendations for ways in which such compliance may be improved.

This report is a product of the Human Rights Clinic (HRC) at the University of Texas School of Law, where a group of law and graduate students work on human rights projects and cases under the supervision of Clinic Director Ariel Dulitzky. Students from the Clinic began work on this project in January 2010. In February and March 2010, an HRC fact-finding delegation travelled to Costa Rica to meet with state representatives, attorneys, local experts on indigenous affairs, and indigenous people in both San José and in southern Costa Rica.

The Human Rights Clinic would like to thank those individuals in Costa Rica who assisted HRC representatives with organizing and coordinating their trip, as well as all of those state and non-governmental individuals with whom the fact-finding delegation was able to meet.

II. CONTEXT OF *EL DIQUÍS*: a Story of Repeated Intrusions, Land Loss, Marginalization, and Poverty



Figure 2. A Teribe boy fishes along the Veraguas stream, which runs through a ravine. See also Figure 9.²

A. Socioeconomic Context

In Costa Rica, a country of approximately 4.6 million inhabitants, indigenous peoples comprise less than 1.5% of the population.³ Within Costa Rica's eight indigenous peoples, the Teribe of Térraba number approximately 750 people.⁴ Their 9,355 hectares of land are situated along the *Rio General*; the proposed dam would be located about five kilometers northwest of the community of Térraba, and its reservoir would flood approximately 650 hectares of Teribe land.⁵

² Photo provided by Jehry Rivera Rivera, a Teribe community member.

³ Maria Eugenia Bozzoli Vargas and Marcos Guevara Berger, *Indígenas Costarricenses en el Siglo XXI: Algunas Perspectivas Para la Acción* (San José: Editorial Universidad Estatal, 2002), 6 (estimating total indigenous population of approximately 40,000).

⁴ Marcos Guevara Berger et al., *Perfil de los Pueblos Indígenas de Costa Rica* (Inter-American Institute of Human Rights, May 2000), 6.

⁵ *Id.* at 1, 3. Instituto Costarricense de Electricidad. *Una Mirada al Proyecto Hidroeléctrico*, 8–9, [hereinafter *Una Mirada al Proyecto Hidroeléctrico*] available at http://www.grupoice.com/esp/ele/infraest/proyect/icelec/doc/generalidades_phed.pdf.

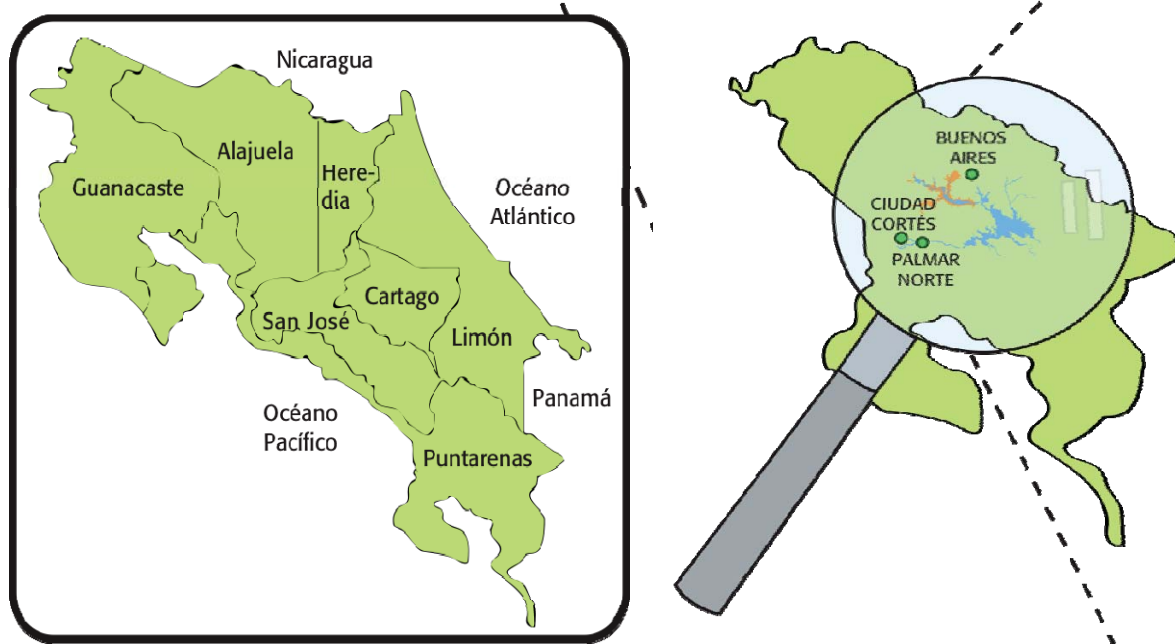


Figure 3. Map of Costa Rica, showing the location of Puntarenas province, where Buenos Aires *cantón* is located; Térraba is located within Buenos Aires *cantón*.⁶

The Teribe peoples originally lived along the Caribbean coast but were forcibly moved to Térraba by the Spanish in the eighteenth century.⁷ As they adapted to the central valley, their language and many cultural traditions were lost.⁸ Pressures for development, including the construction of the Inter-American Highway, caused substantial losses of indigenous lands, both as part of the construction itself and the mass migrations that accompanied it.⁹ This large inflow of outsiders to indigenous lands marked the early stages of the process of indigenous peoples' dispossession of their territories.¹⁰

The alienation of indigenous lands by non-indigenous people is a major problem confronting Costa Rica's indigenous communities, and for the Teribe peoples the loss has been especially severe.¹¹ Nationwide, control of indigenous lands by the non-indigenous has been estimated to be as high as 40 to 60%; in Térraba, the amount of land controlled by the non-indigenous

⁶ Instituto Costarricense de Electricidad. *De Boruca a el Diquís* [hereinafter *De Boruca a el Diquís*], available at http://www.grupoice.com/esp/ele/infraest/proyect/icelec/doc/boruca_eldiquis.pdf.

⁷ Manuel María de Peralta, *La géographie historique et les droits territoriaux de la république de Costa-Rica*. (Paris: générale Lahure, 1900), 9, 87. Doris Z. Stone. *The Boruca of Costa Rica*. (Cambridge: Peabody Museum of American Archaeology and Ethnology, 1946), 3.

⁸ Through contact with their Teribe relatives in Panamá, some of their language and other traditions have been preserved. As of 2000, five speakers of the Teribe language were reported in Térraba. Guevara et al., *supra* note 4 at 7, 24.

⁹ Rodrigo Salazar S. *El indígena costarricense: una visión etnográfica*. (Cartago: Editorial Tecnológica de Costa Rica, 2003), 22–23. Thomas S. Creedman, *Historical Directory of Costa Rica* 2d ed, (Scarecrow Press: 1999), 267. Robert M. Carmack, "Un estudio microhistórico de Centroamérica colonial: los casos de Buenos Aires, Costa Rica, y Momostenango, Guatemala," in *Primer Congreso Científico sobre Pueblos Indígenas de Costa Rica y sus fronteras*. (María Eugenia Bozzoli et al., eds., 1998), 179.

¹⁰ Guevara et al., *supra* note 4, at 19.

¹¹ Marcos Guevara Berger, "Los pueblos indios costarricenses en la actualidad," *Revista Herencia* (1992): 158.

exceeds 90%.¹² The proposal for *El Diquís* is the most recent threat to indigenous landholdings as it would both flood indigenous lands and bring more outsiders to the indigenous territories of southern Costa Rica. This project is just the most recent example of projects proposed in the interest of national development, but with particularized negative externalities felt by indigenous communities.

The PHED is expected to create the largest dam of its kind in Central America and is estimated to employ approximately 3,500 at its peak construction phase.¹³ Members of the community expressed concerns to the HRC that such a large-scale project may result in an influx of people, as has occurred with previous development projects.¹⁴ The construction of the Inter-American Highway in the mid-twentieth century, which brought about massive immigration to Buenos Aires *cantón*, provides an example of this.¹⁵ The penetration by outsiders of indigenous territories led to the loss of indigenous territories to non-indigenous and made indigenous peoples a minority in their own territories.¹⁶ Dispossession of their lands impoverished the Teribe both economically and spiritually.

The Teribe peoples of Buenos Aires have also faced the threat of cultural extinction. National policies that have emphasized their assimilation into the majority culture have exacted linguistic and cultural costs.¹⁷ Because use of indigenous languages was discouraged, in the national interest of promoting transitions to Spanish as the national language, the Teribe language was almost lost.¹⁸ Only through reconnections with Panamanian relatives whose language has survived have the Teribe regained a modicum of language mastery.¹⁹ As of 2000, there were approximately five speakers of the Teribe language in Costa Rica.²⁰

These linguistic policies represent a broader strategy of integration and assimilation that was reflected in International Labour Organization Convention 107, the Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries.²¹ ILO 107 was not repudiated until 1993, when Costa Rica ratified International Labour Organization Convention 169, the Convention concerning Indigenous and Tribal Peoples in Independent Countries, which has a greater emphasis on autonomy for indigenous peoples.²² Most of the institutions in existence in Costa Rica for the representation

¹² Salazar S., *supra* note 9, at 21. “For the rest of the territories the situation is truly alarming, since it is estimated that they possess less than 50% of the lands in their hands and, in some cases, such as Térraba, this percentage doesn’t even reach 10%.”

¹³ *Una Mirada al Proyecto Hidroeléctrico*, *supra* note 5, at 12.

¹⁴ Interview with community members, Feb. 27, 2010, Térraba, Costa Rica.

¹⁵ Cletus Gregor Barié, *Pueblos Indígenas y Derechos Constitucionales en América Latina: un panorama*, 2d ed. (La Paz, Bolivia: Génesis, 2002), 279, available at http://www.acnur.org/paginas/index.php?id_pag=7562.

¹⁶ Stone, *supra* note 7, at 4.

¹⁷ Guevara et al., *supra* note 4, at 34–39.

¹⁸ *Id.*

¹⁹ *Id.* at 3, n.7.

²⁰ *Id.*

²¹ International Labor Organization, Convention concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries, 1957 [hereinafter ILO 107].

²² International Labor Organization, Convention concerning Indigenous and Tribal Peoples in Independent Countries, 1989 [hereinafter ILO 169].

and governance of indigenous peoples were created before the ratification of ILO 169, while ILO 107 was in effect.²³

At the national level, Costa Rica's indigenous peoples are governed by a state-created system comprised of institutions including the Associations for Integral Development (*Asociaciones de Desarrollo Integral*, ADI), discussed more fully in later sections of this report. Legally, this system has a strong impact on the Teribe peoples' potential for meaningful self-governance, as the state dictates the procedures by which indigenous territory may be recovered, requires indigenous individuals to be members of these associations in order to participate, and limits indigenous participation in national politics to these institutions.²⁴ Practically, the ADIs' utility as a meaningful forum for self-governance has been called into question by a number of factors including sizable participation of non-indigenous individuals in the ADIs of indigenous communities and the exclusion of dissenting voices, accomplished through the denial of membership in the ADIs.²⁵ The legal antecedents and the practical operation of the ADI in Térraba renders it ineffectual to prevent further land loss, redress past losses, ensure the effective exercise of self-government, and enable the Teribe peoples to exercise their rights of effective participation, consultation, and consent on mega-projects such as the PHED.

In addition to creating and maintaining problematic institutions for indigenous representation and participation, the Costa Rican state has also acted inadequately to ensure indigenous peoples' property rights. This failure is made even more serious by the potential effects of the PHED. To date, the Teribe peoples have lost to non-indigenous people about 90% of the land recognized by the state as comprising the indigenous territory of Térraba. This, taken together with further losses anticipated to be caused by the proposed dam project, makes land tenure issues a major aspect of their situation.²⁶ Land loss is certainly of economic significance to peoples such as the Teribe, and it could also have a devastating cultural impact given the vital relationship between indigenous peoples and their land.²⁷ This is particularly true where, as here, delicate ecosystems are threatened by large-scale development, and previous land losses have been so sizable. Indigenous peoples see themselves as "one more strand in the web of life [,] rather than the center of the delicate balance of the ecosystems."²⁸ Land provides the foundation for their cultures, spiritual life, and economic survival.²⁹ The land along the *Río General* is thus unique and irreplaceable; land loss, both past and anticipated to be caused by the *El Díquis* development, has cultural, spiritual, and other economic dimensions in the case of indigenous peoples.

The low level of indigenous land ownership in Térraba also represents an extreme case of the poverty that typifies the Costa Rican indigenous population as a whole. Literacy rates, for example, demonstrate the contrast between national and indigenous educational accomplishment.

²³ Guevara et al., *supra* note 4, at 34–35.

²⁴ *Id.* at 23–32, 84.

²⁵ *Id.* at 84. Decision number 2009-011556 (file number 09-007886-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia* (2009) [hereinafter Decision number 2009-011556].

²⁶ Guevara et al., *supra* note 4, at 32, 34.

²⁷ Salazar S., *supra* note 9, at 29.

²⁸ *Id.*

²⁹ Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua, 2001 Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) [hereafter cited as *Awas Tingni* merits judgment], para. 149.

Although Costa Rica's national literacy rate is approximately 94%, literacy in indigenous areas ranges between 70 and 85%.³⁰ Only one in one hundred indigenous children who start high school complete it.³¹

In this socioeconomic context, the presence of ICE, even in what is described as only the "feasibility study" phase, is notable. As will be discussed more fully below, the promotion of *El Diquís* by ICE makes clear its economic power as a major provider of electricity and telephone services in Costa Rica. The project will make ICE a major employer, and ICE's promotional brochures emphasize the prospects for educational centers and free internet access in Buenos Aires.³² The proposal for the PHED has been linked by some actors to discussions about the development of tourism and the construction of an airport in the area.³³

ICE's economic leverage and the potential positives and negatives presented by the project have created new community divisions and highlighted existing differences of opinion. ICE's practice of hiring within the community has been controversial among community members, viewed from various perspectives as manipulative or a way in which the community may stand to benefit from such opportunities during preparation, potential construction, and eventual operation of the dam. The possibility of ecotourism developments along the reservoir is another polemic issue that finds some support and some resistance among community members.³⁴ Finally, while some view the construction of the *El Diquís* dam as inevitable, others are concerned less with the certainty or not of the dam's construction and more with being informed about what is going on and what its effects may be, as well as ways in which the Teribe peoples might be compensated for the losses and difficulties that the project may cause them.³⁵ On both sides of these divisions, disagreements about the timing and scope of effective participation of indigenous peoples and the adequacy of indigenous representation call into question more fundamental issues about human rights for Costa Rica's indigenous peoples. These tensions and divisions highlight the limitations of the current ADI system.

As will be discussed below in more detail, circumstances unique to Costa Rica's systems for both indigenous self-governance and property rights present interdependent complications for the exercise of indigenous rights within the national system. ADI structural limitations undermine indigenous peoples' right to self-determination and create problems for indigenous redress of land issues, representation in the Costa Rican polity, and the effective participation of indigenous

³⁰ Literacy statistics on the indigenous are based on a 2003 survey. Sonia Cárdenas, *Human Rights in Latin America: a Politics of Terror and Hope* (Philadelphia: University of Pennsylvania Press, 2010), 229, Table 2.

³¹ *Id.* Gillette Hall, Heather Marie Layton, and Harry A. Patrinos, "Introduction," in *Indigenous Peoples, Poverty, and Human Development in Latin America* (Gillette Hall and Harry A. Patrinos, eds., 2006), 4–5. "It is calculated that only 10% of those registered in first grade will finish 6th grade. Of those graduates, 615 (55%) will start 7th grade, and of those only 45 will start 10th grade and only 10 students are expected to finish 12th grade." Defense of the Children International (DNI), "Costa Rica Equity and Efficiency of Education Project: Social Assessment and Indigenous Peoples Development Framework," September 2003.

³² Instituto Costarricense de Electricidad, *¡Déjenos Contarle! Revista Informativa del Proyecto Hidroeléctrico El Diquís*, Ed. 1, September 2009, 5 [hereinafter *¡Déjenos Contarle!*].

³³ Interview with Franklin Ávila Pérez, Director of PHED, ICE, Feb. 27, 2010, San José, Costa Rica.

³⁴ Interview with community members, *supra* note 14. Interview with Genáro Gutiérrez, President of Térraba ADI and CONAI, Feb. 28, 2010, Térraba, Costa Rica. Interview with Hugo Lázaro, President of Curré ADI, Feb. 28, 2010, Curré, Costa Rica.

³⁵ Interview with community members, *supra* note 14.

peoples in the decision-making processes regarding projects that directly affect them. Thus the PHED highlights many structural problems that exist in Costa Rica, frustrating indigenous peoples' realization of their human rights and illustrating the Costa Rican state's non-compliance with its obligations under international law.

B. Legal Context

The socioeconomic development discussed above has taken place against the backdrop of Costa Rica's domestic law. Developments in Costa Rica's laws related to indigenous peoples have changed over time from a more assimilationist approach to an approach that is at least rhetorically more protective of indigenous peoples' rights to self-governance. However, as this section and the ones that follow will show, several of the reforms of Costa Rican law governing indigenous peoples have replaced old problems with new dilemmas. Furthermore, legislative proposals introduced over a decade ago designed to recognize and secure indigenous peoples' right to self-governance through their own institutions remain pending in the Costa Rican legislature.

The Costa Rican legislature's early laws addressing the country's indigenous peoples included law number 13, the law of vacant lots, which was passed in 1939.³⁶ This law was the first in Costa Rica's republican era to recognize indigenous property rights—Article 8 of this law stated that “it is declared as inalienable and exclusive property of indigenous peoples, a prudential zone decided by the executive branch, in the places where such tribes exist, with the ends of conserving our autochthonous race and free them from future injustices.”³⁷ In 1945, the State created the Board for the Protection of the Aboriginal Races (*la Junta Protectora de las Razas Aborígenes*), which was charged with the task of delimiting indigenous territories.³⁸

Despite the fact that these laws predated Costa Rica's constitution, the Political Constitution of Costa Rica (*Constitución Política de la República de Costa Rica*), adopted in 1949, did not make reference to the country's indigenous peoples or their rights.³⁹ Although the constitution has undergone various amendments since its inception, this lack of recognition of indigenous peoples and their rights endures. In fact, the sole reference to indigenous peoples (*indígenas*) in the constitution dates back only to 1999 and is of limited scope; this article, Article 76, provides that the state supports the maintenance of indigenous languages despite the fact that the country's official language is Spanish.⁴⁰ In the absence of constitutional provisions regarding indigenous rights in Costa Rica, particularly dealing with protection of their territories, the country has promulgated various pieces of legislation, which have been supplemented by executive decrees.

Aside from a 1945 decree providing the regulations of the *ley general de terrenos baldíos*, Costa Rica did not substantively take up the issue of indigenous rights again until 1956, when executive decree number 34 (*decreto ejecutivo número 34*) created Costa Rica's first indigenous

³⁶ Gregor, *supra* note 15, at 279.

³⁷ *Ley de Terrenos Baldíos*, Law number 13 (1939), quoted *id.* at 279.

³⁸ Guevara et al., *supra* note 5, at 19.

³⁹ Constitución Política de la República de Costa Rica (November 7, 1949) [hereinafter the Constitution].

⁴⁰ *Id.* at Art. 76.

reserves.⁴¹ The three “reserves” created and delimited at this point were Ujarrás-Salitre-Cabagra, China Kichá, and Boruca-Térraba; in other words, the lands currently targeted by ICE for the PHED have been recognized by the state as indigenous lands for over a half-century.⁴²

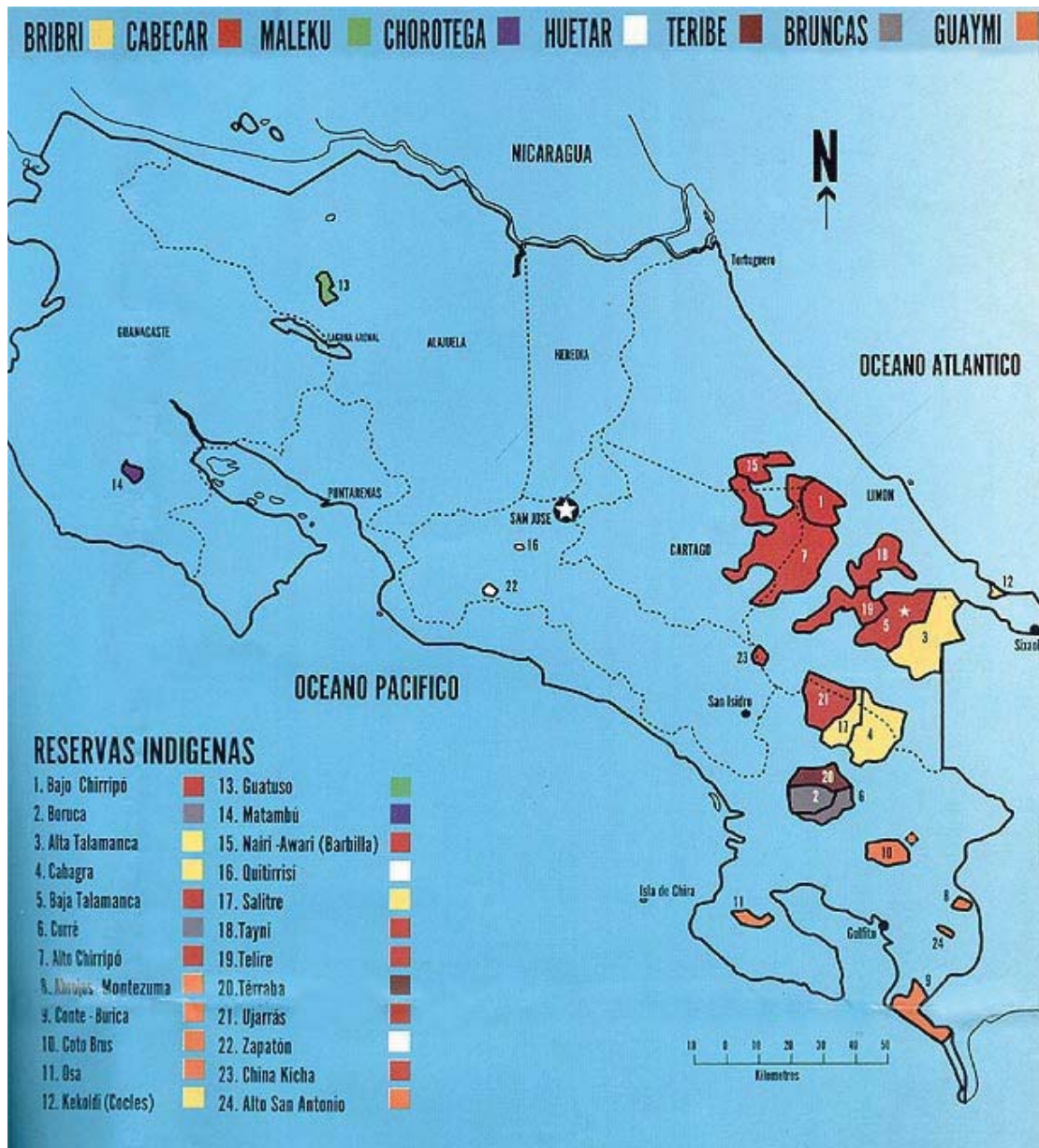


Figure 4. Map of Costa Rica’s indigenous territories, including Térraba (number 20, located next to Boruca, number 2). This map is available only in Spanish.⁴³

⁴¹ Gregor, *supra* note 15, at 277.

⁴² Guevara et al., *supra* note 5, at 19. Although these reserves were recognized at this point in time, it was not until executive decree number 6866 in 1977 that they were inscribed in the Public Registry of Costa Rica in the name of the respective indigenous community. *Id.*

⁴³ Comisión Costarricense de Cooperación con la UNESCO, “Grupos indígenas,” *Portal de Cultura Costarricense*, available at <http://www.unesco.or.cr/portalcultural/indigenas.htm>.

In 1959, shortly after the creation of these indigenous “reserves,” Costa Rica signed on to ILO 107 and passed legislation giving it effect in domestic law.⁴⁴ ILO 107 addressed a broad spectrum of issues including health, education, social security, and land.⁴⁵ The convention clearly addressed these issues with an eye to the homogenization of national populations, embodying the integrationist and assimilationist orientation that was characteristic of the time in pursuit of a limited concept of development.⁴⁶

Two years later, the Costa Rican state entrusted administration of indigenous “reserves” to a newly created state institute called the Institute of Lands and Colonization (*Instituto de Tierras y Colonización*, ITCO), which is the immediate precursor to the institution that currently manages indigenous lands in Costa Rica.⁴⁷ In 1967, law number 3859, the law about community development, was passed, which, among other provisions, created the National Directorate for Community Development (*Dirección Nacional para Desarrollo Comunitario*, DINADECO).⁴⁸ DINADECO’s mandate was to promote self-government in communities throughout the country.⁴⁹ Though not of particular importance to indigenous peoples at the time of its creation, subsequent legal developments have increased the relevance of DINADECO to indigenous peoples.

The 1970s saw Costa Rican law begin to address issues of indigenous representation and governance. In 1973, the Costa Rican legislature created the National Commission of Indigenous Affairs (*Comisión Nacional de Asuntos Indígenas*, CONAI).⁵⁰ CONAI holds a privileged position at the national level as the institutional link between indigenous communities and the Costa Rican government, tasked with coordinating state actions towards indigenous communities, and is the superior of two levels of state-created institutions for indigenous representation in Costa Rica.⁵¹ Although *ley CONAI* was relatively progressive at the time of its birth in its recognition of indigenous property rights, the language of the document suggests that it was suffused with the integrationist and assimilationist outlook characteristic of the time period.⁵²

The period 1976–1977 saw the demarcation and re-demarcation by decree of various indigenous reserves, supplementing the original three. In 1977, law number 6172, the Indigenous Law (*Ley*

⁴⁴ ILO 107, *supra* note 21. Costa Rica ratified ILO 107 on May 4, 1959 and was passed into domestic law in law number 2330. Sala Constitucional, Defensoría de los Habitantes, Procuraduría General de la República, *Costa Rica: Resoluciones sobre Pueblos Indígenas* [hereinafter *Resoluciones*] (San José, Costa Rica: IIDH, 2002), 27.

⁴⁵ ILO 107, *supra* note 21.

⁴⁶ *Id.*

⁴⁷ Guevara et al., *supra* note 5, at 19. The law that created ITCO is law number 2825, the law of lands and colonization. *Ley de tierras y colonización*, Law number 2825 (1961). Gregor, *supra* note 15, at 277.

⁴⁸ Gregor, *supra* note 15, at 277. *Ley sobre el Desarrollo de la Comunidad* (DINADECO), Law number 3859 (1967) [hereinafter *ley DINADECO*].

⁴⁹ Guevara et al., *supra* note 5, at 25.

⁵⁰ Gregor, *supra* note 15, at 277. The law that created CONAI was law number 5671, the law of creation of the National Commission of Indigenous Affairs (*la ley de creación de la Comisión Nacional de Asuntos Indígenas*, CONAI). *Ley de creación de la Comisión Nacional de Asuntos Indígenas* (CONAI), Law number 5671 (1976) [hereinafter *ley CONAI*]. *Id.*

⁵¹ Guevara et al., *supra* note 5, at 21.

⁵² *Id.* at 21–24.

Indígena) came into effect in Costa Rica.⁵³ This law represented a major change for indigenous rights in the country: in addition to raising to the level of law previous decrees establishing indigenous reserves, the law recognized that “indigenous reserves are inalienable and imprescriptible, nontransferable and exclusive for the indigenous communities that inhabit them.”⁵⁴ This law also contained a provision stating that the lands of the recognized indigenous reserves would be recorded in the Public Registry in the name of the respective indigenous communities.⁵⁵ Finally, *Ley Indígena* provided for the self-governance of indigenous peoples “through their traditional communal structures or the laws of the Republic that govern, under the coordination and advice of CONAI.”⁵⁶

Despite this provision recognizing the potential for using traditional communal structures for governance, executive decree 8487-G was passed the following year, imposing a state-created structure for local governance.⁵⁷ This executive decree, which regulates the application of the *ley indígena*, provided for the creation of institutions called ADIs.⁵⁸ The basis for the creation of ADIs was found in the reference to the Associations for Community Development (*Asociaciones para el Desarrollo de las Comunidades*) created in *ley DINADECO*, and their purpose was “to serve as an instrument of coordination of government, municipal, and communal efforts in the realization of projects of common interest that contribute to the country’s social and economic development.”⁵⁹

ADIs are the legally recognized structure for governance of indigenous territories; thus, twenty-four of them exist in Costa Rica, one for each indigenous territory.⁶⁰ ADIs are comprised of a general assembly and a board of directors.⁶¹ By law, ADIs must have a membership of at least 100 but no more than 1,500 individuals.⁶² Any indigenous member of the community over fifteen years of age is eligible to become a member of the ADI of his or her community and participate in the general assembly; however, there are two primary limitations.⁶³ First, individuals must undergo a process of application and be affiliated to the ADI in order to participate.⁶⁴ Second, indigenous individuals who do not reside in the indigenous territory are not entitled to participate in the decision-making.⁶⁵ This issue is highlighted in the context of indigenous individuals who live near the territory but not within its boundaries, due to the way in which the territory was delimited. Members of the ADI general assembly elect the members of

⁵³ Gregor, *supra* note 15, at 277. *Ley indígena*, Law number 6172 (1977) [hereinafter *ley indígena*].

⁵⁴ *Id.* *Ley indígena*, *supra* note 53, at Art. 3.

⁵⁵ *Ley indígena*, *supra* note 53, at Art. 2.

⁵⁶ *Id.* at Art. 4.

⁵⁷ Gregor, *supra* note 15, at 277. *Decreto ejecutivo 8487-G* (1978). *Id.* at Art. 3.

⁵⁸ *Decreto ejecutivo 8487-G*, *supra* note 57, at Art. 3.

⁵⁹ *Ley DINADECO*, *supra* note 48, at Art. 14, 16. Decision Number 2002-02623 (file number 96-006433-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia* (2002) [hereinafter Decision Number 2002-02623].

⁶⁰ José Carballo, *Los Grupos Indígenas Costarricenses* (Universidad Nacional de Costa Rica), available at http://www.una.ac.cr/bibliotecologia/grupos_eticos/indigenascr.htm. Interview with Rubén Chacón, lawyer and indigenous law expert, San José, Costa Rica, Feb. 26, 2010

⁶¹ Interview with Genaro Gutiérrez, *supra* note 34.

⁶² *Ley DINADECO*, *supra* note 48, at Art. 16.

⁶³ *Id.* Interview with Genaro Gutiérrez, *supra* note 34.

⁶⁴ *Id.*

⁶⁵ Interview with Rubén Chacón, *supra* note 60.

the board of directors according to procedures established and, when relevant, modified, by each individual ADI.⁶⁶

ADIs are the only entities legally qualified to speak on behalf of indigenous communities; per Article 5 of executive decree 8487-G, “the traditional communal structures to which Article 4 of the law refers will operate inside of the respective communities; and the Associations for Development, once legally inscribed, will represent said communities judicially and extra-judicially.”⁶⁷ In addition to having confronted challenges for denying membership to eligible indigenous individuals, ADIs have also received attention for allowing the participation of non-indigenous individuals, particularly in the Buenos Aires *cantón*, where the non-indigenous population is very large.⁶⁸ Finally, low levels of community membership in ADIs and low attendance at general assembly meetings also raise problems for the representativeness of ADIs—in some indigenous communities the percentage of individuals affiliated to the local ADI does not even reach 60% and typical attendance of general assembly meetings hovers around 20-40% of members.⁶⁹

As shown by ADIs’ origins in *ley DINADECO*, a law with no content specific to indigenous peoples, ADIs are not specifically indigenous organizations, nor are they traditional or indigenous forms of government. At present, there are over 300 ADIs in Costa Rica, all coordinated by DINADECO; twenty-four of these are located in and serve as the legal representative of indigenous territories.⁷⁰ ADIs were not originally “proposed as forms of government that would compete with other official organs, like the municipalities themselves,” nor were ADIs intended to replace existing structures in indigenous communities, but rather to exist alongside traditional community organizations and function as the legal representative of the indigenous peoples to the state.⁷¹ However, in indigenous communities ADIs have come to

⁶⁶ Interview with Genaro Gutiérrez, *supra* note 34. Interview with DINADECO officials, San José, Costa Rica, March 3, 2010. The representatives of DINADECO present at this meeting were Lilliam Hernández (head of the DINADECO department of training) and Ana Cecilia Acosta; Carlos Brizuela, head of the legal department at CONAI, was also present at this meeting, however this meeting will be cited as “Interview with head of legal department of CONAI,” *see infra* at 97.

⁶⁷ The status of ADIs as the sole entity with juridical personality to represent the community in which it is located has been recognized in numerous sources of Costa Rican law. In addition to executive decree 8487-G, ADIs’ position was confirmed in executive decree 13568-C-G of April 30, 1982, which decreed in Article 1 that, “The Associations of Integral Development have the legal representation of the indigenous communities and will act as their local governments.” The validity of these structures has been upheld several other times, including in action of unconstitutionality 6433-96, decided on April 25, 1997 and *recurso de amparo* 2007-016213, decided on Nov. 9, 2007. Decision number 6433-96 (file number 96-006433-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia* (1997). Decision number 2007-016213 (file number 07-011520-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia* (2007).

⁶⁸ Guevara et al., *supra* note 5, at 84. Interview with community members, *supra* note 14.

⁶⁹ Mesa Nacional Indígena (MNI) de Costa Rica, *Informe Alternativo Presentado por los Pueblos Indígenas al Informe presentado por el Estado de Costa Rica al Comité contra la Discriminación Racial de la Convención Internacional sobre la Eliminación de Todas las Formas de Discriminación Racial, 71 Período de Sesión, 30 de julio al 18 de agosto de 2007* [Alternative Report Presented by Indigenous Peoples to the Report Presented by the State of Costa Rica to the Committee against Racial Discrimination of the International Convention on the Elimination of All Forms of Racial Discrimination, 71st Session, July 30 through August 18, 2007] [hereinafter MNI report]. (San José: MNI, July 2007), 90–91.

⁷⁰ Interview with Rubén Chacón, *supra* note 60.

⁷¹ Guevara et al., *supra* note 5, at 25. Decision number 2002-02623, *supra* note 59.

hold a range of responsibilities traditionally held by local governments, despite the fact that they typically lack the funds to carry out such broad mandates.⁷²

Several significant legal developments occurred in 1982. Executive decree number 13573 officially recognized eight different indigenous ethnic groups in Costa Rica and outlined some of the characteristics of indigenous communities, including their relationship with their ADIs.⁷³ On the issue of land, the Mining Code, law number 6797, was passed, eliminating the co-ownership by indigenous peoples and the state of subsoil resources in indigenous territories and vesting such rights in the state alone.⁷⁴ This legislative change was undertaken before the ratification of ILO 169 and thus without due process, participation, consent, or compensation to indigenous peoples for this taking. Because this reform had and continues to have a strong impact on indigenous peoples' rights, its application today requires special care and enhanced processes of the effective participation and consultation of indigenous peoples regarding projects in these areas that affect them. In 1982, another major development occurred regarding indigenous lands as the Institute of Agrarian Development (*Instituto de Desarrollo Agrario*, IDA) was created by law number 6735.⁷⁵ IDA replaced ITCO as the entity in charge of managing indigenous lands, empowered to grant rights of possession to indigenous individuals.⁷⁶

Costa Rica's indigenous peoples have suffered alienations of large portions of their territories through, for example, occupations by non-indigenous individuals as well as illegal sales and transfers by indigenous individuals to non-indigenous individuals.⁷⁷ As such, the Costa Rican state has established mechanisms whereby the recapture of these lands and subsequent transfer to indigenous peoples is realized.⁷⁸ Today, ADIs are the entities that should hold title to indigenous lands and grant individuals rights of possession, with IDA retaining a role in recapturing land in the possession of non-indigenous peoples through a process of petition and compensation.⁷⁹ However, in the cases of some indigenous territories, such as Boruca, Curré, and Térraba, the land remained public and in the hands of the IDA, which affected communities tried to remedy by bringing legal action against the institution to compel the transfer of land.⁸⁰

One serious issue with the dispossession and recovery of indigenous territories is posed by how these processes take place. Article 3 of *ley indígena* established that after 1977 (the year of passage of the *ley indígena*) any sale or transfer to a non-indigenous person of a right to

⁷² Guevara et al., *supra* note 5, at 25. Interview with Genaro Gutiérrez, *supra* note 34. Interview with DINADECO officials, *supra* note 66.

⁷³ Gregor, *supra* note 15, at 277. *Decreto ejecutivo 13573, Reconoce existencia oficial de Grupos Étnicos Indígenas en Costa Rica* (1977).

⁷⁴ Gregor, *supra* note 15, at 277.

⁷⁵ *Id.*

⁷⁶ Interview with IDA officials, San José, Costa Rica, March 3, 2010. The IDA representatives present at the meeting were Dr. Carlos Bolaños, president of IDA, and Freddy Calvor, long-time employee of IDA who has worked with indigenous communities regarding their land issues. *Reglamento de Programa de recuperación de tierras en Reservas indígenas emitido por la Comisión Nacional de Asuntos Indígenas* (1994) [hereinafter *Reglamento de Programa de recuperación de tierras*].

⁷⁷ Guevara et al., *supra* note 4, at iv, 17–23.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ These communities brought a complaint to the constitutional court in 2002, the resolution of which was that IDA was ordered to transfer the land to the communities. MNI report, *supra* note 69, at 96.

indigenous land is invalid and null.⁸¹ Non-indigenous individuals who possessed land prior to the *ley indígena* were considered good faith possessors, who are entitled to compensation for their lands.⁸² Despite the prohibition in *ley indígena* on transfers and sales of indigenous land to non-indigenous individuals, such actions continued, causing increasing alienation of indigenous lands.⁸³ Because these non-indigenous individuals are not good faith possessors, however, they are not entitled to compensation for their land.⁸⁴ Instead, legal action is required to remove these individuals from the lands that they occupy or possess.⁸⁵ In this regard, then, IDA is not solely responsible for recovering lands. IDA may recover lands from good faith possessors through means of compensation, but the ejection from indigenous territories of non-indigenous



Figure 5. Court headquarters in San José.

(*hábeas corpus*), *amparo*, judicial review (*acción de inconstitucionalidad*), legislative consult (*consulta legislativa*), judicial consultation (*consulta judicial*), and conflict of jurisdiction (*conflicto de competencia*).⁸⁸ Although not a legal innovation specific to indigenous rights, these

individuals who occupied indigenous land after 1956, in the cases of Ujarrás, Salitre, Cabagra, Boruca, Curré, and Terraba, and after 1977 in all other territories, requires legal action and does not require compensation.⁸⁶

In 1989, an amendment to the Costa Rican constitution created the Costa Rican Constitutional Court, which is called the *Sala IV* and is a chamber of the nation's Supreme Court.⁸⁷ The *Sala IV* can hear six types of appeal, each of which has its own procedural and substantive requirements. The six types are habeas corpus

⁸¹ *Ley indígena*, *supra* note 53, at Art. 3.

⁸² *Id.* at Art. 5. *See also* Chacón, *infra* note 95, at 34.

⁸³ Guevara et al., *supra* note 4, at iv, 17–23.

⁸⁴ *Ley indígena*, *supra* note 53, at Art. 5.

⁸⁵ *Id.*

⁸⁶ *Id.* Guevara et al., *supra* note 4, at 31.

⁸⁷ The *Sala IV* was created through the reform of Articles 10, 48, 205, and 128 of the Costa Rican Constitution. Law number 7128 (1989). A law was subsequently passed defining the legal framework for the *Sala IV*'s specialized role in the judicial branch. *Ley de la Jurisdicción Constitucional*, Law number 7135 (1989).

⁸⁸ Sala Constitucional, Corte Suprema de la Justicia, *Funciones y Competencias de la Sala*, available at <http://www.poder-judicial.go.cr/salaconstitucional/competencia.htm>.

mechanisms—in particular, *recursos de amparo* and *acciones de inconstitucionalidad*—have been used by indigenous individuals to present constitutional complaints regarding their rights.⁸⁹ The next major development regarding Costa Rica’s indigenous law occurred in 1992, when the country signed ILO 169 and passed law number 7316 giving it domestic effect.⁹⁰ In the legislative consult submitted to the *Sala IV* about ILO 169, the court made numerous observations about the challenges faced by Costa Rica’s indigenous peoples:

[T]he principal problem they face is the constant loss of their lands, above all because, despite existing legislation, they are still not owners of it. As an example, the reserves of Boruca-Térraba, Salitre-Cabagra and Ujarrás, with close to 100,000 hectares, are inscribed in the Public Registry in the name of the Institute for Agrarian Development (*Instituto de Desarrollo Agrario*, I.D.A.) or the state, and not in the name of the indigenous communities, which impedes their ability to negotiate directly for lack of formal legitimation. The invasions of their land have not been able to be stopped, despite the fact that the law prohibits any type of occupation by third parties, due to the fact that they are not demarcated on the land, there are not plans and for them the internal fences do not have any meaning, because they employ natural geographic points of reference, which facilitates their plunder. Existing legislation does not recognize their own forms of organization, forcing them to organize themselves juridically around the Associations of Communal Development or like simple non-profit organizations, which impose on them foreign models of organization and competency. They cannot obtain credit, because the lands are not theirs and the law declares them inalienable, imprescriptible, etc. And juridical forms have not been designed to provide guarantees over communal property. Additionally, they protest that the institutions created by law for their defense are not theirs, but rather of the state...⁹¹

Since ratifying ILO 169—and despite the *Sala IV*’s critique of the legal and factual situation facing indigenous peoples almost twenty years ago—the most significant legal development regarding indigenous rights in Costa Rica has been work on the Bill for Autonomous Development of Indigenous Peoples (*Proyecto de Ley de Desarrollo Autónomo de los Pueblos Indígenas*).⁹² The *proyecto de ley* has been underway for around a decade-and-a-half; processes of pre-consultation and consultation with indigenous peoples occurred before the law was

⁸⁹ See, e.g., Decision number 2002-02623, *supra* note 59 (action for unconstitutionality seeking to declare the ADI system as violating the constitutional freedom of association); Decision number 2008-011188 (file number 08-008635-0007-CO), *Sala Constitucional de la Suprema Corte de Justicia*, July 9, 2008 (*recurso de amparo* brought against ICE for its approach to the PHED and resulting environmental damages); Decision number 2008-013560 (file number 08-010746-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia*, September 5, 2008 (*recurso de amparo* brought against ICE for its activities related to the PHED carried out in Térraba without the authorization of the Térraba ADI); Decision number 2009-06045 (file number 09-001709-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia*, April 22, 2009 (*recurso de amparo* brought against the executive president of ICE for its ongoing unauthorized in Térraba that are impacting indigenous peoples, without having carried out consultation); Decision number 2009-011556, *supra* note 25 (action for unconstitutionality filed to declare unconstitutional articles 3, 4, 5, 6, 7, and 15 of the regulations of the *ley indígena*, as well as executive decree 13568-C-G).

⁹⁰ ILO 169, *supra* note 22. At this point, usage in Costa Rica also shifted from the use of the word “reserve” to “territory” to refer to indigenous lands. Guevara et al., *supra* note 5, at 1.

⁹¹ Vote 3003-92 (file number 92-003003-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia* (1992).

⁹² Ley de desarrollo autonomo de los pueblos indígenas, File number 14.352, Asamblea Legislativa de la República de Costa Rica [hereinafter the reform bill or the *proyecto de ley*], available at <http://www.sise.co.cr/normativa/Proyecto%20de%20Ley%20de%20Desarrollo%20Aut%C3%B3nomo%20de%20los%20Pueblos%20Indigenas.doc>. This version of the bill is the most recent version to which the HRC has had access.

introduced to congress, at which time it was approved on first review and subsequently filed away for later consideration.⁹³ The bill was reintroduced into congressional debate in 2005, but has yet to pass.

The reform bill, if approved, would present various legal and institutional innovations to Costa Rican law governing indigenous peoples. The bill aims to modify existing institutions for the representation of indigenous peoples in the Costa Rican polity with the aim of retaining and revitalizing traditional structures of representation and promoting the self-governance of indigenous peoples.⁹⁴ The elimination of CONAI and replacement of ADIs with indigenous territorial councils (*consejo indígena del territorio* or *consejo territorial*) are two proposals included in the reform bill.⁹⁵

Opinions regarding the proposed bill's form and function vary widely. Numerous members of the Teribe community, as well as representatives from the ADI of the nearby community of Curré, prominent indigenous rights activists in Costa Rica, and representatives from the Office of the Ombudsman (*Defensoría de los Habitantes*) expressed positive sentiments regarding both the bill's preparation (e.g., consultation) and the resulting document.⁹⁶ However, the president of the Térraba ADI, who is also currently the president of CONAI, and representatives of CONAI and DINADECO express greater reservations about the *proyecto de ley*, arguing that the processes of consultation that took place for the bill's preparation were inadequate and noting that ADIs, as designed, provide a good institutional framework for indigenous representation in Costa Rica.⁹⁷ Carlos Brizuela, head of the legal department at CONAI, expressed a viewpoint opposing the proposed bill and pointed out that ADIs are a good system.⁹⁸ He also, however, issued the caveat that ADIs work well if they work as they are meant to and acknowledged that they are not, in many cases, working the way they are supposed to; for example, he mentioned that in some cases, individuals have manipulated the system in order to perpetuate themselves in power in the ADI by serving multiple consecutive terms in a leadership position.⁹⁹

Thus Costa Rica's laws addressing indigenous peoples' rights have evolved substantially since the early twentieth century, moving progressively away from the old model of assimilationism and towards an emphasis on the self-governance and autonomy of indigenous peoples. However, the institutions created by the Costa Rican government for this purpose—as well as the fact that

⁹³ Eduardo Ramírez Flores, "Insisten en que se apruebe proyecto de ley: indígenas consideran vital el desarrollo autónomo." *Semanario Universidad*, Apr. 28 – May 4, 2010, available at <http://www.semanario.ucr.ac.cr/index.php/mainmenu-pais/1295-insisten-en-que-se-apruebe-proyecto-de-ley-indigenas-consideran-vital-el-desarrollo-autonomo-.html>. MNI report, *supra* note 69, at 7–10.

⁹⁴ *Id.*

⁹⁵ Guevara et al., *supra* note 4, at 85. Rubén Chacón Castro, ed. *Pueblos Indígenas de Costa Rica: 10 años de Jurisprudencia Constitucional (1989–1999)*, Serie Normativa y Jurisprudencia Indígena de la Organización Internacional de Trabajo (San José, Costa Rica: Impresora Gossesstra Intl. S.A., 2001), 245–47. *Proyecto de ley*, *supra* note 92, at Article 4(d).

⁹⁶ Interview with Rubén Chacón, *supra* note 60. Interview with José Carlos Morales, San José, Costa Rica, Feb. 24, 2010. Interview with community members, *supra* note 14. Interview with Hugo Lázaro, *supra* note 34. Interview with Maigualida Brenes, Defensoría de los Habitantes, San José, Costa Rica, March 3, 2010.

⁹⁷ Interview with Genaro Gutiérrez, *supra* note 34. Interview with DINADECO officials, *supra* note 66. Interview with Carlos Brizuela, Head of Legal Department, CONAI, San José, Costa Rica, March 3, 2010.

⁹⁸ Interview with Carlos Brizuela, *supra* note 97.

⁹⁹ *Id.* See also Ramírez, *supra* note 93.

such institutions were created by the state and subsequently imposed on indigenous communities—have proven problematic in many contexts. The system of ADIs has proven to be ill suited to the task of providing an effective and accurate mechanism of representation for indigenous communities. Such weaknesses have had repercussions in other areas, such as the recovery of indigenous lands, thus contributing to the further marginalization of Costa Rica’s indigenous peoples. In the face of a large infrastructure project such as the *El Diquís* dam, the existing structure’s problems are particularly troubling as they frustrate the realization of indigenous peoples’ rights to effective participation, which includes their right to free, prior, and informed consent.

III. PROYECTO HIDROELÉCTRICO EL DIQUÍS: Thirty Years of Contestation



Figure 6. The General River (*Río General*), which would be dammed by the *Proyecto Hidroeléctrico El Diquís*.

In this section of the report, the Human Rights Clinic will describe the historical background and present trajectory of the PHED project in the Southern region of Costa Rica. From its outset, this section will outline ICE's previous plans to site a dam in this region before moving into a detailed description of the present *El Diquís* project. Finally, this section of the report will move forward in outlining several problems related to the present status of the project that the HRC observed during its fact-finding mission in Costa Rica.

A. Boruca-Cajón and the move to El Diquís

The *Proyecto Hidroeléctrico EL Diquís* is the current manifestation of a thirty-year venture by ICE to design and construct a dam in Southern region of Costa Rica.¹⁰⁰ Proposed in the early 1970s, the Boruca-Cajón project moved slowly until interest mobilized in the 1990s after Costa Rica signed and ratified the Framework Treaty of the Central American Electrical Market, allowing Costa Rica to sell electricity to other Central American countries.¹⁰¹ The project's

¹⁰⁰ *De Boruca a El Diquís*, *supra* note 6.

¹⁰¹ Framework Treaty of the Central American Electrical Market, Dec. 30, 1996, 2025 U.N.T.S. 21, *available at* http://untreaty.un.org/unts/144078_158780/6/7/138.pdf.

proposed location at Cajón, on the boundary of the indigenous territories of Boruca and Curré, implied serious social and environmental impacts. Construction of the dam would have led to the inundation of approximately 4,000 hectares of indigenous territory and the relocation of indigenous individuals from several communities along the river basin of the *Río Grande de Térraba* ('Big/Great River of Térraba').¹⁰²

In light of these effects, the Boruca-Cajón project was met with serious opposition by both indigenous and non-indigenous communities.¹⁰³ Over the next thirty years, conflict between the Costa Rican government and the communities of the Southern region intensified, garnering international attention and leading to international opposition to the project.¹⁰⁴ According to Hugo Lázaro, a Curré indigenous leader involved in the opposition efforts against the Boruca-Cajón project, the indigenous communities of Boruca and Curré came together against the dam.¹⁰⁵ Using different means to draw attention to their struggle, the communities staged protests and blockades of major roadways and worked to bring attention to what they understood as the state's violation of their rights as indigenous peoples.¹⁰⁶ A coordinated study of the dam project between the University for Peace and Arcadia University concluded that serious human rights violations had occurred during the planning stages of the project, warning that further violations would likely occur if the project moved forward without a closer review of the project's plan.¹⁰⁷ Enlisting the help of Colombian engineering firm, INGETEC, ICE determined that the potential consequences of the Boruca-Cajón project were too great to justify construction.¹⁰⁸ Thus, combined domestic and international resistance to the Boruca-Cajón project eventually resulted in its abandonment by the Costa Rican government and replacement with a new proposal.

In lieu of the Boruca-Cajón plan, ICE proposes instead to construct the dam on the General River (*Río General*), a major tributary of the *Río Grande de Térraba*.¹⁰⁹ According to the Inter-American Development Bank (IDB), the 2005 INGETEC report "identified the prevention, mitigation, and compensation measures necessary to make the project environmentally feasible."¹¹⁰ Supported with funds from the IDB, ICE began working on plans to carry out further feasibility studies related to the economic and environmental viability of the *El Diquís* dam and to determine the potential energy output of the new project.¹¹¹ For some observers, the

¹⁰² Inter-American Development Bank, *Supplemental Studies for the El Diquís (Boruca/Veraguas) Hydroelectric Project (CR-T1017): Plan of Operations*. IDB, Jan. 30, 2007, 4 [hereinafter IDB Diquís Supplemental Studies Plan], available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=887211>.

¹⁰³ Jurgen Carls and Warren Haffar, "Resolving the Boruca dam conflict in Costa Rica," *University for Peace and Conflict Monitor*, Nov. 4, 2008, available at http://www.monitor.upeace.org/innerpg.cfm?id_article=560.

¹⁰⁴ *Id.*

¹⁰⁵ Interview with Hugo Lázaro, *supra* note 34.

¹⁰⁶ *Id.*

¹⁰⁷ Carls and Haffar, *supra* note 103.

¹⁰⁸ Interview with ICE technical team, March 1, 2010, Buenos Aires, Costa Rica. The members of the ICE technical team present at this meeting were: Jahaira Espinoza (sociologist in the social section), Ruperto Vargas (forestry engineer in the social section), Elías Alfaro (coordinator of the socio-environmental section), and Oky Segura (coordinator of the legal section).

¹⁰⁹ *Id.*

¹¹⁰ IDB Diquís Supplemental Studies Plan, *supra* note 102, at 10.

¹¹¹ *Id.* Starting in 2006, IDB policy regarding indigenous peoples has required assessment of and compliance with applicable international norms. The term "applicable international norms" is defined to include international human

new project also illustrated ICE’s attempts to minimize the ecological and social effects of the dam in comparison to the Boruca-Cajón proposal. The new proposal, originally named the Veraguas Hydroelectric Project, offers significant differences to the Boruca-Cajón project (see Table 1).

Basic Comparison of Differences Between Boruca and <i>El Diquís</i> Projects		
	Boruca-Cajón	<i>El Diquís</i> (formerly Veraguas)
Power Generated (Megawatts)	832	631
Reservoir Size (Hectares)	12581.6	6815
Area of Inter-American highway Affected (Kilometers)	37.25	3.6
Indigenous Territory Inundated (Hectares)	4039.7	734.1

Table 1. Comparison of the *El Diquís* project to the Boruca-Cajón project, based on ICE data.¹¹²

The new proposal reduces the total amount of land inundated by half and reduces the amount of indigenous territory flooded by the project by nearly 3,000 hectares.¹¹³ Additionally, the new project no longer affects the Boruca and Curré territories directly, but instead would flood land in the Térraba and China Kichá indigenous territories (658.7 and 75.4 hectares, respectively).¹¹⁴

From the perspective of indigenous leaders both inside and outside of the Teribe community, this change in affected indigenous communities is significant. For Mr. Lázaro, the new project poses an additional challenge to an already divided community, straining relations among various Teribe community organizations and family clans.¹¹⁵ Many Teribe community members expressed similar feelings, describing the ineffectiveness of local governance structures to fully represent varied opinions about the project, especially those in opposition to the project.¹¹⁶ Ultimately this situation underscores a weakness of the ADI structure as it fails in the Teribe community to present a legitimate, unified response to ICE. Further, the ADI structure does not provide space to incorporate the different community positions. As will be discussed later, this division also presents particular human rights issues with regard to the strategies presently used by ICE to communicate with the Teribe peoples. Most of all, however, the new project represents an intervention on the part of the state into an indigenous community, which despite being one of the first to be recognized by the state as an indigenous territory (then a “reserve”), has been historically ignored and neglected. From the perspective of the Teribe peoples, the scaling down

rights conventions and the associated jurisprudence of tribunals that have the authority to interpret those instruments; it specifically names the Inter-American Court of Human Rights in this respect. This means that IDB policy would require reference to decisions such as *Saramaka People v. Suriname*, see *infra* 200, as part of the feasibility studies for the PHED. Inter-American Development Bank, *Operational Policy on Indigenous Peoples and Strategy for Indigenous Development*, IDB Feb. 22, 2006, available at <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2032081>.

¹¹² *De Boruca a el Diquis*, *supra* note 6.

¹¹³ *Id.*

¹¹⁴ *Id. Una Mirada al Proyecto Hidroeléctrico*, *supra* note 5.

¹¹⁵ Interview with Hugo Lázaro, *supra* note 34.

¹¹⁶ Interview with community members, *supra* note 14.

and moving of the project into Térraba raises questions about the negative effects the project may have on their territory and their community's way of life.

Indeed community concerns about the new project are not surprising. If constructed, the new dam would be the largest of its kind of Central America, a fact that on its own raises questions about the ecological and social impacts the dam may have in the Southern region and, more specifically, on the communities potentially affected.¹¹⁷ In the next section, the HRC will review the new proposal more closely, drawing attention to the dam's technical specifications and the process of review the dam must undergo before approval can be obtained and construction can begin. In addition, the next section will review some of the ecological and social concerns raised by the project and addressed in ICE publications.

B. El Diquís: New Project, New Name, and New Challenges

In 2006 ICE, with help from the Ministry of Education, invited school children from the Buenos Aires and Osa regions to submit names for the new proposed dam.¹¹⁸ The winner of the contest, a student named Geudy Oreamuno Maroto, submitted the name *El Diquís*, which in the Teribe language means "big river."¹¹⁹ According to public statements released by ICE on the project, the change in name exemplified ICE's public commitment to respecting the local indigenous communities affected by the project.¹²⁰

Even in its new form, if constructed the *El Diquís* dam will be the largest of its kind in Central America. The project would employ 3,500 people at peak construction and would inundate a sizeable area of land, require the relocation of an estimated 1,130 non-indigenous individuals, and provide enough electricity for 1,050,000 people.¹²¹ In the long term, the project represents both domestic and international commitments on Costa Rica's part to becoming the first carbon-neutral nation and to furthering its commitment to *Plan Puebla Panamá*, or currently *Plan Mérica*, a long-term development strategy aimed at improving communication infrastructure across Mexico and Central America.¹²²

Despite its large size, technically speaking, the PHED is a conventionally designed dam. According to ICE's description of the project, the dam would divert water from the *Río General* and pass it through an eleven-kilometer tunnel located in the Brunka Mountain Range.¹²³ While moving through the mountain, the water would be channeled through a power station located inside the mountain, where the majority of the electrical output from the dam would be

¹¹⁷ *Una Mirada al Proyecto Hidroeléctrico*, *supra* note 5, at 6.

¹¹⁸ *Id.* at 4.

¹¹⁹ *Id.*

¹²⁰ Instituto Costarricense de Electricidad, "Abordaje socio ambiental," available at http://www.grupoice.com/esp/ele/infraest/proyecto/icelec/proy_diquis_aboamb.htm.

¹²¹ *Una Mirada al Proyecto Hidroeléctrico*, *supra* note 5, at 4, 11–12.

¹²² Dan Moscovici and Craig Wenger, "Planning for Scale: Plan Pueblo Panama and the Diquis Hydroelectric Project," *Panorama*, 2008, available at http://www.design.upenn.edu/files/panorama08-13_Moscovici.pdf. Stefan Lovgren, "Costa Rica Aims to Be 1st Carbon Neutral Country," *National Geographic News*, March 7, 2008, available at <http://news.nationalgeographic.com/news/2008/03/080307-costa-rica.html>.

¹²³ *¡Déjenos Contarle!*, *supra* note 32.

generated. From there, water would be carried out of the tunnel and returned to the *Río Grande de Térraba* (see Figures 7 and 8, below).¹²⁴

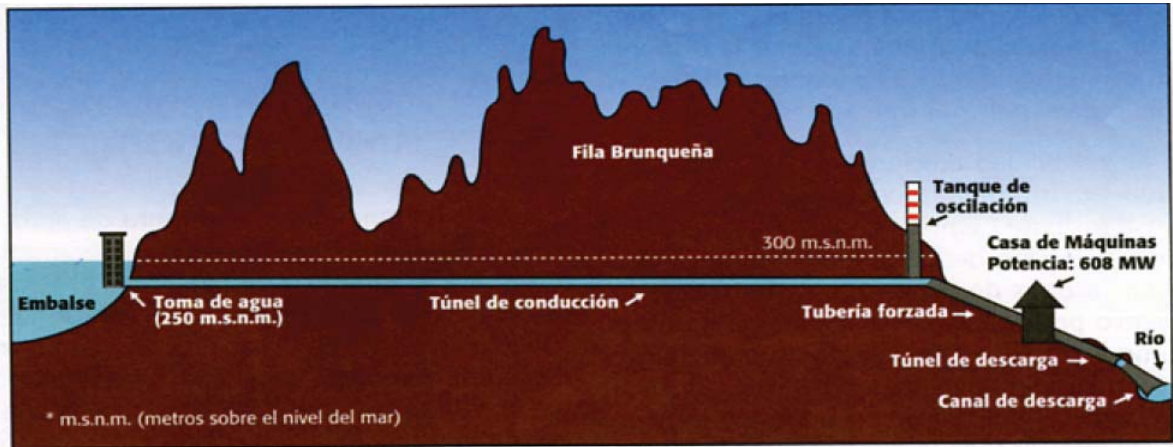


Figure 7. Schematic of the flow of water from the reservoir to the power station. *This figure is only available in Spanish.*¹²⁵

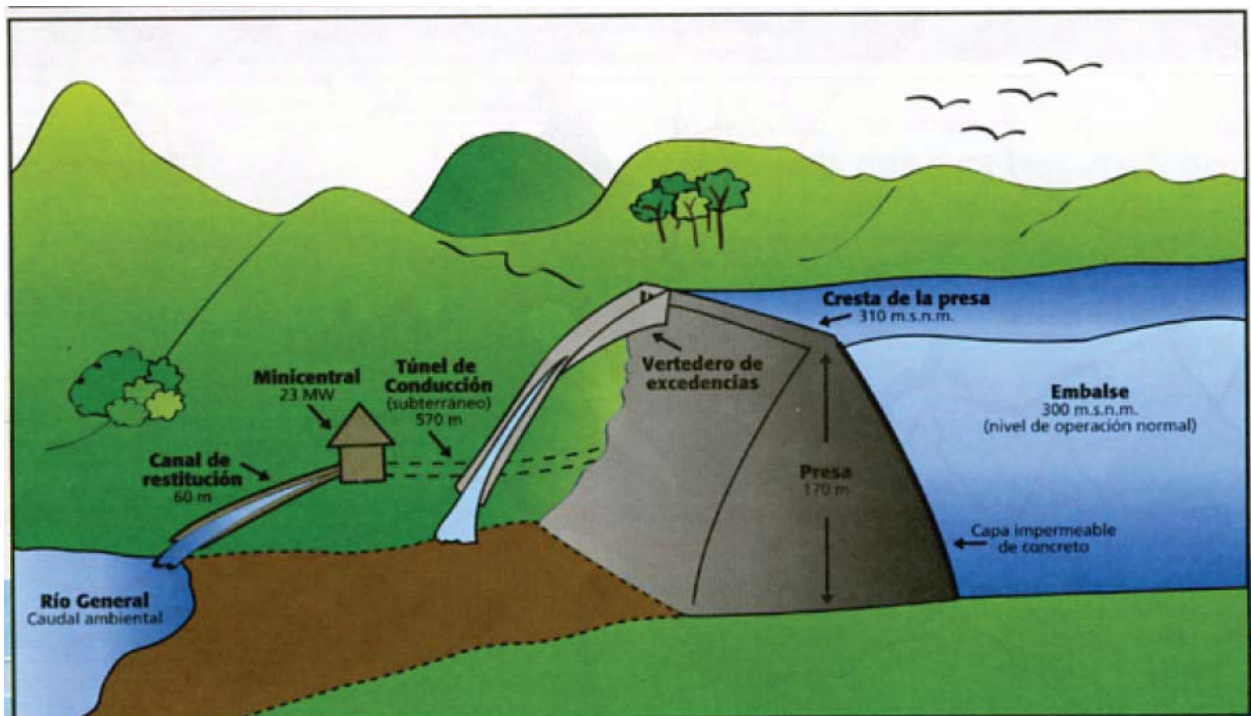


Figure 8. Panoramic illustration of the PHED site. *This figure is only available in Spanish.*¹²⁶

Diverting the river would, of course, entail the creation of a large reservoir of water that would be used to produce electricity. To ensure the reservoir does not overflow, a secondary power station would be installed on the dam and serve as a release valve in the event water levels were

¹²⁴ *Una Mirada al Proyecto Hidroeléctrico*, supra note 5, at 4–5.

¹²⁵ *Una Mirada al Proyecto Hidroeléctrico*, supra note 5.

¹²⁶ *Id.*

to become too high.¹²⁷ Despite the dam's conventional nature, the size of the project signifies large environmental and social impacts for the region.

As mentioned before, the new dam site affects different indigenous peoples than the Boruca-Cajón project—placement of the *El Diquís* dam in Térraba results in the projected inundation of land in the indigenous territories of Térraba and China Kichá.¹²⁸ In the Teribe community, the dam would flood nearly 10% of the total indigenous territory recognized by Costa Rica as comprising Térraba.¹²⁹ However, because 90% of recognized Teribe land is presently in the hands of non-indigenous individuals, the projected inundation will result in the flooding of approximately 650 hectares of the 10% of land in indigenous possession.¹³⁰

In addition to the inundations of land, public information released by ICE acknowledges further ecological impacts the project may cause, as well as steps ICE may take to mitigate these challenges if the dam were constructed.¹³¹ These concerns include the effect the dam would have on local flora and fauna, the potential consequences of the change in the flow of the river, and the effect inundation would have on local species.¹³² In accordance with national environmental protection standards, ICE states that part of the project entails the establishment of a conservation program to protect local species and relocate vital flora and fauna if necessary.¹³³ Preliminary studies conducted by ICE show the potential for the reservoir and the tunnel through which the water would pass to have an effect on the river water's natural chemistry.¹³⁴ Part of the studies presently being conducted by ICE is an attempt to better understand this problem and find a manageable solution that maintains the river's chemical integrity.¹³⁵

Although primarily issues related to the maintenance of the region's ecological health, discussions with Teribe community members illustrated how many of the environmental impacts listed by ICE would directly and indirectly impact the Teribe peoples. Community members expressed fears to the HRC team about the potential effects the dam would have on the amount of water the community could use for agriculture and consumption, the ecological impacts of dam construction, and the effect that the clearing of vegetation and construction would have on local wildlife. To mitigate the effect of these concerns, ICE is required by law to conduct environmental and social impact assessments (ESIAs) in order to receive approval for the project and begin construction.¹³⁶

¹²⁷ *Id.*

¹²⁸ *See supra* note 114.

¹²⁹ *De Boruca a El Diquís*, *supra* note 6. Interview with community members, *supra* note 14.

¹³⁰ Interview with community members, *supra* note 14. Térraba's extension is approximately 26,975 hectares, approximately 90% of which is in the hands of non-indigenous people and the remaining 10% of which is in indigenous possession. Instituto Nacional de Biodiversidad, "Generalidades," El Área de Conservación La Amistad Pacífico (ACLAP), available at <http://www.inbio.ac.cr/ecomapas/ACLAP/generalidades.htm>.

¹³¹ *Una Mirada Al Proyecto Hidroeléctrico*, *supra* note 5.

¹³² *Id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ Interview with SETENA officials, San José, Costa Rica, March 4, 2010. The representatives of SETENA present at this meeting were: Sonia Espinosa Valverde (Director/General Secretary) and Eduardo Murillo (forestry engineer, environmental analyst, and coordinator of the department of environmental evaluation).

Publically, ICE has stated it is presently conducting studies in order to determine the feasibility of the project under Costa Rican law.¹³⁷ In public documents and court records, ICE states that this phase of the project is only one step in a larger plan it foresees will be followed by approval of the project, consultation with affected communities (indigenous and non-indigenous), and finally, construction of the dam.¹³⁸ Overall, ICE's stance on the project reflects the position of the IDB, which is currently investing capital in the project's feasibility studies, which is that unlike the previous Boruca-Cajón venture, the *El Diquís* project meets environmental, social, and economic best practices for a project of this type.¹³⁹ This, however, begs the question of whether there is a distinction between the studies ICE claims it is doing now and the feasibility studies the IDB funded. If feasibility studies were already conducted through support by the IDB and the project was determined to be feasible, then the question remains as to what role, if any, the present ESIA's serve for ICE? The HRC's fact-finding delegation discovered several problems when attempting to answer these questions, particularly as HRC interviews with Teribe community members, Teribe community leaders, and government officials brought to the surface specific human rights concerns related to both the project's present status and ICE's future ambitions related to the project. In the next section, the HRC will review these issues, highlighting some of the complexities the HRC team encountered and relating them to new hardships faced by the community because of the dam.

C. The El Diquís Project: Present Issues and Future Community Concerns

Over the course of the HRC's fact-finding mission in Costa Rica, it became clear that several differences existed between ICE's public position on the project and the concerns felt by the Teribe peoples. Principally, these differences were related to the increased presence of ICE in the community and the uncertain terms ICE uses to legitimate its current operations. Though closely interrelated, in this section, the HRC will divide these concerns into three main areas: information, the current status of the project, and community representation.

1. Information

The HRC team identified a central problem related to information: the absence of information available to the Teribe peoples, both regarding ICE's ESIA procedures and the information that has resulted from these studies. The Human Rights Clinic concluded that the Teribe peoples lacks both the information necessary to hold ICE accountable to the procedural guidelines ICE claims to follow and the information needed to fully understand the ecological and social implications of the PHED.

According to the HRC delegation's interviews with both the ICE technical team and the National Technical Secretariat for the Environment (*Secretaría Técnica Nacional Ambiental*, SETENA),

¹³⁷ Interview with Franklin Ávila, *supra* note 33.

¹³⁸ Decision number 2008-011188, *supra* note 89. Decision number 2008-013560, *supra* note 89. Decision number 2009-06045, *supra* note 89. Instituto Costarricense de Electricidad, "Avance de la Obra," available at http://www.grupoice.com/esp/ele/infraest/proyectoricelec/proy_diquis_avaobr.htm. *Una Mirada al Proyecto Hidroeléctrico*, *supra* note 5.

¹³⁹ IDB Diquís Supplemental Studies Plan, *supra* note 102. An example of international best practices in this field is represented by the Akwé:Kon guidelines, *see infra* note 200. A discussion of the extent of ICE's compliance with these standards is found at *infra* 352-357.

ICE is not permitted to begin construction until it conducts ESIA's. These studies are designed to ensure that any project with the potential to substantially disrupt the natural environment is evaluated and consequently designed so as to mitigate its potentially negative environmental impacts.¹⁴⁰ In the HRC delegation's conversations with the ICE technical team, the team stated that ICE is still in the process of completing the ESIA's for the PHED. While ICE provided no deadline by which it expects to finish and submit the studies, ICE correspondence with SETENA and the HRC's interview with SETENA officials indicate that ICE has until December 2010 to present its studies to SETENA.¹⁴¹

While the guidelines for these studies are available from the SETENA office, members of the Teribe community reported not knowing what the ESIA's entailed or in what way they could hold ICE accountable if it failed to meet the procedural guidelines set out by SETENA.¹⁴² This is due in part to SETENA's lack of a procedure whereby the information submitted by ICE is directly disseminated to the Teribe peoples.¹⁴³ It was not clear from speaking with ICE and SETENA whether ICE is required by law to distribute to the community any information about the studies it conducts at a specific point during its investigative process. When the HRC inquired about these procedures further with ICE, ICE stated that once the studies were completed and submitted to SETENA, they would then be available to the Teribe peoples for review.¹⁴⁴ In addition, SETENA reported that if a violation in the procedures did occur and SETENA were notified, they would take steps to investigate the claim and hold ICE accountable for any violations it uncovered.¹⁴⁵ This process, however, is reactive rather than proactive, meaning community members are responsible for knowing that this procedure is available; accessing, obtaining, and understanding the procedures ICE is using to conduct its studies; fully understanding the procedures SETENA will use to evaluate those studies; and finally, gaining access to the means to call, fax, or visit the SETENA office in San José. In other words, SETENA's monitoring responsibilities are transferred to the Teribe peoples.

At the meeting with the HRC delegation, the community members interviewed were not aware of these procedures for obtaining information about the PHED. The HRC's attempts at obtaining further information proved difficult and in the end futile, as its requests for information from ICE were denied both in the ICE interview and later, when a formal request for information was submitted following the guidelines provided by ICE.¹⁴⁶ This, of course, poses a particular

¹⁴⁰ Secretaria Técnica Nacional Ambiental, "Sobre Nosotros," [hereinafter "Sobre Nosotros"], available at http://www.setena.go.cr/p_servicios.htm.

¹⁴¹ ICE submitted a request in November of 2009 for a one-year extension on its deadline to submit the social and environmental impact studies. Resolución No. 2849-2009SETENA, December 8, 2009, 2, response to *Asunto: Solicitud prórroga EsIA P.H. El Diquis. Exp. 0843-2007-SETENA. Ref.: Resoluciones No. 2174-2007-Setena y No. 1526-2009-Setena*, November 5, 2009 [hereinafter ICE request for extension], available in SETENA file 0843-2007-SETENA.

¹⁴² Interview with community members, *supra* note 14.

¹⁴³ Interview with SETENA officials, *supra* note 136.

¹⁴⁴ Interview with ICE technical team, *supra* note 108.

¹⁴⁵ Interview with SETENA officials, *supra* note 136.

¹⁴⁶ In its interview with the ICE technical team, the HRC delegation requested information about the studies ICE was conducting and the procedures it used for those studies. The team was denied information at the interview, being told the information was "confidential" and that requests for such information would require a formal request following specific guidelines. The ICE team provided these guidelines to the HRC. The team subsequently filed a formal request on March 17, 2010 following the guidelines provided by ICE, waiting several weeks without hearing

challenge for the Teribe peoples, as will be discussed further, as it denies the community a reference point upon which members can articulate their beliefs that ICE is not conducting studies, but rather performing preliminary construction in the community.

In addition to the community's lack of procedural information about the ESIA's being conducted, it also has little access to the results of the studies conducted by ICE and other information about the ecological and social ramifications of the proposed dam.¹⁴⁷ Though ICE publications shed some light on these issues, they fail to provide a comprehensive depiction of the environmental consequences of the dam and the potential impacts it might have on the Teribe peoples' way of life. This can be attributed to two issues observed by the Human Rights Clinic delegation. First, ICE declines to release any information regarding its studies until it has compiled the results into a report and submitted that report to SETENA.¹⁴⁸ Secondly, the HRC team has not found that consultation processes have taken place. ICE fails to incorporate the peoples' perspectives and sentiments regarding the ESIA's, thus preventing the community's perspective and insight from being adequately represented in the studies being conducted by ICE.¹⁴⁹ For the HRC, this is of particular importance given that the community articulated concerns about the dam's potential consequences that are not yet addressed in ICE publications. ICE is thus limiting the full and effective participation of indigenous peoples in the decision-making process about a project that may affect them, in direct contradiction of human rights law, in particular as set forth by the Inter-American Court of Human Rights in *Saramaka*.

Apart from the community's right to information about the studies being conducted and the procedures used to conduct those studies, the absence of information has also led many community members with whom HRC representatives spoke to become frustrated and suspicious of the PHED and of ICE. Community members did not understand why they were denied information about the project or why ICE had been less than forthcoming with information.¹⁵⁰ Community members articulated their frustration in terms of their understanding of their rights as indigenous peoples, viewing ICE's actions as a violation of the principles of ILO 169.¹⁵¹ This is particularly true as relates to the right of indigenous peoples to have access to information related to activities that directly affect them, which is implied by the rights to effective participation and consultation contained in the document.¹⁵² Other human rights instruments in addition to ILO 169 include this commitment, or a more general commitment to ensure indigenous peoples' participation in ESIA's and broader decision-making processes.

from ICE. After attempts to follow up with ICE, another week passed before a response was sent to the HRC. Received on April 12, 2010, ICE's response informed the HRC that its request for information had been denied. A copy of the HRC's formal request letter, as well as a copy of ICE's response [hereinafter ICE request for information denial], are included in the appendix to this report.

¹⁴⁷ Interview with community members, *supra* note 14. Community members expressed the need for ICE to consider the impact the dam would have on the community's relationship to the land, in the economic and cultural senses.

¹⁴⁸ Interview with ICE technical team, *supra* note 108.

¹⁴⁹ Interview with community members, *supra* note 14. Some community members described how because of ICE's actions in the past, including treating project as inevitable and disregarding community members' opinions, they had cut off communication with ICE. In addition, the community described its meetings with ICE as more promotional than participatory in which the community was lectured about the benefits rather than being included in a discussion about the dam's potential harms.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² ILO 169, *supra* note 22.

D. Current Status of the PHED: Study or Construction?

Aside from deepening tensions between the Teribe peoples and ICE, the absence of information served as source of contention for community members convinced that at present, ICE was not only conducting studies, but performing construction as well. Much of this belief rested on observations by community members of ICE work crews building new roads into and inside the Teribe community, cutting down trees, dynamiting local mountains, and moving equipment and machinery.¹⁵³ Combined with a public commitment on Costa Rica's part to the project, reflected in Decree 34312 granting the PHED special priority in terms of receiving expedited approval for permits and review of its ESIA's, community members were convinced ICE was concealing preliminary construction behind its legal obligation to conduct and complete ESIA's.¹⁵⁴ ESIA's, however, are an important responsibility of SETENA, originally meant to ensure that development projects preserve Costa Rica's environmental integrity and natural biodiversity.

Established by law 7554 in 1995, SETENA is a sub-department of the Ministry of Environment, Energy, and Telecommunications (*Ministerio de Ambiente, Energía, y Telecomunicaciones*, MINAET).¹⁵⁵ SETENA ensures all major projects required by law complete environmental impact studies.¹⁵⁶ For the *El Diquís* project to move forward, SETENA must ensure the environmental impacts of the study do not violate Costa Rican law.¹⁵⁷ In the Human Rights Clinic delegation's conversation with SETENA officials, SETENA Director/General Secretary (*Directora/Secretaria General*) Sonia Espinosa Valverde reported that the *El Diquís* project was in the process of submitting reports to SETENA. Once the reports are received, SETENA officials, along with a group of other officials from various government agencies, will review the studies and determine whether or not the project is approved. In the event the project is not approved, ICE will have an opportunity to address any legal deficiencies and make attempts to rectify any further problems with the ESIA's, especially as they relate to the project.¹⁵⁸

Despite these guidelines, members of the Teribe community expressed uncertainty about whether ICE's present actions constitute a study or instead are indicative of preliminary construction.

Clarifying this understanding is important, especially as ICE is bound by law not to begin construction until it receives SETENA's approval.¹⁵⁹ Additionally, Costa Rica's Constitutional Court maintained in 2009 that ICE was not required to consult with the indigenous communities affected by the project until it completed its preliminary studies, which appears to directly contradict the Inter-American Court's holding that "[t]he State has a duty, from the onset of the proposed activity, to actively consult with the Saramaka people in good faith and with the

¹⁵³ Interview with community members, *supra* note 14.

¹⁵⁴ *Id.* On February 6, 2008, President Oscar Arias of Costa Rica signed executive decree number 34312, which "declare[d] in the national convenience and public interest the studies and works of the hydroelectric project El Diquís and the works of its transmission..." ("*Declar[ó] de Conveniencia Nacional e Interés Público los estudios y las obras del Proyecto Hidroeléctrico El Diquís y sus obras de transmisión...*") [hereinafter executive decree number 34312].

¹⁵⁵ "Sobre Nosotros," *supra* note 140.

¹⁵⁶ Interview with SETENA officials, *supra* note 136.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* See also *Presentación SETENA Subcomite Coordinación Revisión EsIA*, *infra* at 312.

¹⁵⁹ Interview with SETENA officials, *supra* note 136. See also "Sobre Nosotros," *supra* note 140.

objective of reaching an agreement, which in turn requires the state to both accept and disseminate information in an understandable and publicly accessible format.”¹⁶⁰ Absent from the decision and HRC representatives’ conversations with government officials and community members, however, was a clear definition of what “study” meant. Neither is it clear at what point consultation, much less prior consent, is supposed to occur—before the completion of the ESIA’s by ICE, after the completion of the ESIA’s but before their submission to SETENA, or after they are approved by SETENA?

During HRC’s meeting with the ICE technical team, HRC asked ICE about the presence of construction crews in the community and the explosions described by community members. ICE maintained that the road construction and the dynamiting of local mountains are both a part of the studies ICE was authorized to conduct.¹⁶¹ Additionally, ICE explained that given the intrusive nature of these activities, environmental impact studies were carried out ahead of time.¹⁶² ICE could not provide the HRC with a clear definition of the difference or a set of guidelines they followed to ensure their work did not violate SETENA’s procedures for conducting its ESIA’s or the Teribe peoples’ right to consultation.¹⁶³ The Constitutional Court and ICE’s limited interpretations of the duty to consult underscore Costa Rica’s problematic approach to indigenous rights.

Some community members complained that the presence of bulldozers, dump trucks, and construction crews along the road leading into and through the community was evidence that ICE was beginning preliminary construction.¹⁶⁴ In addition, some complained to the HRC delegation that ICE had already begun tunneling through mountains with dynamite, moving equipment, and beginning the groundwork for the dam’s construction. Community members have taken care to collect photos and video of ICE’s presence in the community and during the time the HRC team spent in the community, representatives witnessed machinery and men working on the community road. Those community members with whom the HRC spoke additionally described the situation as not simply a matter of discerning whether ICE’s activities are construction or studies, but that they are intrusive and disturbing to the Teribe peoples’ way of life. One mother, whose complaint was echoed by other community members, described how the presence of construction teams on the road leading to the community school had prompted her to begin escorting her children to school every day. In addition, some members complained of the noise caused by machinery and movement of vehicles, while others were concerned about the environmental impact of tunneling on nearby mountains.

¹⁶⁰ Decision number 2009-06045, *supra* note 89. *Saramaka* interpretation, *infra* note 200, at para. 17.

¹⁶¹ The ICE technical team has yet to provide the Human Rights Clinic with evidence to support this claim.

¹⁶² ICE refuses to provide any information giving evidence to this claim and maintains all information related to its ESIA is confidential until a report is finally submitted to SETENA. *See supra* note 146 for a discussion of the HRC’s difficulties obtaining information from ICE.

¹⁶³ Interview with ICE technical team, *supra* note 108.

¹⁶⁴ Interview with community members, *supra* note 14.



Figure 9. Construction in (and destruction of) the Veraguas stream. The stream, which runs through a ravine, is of great cultural importance and serves as an integral source of recreation and sustenance for the community. See also Figure 2.¹⁶⁵

In its meeting with SETENA, the HRC relayed some of the complaints made by the community to SETENA officials, attempting to obtain a bright-line between authorized studies and unauthorized construction. SETENA officials informed the HRC that all studies must receive their approval, but that they were unaware that the types of activities described by the community were taking place. They further informed the HRC that community members were free to present SETENA with complaints at any time (by phone, fax, in person, or by letter) and that as of that point, SETENA had not received any formal complaint regarding ICE's activities. SETENA informed the HRC delegation that SETENA would have the obligation to investigate further to determine whether or not a violation had occurred if it did receive a complaint.

No one in the community with whom the HRC spoke was aware of SETENA's complaint mechanism, including where and to whom in SETENA a complaint could be made.¹⁶⁶ Though many members of the community have cellular phones, most do not have access to a fax machine nor the time or money to personally meet with SETENA in San José. Though SETENA

¹⁶⁵ Photo provided by Jehry River Rivera, a Teribe community member.

¹⁶⁶ Interview with community members, *supra* note 14.

did mention they make trips to local communities and planned to meet with people in T erraba, the officials acknowledged that much of the information provided to the HRC during the interview was not readily available to the Teribe peoples.¹⁶⁷

Most community members with whom the HRC spoke felt the Constitutional Court was their only option, yet because of the 2009 decision the community was convinced there was little it could do institutionally to receive clarification about the manner and types of studies ICE was approved to carry out.¹⁶⁸ Having a clear understanding of the types of studies that were approved and providing that information to the Teribe peoples seems crucial in this case. At the same time, ensuring community members are informed of the options available to them to express grievances appears important in mediating community frustration and calling attention to potential violations of national policy and the community's rights.

Without a solid definition of what constitutes a study, describing the current status of the project is difficult for all parties involved. In addition, the absence of a definition of what constitutes a study and the failure on ICE's part to provide information regarding its social impact assessment makes it hard to know whether ICE's decision to not work closely with the community is either a failure to apply ICE operating policy correctly or a general lack of consideration for local, indigenous community structures.¹⁶⁹ Either way, the consequences for the Teribe peoples are clear. Community leaders are frustrated with ICE's actions and in conversations with the HRC team, expressed distrust and suspicion of ICE and the *El Diqu s* project.¹⁷⁰

Furthermore, the presence of ICE in the community in the form of construction crews and heavy machinery has inconvenienced the livelihoods of many community members and raised caution about the impact the presence of machinery and men will have on the Teribe peoples. Determining whether ICE activities fall within ESIA guidelines is not simply important for allaying the community's frustrations and apprehensions, but would serve as a point of departure for holding ICE accountable for its actions. The current lack of communication between the Teribe peoples and ICE, however, highlights the issue of representation the HRC team observed during its investigation. Inconsistencies exist between community and institutional actors as to who serves as the voice of the Teribe peoples, and more specifically, with whom ICE is obliged to communicate when moving forward with the PHED.

The next subsection will unpack this issue of representation, calling attention to the lack of congruence between state and community actors with regard to who represents the Teribe peoples and to what extent ICE is obliged to communicate with them.

¹⁶⁷ Interview with SETENA officials, *supra* note 136.

¹⁶⁸ See decision number 2009-06045, *supra* note 89.

¹⁶⁹ See the following section for a more complete description and discussion of Linking Commissions, an organization that exists in T erraba with which ICE has been communicating.

¹⁷⁰ Interview with community members, *supra* note 14.

1. Community Representation

According to community representatives and the ICE team, three groups have emerged in response to the PHED: the community organizations opposing the project, the state-created ADI, and the Linking Commissions.¹⁷¹ Certain details about the Linking Commissions remain unclear between community members and state actors with whom the HRC team spoke, however, some agreement exists regarding the Commissions' role within the community. The Linking Commissions, as most affirmed, are a non-traditional community organization created during the development of the *El Diquís* project proposal and designed to allow community members to work and communicate with ICE about the project. While both the ADI and opposition groups were described by different parts of the community as traditional community structures, the Linking Commissions were described by non-members as promotional organizations supported by ICE. These central differences between the three entities underscored the varying perceptions regarding the extent to which these groups represented the Teribe peoples with regards to PHED. At one level, the HRC team encountered varying opinions about the extent to which some groups in the community could speak for the rest of the Teribe community, specifically, questions arose around who served as the Teribe peoples' legal representative, and, if the legal representative was the sole actor ICE was obliged to consult with about the PHED.¹⁷² At another level, some actors viewed representation as a matter of numbers, believing some groups to be too small to be representative of the community.¹⁷³ Representation was also articulated as an issue of legitimacy, with some members of the community asserting that because the Linking Commissions were a product of ICE, they did not serve as a true representative of the community or its opinions about the dam.¹⁷⁴

Like most questions of representation, community members expressed concern about the ability of the three groups to articulate the community's concerns about the dam fairly. From the perspective of the ADI and the opposition groups, this was best exemplified by the Linking Commissions. Both the ADI and the community members in opposition to the dam described the Commissions as serving the interests of ICE.¹⁷⁵ In addition, they suggested that members of the Linking Commissions were employees of ICE as well and that the Commissions were designed to present an image that ICE was working with the Teribe peoples without actually engaging with the two organizations that originated from within the community.¹⁷⁶

¹⁷¹ In the Human Rights Clinic's interviews with Franklin Ávila, *supra* note 33, and the ICE technical team, *supra* note 108, both parties identified these three organizations as central actors in the Teribe community with regard to the PHED project. In addition, community members with whom the HRC delegation met identified the same three groups. Interview with community members, *supra* note 14. Térraba ADI president Genaro Gutiérrez corroborated this. Interview with Genaro Gutiérrez, *supra* note 34.

¹⁷² Interview with community members, *supra* note 14. Interview with Genaro Gutiérrez, *supra* note 34.

¹⁷³ ICE and ADI leader Genaro Gutiérrez both claimed opposition to the dam was small, however, community members in opposition to the dam claimed this was untrue for two reasons. First, because most members of the community were too uninformed to make a reasonable opinion about the dam, and second, that in fact, the opposition to the dam was large in comparison to those who strongly supported the project or were heavily involved in the Linking Commissions or the ADI. Interview with Genaro Gutiérrez, *supra* note 34.

¹⁷⁴ Interview with community members, *supra* note 14.

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

ICE interpreted the situation differently. According to ICE, the Linking Commissions were established to provide a clear line of communication between the Teribe peoples and ICE in order to ensure the community remained informed of ICE's activities and so that ICE could collect community opinion about the project through a centralized entity.¹⁷⁷ Further, ICE claimed the Linking Commissions were not an organization started by ICE, but were a more nuanced effort on the part of ICE and the Teribe peoples to communicate and coordinate. Thus, the Commissions were described as more of a partnership than an organization under ICE's control. At the same time, ICE blamed the disorganization of the Teribe community groups for the establishment of the Commissions.¹⁷⁸ According to ICE, Teribe community organizations are difficult to work with, lack a consistent structure, and are too prone to conflict and disagreement.¹⁷⁹

Regardless of the validity of ICE's opinion about Teribe community organizations, based on HRC interviews with ICE and Teribe community leaders, it appears that ICE uses this opinion to structure its communication strategy with the Teribe peoples. Community members and the ADI leader Genaro Gutiérrez both reported only meeting with ICE on a handful of occasions over the past several years, while ICE reported it maintained consistent contact with the community through the Linking Commissions.¹⁸⁰ ICE's strategy of working with the Linking Commissions more closely than the other two organizations has divided the community and strained relations between community members already highly suspicious of or opposed to the construction of the dam. In addition, the Commissions have raised questions among the Teribe peoples leaders about their legitimacy to articulate community opinions about the project. ICE's use of the Commissions in lieu of talking with community organizations or the local governance structure suggests insensitivity to community practices, local forms of organization, and state sanctioned structures. ICE's impact assessment strategies must begin to incorporate the Teribe organizations at least in the same ways it has developed effective communication with the Commissions.

Representation became a further issue of contention when the HRC team inquired about the legal representation structure of the Teribe peoples. As it presently stands, juridical representation of the Teribe peoples is rooted in the ADI.¹⁸¹ A Constitutional Court decision in 2009 reiterated that the ADI is the representative of the Teribe peoples while barring the ADI from excluding community members from participating.¹⁸² Opposition groups, however, asserted the ADI organization was corrupt and that its previous exclusion of community members illustrated this point.¹⁸³ In addition, community members claimed the present ADI president had violated the ADI rules by serving longer than was mandated by the ADI constitution and using his power to

¹⁷⁷ Interview with Franklin Ávila, *supra* note 33. Interview with ICE technical team, *supra* note 108.

¹⁷⁸ Interview with ICE technical team, *supra* note 108.

¹⁷⁹ *Id.*

¹⁸⁰ Genaro Gutiérrez reported only having met with ICE 10 times since 2006 while the opposition group leaders state communication with ICE was rare and inconsistent. Interview with Genaro Gutiérrez, *supra* note 34.

¹⁸¹ See discussion of this issue *supra* note 67.

¹⁸² In the case the ADI had been accused of excluding members from participation, which was determined to be a violation of an indigenous person's right to participation in their local government. Decision number 2009-011556, *supra* note 25. See *supra* note 67 for a selection of legal authority supporting and confirming ADIs' place as the sole legal representatives of indigenous communities.

¹⁸³ Interview with community members, *supra* note 14.

garner benefits from ICE.¹⁸⁴ Altogether, disagreements about which group could be considered a legitimate representative of the Teribe community reflected deeper divisions related to the issues each entity felt were at stake with the construction of the dam.

In this way, the HRC team found that while previous divisions had existed between opposition groups and the ADI, ICE's presence in the community intensified such divisions. This is, of course, due to the benefits and consequences each side feels will result if the dam is constructed. In taking advantage these concerns, ICE has at one end loosely informed the community and heightened tensions within Térraba, and at the other, garnered support for its project through manipulative and potentially coercive means. The HRC mission reveals a strong need on the part of ICE to reassess its communication strategy with the community and work closely with the community representatives to ensure all entities with a stake in the PHED are communicated with in a fair and informative manner. Despite the ADI having juridical authority under Costa Rican law, a point explored in the following section of the report, a good faith consultation process requires that ICE consult not only with ADI, but ensures that all community voices are heard.

Overall, the three issues of information, the present status of the project, and indigenous peoples' representation underscore particular human rights concerns rooted in international law and jurisprudence. In the next section of the report, the HRC observations of the present situation in Costa Rica, specifically the problems it observed within the Teribe community, are tied to legal issues rooted in the Costa Rica's obligations under international law.

¹⁸⁴ *Id.*

IV. THE HUMAN RIGHTS IMPLICATIONS OF THE *PROYECTO HIDROELÉCTRICO EL DIQUÍS*

In the previous sections, this report has explored the scope of the *El Diquís* Hydroelectric Project, as well as its current and potential effects on the indigenous peoples in Térraba. This portion of the report will show how the effects previously described have human rights implications under Costa Rica's obligations under international law and what these implications are. Figure 10, below, provides a selection of Costa Rica's obligations under international law.

The first subsection will explore how the quantity and quality of information made available to the Teribe peoples by ICE and other institutional actors makes problematic their realization of the right to information. Then the section will turn to a discussion of the right to property in indigenous territories. Here the report will shed light on how Costa Rica's system of state ownership of indigenous land, as well as problems with the alienation and recovery of indigenous land, frustrate indigenous rights to property. It will also explore how the PHED stands to aggravate this longstanding and fundamental issue for Costa Rica's indigenous peoples. The following subsection will discuss the problematic nature of Costa Rica's state-created system for the representation of indigenous peoples. In particular, this subsection will show how both the origins and the functioning of the extant system create tensions between the Costa Rican state and its international legal obligations in the area of indigenous peoples' right to representation, which includes a right to self-governance and, in the Costa Rican context, an element of the right to association.

The final subsection of this report will integrate elements from these discussions of the rights to information, property, and representation as the report turns to address the right to effective representation of indigenous peoples in the planning and carrying out of projects that affect them. It will start with a discussion of indigenous peoples' right to effective participation and how its realization has been problematic because of circumstances specific to the PHED, as well as specific elements of the Costa Rican legal landscape. The discussion will then address the right to consultation, including a summary of how individual actors in Costa Rica view this requirement and an evaluation of how these viewpoints comport (or not) with international law. As will be discussed further below, the scope of the *El Diquís* dam project will require that ICE seek the free, prior, and informed consent (FPIC) of the indigenous peoples affected by the project. Thus, each of the elements of this framework will then be discussed in turn as it relates to the PHED. Finally, the section will turn to a discussion of the ESIA's, which ICE will be required to produce as part of the process of the effective participation of and consultation with indigenous peoples. Here the report will provide some observations about the studies currently in effect by ICE, as well as how the form and content of these studies measure up to Costa Rica's international legal obligations. After finishing this discussion about the human rights implications of the PHED, the report will provide some conclusions about the project and the outlook for the realization of the indigenous peoples' rights explored in this report.

<p>Article 21 of the American Convention on Human Rights</p> <p>1. Everyone has the right to the use and enjoyment of his property. The law may subordinate such use and enjoyment to the interest of society.</p> <p>2. No one shall be deprived of his property except upon payment of just compensation, for reasons of public utility or social interest, and in the cases and according to the forms established by law.</p> <p>3. Usury and any other form of exploitation of man by man shall be prohibited by law.</p> <p>As interpreted by the Inter-American Court for Human Rights: “Indigenous groups, by the fact of their very existence, have the right to live freely in their own territory; the close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.” <i>Awasi Tingni</i> judgment, Merits, Reparations, and Costs, <i>supra</i> note 29, at para. 149</p> <p>“[I]n order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter “development or investment plan”) within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly the State must ensure that no concession will be issued within the Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.” <i>Saramaka</i> judgment, <i>infra</i> note 277, at para. 129.</p>	<p>Article 19, International Covenant on Civil and Political Rights</p> <ol style="list-style-type: none"> 1. Everyone shall have the right to hold opinions without interference. 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice. 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: <ol style="list-style-type: none"> a. For respect of the rights or reputations of others; b. For the protection of national security or of public order (ordre public), or of public health or morals. 	<p>Article 25, Declaration on the Rights of Indigenous Peoples</p> <p>Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.</p> <p>Article 26, Declaration of the Rights of Indigenous Peoples</p> <ol style="list-style-type: none"> 1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired. 2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired. 3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned.
<p>Article 20 of the Universal Declaration of Human Rights</p> <ol style="list-style-type: none"> 1. Everyone has the right to freedom of peaceful assembly and association. 2. No one may be compelled to belong to an association. 		

Figure 10. Selections of international law relevant to the human rights of Costa Rica’s indigenous peoples in the context of the PHED.

A. Information

The right to receive information is incorporated within the rights to freedom of expression contained in numerous international human rights agreements, including ones that Costa Rica has ratified and incorporated into its domestic law.¹⁸⁵ Furthermore, the right to information regarding matters of public interest is also guaranteed in Article 30 of the Costa Rican Constitution.¹⁸⁶ This section explores deficiencies in the information provided to the Teribe peoples regarding both procedural and substantive aspects of the *El Diquís* project. Although a certain amount of diffusion of information has taken place from ICE to indigenous communities during this “preliminary” phase, the full realization by the Teribe peoples of their right to information has been substantially limited to date.

On the procedural front, the Teribe peoples lack information about the procedures to which they can resort for recourse about the PHED, particularly ways in which they can approach the competent managing organizations such as ICE and SETENA about ongoing problems. As discussed above, for example, community members were not aware of the possibility of and procedures for contacting SETENA to present a complaint about the project.¹⁸⁷ The community also requires greater information about the procedures that will eventually be used by ICE to try to obtain the project’s approval and by SETENA for determining whether or not to approve the project, as well as potential mechanisms for challenging such decisions.

In addition to being informed about ways of dealing procedurally with milestones in the project’s progression, the Teribe peoples should also be informed about more day-to-day procedural concerns, as this is important to ensuring their ability to participate effectively in debates surrounding the project.¹⁸⁸ For example, all community members, without regard to organizational affiliations, should be informed of the schedule of meetings and other community events attended by ICE and the purpose of these meetings. This is an important consideration because community members informed the HRC delegation that many of them were not aware of when these meetings occurred.¹⁸⁹ When the Clinic submitted to ICE a formal information request about these meetings—for example, when they were held and who attended—ICE refused the request, explaining that it considered that information to be confidential.¹⁹⁰

In addition to the dearth of procedural information provided by ICE, there are also problems regarding the substantive information it provides; these problems are, in general, largely qualitative rather than quantitative. That said, however, quantity is also an issue when analyzed in terms of the information available to each of the parties affected by the dam project,

¹⁸⁵ Article 19, Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948). Article 13, Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123. Article 19, International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), at 21, U.N. GOAR Supp. (No. 16) at 52, U.N. Doc. A/6316 (Dec. 16, 1966).

¹⁸⁶ Article 30, Costa Rican Constitution, *supra* note 39. “Free access is guaranteed to the administrative departments, with purpose of information about matters of public interest.”

¹⁸⁷ Interview with community members, *supra* note 14.

¹⁸⁸ See discussion of effective participation, below.

¹⁸⁹ Interview with community members, *supra* note 14.

¹⁹⁰ ICE request for information denial, *supra* note 146.

considered in isolation. In the view of Javier Rodríguez Oconitrillo, consultant to the Inter-American Institute for Human Rights (*Instituto Interamericano de Derechos Humanos*, IIDH), ICE has adopted a strategy of the controlled release of information—it releases information a little bit at a time, but to different groups within the community, so that in the end, only ICE knows the whole story about what is going on.¹⁹¹ This was borne out in ICE’s denial of the Human Rights Clinic’s formal request for information.¹⁹²

ICE has invested resources in the creation of printed materials to provide to communities projected to be affected by the PHED, such as the Teribe peoples.¹⁹³ Furthermore, community members in Térraba confirmed that they have received these materials from ICE.¹⁹⁴ However, a close examination of these materials helps illuminate community members’ concerns about the materials.¹⁹⁵ Although ICE materials regarding the PHED *do* contain information about the project, the information is limited in scope, often redundant, and largely promotional in focus (Figures 11 and 12, below).

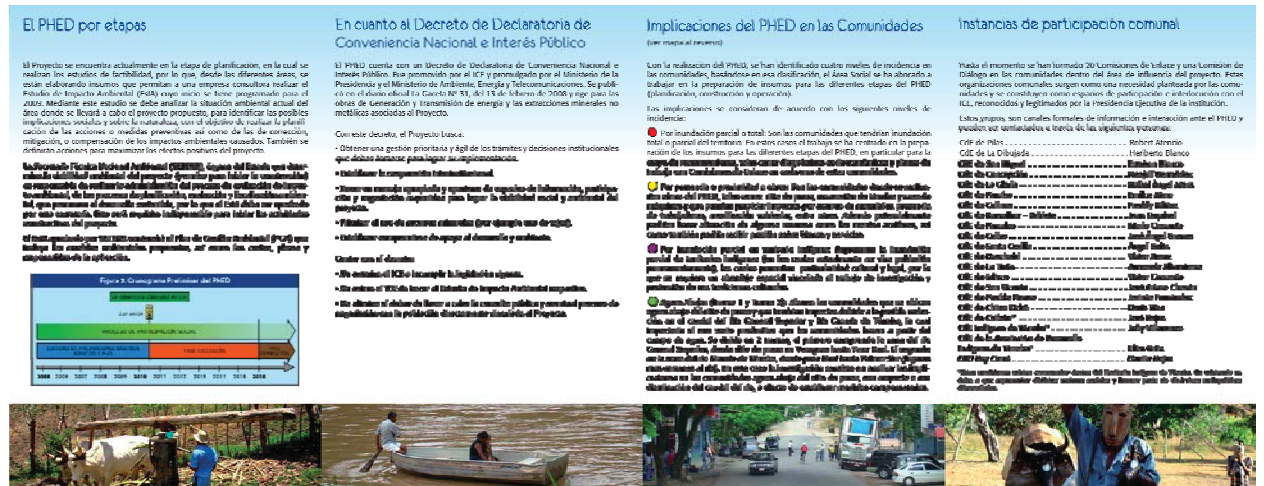


Figure 11. Sample of ICE pamphlet *Una aproximación a las implicaciones sociales del Proyecto Hidroeléctrico El Diquis*, *infra* note 197.

¹⁹¹ This interview took place over the phone on March 26, 2010.

¹⁹² ICE request for information denial, *supra* note 146.

¹⁹³ See, e.g., Figures 11 and 12, below.

¹⁹⁴ Interview with community members, *supra* note 14.

¹⁹⁵ *Id.* Community members expressed to the HRC delegation their concern that ICE’s information was mostly promotional and that it does not address some of their specific concerns regarding how the project will affect them as an indigenous community with a unique history and relationship to the land.



Implicaciones para el uso del Río General Superior

El río General constituye una barrera natural entre sus dos riberas, que solo son accesibles con la utilización de botes. Por lo tanto, este río no podrá servir sustituta a esta situación física, pero sí alargará las trayectorias navegables para pasar de un lado al otro.

Se deben considerar en algunos casos el río, la pérdida irreversible de los usos culturales asociados, ante lo cual el ICE establecerá acciones compensatorias que permitan resarcir en la medida de lo posible estas pérdidas.

Implicaciones sobre Actividades Agrícolas Productivas

El embalse y la construcción de la obra tendrán como un cambio de uso del suelo que influya significativamente sobre las actividades productivas. En el caso de las actividades agropecuarias, se estima que en algunas áreas naturales de pastoreo dedicadas hoy en día al desarrollo de cultivos permanentes, cultivos transitorios y pasto serían parcialmente o totalmente ganaderos. El proyecto tendrá en conjunto con las consultorías involucradas para determinar las medidas que ayuden a determinar alternativas para enfrentar estas situaciones.

Implicaciones en Materia de Empleo

Si bien los datos exactos en materia de empleo no se han concluido, las proyecciones hechas con base en la experiencia del ICE en construcción de proyectos hidroeléctricos y otros variables han permitido estimar que el Proyecto El Diquís, hasta su entrada en funcionamiento, empleará alrededor de 3300 personas. Se espera reducir en el mes de marzo actividad de la construcción, sin embargo estas características serán paulatinas de acuerdo con el avance y finalización de la obra. Según estas estimaciones la categorización del tipo de personal para una obra como El Diquís podría resumir aproximadamente 168 profesionales (5%), 245 técnicos y administrativos (11%) y 2951 (89%) operarios, (Figura 5).

Al entrar en funcionamiento El Diquís, las necesidades de empleo bajarán, por lo que se resalta a las poblaciones involucradas en la generación de iniciativas de desarrollo propias de manera que se evite la dependencia hacia el proyecto hidroeléctrico. Al respecto, es imprescindible que las comunidades se organicen, apoyen propuestas e impulsen sus propias estrategias de desarrollo para impulsar la economía local.

El Proyecto Hidroeléctrico El Diquís hará un aporte de manera responsable, de acuerdo con sus posibilidades y acciones para contribuir con el desarrollo de las comunidades dentro de su zona de influencia.



Implicaciones para el Desarrollo Turístico y otras Actividades Económicas

La creación de un gran embalse (lago artificial) podría ser para las comunidades un factor para el desarrollo de impactos locales con recursos propios y la explotación de recursos de capacitación y fomento en las actividades turísticas o vinculadas a esta actividad. Sin embargo, aún se investiga cuál podría ser su verdadero uso, ya que por las características de la topografía y la red hídrica, el nivel del embalse no es permanente: entre el invierno y el verano podría sufrir una oscilación de hasta 40 metros verticales y al consiguiente cambio horizontal (más evidente en zonas planas). Esta variación podría constituir una limitante para el desarrollo de actividades turísticas en algunas secciones del embalse, tales como la habilitación de atracaderos para embarcaciones.

Además, por el deterioro actual de la cuenca donde se ubicará el proyecto, el desarrollo de cualquier actividad turística deberá ir acompañada de un plan de manejo, mantenimiento y regulación de las actividades, con el fin de proteger y mejorar las condiciones ecológicas.

Implicaciones para la Gestión de la Cuenca

Actualmente la cuenca tiene varios problemas como las ocurrencias de flujos, contaminación por el uso de agroquímicos, remoción de suelos y quemas, entre otros. Esto provoca mucha erosión, lo que se traduce en un aumento aporte de sedimentos que llegan hasta la zona de la desembocadura del río Yémba con lo que se afecta este río.

En este mismo sentido, el aporte de sedimentos ocasionado por la erosión que hay sobre la cuenca, disminuye la capacidad de almacenamiento del embalse. En procura de mejorar estas condiciones en el área de construcción (que además aseguran la capacidad del embalse en caso de ocurrencias extraordinarias) se realizarán actividades de restauración y manejo de las prácticas de labranza de la tierra, lo que disminuirá el aporte de sedimento al embalse y a su vez repercutirá en una mejora en la calidad del recurso para las poblaciones de la cuenca.

Junto con estas medidas, el ICE participará activamente en el impulso de una adecuada gestión de la cuenca, de la mano con otras instituciones, empresas y pobladores, para garantizar la disponibilidad futura de los recursos naturales.



Figure 12. Sample of ICE pamphlet *Una Mirada al Proyecto Hidroeléctrico*, supra note 5.

The material that is not promotional tends to be very technical—regarding, for example, the precise way in which the dam would work and the dimensions (e.g., height, length) of the component parts such as the tunnel, the reservoir, and the dam itself.¹⁹⁶ While this technical information is also important and needs to be included, it is not presented in a culturally sensitive way, as required by international law, and does not address the Teribe peoples’ primary concerns. When ICE’s materials provide some overview of potential effects of the PHED on the community specifically, the effects are assessed at a high level of abstraction, with substantial ambiguity, and with an emphasis on the positive. For example, in their pamphlet entitled, “An approach to the social impacts of the *El Diquís* hydroelectric project” (“*Una aproximación a las implicaciones sociales del Proyecto Hidroeléctrico El Diquís*”), the only information provided regarding the social impacts of the project takes the form of an outline of the “levels of impact” (“*niveles de incidencia*”): “by partial or total flooding,” “by presence or proximity to construction,” “by partial flooding of indigenous territory,” and “downstream.”¹⁹⁷

ICE provides ample quantitative information about effects on the Teribe peoples—for example, the number of hectares, families, and individuals affected. ICE’s ability to provide these precise numbers contradicts its assertion that the ongoing studies are only preliminary feasibility studies

¹⁹⁶ *Una Mirada al Proyecto Hidroeléctrico*, supra note 5.

¹⁹⁷ Instituto Costarricense de Electricidad, *Una aproximación a las implicaciones sociales del Proyecto Hidroeléctrico El Diquís* [hereinafter *Una aproximación*], available at http://www.grupoice.com/esp/ele/infraest/proyect/icelec/doc/implicaciones_sociales_phed.pdf. In Spanish, these categories are: “por inundación parcial o total,” “por presencia o proximidad a obras,” “por inundación parcial en territorio indígena,” and “aguas abajo.” See Figure 11, above.

and that the location is not yet decided. Meanwhile, community members expressed concern about the lack of more qualitative information about how the project will affect the Teribe peoples as a unique, indigenous community; the issues they are concerned about include the impacts of the project on the river and the flora and fauna that depend on it, the percentage of jobs to be reserved for community members, and the changes (e.g., in available employment) that will occur between the construction and operation phases.¹⁹⁸

ICE's technical team demonstrated awareness that the Teribe peoples desires more information of a more qualitative nature, such as the possible negative effects caused by the substantial inflow of a primarily male and non-indigenous workforce to construct the dam.¹⁹⁹ However, ICE technical team members indicated that the information requested by the community is the information designed to be extracted by the ESIA's.²⁰⁰ Thus, until the ESIA's are done, the community cannot have the answers they are looking for because ICE itself will not have them.²⁰¹

While ICE's explanation about waiting on the ESIA's makes sense on one level, the HRC emphasizes the importance that ICE make a good faith effort to get information to the community. The ESIA's were originally slated for completion and presentation on November 9, 2009, but on November 5, 2009, SETENA received and granted ICE's request for a one-year extension to turn in the ESIA's at the end of 2010, assuming that no further extensions are requested and granted.²⁰² Thus, ICE is within a year of the projected turn-in date for its studies and has already been engaged in studies for the PHED for approximately five years.²⁰³ This, combined with lessons ICE may have learned from studies for the Boruca-Cajón project,

¹⁹⁸ Interview with community members, *supra* note 14.

¹⁹⁹ Interview with ICE technical team, *supra* note 108. At this interview, the HRC delegation inquired as to team's awareness of community members' concerns regarding such social ills as alcohol use (which is legally prohibited in indigenous territories) and prostitution burgeoning with the dam workforce. HRC representatives also asked if affects such as these are being considered in ICE's ongoing studies. ICE team members responded affirmatively to both questions.

²⁰⁰ "Environmental impact assessment – is a process of evaluating the likely environmental impacts of, and proposing appropriate mitigation measures for, a proposed development, taking into account interrelated socio-economic, cultural and human health impacts, both beneficial and adverse [...] Social impact assessment – is a process of evaluating the likely impacts, both beneficial and adverse, of a proposed development that may affect the rights, which have an economic, social, cultural, civic and political dimension, as well as the well-being, vitality and viability, of an affected community – that is, the quality of life of a community as measured in terms of various socio-economic indicators, such as income distribution, physical and social integrity and protection of individuals and communities, employment levels and opportunities, health and welfare, education, and availability and standards of housing and accommodation, infrastructure, services..." Secretariat of the Convention on Biological Diversity (CBD), *Akwé:Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessments Regarding Developments Proposed to Take Place on or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities*. Montreal: CBD, 2004 [hereinafter the Akwé:Kon Guidelines]. The Akwé:Kon Guidelines were mentioned by the Inter-American Court of Human Rights in *Case of the Saramaka People v. Suriname* as an example of standards that "conform to the relevant international standards and best practices...for [conducting] ESIA's in the context of indigenous and tribal peoples..." *Case of the Saramaka People v. Suriname*, 2008 Inter-Am. Ct. H.R. (ser. C) No. 185, (Aug. 12, 2008), para. 41, [hereinafter *Saramaka* interpretation].

²⁰¹ Interview with ICE technical team, *supra* note 108.

²⁰² ICE request for extension, *supra* note 141.

²⁰³ See discussion of the project's development in the section *Proyecto Hidroeléctrico El Diquís: Thirty Years of Contestation*, above.

suggests that ICE may have some preliminary information or conclusions to provide the community. Furthermore the Teribe peoples' current demands do not require information of the detail and precision that the ESIA will produce, but rather more preliminary conclusions by ICE.²⁰⁴ Even such information as ICE's tentative calendar of activities and the types of studies being carried out, including what kind of information they are intended to gather, might help assuage some of the community members' anxieties.

ICE's planned timeline, as related to the Human Rights Clinic delegation, outlined to the *Sala IV*, and depicted in its own documents, does not prioritize informing the Teribe peoples. The results of the ESIA's are made public only after SETENA has reviewed them, but before the affected indigenous peoples have an opportunity to comment; once SETENA approves the ESIA, construction may begin.²⁰⁵ Thus ICE should already have been providing more qualitative information to the Teribe peoples. One of the purposes of the HRC's fact-finding delegation to Costa Rica and this report is to help fill the lacuna of information available to community members.

B. Property

The right to property, recognized in various international agreements as well as Costa Rican domestic law, is a right of key importance to indigenous peoples. Indigenous peoples' right to property has been recognized as including a right to traditionally owned lands, territories, and resources.²⁰⁶ Because of their historical residence on and use of the land, the centrality of land and natural resources to many indigenous peoples' belief systems and local economies, and the significance of territory as representing autonomy or self-governance, have become integrated into understandings of indigenous identity.²⁰⁷ The role of land and territory is thus very important as regards indigenous culture, tradition, and identity.²⁰⁸ In addition to the potential eventual impacts of the dam's operation, the presence of over 3,000 individuals engaged in the construction of the *El Diquís* dam would represent a substantial impact on the Teribe peoples' approximately 750 indigenous members, as well as their culture and identity.

²⁰⁴ Interview with community members, *supra* note 14.

²⁰⁵ Interview with SETENA officials, *supra* note 136. See also *Presentación SETENA Subcomite Coordinación Revisión EsIA*, *infra* note 312.

²⁰⁶ See, e.g., Article 21, American Convention on Human Rights, *supra* note 185; Article 2, Universal Declaration of Human Rights, *supra* note 185; Article 45, Costa Rican Constitution, *supra* note 39. The Inter-American Court on Human Rights has been particularly articulate regarding how indigenous peoples' property rights include a right to land. See, e.g., *Case of the Yakye Axa Indigenous Community v. Paraguay*, 2005 Inter-Am. Ct. H.R. (ser. C) No. 125, (June 17, 2005) [hereafter cited as *Yakye Axa* merits judgment]; *Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua*, 2000 Inter-Am. Ct. H.R. (ser. C) No. 66 (Feb. 1, 2000) [hereafter cited as *Awas Tingni* preliminary objections judgment]; *Case of the Sawhoyamaya Indigenous Community v. Paraguay*, 2006 Inter-Am. Ct. H.R. (ser. C) No. 146 (March 29, 2006) [hereafter cited as *Sawhoyamaya* judgment].

²⁰⁷ The Inter-American Court on Human Rights has recognized that the Article 21 right to property in the American Convention provides comprehensive property protections for indigenous peoples, stating: "The culture of the members of the indigenous communities directly relates to a specific way of being, seeing, and acting in the world, developed on the basis of their close relationship with their traditional territories and the resources therein, not only because they are their main means of subsistence, but also because they are part of their worldview, their religiosity, and therefore, of their cultural identity." *Yakye Axa* merits judgment, *supra* note 206, para. 135.

²⁰⁸ *Id.*

The *El Diquís* hydroelectric project aggravates an existing problem with land because it would flood indigenous lands in Térraba, where the proportion of indigenous lands in indigenous hands is already low due to illegal incursions by and sales to non-indigenous individuals.²⁰⁹ Furthermore, numerous sites of historical and cultural importance—approximately 108 burial sites, for example—are located within the lands to be affected.²¹⁰ Finally, in most cases indigenous peoples have longer-standing ties to the land than other sectors of the population and often depend on the land for survival.²¹¹

One issue regarding the PHED's effects on indigenous peoples' land rights has to do with the right to culture, given that the special relationship between indigenous peoples and their environment, which includes land, occupies a unique space in international law. For example, Articles 24–32 of the Declaration on the Rights of Indigenous Peoples all articulate specific rights of indigenous peoples in relation to land and other aspects of the environment.²¹² The Inter-American Court of Human Rights has also recognized this special relationship through its decisions in cases such as *Awás Tingni*, *Yakye Axa*, and *Sawhoyamaxa*.²¹³

The potential siting of the PHED in Térraba raises serious implications for the Teribe peoples' realization of their rights, given the ways in which the project would disturb not only the river, but also other features of the natural habitat. In addition to wondering about how the PHED might contribute to environmental and climatic change on a more global scale, community members also noted effects on their specific ecosystem, such as the migration into the town area of birds that normally reside along the riverbank.²¹⁴ Community members expressed suspicion that the noise of the trucks and other machinery was the cause of this migration and suggested that this would be only one of many changes to come for which they would not be prepared, and that they could speak only to the changes they could see, which does not include changes at nature's most basic levels.²¹⁵ A further issue is raised by cultural and spiritual heritage, such as burial sites in the area, given that over one hundred archaeological sites would be affected in the construction of the PHED.²¹⁶ Thus, this is one aspect of indigenous peoples' land, cultural, and spiritual rights that stands to be affected by the PHED.

The second way in which the project stands to affect indigenous land rights in Costa Rica is through the Teribe peoples' uses of land, as for shelter and sustenance. Despite increasing *de jure* protections of indigenous land over time, the penetration of indigenous land by non-indigenous people has been a constant phenomenon and source of concern for indigenous

²⁰⁹ See *supra* notes 9–12 for a more comprehensive discussion of the dispossession of indigenous lands in Costa Rica and, specifically, in Térraba.

²¹⁰ IDB Diquís Supplemental Studies Plan, *supra* note 102.

²¹¹ The Teribe peoples were moved from their lands on the Caribbean coast to their present location in the eighteenth century, where they have resided since. See *supra* note 7.

²¹² United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. GAOR, 61st Sess., 107th plen. mtg., U.N. Doc. A/RES/61/295 (Oct. 2, 2007) [hereinafter UNDRIP].

²¹³ See, e.g., *Yakye Axa* merits judgment, *supra* note 206, *Awás Tingni* preliminary objections judgment, *supra* note 206, *Awás Tingni* merits judgment, *supra* note 29, and *Sawhoyamaxa* judgment, *supra* note 206.

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ IDB Diquís Supplemental Studies Plan, *supra* note 102.

peoples in Costa Rica.²¹⁷ Community members in Térraba reported that the large presence of non-indigenous people in the community is not simply a legacy of past incursions; they alleged that certain community members continue to make illegal sales of indigenous land to non-indigenous individuals.²¹⁸

The Costa Rican government's failures with regards to indigenous land rights are far-reaching. In the first place, the government failed to adequately protect indigenous lands from alienation to non-indigenous people; in the second place, it failed to react to non-indigenous encroachment on these territories through expulsion and other mechanisms.²¹⁹ Beyond this, even, the Costa Rican state has established inadequate procedures for the recovery of indigenous land.

As discussed above, the IDA has been the institute with the competency for managing rural land in Costa Rica—where most indigenous territories are located—since its establishment in 1982.²²⁰ At the same time, however, ADIs have been empowered to hold official title to the lands since their creation in 1978.²²¹ The legal recognition of ADIs as the holders of land title relegated IDA to a role of collaborator in recovering indigenous lands from non-indigenous hands.²²² In fact, Dr. Carlos Bolaños, director of IDA, reported that there is some doubt as to whether or not IDA has any role with regards to indigenous lands aside from working on their recovery. Limited though it may be in scope, the sheer proportion of indigenous lands that have been alienated retains for IDA an important role in the protection of indigenous rights, which it realizes by recovering several plots of land and properties (*fincas*) per year.²²³

Despite IDA's continued importance to the realization of indigenous rights to property, the Costa Rican government established procedures that undermine IDA's power and utility, even with regards to the small area of competency it retained regarding indigenous lands.²²⁴ A portion of IDA's budget every year is earmarked for indemnifying illegal possessors of indigenous lands so that they will vacate the premises; once IDA pays the illegal possessor, the title transfers to IDA, who then transfers title to the local ADI.²²⁵ The main problem arises with regards to the procedure established for IDA to select the lands that it will buy back. ADIs are the only bodies empowered to request that IDA consider a parcel of land for repurchase; "indigenous communities [have] encountered serious obstacles on the part of public institutions at the hour of establishing processes for the defense and recovery of their lands, given that the Costa Rican system [does] not recognize its traditional organizations as valid entities for the defense and

²¹⁷ See *supra* notes 9–12 for a more comprehensive discussion of the dispossession of indigenous lands in Costa Rica and, specifically, in Térraba.

²¹⁸ More specifically, community members alleged that Genaro Gutiérrez, president of the Térraba ADI and CONAI, had recently realized an illegal sale of land in Térraba, held in his mother's name, to a non-indigenous person. The HRC was unable to obtain a copy of the document of sale for this transaction.

²¹⁹ See *supra* notes 9–12 for a more comprehensive discussion of the dispossession of indigenous lands in Costa Rica and, specifically, in Térraba.

²²⁰ *Resoluciones*, *supra* note 44, at 2. See *supra* notes 75–76 for a discussion of IDA and its antecedent, ITCO.

²²¹ Interview with IDA officials, *supra* note 76. In some situations, land transfers from IDA to local ADIs were never carried out, leaving the land in public possession.

²²² *Id.*

²²³ *Id.*

²²⁴ *Reglamento de Programa de recuperación de tierras*, *supra* note 76.

²²⁵ Interview with IDA officials, *supra* note 76.

recovery of their lands.”²²⁶ Thus, if the recovery of a particular parcel of land—or the recovery of land in general—is not an ADI priority, the process of IDA involvement cannot begin.²²⁷ If the Teribe community members’ allegations about their ADI’s approach to land are true, this stands for the greater proposition that the Térraba ADI does not view recovery of land as a priority, which is problematic for the activation of IDA’s power and the prospect of recovering Teribe lands.

A secondary problem with this procedure regards the price of land that IDA has to pay to recover land. As it stands, the prices IDA pays to buy back land may already be premiums for indigenous lands given that “[i]n many indigenous territories, the best plots of land and properties are possessed by non-indigenous individuals, while indigenous individuals occupy the worse ones and the ones that are most at risk.”²²⁸ The potential construction of the PHED may cause land values in Térraba to increase further. Unless IDA’s budget for land recovery were to increase in lockstep, IDA’s available funds for recovering land would be diminished, which would likely represent a further obstacle for this process of land recovery.

One final issue is that IDA should not be considered solely responsible for recovering lands. IDA may recover lands only from good faith possessors through means of compensation; legal action must be taken against bad faith or non-good faith possessors in order to eject them from indigenous territories.²²⁹ These non-good faith possessors are not entitled to compensation.²³⁰ And “although studies precisely about this issue have not been carried out, it is known that the great majority of non-indigenous possessors inside of indigenous territories are owners of ‘bad faith.’”²³¹ Thus, IDA’s capability to address indigenous land issues is even further limited and others—individuals or entities—must be responsible for bringing legal action against non-good faith possessors in order to recover indigenous land.

In this regard, then, the failures of the Costa Rican state are twofold. The state has delegated its positive responsibility to recover the land. In the context of bad faith possessors, the state has shifted the burden to individuals to bring legal actions against these individuals. In the context of good faith possessors, the state has shifted the burden first to the Teribe peoples to go to their ADIs, and second, to ADIs to go to IDA in order for the process of land recovery to begin. Additionally, ADIs, the bodies to which the government has entrusted the responsibility for carrying forward this process, are problematic in their own right, having shown a propensity to

²²⁶ *Id.* Human Rights Council, Working Group on the Universal Periodic Review, Summary Prepared by the Office of the High Commissioner for Human Rights, in Accordance with Paragraph 15(C) of the Annex to Human Rights Council Resolution 5/1: Costa Rica, para. 46, U.N. Doc. A/HRC/WG.6/6/CRI/3 (Sept. 8, 2009).

²²⁷ Interview with IDA officials, *supra* note 76. However, if one were resigned to the idea of operating within the existing institutional structure, flawed though it is, an ADI that *does* view the recovery of land as a priority can take the initiative to put in motion the process outlined above. Such recoveries of land might, in the context of the Teribe and PHED, help offset some of the project’s negative effects and provide middle ground on which the ICE, representing the interests of the Costa Rican government in moving forward with the project, and the community can agree.

²²⁸ MNI report, *supra* note 69, at 21.

²²⁹ See discussion of this issue, *supra* note 81–86.

²³⁰ *Id.*

²³¹ Guevara et al., *supra* note 4, at 31.

be vulnerable to attempts to command and concentrate power.²³² Because of problems with ADIs' effectiveness, efficiency, and ability to provide space for a variety of different views, the Costa Rican state must provide a mechanism whereby indigenous peoples may promote the recovery of indigenous land outside of the guise of the local ADI.

The procedures for recovery of land established by the Costa Rican government make difficult the task of complying with its obligations under international human rights law, at least in situations in which ADIs do not view land recovery as a priority. By leaving recovery of land to be initiated by a process of ADI referral, rather than taking a more proactive role in attempting to continually reacquire alienated land, the Costa Rican government effectively slows or even halts the momentum towards regaining control and possession of indigenous territories.

The Costa Rican state has failed to go beyond *de jure* protection of indigenous lands and ensure the *de facto* enforcement of its laws, as shown by the lack of oversight to prevent illegal transfers of land to non-indigenous individuals and prevent illegal incursions by non-indigenous individuals. These failures are made even more problematic by the system the state has put in place for the recovery of land in which only ADIs are empowered to start the process, budgetary constraints are substantial, and competing claims represent an additional hurdle. These problems related to land are troubling not only from the standpoint of the dispossession of ancestral inhabitants of the land and the difficulty it creates for indigenous peoples to sustain themselves, but also from a cultural and traditional perspective, considering the central importance of land in many indigenous cultures.

C. Representation

The issue of representation is of vital importance, particularly with regards to large infrastructure projects, such as the *Proyecto Hidroeléctrico El Diquís*, which would have environmental, social, economic, and cultural effects that would reverberate throughout the country. Costa Rica has ratified or endorsed international agreements that recognize the rights of representation and participation of individual citizens.²³³ Various of these instruments go even farther by recognizing that more comprehensive rights to representation and participation are bestowed upon indigenous peoples, including the right to determine for themselves the way in which and the mechanisms or institutions through which they would like to realize these rights.²³⁴ In the context of Costa Rica's indigenous peoples, the right to representation takes on an additional dimension related to the freedom of association because one of the country's two primary existing structures for indigenous representation requires membership as a prerequisite for participation.²³⁵ This is especially important given that affiliation to an ADI is required for an

²³² In addition to the use of ADIs to promote individual goals, ADIs have at times not affiliated all indigenous individuals who wish to be members of the ADI, helping limit dissent within the organization. Both of these problems are discussed in the section that follows.

²³³ Article 23, American Convention on Human Rights, *supra* note 185. Article 21, Universal Declaration of Human Rights, *supra* note 185. Article 25, International Covenant on Civil and Political Rights, *supra* note 185.

²³⁴ See, e.g., Articles 18–20, UNDRIP, *supra* note 212. See particularly, Article 9 of the Inter-American Democratic Charter.

²³⁵ Two examples of the right to association can be found in Article 20, Universal Declaration of Human Rights, *supra* note 185, and Article 25, Costa Rican Constitution, *supra* note 39. Article 20 of the Universal Declaration of Human Rights specifically contemplates that the right to associate is both a positive and a negative right—it

indigenous individual to have a voice in the community, yet some indigenous individuals in Térraba have historically been denied the right to affiliate to their territory's ADI until *Sala IV* decisions compelled their affiliation.²³⁶

For three decades, a state-created institutional framework—comprised in most relevant part of CONAI and ADIs—has governed indigenous peoples in Costa Rica.²³⁷ Though perhaps progressive for the historical moment in which the laws and institutions were created, neither the origins nor the current functioning of these institutions satisfies the demands of international human rights law, which recognizes the right of indigenous peoples to decide for themselves their systems of representation; for example, Article 18 of the Declaration on the Rights of Indigenous Peoples provides that “[i]ndigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.”²³⁸

1. *Origins*

The fact that the state is the origin of the current system of representation and governance for Costa Rica's indigenous communities is immediately problematic given international law's emphasis on indigenous peoples' right to choose their own forms of government and representation. That said, however, some institutional actors in Costa Rica emphasized international law's recognition of indigenous peoples' right to govern themselves specifically according to their traditions.²³⁹ According to them, Costa Rica's indigenous communities have lost so much of their tradition over time that no traditional mechanisms for self-governance exist; thus, the use of state-created institutions for indigenous governance is a legitimate substitute for these lost traditional structures.²⁴⁰ This argument is troubling in that it allows the Costa Rican state to empower itself vis-à-vis indigenous communities and justify its continued interference with their rights to representation and self-governance by referencing losses of tradition that have largely resulted from Costa Rican state policies promoting or supporting the marginalization and eradication of indigenous culture and traditions.²⁴¹ Additionally, the absence of extensive knowledge of tradition or customary practices, which at any rate evolve over time as part of maintaining adaptability and may no longer be fully practiced, does not negate indigenous peoples' rights to choose for themselves their own form of non-traditional government.

recognizes that individuals are free to associate but they may not be compelled to associate. The existence of both a positive and a negative component to Article 25 of the Costa Rican Constitution has also been recognized by the *Sala IV*: “This right to association includes two faces or manifestations which are, on the one hand, the positive right to associate for whatever end, and on the other a negative right, in other words the liberty to stop belonging to an organization.” Decision number 2005-017457 (file number 05-012286-0007-CO), *Sala Constitucional de la Corte Suprema de Justicia*, December 20, 2005. The *Sala IV* has also held that “the right protected in Article 25 of the Political Constitution [requires] that no person can be obligated to form part of an organization.” Decision number 2002-02623, *supra* note 59.

²³⁶ Interview with community members, *supra* note 14. See also Decision number 2009-011556, *supra* note 25.

²³⁷ See *supra* notes 50–56 for a discussion of CONAI, notes 57–72 for a discussion of ADIs.

²³⁸ UNDRIP, *supra* note 212, at Article 18.

²³⁹ Interview with DINADECO officials, *supra* note 66.

²⁴⁰ *Id.*

²⁴¹ See discussion of Costa Rica's previous integrationist policies towards indigenous peoples, *supra* notes 17–21.

The president of the Térraba ADI and of CONAI, Genaro Gutiérrez, made a related but different argument.²⁴² According to Mr. Gutiérrez, ADIs and CONAI have, by virtue of their longstanding use, become traditional forms of government for indigenous communities.²⁴³ In his view, the perpetuation of the existing system would comply with Costa Rica's obligations under international law to allow indigenous peoples to govern themselves according to their own traditions, and any changes to the existing system, such as those contained in proposed *proyecto de ley*, are the legally problematic propositions.²⁴⁴ In its decision in case number 2002-02623, an action for the unconstitutionality of the executive decree creating ADIs on the grounds that it violates indigenous individuals' freedom of association, the *Sala IV* made the similar argument that "it should not be forgotten that communal development associations –more than any other juridical figure- is [*sic*] the one that most resembles the communal nature of traditional indigenous organization..."²⁴⁵

In this case, the *Sala IV* went on to hold that the ADI structure complies with Costa Rica's obligations under international law, specifically ILO 169.²⁴⁶ In the court's view, the Costa Rican state complied with the demands of ILO 169 in creating ADIs because "Article 6 of the cited convention established the obligation of states to establish means by which interested communities could participate freely...the Convention expressly provides that the adoption of a specified organization does not prevent the members of said [indigenous] communities from 'exercising the rights recognized for all citizens of the country and assuming the corresponding obligations.'"²⁴⁷ The Court partially justifies the right of the state to establish ADIs by arguing that the right arises out of the state's status as possessor of the land that makes up indigenous territories.²⁴⁸ Because the land in indigenous territories is public land, owned by the state, the state retains extra privileges over indigenous communities: "...the state –by virtue of adjudicating the title of properties in the name of indigenous communities at no charge- can impose certain conditions such that said communities exercise their rights over these lands; that to the extent that it constitutes a legitimate exercise of an authority of the state in its capacity of transmitter of the domain."²⁴⁹ The notion that the state should be able to dictate the governance structures of indigenous peoples and retain control over them by virtue of possessing the land on which they live is at odds with international law's recognition of indigenous rights to autonomy and self-government.²⁵⁰ It also contradicts one of the main tenets of indigenous peoples' property rights when read conjunctively with the right to self-determination—indigenous peoples' right to own and effectively control traditional lands, territories, and resources through their own institutions and procedures.

²⁴² Interview with Genaro Gutiérrez, *supra* note 34.

²⁴³ *Id.*

²⁴⁴ *Id.* In Mr. Gutiérrez's view, for example, the existing institutional structure is all that Costa Rica's indigenous communities have and it should not be taken away.

²⁴⁵ Decision number 2002-02623, *supra* note 59, at Section IX.

²⁴⁶ *Id.* at Section VII and Section IX.

²⁴⁷ *Id.* at Section VII.

²⁴⁸ *Id.* at Section VIII.

²⁴⁹ *Id.*

²⁵⁰ State possession of indigenous lands is itself problematic, as recognized in the *Awes Tingni* merits judgment, *supra* note 29. Furthermore, this reality is made even more problematic by the way in which ADIs function—for example, based on membership—which is discussed in the subsection that follows. See also *Saramaka* judgment, *infra* note 277, paras. 93 and 157-159, recognizing the right to self-determination and reading it conjunctively with the right to property.

At the same time that many institutional voices in Costa Rica have continued to support and view as legitimate the existing institutions, community members, NGO leaders, and indigenous scholars offered a different point of view. Rubén Chacón, lawyer and expert on indigenous law, emphasized that the Costa Rican government made a conscious choice to supplant existing indigenous governance structures or extinguish the possibility of their emergence through the creation of state governance structures.²⁵¹ To reach this conclusion, Mr. Chacón drew in part on the disjunctive “or” (“o”) in the first part of Article 4 of the *Ley Indígena*: “The reserves shall be governed by the indigenous peoples in their traditional community structures *or* from the laws of the Republic that govern them, under the coordination and advice of the CONAI” [*emphasis added*].²⁵² In Mr. Chacón’s view, *ley DINADECO*, the law that created ADIs, is a law against indigenous autonomy—with its passage, the government set aside the possibility of a traditional form of government for indigenous peoples and imposed DINADECO law in its stead.²⁵³

International human rights law requires at a minimum that institutions for indigenous representation selected or designed on the basis of community consensus, yet Costa Rica’s ADIs and CONAI fail to meet this initial threshold of acceptability.²⁵⁴ Some sectors of society and, in particular, government claim that the existing institutions do meet these requirements and that they are satisfactory or even preferable to alternatives proposed by the communities, as in the *proyecto de ley*.²⁵⁵ However, this partial *post hoc* ratification of the state-created system does not enjoy overwhelming support of indigenous peoples, as shown by substantial indigenous support for the *proyecto de ley*’s reforms of the existing system. Thus the CONAI and ADI system for indigenous representation in Costa Rica, with its state origins, is problematic under international law’s requirements that indigenous peoples be empowered to choose their form of representation and mechanisms for governance. It is important to note, however, that the focus is ultimately on indigenous peoples’ free acceptance of and consent to the structures that govern them, thus the state origins of CONAI and ADIs would not be problematic under international law if they were endorsed and supported by indigenous peoples.

2. Current Functioning

Further compounding the problematic origins of Costa Rica’s system for indigenous representation is the current functioning of the system. In some indigenous communities, particularly those with clear consensus and few internal cleavages, the local ADI enjoys popular support and recognition as the legitimate representative (in the *de facto* as well as the *de jure* sense) of the community.²⁵⁶ In other communities, such as Terraba, however, divisions within

²⁵¹ Interview with Rubén Chacón, *supra* note 60.

²⁵² *Id.* *Ley indígena*, *supra* note 53, at Article 4.

²⁵³ Interview with Rubén Chacón, *supra* note 60.

²⁵⁴ *See also* Yatama v. Nicaragua, 2005 Inter-Am. Ct. H.R. (Ser. C) No. 127 (June 23, 2005) [hereinafter cited as *Yatama*], para. 149, on forcing indigenous peoples to adopt alien structures in order to participate.

²⁵⁵ Interview with Genaro Gutiérrez, *supra* note 34. Interview with DINADECO officials, *supra* note 66. Mr. Gutiérrez and DINADECO officials expressed to HRC representatives that they thought that the current system for indigenous representation in Costa Rica works fine and that the proposed reforms in the *proyecto de ley* would be negative.

²⁵⁶ Interview with Hugo Lázaro, *supra* note 34. Hugo Lázaro, president of the ADI for the Curré indigenous community, told HRC representatives that the Curré ADI enjoys broad public support. However, he also stated that the Curré ADI does not view membership as determinative as to whether an individual can participate in ADI

the community have made the functioning of ADIs even more problematic because ADIs do not have a mechanism for guaranteeing the inclusion and representation of varying viewpoints from a single community.²⁵⁷ In their interview with Human Rights Clinic representatives, DINADECO officials recognized this issue and pointed out that they try not to limit themselves to working with the juridical representative of the community (the ADI) but to recognize and work within the social reality—generally one of fragmentation—instead.²⁵⁸

An indigenous community's ADI is the sole entity with juridical identity as representative of an indigenous community.²⁵⁹ ADIs are given a great deal of latitude with regards to their operation.²⁶⁰ Each ADI has its own statute establishing its rules of operation and the ADI membership is entrusted with the responsibility for reforming the statute; for example, each ADI set the term limits for its president and executive board (*junta directiva*) in its initial version of the statute, and ADI members are also empowered to make any changes.²⁶¹ According to DINADECO, the general assembly (*asamblea*), in which all indigenous members of a territory are eligible to participate, reviews any changes made by ADI to its constitutive statute and evaluates them, at which point the changes are publicized and then take effect if there are no complaints.²⁶²

ADIs function on the basis of a membership structure, thus a community member must be formally affiliated to the ADI in order to have a voice within the organization.²⁶³ The ADI itself decides which individuals to affiliate; in the event of denial, the rejected individual may appeal to the *asamblea*.²⁶⁴ In other words, under Costa Rica's laws and practices, political

proceedings or not, thus the Curré ADI represents the views of non-affiliated individuals, as well as official ADI members.

²⁵⁷ See *Saramaka* interpretation, *supra* note 200, at para. 26. “Furthermore, regarding the State’s concern that there may be internal divisions among the Saramaka as to who can benefit from development projects, the Court observes that, pursuant to paragraph 164 of the Judgment, in the event that any internal conflict arises between members of the Saramaka community regarding this issue, it ‘must be resolved by the Saramaka people in accordance with their own traditional customs and norms, not by the State or this Court in this particular case.’”

²⁵⁸ Interview with DINADECO officials, *supra* note 66. The fragmentation in the community is based primarily on ideological differences; however, an institutional fragmentation has also emerged within the community, matching the landscape of social fragmentation. Besides the operation of various NGOs in the community, the Teribe community fragmented into three broad groups: members of the ADI, participants in *comisión de enlace* (discussed above), and individuals affiliated with neither ADI nor the local *comisión de enlace*.

²⁵⁹ The status of ADIs as the sole entity with juridical personality to represent the community in which it is located has been recognized in numerous sources of Costa Rican law. See *supra* note 67 for a selection of legal authority supporting and confirming ADIs’ place as the sole legal representatives of indigenous communities.

²⁶⁰ Interview with DINADECO officials, *supra* note 66.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Interview with community members, *supra* note 14. Interview with Genaro Gutiérrez, *supra* note 34. As a result, the right to representation of indigenous peoples in Costa Rica is strongly related to the right to association. Costa Rica’s legal obligations as regards the right to association arise out of instruments such as Article 16, American Convention on Human Rights, *supra* note 185; Article 22 of the International Covenant on Civil and Political Rights, *supra* note 185; Article 20 of the Universal Declaration of Human Rights, *supra* note 185; and Article 25 of the Costa Rican Political Constitution, *supra* note 39.

²⁶⁴ Interview with Genaro Gutiérrez, *supra* note 34. This process is also explained in the *Sala IV*’s response to decision number 2009-011556, *supra* note 25, decided on July 24, 2009. The president of the Terraba ADI, Genaro Gutiérrez, acknowledged that the ADI had denied membership to a group of people and gave the individuals’ previous opposition an aqueduct project in the community as the reason for the rejection. Because the ADI views the

representation is granted to indigenous individuals conditioned on their affiliation to a state-created institution, rather than their membership in an indigenous community.

In Térraba in 2009, various individuals were denied affiliation to the ADI because of their previous opposition to an aqueduct project in the community.²⁶⁵ The general assembly agreed with the ADI and confirmed on appeal the denial of association to these dissident individuals.²⁶⁶ At that point, one of the individuals in question brought a *recurso de amparo* before the *Sala IV*, alleging that his rights to association had been violated.²⁶⁷ The Court held that the petitioner's rights had been violated and that ADIs could not deny affiliation to any indigenous person who wishes to be an ADI member and complies with the membership application process.²⁶⁸ Despite this judicial resolution, dissension continues in the community, as Mr. Gutiérrez claimed that the individuals were immediately affiliated in early 2010, while members of the community claimed that they still had not been granted *entrée* to the ADI.²⁶⁹

On March 14, 2010, the Térraba ADI held its biannual general assembly, which included the selection of a new executive board.²⁷⁰ Approximately ten community members presented to the assembly a number of complaints regarding the lack of affiliation to the ADI of eligible indigenous individuals, the affiliation to the ADI of ineligible non-indigenous individuals, and the lack of a roster showing individuals' participation and votes on issues within the general assembly.²⁷¹ These individuals requested that the Térraba ADI general assembly and executive board be annulled and that all of the decisions it has emitted be declared null and void; the action for nullification (*acción de nulidad*) was officially presented to DINADECO on March 16, 2010.²⁷² DINADECO subsequently commenced an investigation of this action, carried out by Juan Carlos Villalobos Umaña, social organizer (*promotor social*), for review by Daniel Mesen Araya, DINADECO director of the Brunca region (*Director Región Brunca*).²⁷³ On April 12, 2010, members of the Térraba ADI submitted a letter to DINADECO that, among other statements, alleged a conflict of interest between the department carrying out the investigation and the board of directors of the Térraba ADI.²⁷⁴ To remedy this problem, the writers of the letter requested that a different department carry out the investigative activities.²⁷⁵ On April 6, 2010 DINADECO called a meeting of the Térraba ADI's board of directors regarding the situation, to take place after a non-renewable ten-day period from the date of issuance of the letter.²⁷⁶ The

aqueduct as a major priority, the admission of individuals of a different opinion would represent a challenge in moving forward with the project; in Gutiérrez's words, with these people in the ADI, "development stagnates."

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Decision number 2009-011556, *supra* note 25.

²⁶⁸ *Id.*

²⁶⁹ Interview with community members, *supra* note 14. Interview with Genaro Gutiérrez, *supra* note 34.

²⁷⁰ Centro para el Desarrollo Indígena (CEDIN), *Asociación Indígena de Térraba Se Encuentra Inactiva*, Apr. 13, 2010.

²⁷¹ *Id.*

²⁷² Resolution DLR number 028-2010, DINADECO.

²⁷³ Report about Ordinary General Assembly, held by the ADI of Térraba. For Daniel Mesen Araya, DINADECO director for the Brunca region, from Juan Carlos Villalobos Umaña, social organizer, dated April 5, 2010.

²⁷⁴ Letter signed by members of the ADI of Térraba, dated April 12, 2010.

²⁷⁵ *Id.*

²⁷⁶ DLR number 125-2010, to Daniel Mesen Araya, from Carlos Brizuela, dated April 6, 2010.

HRC is not aware of the resolution of this issue as the documents available to the HRC were current only as of April 16, 2010.

There are thus multiple problems with the current functioning of ADIs as the primary component of Costa Rica's system for indigenous representation. Although the state may have the authority to establish organizations for the representation of indigenous peoples, this does not mean that it can limit the official representation of indigenous peoples to that entity. The Inter-American Court of Human Rights explored this notion in the *Case of the Saramaka People v. Suriname*, addressing the state's argument that petitioners' complaints could not be heard because they lacked the permission of "the *Gaa'man*, whom the State consider[ed] to be the representative of the petitioners."²⁷⁷ The Court held that "it is not necessary for the petitioners to be the actual victims or to hold power of attorney or other legal authorization from the victims or next of kin in order to file the petition...there is no requirement, explicit or implicit, ... that the *Gaa'man*, whom the State considers to be the representative of the petitioners, had to submit the petition or that the petitioners had to obtain authorization from the *Gaa'man* to do so."²⁷⁸ The Court added: "[t]he State has a duty to consult with the Saramaka people in order to comply with several of the Court's orders, and...the Saramaka must determine, in accordance with their customs and traditions, which tribe members are to be involved in such consultations...[t]he Court deliberately omitted from the Judgment any specific consideration as to who must be consulted. By declaring that the consultation must take place 'in conformity with their customs and traditions,' the Court recognized that it is the Saramaka people, not the State, who must decide which person or group of persons will represent the Saramaka people in each consultation process ordered by the Tribunal."²⁷⁹

Although the Court's conclusion arises in the context of petitions to the Inter-American Commission and Inter-American Court, the rationale animating its holding is similar to that in this case and should be applied by extension: "Preventing the alleged victims from advancing their own legal arguments would be an undue restriction upon their right of access to justice, which derives from their condition as subjects of international law."²⁸⁰ In this case, requiring that individuals' challenges be channeled through the ADI focuses too much on procedure at the expense of the substantive and meaningful representation of indigenous peoples, which ADIs were ostensibly established to ensure.

Once such entities were created by the state in lieu of organizations created by indigenous peoples themselves, an additional hurdle arose in the form of a membership requirement for participation in the ADIs. The *Sala IV* has denied that the ADI structure compels indigenous peoples to associate, affirming the argument that "...one's incorporation to the development association that represents a given community is not automatic, but rather requires the act of affiliation, which can only be the result of a free decision of each one of the individuals that comprise that community. An indigenous individual's negation of incorporation in the

²⁷⁷ *Case of the Saramaka People v. Suriname*, 2007 Inter-Am. Ct. H.R. (ser. C) No. 172, (Nov. 28, 2007), para. 19, [hereafter cited as *Saramaka* judgment].

²⁷⁸ *Id.*

²⁷⁹ *Saramaka* interpretation, *supra* note 200, at paras. 15, 18.

²⁸⁰ *Id.* at para. 26.

association does not give rise to any consequence adverse to his or her dignity as a human, nor does it impose an arbitrary restriction on his or her enjoyment of fundamental rights.”²⁸¹

The court went on to recognize, however, that “there is no doubt that [an individual’s] voluntary separation from the association for development supposes for the citizen a decrease in his or her participation in the adoption of the indigenous decisions related to the administration of the indigenous reserve, over which it governs with strong collective characteristics.”²⁸² Thus the court partially recognizes that the way the Térraba ADI works in its strict adherence to membership requirements amounts to a functional compulsion of individuals to associate with the ADI in order to have their views heard. Not only were some community members’ views ignored for so long as they were not members of the ADI, but as voices of dissension within the community, such individuals were targeted for exclusion from the ADI. This makes clear that the ADI structure compels individuals to associate with organizations in a way that is in violation of international law. Furthermore, it demonstrates that ADIs lack a mechanism to represent a multiplicity of opinions, which violates the right to representation protected under international law.

Thus Costa Rica’s current system for the representation of indigenous peoples is problematic for two reasons. As discussed above, the institutions for representation are inherently suspect because they were created by the state, without regard for indigenous tradition or for indigenous peoples’ collective right to juridical capacity, in lieu of indigenous tradition, and without consultation with indigenous communities. Furthermore, the way in which these institutions function—on the basis of membership and as the only way for indigenous peoples to speak as a community—denies indigenous peoples the right to choose their own method for representation and participation and compels them to seek membership in an association. Both of these effects, created and sanctioned by the Costa Rican state on multiple occasions, represent violations of Costa Rica’s obligations under international human rights law to provide indigenous peoples a right to representation. These issues with representation affect, in turn, indigenous peoples’ ability to realize their right to effective participation, which includes rights to consultation and free, prior, and informed consent.

D. Effective Participation/Consultation/Free, Prior, and Informed Consent

The effective participation and consultation of indigenous peoples must occur continuously in projects that may affect indigenous peoples, such as the *El Diquís* hydroelectric project.²⁸³ Article 6(1)(a) of ILO 169 provides that, “[i]n applying the provisions of this Convention, governments shall consult the peoples concerned, through appropriate procedures and in particular through their representative institutions, whenever consideration is being given to legislative or administrative measures which may affect them directly.”²⁸⁴ Similarly, the UN Declaration on the Rights of Indigenous Peoples provides that “[i]ndigenous peoples have the

²⁸¹ Response to decision number 2002-02623, *supra* note 59.

²⁸² *Id.*

²⁸³ As discussed in greater detail below, this right to consultation is required by various legal instruments, such as Articles 6, 7, and 15 of ILO 169, *supra* note 22, and Articles 21, 13, 15, 23, 1.1, 2, 24, and 11 of the American Convention, *supra* note 185.

²⁸⁴ ILO 169, *supra* note 22, at Article 6(1)(a).

right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures...” and requires that “[s]tates...consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.”²⁸⁵

As interpreted by the Inter-American Court of Human Rights, Article 21 of the American Convention of Human Rights requires the effective participation, including the consultation and free, prior, and informed consent (FPIC), of indigenous peoples in the processes of planning infrastructure and investment projects that have a major affect on indigenous peoples.²⁸⁶ The Court recognized that “the level of consultation that is required is most obviously a function of the nature and content of the rights of the Tribe in question,” and emphasized that when large-scale development or investment projects could affect the integrity of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.²⁸⁷

The large scale of the PHED, both in terms of the amount of investment it is projected to invite as well as the scope of the effects it is predicted to have, strongly suggest that this is the type of large-scale project the construction of which the Inter-American Court viewed as requiring extra safeguards of consultation and FPIC of indigenous peoples.²⁸⁸ Thus, the PHED is doubtless a project of the character and scope intended under international law to require the effective representation, consultation, and FPIC of indigenous peoples. In order to bypass the substantive and procedural requirements of effective representation, consultation, and FPIC (as it already has), the Costa Rican government should have to confront this argument in favor of greater protection of indigenous communities.

Rather than confront this argument, however, the *Sala IV* has recognized that the PHED requires a process of consultation.²⁸⁹ According to the Court, “there is a right on the part of indigenous peoples to be consulted, through appropriate procedures, and in particular through their representative institutions, any time that legislative or administrative measures with potential to directly affect them are foreseen. Certainly the construction of a hydroelectric plant is one of

²⁸⁵ UNDRIP, *supra* note 212, at arts. 18-19. A parallel analysis may be carried out with the American Convention, as shown in *Saramaka*. The court’s interpretation in *Saramaka* allows for two different legal analytical routes that lead to the same conclusion. Because Costa Rica has ratified a wide range of international human rights law instruments, either argument applies. Initially, the court’s interpretation is based on Article 21 and Article 29(b) of the American Convention, relying on the latter to incorporate relevant legislation and, in particular, ILO 169. *Saramaka* judgment, *supra* note 277, at para. 92. In the alternative, the *Saramaka* judgment stands on the basis of Article 21 and Article 29(b) of the American Convention, relying on the latter to incorporate relevant legislation and, in particular, Article 1 and Article 27 of the ICCPR. *Id.* at paras. 92–95.

²⁸⁶ *Saramaka* judgment, *supra* note 277, at paras. 125–133.

²⁸⁷ *Id.* at para. 137. *Saramaka* interpretation, *supra* note 200, at para. 17.

²⁸⁸ “The Tribunal has emphasized that large-scale development or investment projects could affect the integrity of the Saramaka people’s lands and natural resources, the State has a duty not only to consult with the Saramakas, but also to obtain their free, prior, and informed consent in accordance with their customs and traditions.” *Saramaka* interpretation, *supra* note 200, at para. 17. *See also* ILO 169, *supra* note 22, at Article 6(1)(a).

²⁸⁹ Decision number 2009-06045, *supra* note 89.

those issues...”²⁹⁰ Although Costa Rica recognizes that the PHED will require consultation at some point in the future, the HRC argues that the manner in which the Costa Rican government has allowed ICE to proceed with the studying and planning of the PHED already creates numerous problems with the country’s compliance with its obligations under international law. Studies have long been and continue to be underway, which represents a problem for the required “prior” nature of indigenous peoples’ effective participation and consultation.²⁹¹ Furthermore, the nature of these studies and the reality that they are already affecting the community—through noise, machinery, and traffic, for example—goes against the purpose animating instruments such as ILO 169, which is to ensure that indigenous peoples have a voice regarding projects that will affect them, before such effects begin to occur.

All parties involved—from ICE to ADIs to the *Sala IV*—couch their arguments and justifications in the terms of international law. In the meeting between HRC representatives and ICE officials, members of the ICE technical team recognized the applicability of ILO 169 and its implications for ICE’s plans to move forward with the PHED.²⁹² CONAI and Térraba ADI president Genaro Gutiérrez similarly alluded to the importance of ILO 169 in establishing the contours of indigenous peoples’ rights in the context of projects that affect them.²⁹³ Finally, the *Sala IV* referred extensively to the demands of ILO 169 in holding that ADIs satisfy international law’s demands for the representation of indigenous peoples and that consultation with indigenous communities at this point in the PHED would be premature.²⁹⁴ Although these parties’ recognition of the applicability and supremacy of international law is of utmost importance, merely citing to ILO 169 does not bring them into compliance with the instruments to which they cite. Furthermore, the inconsistency presented by these actors’ extensive references to international law and their ongoing operations suggests, at least, limited institutional knowledge of international law; in the extreme, it would indicate that these actors are operating under inadvertent or purposeful misunderstandings of international law.

1. *Effective Participation*

Under the Inter-American Court’s interpretation in *Saramaka*, the planning process of infrastructure and investment projects that may affect indigenous peoples requires their effective participation in order to comply with the demands of international law. The Court gave content to the idea of effective participation by requiring “that the participation of the Saramaka People in such process...take place in conformity with their customs and traditions.”²⁹⁵ The current situation of Teribe participation in the planning stages of the PHED does not meet this standard.

As discussed above, there exists some debate about what representative institutions in Térraba qualify as customary or traditional; the Human Rights Clinic’s view is that ADIs are problematic

²⁹⁰ *Id.* at Section IV. The Court went on to hold that although consultation is required for a project of the scope of the PHED, such consultation would be premature at the point at which the *recurso de amparo* was brought: “the present *amparo* is premature, given that it is before a future an uncertain occurrence, due to which it is still not surely know if the construction at issue is going to take place or not.” This element of the decision is discussed further below.

²⁹¹ The “prior” element of the free, prior, and informed consent framework is discussed in greater detail below.

²⁹² Interview with ICE technical team, *supra* note 108.

²⁹³ Interview with Genaro Gutiérrez, *supra* note 34.

²⁹⁴ *See, e.g.*, decision number 2002-02623, *supra* note 59, and decision number 2009-06045, *supra* note 89.

²⁹⁵ *Saramaka* interpretation, *supra* note 200, at para. 12.

from an international law standpoint in terms of both their origins and their current functioning.²⁹⁶ Even assuming that ADIs did represent a mechanism that operated in conformity with Teribe customs and tradition, it is far from clear that ICE has sufficiently engaged the substantive participation of the Térraba ADI.²⁹⁷ The president of the ADI, for example, asserted that he has only met with Franklin Ávila, director of the PHED, about ten times in the five years that Mr. Ávila has been working on the project.²⁹⁸

Furthermore, members of the ICE technical team expressed some doubts about the utility of the Térraba ADI as a representative of the Teribe peoples.²⁹⁹ In their experience engaging with the Térraba ADI, the organization is problematic because it does not include and represent the viewpoints of all members of the Teribe community.³⁰⁰ ICE characterized the ADI as difficult to work with as its meetings are often unpredictable due to a tendency to stray from or fail to make it through the agenda established for the meeting.³⁰¹ This argument would be highly problematic if ADI, the only representative of Térraba recognized by law, were considered the community's representative according to custom and tradition, given that *Saramaka* requires that "consultation...take account of...traditional methods of decision-making."³⁰² Thus, ICE must be sure going forward that it respects the rights of the Teribe peoples by carrying out consultation "according to their customs and traditions," and with representatives freely identified by the people, even in the event that this turns out not to be the efficient and streamlined process ICE might prefer.³⁰³

In addition to ICE's incomplete engagement with ADIs or non-ADI members of the community, ICE has engaged with other institutions within the community—namely, the Linking Commissions.³⁰⁴ Discussed in more detail above, ICE has given these Commissions an amount of attention perhaps disproportionate to their history and importance in the community.³⁰⁵ Thus the relationship of these bodies with ICE should also not be considered as providing for effective participation of community members, as these do not conform with the customs and traditions of the Teribe.

Finally, the Inter-American Court points out in *Saramaka*, that "[b]y declaring that the consultation must take place 'in conformity with their customs and tradition,' the Court recognized that it is the Saramaka people, not the State, who must decide which person or group

²⁹⁶ See discussion of this issue in the subsection entitled Representation, above.

²⁹⁷ ADIs status as a traditional structure is only assumed here for the purpose of argument; it is by no means conceded. In decision number 2009-06045, *supra* note 89, evidence was presented that the Térraba ADI had reached a preliminary agreement with ICE to grant ICE ingress to the territory, as well as permission to conduct the PHED feasibility studies, the terms of such agreement to be further elaborated at some point in the future. However, it appears that the relationship between ADI and ICE broke down (ICE contests this assertion) and the terms of the agreement were never elaborated. Despite this, ICE has continued to take actions in Térraba towards completion of the feasibility studies.

²⁹⁸ Interview with Genaro Gutiérrez, *supra* note 34.

²⁹⁹ Interview with ICE technical team, *supra* note 108.

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Saramaka* judgment, *supra* note 277, at para. 133.

³⁰³ *Id.*

³⁰⁴ See *supra* notes 171–180 for a discussion of the linking commissions.

³⁰⁵ *Id.*

of persons will represent the Saramaka people in each consultation process ordered by the Tribunal...The Saramaka people will then communicate to the State who must be consulted, depending on the issue that requires consultation.”³⁰⁶ Thus the ADI, despite being the entity with juridical personality to represent the Teribe peoples, need not be the community representative for the purposes of effective participation and FPIC; indeed perhaps the ADI cannot take on this role without a more robust demonstration that its status as representative enjoys very broad community support. Genaro Gutiérrez, president of the Terraba ADI and of CONAI, appeared to be in agreement with these more comprehensive rights for consultation.³⁰⁷ Despite being a proponent of the view that ADIs represent traditional governance mechanisms for indigenous communities and that the ADI is the sole legal representative of a given indigenous community, Mr. Gutiérrez asserted that every indigenous individual should have a say in whether the PHED goes forward or not.³⁰⁸ In Mr. Gutiérrez’s view, every indigenous individual enjoys the rights to effective participation, consultation, and FPIC by virtue of his or her being indigenous, without regard to his or her membership in or affiliation to one community group or another.³⁰⁹ The HRC asserts that the FPIC is a collective right of the Teribe peoples that should be faithfully respected by Costa Rica.

2. Consultation

As discussed above, the actors involved in the PHED operate under different understandings of the term “consultation,” with some actors expressing multiple meanings for the same word. Furthermore, these different actors expressed different views of the current status of the hydroelectric project.

Community members, for example, consider that some consultation should have already occurred, but they do not consider their communications with ICE to date to have constituted consultation. Community members expressed that they were and continue to be inadequately prepared for the project’s evolution; according to them, ICE’s activities were already impacting their daily lives but they had little sense of what would be coming next. The serious scope of some of ICE’s works, including the dynamiting of mountains in the area, was interpreted by some community members as an indicator that the PHED has already been *de facto* sited in Terraba. In this way, the ongoing studies, particularly any related to social effects, would be a mere formality to ensure the *de jure* siting of the dam. Thus, community members were largely concerned with what they viewed as a negotiation aspect of consultation, in which ICE and the Teribe peoples might agree to terms for the carrying out of the PHED that satisfy both sides. And while Teribe community members recognized that ICE disseminated information and held some meetings in the community, they felt that this did not reach the level of consultation for several reasons. They expressed reservations about the type of information provided in these meetings, characterizing it as primarily promotional in nature. Similarly, they saw meetings with ICE as less participatory than they expect consultation to be, in that the meetings are set up more as a way for ICE to transmit information than as a forum for dialogue and interaction between ICE and the community. Community members also expressed concern about what they characterized as a

³⁰⁶ *Saramaka* interpretation, *supra* note 200, at paras. 18 and 22.

³⁰⁷ Interview with Genaro Gutiérrez, *supra* note 34.

³⁰⁸ *Id.*

³⁰⁹ *Id.*

rather ad hoc approach to meeting with community members, in which some community groups, such as the Linking Commissions, receive more consistent attention from ICE than others. Finally, members of the community emphasized that ICE's relations with the community were intermittent, rather than consistent, and did little to make them understand or feel prepared to deal with the changes the PHED would bring to Térraba.

Genaro Gutiérrez, president of the Térraba ADI and of CONAI, expressed similar feelings that consultation had not occurred but that it probably should have. He stated that no one had authorized ICE activities in Térraba beyond the cutting down of twenty-three trees and that he was not sure what would happen next. In Mr. Gutiérrez's view, the Teribe peoples should be receiving benefits, such as schools, bridges, and roads, in exchange for ICE's carrying out studies that affect them. He also expressed concern that ICE consult with all members of the community, not just those who are ADI members. In Mr. Gutiérrez's view, the right to be consulted emerges out of an individual's identity as indigenous, not his or her membership in a group. That said, however, Mr. Gutiérrez did emphasize that although ICE should consult with all indigenous individuals in the community, the ADI remains the sole legal entity empowered to speak on behalf of the community. He elaborated on this by characterizing his personal relationship with ADI: "If I say yes, they vote yes; if I vote no, then it's no."³¹⁰

Meanwhile, institutional actors in Costa Rica expressed much more limited understandings of the requirement of consultation. Neither SETENA nor the representative from the Office of the Ombudsman with whom the Human Rights Clinic delegation met viewed consultation as being in process yet, as they both seemed to view consultation as a process that occurs after the completion of the feasibility studies and ESIA's. For them, then, the primary function served by processes of consultation would be that they provide a forum for ICE and the affected indigenous peoples to negotiate and reach a mutually acceptable agreement on the terms of the PHED.

The ICE technical team also stated that consultation was not yet occurring, supporting this lack of consultation by reference to the *Sala IV's* decision holding that *recurso de amparo* demanding consultation was premature. ICE team members viewed consultation as a process that would occur subsequent to the completion of the ESIA's, given that ICE would not be able to adequately answer any of the community members' questions without the conclusions of their studies. They recognized that consultation at that point would require ICE to engage with the Teribe peoples in a process of dialogue about the project's anticipated effects and, in particular, the ways in which the PHED could be made agreeable to those on all sides of the debate. ICE team members did not seem to view consultation as a process that would be at all determinative as to whether the project would go forward and classified it as an "exercise," another administrative hurdle to fulfill in order to move on with the project. This interpretation is at odds with the spirit of the international legal instruments that require the consultation of indigenous peoples—rather than being one of many administrative details to be dealt with eventually, somewhere along the road to construction, consultation is a major substantive requirement and must be oriented towards obtaining indigenous peoples' consent. In fact, even ILO 169 requires agreement as the objective of any consultation, with such agreement pursued in good faith and in a form appropriate to the circumstances.³¹¹

³¹⁰ Interview with Genaro Gutiérrez, *supra* note 34.

³¹¹ ILO 169, *supra* note 200, at para. 40.

Tellingly, Franklin Ávila, director of the *El Diquís* project, was the only actor who viewed consultation as already being in process; however, he noted that this was not yet legally required. According to Mr. Ávila, consultation with the Teribe peoples has been ongoing since approximately 2005, when the project's location was changed to its current proposed site. In his emphasis on the continuous presence of ICE team members in affected communities in Térraba, Mr. Ávila appeared to view consultation as a process of information and communication about the project's status and future plans. Considerations of consent, either in the sense of wholesale acceptance or reaching an agreement, did not seem to figure in Mr. Ávila's conception of the legal requirements for continuing work on or moving forward with the project.

ICE documents submitted to SETENA provide a view of when consultation is supposed to occur and what form it is supposed to take that largely comports with the view put forth by the relevant institutional actors in Costa Rica.³¹² This approach is characterized primarily by its relegation of consultation to a minor role at a late stage in the process of studies. Flowcharts provided by ICE of the three phases of its project—Contracting of the Consultant Responsible for Executing the EsIA, Execution of the EsIA and Presentation to SETENA, and Approval of EsIA and Award of the Environmental License—illustrate the minimal participation of communities and target groups (*comunidades-grupos meta*) intended.³¹³ The first two of these phases include a process ICE refers to as “social interaction and dissemination,” which is unelaborated as to its contents; the last phase is the only one that includes a process called “consultation,” and it occurs through the form of a public hearing after the EsIA is already completed. At this “consultation,” SETENA will hear the observations of participants and request from ICE any clarifications and modifications, after which ICE is to prepare and present a “technical” response to SETENA. Then SETENA will evaluate whether or not to grant the environmental license; if it decides not to license the project, the studies will go back to public hearing and the “consultation” will begin again. If this is true, it is problematic for ICE and SETENA's “consultation” to comply with what international law demands of these processes. The former leaves aside the issue of the PHED itself, overlooking indigenous peoples' views on the project in favor of an approach that falls short of Costa Rica's international legal obligations in its sole focus on negotiating the terms of the inevitable and nonnegotiable siting of the dam in Térraba.

As discussed above, international law actually requires that a continuous process of consultation with indigenous peoples, which includes multiple phases, occur before any concessions are granted for projects that may affect them. The Inter-American Court interpreted Article 21 of the American Convention on Human Rights in *Saramaka* with regards to the right to consultation, stating:

...the State has a duty to actively consult with [the] community according to their customs and traditions (*supra* para. 129). This duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These

³¹² Instituto Costarricense de Electricidad, *Presentación SETENA Subcomite Coordinación Revisión EsIA*, available in SETENA file number 0843-2007-SETENA. These flowcharts are also included in the appendix to this report.

³¹³ *Id.* at 11–13. Note here the difference in usage between ESIA and EsIA. ESIA, defined for the first time *supra* note 136, is used by the HRC, following the Inter-American Court in the *Saramaka* interpretation, *supra* note 200, to refer to an Environmental and Social Impact Assessment. EsIA, by contrast, is the abbreviation used by ICE to refer to its Environmental Impact Studies (*Estudios de Impacto Ambiental*), see *infra* note 370.

consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement...The State must also ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily. Finally, consultation should take account of the Saramaka people's traditional methods of decision-making.³¹⁴

Furthermore, ILO 169 also explicitly requires that a preliminary consultation occur before initial studies, such as feasibility studies and ESIA's, for a larger project are carried out. While international law's requirement of a process of consultation with different stages helps shed light on a potential reason for diverging opinions among the main players in the PHED context, it also brings into focus the Costa Rican state's violations of its obligations under international law.

Thus the fact that consultation is not in effect is largely a point of agreement for the parties involved. Where viewpoints start to diverge, however, is with regards to the point at which consultation is, was, or will be necessary and what form consultation must take. Consultation should have already occurred in the *El Diquís* context, before the project's preliminary studies were undertaken. As studies are being conducted, state agencies are entering indigenous territory and alterations to indigenous territory are taking place, thus consultation was required.

According to ICE's flowcharts, it should be engaged in a process of "social interaction and dissemination"; although ICE may have intended this to be an equivalent to consultation, community members with whom HRC spoke did not view ongoing ICE activities as containing adequate substance to qualify as consultation. This phase should have been aimed at providing the Teribe peoples with comprehensive information about the types of effects they can expect from the studies, as well as descriptions of and a timeline for these activities. Additionally, this phase should have served to allow community members to express their concerns about the project, allowing ICE officials to address these right away if they were able, or providing suggestions for concerns that should be discussed in the ESIA's.

Shortly after commencing the preliminary studies, ICE should have shifted the focus of its consultation to obtaining indigenous peoples' consent for the project itself. Although all types of consultation require the effective participation of indigenous peoples, only this later phase requires that ICE be oriented towards obtaining their free, prior, and informed consent. In addition to FPIC, this stage of consultation should also be focused on the production of the ESIA's—ICE should interact consistently with indigenous peoples in order to create inputs for these studies, which should be subsequently submitted to the Teribe peoples for review. As required by international law, ICE's activities in Térraba to date should have resembled the timeline presented below (Figure 13).

³¹⁴ *Saramaka* judgment, *supra* 275, para. 133.

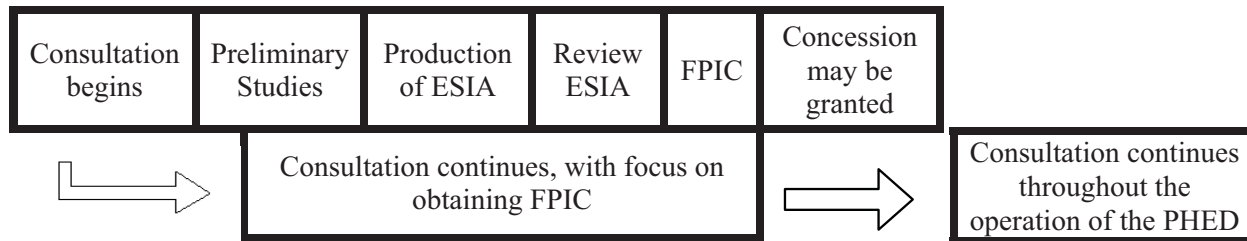


Figure 13. Sample timeline complying with Costa Rica’s obligations under international law.

Thus, even the process that ICE refers to in its materials as “consultation” is inadequate for meeting the requirements of international law. This is particularly apparent given ICE’s lack of emphasis on obtaining indigenous peoples’ consent for the project and the fact that ICE’s revisions are limited to being “technical” in nature. The latter implies that community feedback about the environmental and social parts of ICE’s studies serves no function except an expressive one and that ICE’s evaluations of the project’s environmental and social impacts are decisive.

3. Free

The first element of the FPIC framework requires that indigenous peoples be free from “coercion, intimidation, or manipulation” in deciding whether or not to accept infrastructure or investment projects that affect them.³¹⁵ Coercion of this type might occur in two primary ways—physical or economic—but the use of psychological coercive tactics is a possibility that must not be ignored. The principle of good faith should inform any determination of how free the indigenous peoples’ consent was.

The vast disparity of economic power between ICE and the Teribe peoples makes economic coercion—the coaxing the cooperation of likely dissidents through monetary and in-kind incentives—likelier than physical coercion. Térraba is a largely poor and marginalized community with many needs, such as schools, teachers, and health facilities.³¹⁶ The community is also fragmented, which may make economic incentives an even more viable mechanism for obtaining consent of community members. By contrast to the Teribe peoples, ICE is a monolithic entity with ample resources at its disposal and a clear interest in obtaining the consent of the Teribe peoples in order to move forward with construction of the *El Diquís* dam. Franklin Ávila, director of the project, mentioned that community members have already seen ICE as a well-funded alternative route to obtaining resources they have long demanded from the state with no results.³¹⁷ For example, according to Mr. Ávila ICE has already received requests from the community for such amenities as schools and healthcare facilities.³¹⁸

Although the HRC views this disparity in economic resources as potentially problematic, it also recognizes that this factor may not be dispositive, as such disparities are likely to be present in

³¹⁵ Permanent Forum on Indigenous Issues, 4th Sess., May 16 – 27, 2005, *Report of the International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples*, U.N. Doc. E/C.19/2005/3 (Feb. 17, 2005), para. 46.

³¹⁶ Interview with community members, *supra* note 14.

³¹⁷ *Id.*

³¹⁸ *Id.*

the construction of any major infrastructure project, whether the people affected are indigenous or not. Thus the Clinic views the element of coercion as requiring actions on the part of the constructing authority to provide money or other resources in exchange for “votes” in favor of the project. In particular, the provision of resources that bear little or no relationship to the project is more likely to constitute manipulation of a problematic sort than is the provision of resources incidental to the project; for example, ICE’s provision of internet and other telecommunications services to the community may be more troublesome than its creation of job opportunities or public roads, considering that the latter goods satisfy ICE needs moving forward with the project, whereas the former appear to be more gratuitous in nature. The notion of conditionality is also important in evaluating whether resources provided by ICE eviscerate the Teribe peoples’ freedom to decide. If ICE were to guarantee certain goods and/or services to the community on the condition that they approve the project, this would likely be problematic from the standpoint of the “free” element of FPIC.

Some community members alleged that others within the community had already received favors from ICE, such as jobs from ICE working in its ongoing works in Térraba.³¹⁹ In particular, though, community members pointed to the recent construction by ICE of a road, complete with electrified streetlights, to ADI and CONAI president Genaro Gutiérrez’s house as an example of ways in which ICE’s resources might be decisive in determining whether or not the PHED would go forward.³²⁰ Mr. Gutiérrez’s relationship with ICE was also commented on by members of the ICE technical team, who indicated that Mr. Gutiérrez’s opinion in favor of or in opposition to the project is in constant flux.³²¹ According to them, Mr. Gutiérrez’s changes in opinion often occur after receiving responses from ICE about whether they will assist with projects he has proposed or other requests he has submitted to ICE.³²²

The notion of psychological coercion is also one that ought to be considered in the context of the PHED. On March 16, 2010, Costa Rican television station Teletica/Canal 7 aired an episode of its program, *7 days (7 días)*, focused on the PHED.³²³ During the Clinic delegation’s visit to Térraba, community members expressed excitement about this program—about what the institutional actors would say about the situation, about how it would be to see interviews of the community featured alongside interviews with key institutional actors and footage of the situation in Térraba, and about what the general public’s reaction would be. The first of these issues was of particular interest because community members feel that dialogue with key institutional actors has been lacking since the beginning of the project. Unfortunately, however, the night the program was to air, Térraba experienced a loss of electricity, which community members attribute to ICE’s trying to keep them literally and figuratively in the dark about the

³¹⁹ *Id.*

³²⁰ *Id.* Interview with Genaro Gutiérrez, *supra* note 34. The HRC representatives’ interview with Mr. Gutiérrez took place at his house, which is in an isolated location on a hill outside of the center of Térraba town. As the HRC delegation traveled with him to his home, Mr. Gutiérrez pointed out that the road leading to his home and the streetlights on it were new. The delegation was unable to confirm or deny community members’ allegations that ICE was responsible for its construction.

³²¹ Interview with ICE technical team, *supra* note 108.

³²² *Id.*

³²³ *Proyecto Diquis: gigante y polémico*, available at <http://www.teletica.com/7dias/reportaje-detalle.php?id=39960> [last visited: April 11, 2010]. This program airs at 8pm.

PHED.³²⁴ Occurrences such as the March 16 power outage provide evidence of the forms that psychological coercion might take in the relationship between ICE and the Teribe peoples. Even if the power outage was purely coincidental, ICE’s failure to previously or subsequently address this issue with the community creates a climate of distrust towards ICE within the community. “The creation of a climate of confidence is particularly important in relation to indigenous peoples, ‘given their lack of trust in State institutions and their feeling of marginalization, both of which have their origins in extremely old and complex events, and both of which have yet to be overcome.’”³²⁵

4. *Prior*

The requirement that consent be “prior” is one that applies throughout the consultation process, including its multiple phases, necessary in the context of the PHED.³²⁶ Consultation should have occurred before investigatory studies were begun. It should have continued throughout ICE’s phases of study and evaluation, oriented towards obtaining the free, prior, and informed consent of affected indigenous peoples, which must take place before a concession for a project such as the PHED is granted.

ICE reported that it is in the preliminary phases of the project, that its work is purely investigatory in nature, and that the ongoing feasibility studies and ESIA are meant to determine if the project can go forward at all.³²⁷ According to Franklin Ávila, director of the PHED, the concession has not yet been granted and the funding for the project has not yet been lined up, thus ICE is still operating within the timeframe of “prior,” and does not need the Teribe peoples’ consent.³²⁸ The *Sala IV* ratified this interpretation, stating that “neither the development nor the effective construction of the *Proyecto Hidroeléctrico El Diquís* are assured, given that the

³²⁴ Community members reported that the electricity went out at 7:58pm and went back on at 9:12pm and that the loss of power was throughout the community. They reported that while blackouts do occur in the community, often while it is raining, they are not frequent. On the evening in question, it was not raining. Community members did not make any reports or formal inquiries with ICE regarding this incident and they report that ICE did not communicate with them regarding the power outage, either before or after it happened. Even assuming that ICE did not have a hand in this blackout, the fact that community members express such high levels of suspicion about ICE is telling about the relationship between ICE and the community. Furthermore, the fact that ICE did not do any follow-up with the community after the power outage to field any questions, comments, or concerns or issue any clarifications about the incident suggests that ICE is unwilling to or uninterested in addressing the community’s concerns. Given that ICE team members were interviewed for this program of national recognition, they were probably aware when it was to air; given their ongoing contact with at least parts of the community, they would have understood community members’ interest in watching the program on TV and how suspiciously such a coincidentally-timed black-out on that particular date and at that particular time might be seen within the community.

³²⁵ Human Rights Council, 12th Sess., *Promotion and Protection of All Human Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development: Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of indigenous people, James Anaya*, U.N. Doc. A/HRC/12/34 (July 15, 2009), para. 50 (quoting Report of the Committee set up to examine the representation alleging non-observance by Mexico of the Indigenous and Tribal Peoples Convention, 1989 (No. 169), made under article 24 of the ILO Constitution by the Authentic Workers’ Front (FAT), para. 107).

³²⁶ Similarly, *Saramaka* requires “free, prior, and informed consent” [*emphasis added*]. *Saramaka* judgment, *supra* note 277, at para. 134.

³²⁷ Interview with Franklin Ávila, *supra* note 33. Interview with ICE technical team, *supra* note 108.

³²⁸ Interview with Franklin Ávila, *supra* note 33.

appropriate permits have not even been requested yet and the feasibility of the mentioned project has not yet been determined, and if the investigations are not carried out, there is no way of knowing if it is possible or not, given the geology of the site, to construct a dam.”³²⁹

These authorities asserted that consultation and consent are not yet required, and while this interpretation is legally questionable, there remains no doubt that preliminary consultation should have occurred before ICE started the studies that are currently in progress.³³⁰ Such practice would comply with indigenous legal experts’ suggestions that consultation must occur “before the first stone is moved,” given ILO 169’s broad protection of the rights of indigenous peoples to be consulted by the state regarding projects that would affect them.³³¹ Thus the activities currently underway are those that require preliminary consultation before beginning. In order to comply with its international legal obligations, Costa Rica’s company, ICE, should *already* have conducted processes of consultation with the Teribe regarding the activities that are currently in progress, preliminary though they may be.³³² Similarly, indigenous peoples have a right to participate in the ESIA process from its inception as part of their right to effective participation in decision making regarding projects that may affect them.

The “prior” requirement also applies in the context of the final stages of the studies in that these consultation processes require the free, prior, and informed consent of indigenous peoples before any concessions for projects are granted.³³³ ICE’s official documents contain no clear indication of how this final process of consultation is to be carried out, nor do they detail the ways in which consent might be obtained or what to do in the absence of the affected indigenous peoples’ consent.

5. *Informed*

Although the “informed” portion of FPIC requires various types of information, this subsection focuses primarily on the ESIA as a component for realizing informed consent; the subsection exploring the right to information, above, provides a great deal of detail about other types of information that should be provided to affected indigenous peoples. As stated above, FPIC must

³²⁹ Decision number 2009-06045, *supra* note 89.

³³⁰ This interpretation is legally questionable because some of ICE’s ongoing works may reach the type of intensity not contemplated for preliminary studies, but rather more characteristic of a project’s construction phase. Also, ICE team members acknowledged that some of the aspects of their preliminary studies lay the physical groundwork for parts of the construction phase and were unable to draw a clear distinction between some of the preparatory works and the works that would make up the main construction phase of the project.

³³¹ *See, e.g., supra* notes 283–290, discussing of some relevant provisions of ILO 169.

³³² *Id.*

³³³ *See, e.g., Saramaka* judgment, *supra* note 277, at para. 129: “[I]n order to guarantee that restrictions to the property rights of the members of the Saramaka people by the issuance of concessions within their territory does not amount to a denial of their survival as a tribal people, the State must abide by the following three safeguards: First, the State must ensure the effective participation of the members of the Saramaka people, in conformity with their customs and traditions, regarding any development, investment, exploration or extraction plan (hereinafter ‘development or investment plan’) within Saramaka territory. Second, the State must guarantee that the Saramakas will receive a reasonable benefit from any such plan within their territory. Thirdly, the State must ensure that no concession will be issued within Saramaka territory unless and until independent and technically capable entities, with the State’s supervision, perform a prior environmental and social impact assessment. These safeguards are intended to preserve, protect and guarantee the special relationship that the members of the Saramaka community have with their territory, which in turn ensures their survival as a tribal people.”

occur before a concession is granted and, as the Court discussed in *Saramaka*, FPIC requires prior ESIA as one of the primary sources of information for the indigenous peoples who may be affected by the project in question. According to the Court, “[t]he purpose of ESIA is not only to have some objective measure of such possible impact on the land and people, but also...to ‘ensure that members of the Saramaka people are aware of possible risks, including environmental and health risks, in order that the proposed development or investment plan is accepted knowingly and voluntarily.’”³³⁴ The preceding sections detail some of the work already ongoing in T rraba. The requirement that ICE create ESIA and share them with the community derives from the need for the community to have a nuanced understanding of what a project’s effects might be, in order that the community have the opportunity to consent or negotiate before the project begins to truly affect them. In Costa Rica, what ICE classifies as the ESIA process has taken place with effects beyond those contemplated in *Saramaka* and with little information provided to the community.

6. Consent

As a point of departure, it is worth noting that “consent,” as such, may be viewed as occurring in two main ways. Article 6 of ILO 169 states that “consultations carried out in application of this Convention shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures.” Thus, a state can meet its obligations under ILO 169 by either seeking to achieve agreement (“*llegar a un acuerdo*”) or obtaining consent (“*consentimiento*”).³³⁵ Unlike ILO 169, international law as interpreted by the Inter-American Court in *Saramaka* focuses on the outcome rather than the objective.

According to T rraba ADI leadership and unaffiliated members of the community, no group in the community has reached an agreement with ICE, nor has ICE obtained any group’s consent for the PHED, in its whole form, or even the “preliminary” works that are ongoing.³³⁶ When asked about this issue, Genaro Guti rrez, president of the local ADI, said that the only consent that the ADI gave to ICE was for the cutting down of twenty-three trees in T rraba.³³⁷ Members of the community expressed receptiveness to the idea of reaching an agreement with ICE through a series of negotiations; however, they also expressed concern that ICE consider and try to integrate the views of all Teribe peoples, not just those who are members of the local ADI or the Linking Commissions.³³⁸

For its part, the ICE team represented that it was already receiving demands from different sectors of the community—for example, the ADI, individuals participating in the Linking Commissions, and members of the community unassociated with either organization—and committed to trying to satisfy the demands over which all groups were in agreement.³³⁹ When asked how they would deal with a situation in which there was little overlap between the

³³⁴ *Saramaka* interpretation, *supra* note 200, at para. 40.

³³⁵ ILO 169, *supra* note 22, at Article 8. Interview with Rub n Chac n, *supra* note 60.

³³⁶ Interview with community members, *supra* note 14. Interview with Genaro Guti rrez, *supra* note 34.

³³⁷ Interview with Genaro Guti rrez, *supra* note 34.

³³⁸ Interview with community members, *supra* note 14.

³³⁹ Interview with ICE technical team, *supra* note 108.

different groups, the ICE team addressed the question indirectly by emphasizing that there were already commonalities between the different groups' demands; they did not, however, outline a process for dealing with the possibility of reconciling conflicting demands from different parts of the community in order to achieve agreement with or obtain consent from the Teribe peoples.³⁴⁰

The *Sala IV*'s holding that ILO 169 does not yet require any consultation is a misinterpretation of the international law requirements for preliminary consultation.³⁴¹ Given that indigenous peoples are already being affected by ICE's activities, a view of consultation as unnecessary when ICE is already undertaking activities that have present and future implications for indigenous communities ignores the ill that the international human rights instruments at issue were intended to protect against and unacceptably reads the substance out of Costa Rica's obligations under these instruments. It is thus highly problematic that ICE has skipped processes of preliminary consultation with indigenous peoples and that the *Sala IV* has ratified ICE's interpretation of its obligations under international law. Although it is too late for ICE to fully comply with the demands of preliminary consultation, the HRC suggests that ICE make efforts to remedy the flaws in its processes of obtaining the effective participation of indigenous peoples to date, in accordance with the problems outlined in the previous sections, and to comply with recommendations offered at the beginning of the report.

A final point of concern regards ICE and SETENA's views about the importance or requirement of consent in the context of effective participation and consultation. While emphasizing that the ESIA for the PHED would be reviewed in an open forum if any of its results were disputed or controversial, Sonia Espinosa Valverde of SETENA also noted that any objections raised there would not be dispositive.³⁴² This practice may or may not comport with *Saramaka*'s holding that the FPIC requirement is not tantamount to absolute veto power for indigenous and tribal communities.³⁴³ ICE, however, expressed a more legally problematic interpretation of the FPIC requirement when one of the members of the team said that "consultation is an exercise, it's not necessarily meant to decide the issue."³⁴⁴ Again, though it may be true that indigenous peoples' property rights by themselves do not preclude the State from, in certain circumstances, considering and eventually issuing concessions there, the State must obtain indigenous peoples' consent if the project in question is of sufficient scale and affects the integrity of indigenous peoples' territory. The PHED would be the largest dam in Central America and would flood almost one quarter of the territory currently in the possession of the Teribe peoples, thus meeting both of these criteria. Furthermore, the view of consultation as simply an exercise trivializes its

³⁴⁰ *Id.*

³⁴¹ Decision number 2009-06045, *supra* note 89.

³⁴² Interview with SETENA officials, *supra* note 136.

³⁴³ "[W]hile it is true that all exploration and extraction activity in the Saramaka territory would affect, to a greater or lesser degree, the use and enjoyment of some natural resource traditionally used for the subsistence of the Saramakas, it is also true that Article 21 of the Convention should not be interpreted in a way that prevents the State from granting any type of concession for the exploration and extraction of natural resources within Saramaka territory...[T]he protection of the right to property under Article 21 of the Convention is not absolute and therefore does not allow for such a strict interpretation. Although the Court recognizes the interconnectedness between the right of members of indigenous and tribal peoples to the use and enjoyment of their lands and their right to those resources necessary for their survival, said property rights, like many other rights recognized in the Convention, are subje[t] to certain limitations and restrictions." *Saramaka* judgment, *supra* note 277, at paras. 126–127.

³⁴⁴ Interview with ICE technical team, *supra* note 108.

importance and suggests that ICE's orientation is not towards obtaining the consent of the Teribe peoples, either their pure consent or reaching an agreement with them.

7. *Environmental and Social Impact Assessment*

In *Saramaka*, the Inter-American Court lays out a requirement that a country carry out an ESIA when it is considering pursuing an infrastructure or investment plan with substantial effects for indigenous peoples.³⁴⁵ The Court's main requirements for the ESIA are that it occur prior to the granting of a concession for the project; that it "...be undertaken by independent and technically capable entities," under the supervision of the State; and that it "conform to the relevant international standards and best practices...and respect the [indigenous peoples'] traditions and culture."³⁴⁶ The Court provided that the Akwé:Kon Guidelines, created by the Secretariat of the Convention on Biological Diversity (CBD), represented an example of international standards and best practices regarding ESIA in the context of indigenous peoples.³⁴⁷



Figure 14. Terraba and surrounding areas.

The country's adamancy about constructing a hydroelectric dam in the Southern Zone, combined with the fact that the project has been ongoing in different iterations for over thirty years, it has already been re-sited, and ICE is engaged in major works in Terraba all suggest a strong bias in favor of Terraba as a *de facto* concession to ICE for this project. This view has been expressed by several elements of Costa Rican civil society. For example, Javier Rodríguez Oconitrillo stated: "At the national level, this project is either going through or it's going through. There's no way even consultation is going to stop it."³⁴⁸ Despite these contextual factors, the Costa Rican government at least facially satisfies the Court's first demand regarding the ESIA, as ICE is

³⁴⁵ *Saramaka* interpretation, *supra* note 200, at section V.

³⁴⁶ *Id.* at para. 41.

³⁴⁷ *Id.*

³⁴⁸ Interview with Javier Rodríguez, *supra* note 191.

currently in the process of conducting its ESIA and the project has not been officially sited yet.³⁴⁹

The Court's second requirement subsumes two elements: (1) that the ESIA be carried out by an independent entity, (2) under State supervision.³⁵⁰ These are potentially more problematic in the PHED context. ICE, a state entity, is the entity managing the PHED. It is supervised by another state entity, SETENA, in that ICE's studies require final approval by SETENA.³⁵¹ If ICE were carrying out its own environmental and social impact assessment to comply with the requirements of *Saramaka*, this would fall short of what is required, as such an in-house undertaking would not meet the threshold of independence needed. This raises the question, then, of what entity is carrying out ICE's ESIA for the PHED and whether or not it qualifies as independent or not, for the purposes of complying with Costa Rica's human rights obligations.

As discussed above, ICE obtained the services of Colombian company INGETEC for investigations regarding the proposed Boruca project.³⁵² In the case of the PHED, ICE's technical team reported that the PHED ESIA has three main sources of information—the preliminary ESIA created by INGETEC for the Boruca project, ICE's own studies over the past five years, and the contributions of an independent consulting group.³⁵³ However, in its letter denying the HRC's official request for information, ICE explained that it maintains classified as confidential certain documents regarding previous studies conducted by ICE, as they contain erroneous affirmations that led to supposed impacts that the studies did not demonstrate.³⁵⁴ In this letter, ICE further asserted that much of the data previously gathered has changed substantially and serves a historical function, rather than one of present applicability.³⁵⁵ ICE acknowledged that a great deal of the information for inclusion in the ESIA has been gathered in-house and that only recently did they obtain the services of an independent consulting firm.³⁵⁶ Considering that ICE admits mistakes made previously in its studies, it is very important to note that the ongoing lack of transparency makes it impossible to monitor ICE's progress, when such oversight is even more crucial in the context of admitted past errors.³⁵⁷ Thus there is no way of ensuring that the ESIA for the PHED is accurate, which is more concerning given that previous ICE studies do contain errors.

Because ICE obtained financing from the IDB and the United States Trade and Development Agency (USTDA) to finance these studies, there is some public information regarding the entities carrying out ICE's studies for the PHED; however, not all of this information is as recent as one would suspect exists elsewhere given the ongoing and priority nature of this project.³⁵⁸

³⁴⁹ *Saramaka* interpretation, *supra* note 200, at para. 41.

³⁵⁰ *Id.*

³⁵¹ Interview with SETENA officials, *supra* note 136.

³⁵² *See supra* note 108.

³⁵³ Interview with ICE technical team, *supra* note 108.

³⁵⁴ ICE request for information denial, *supra* note 146.

³⁵⁵ *Id.*

³⁵⁶ *Id.*

³⁵⁷ *Id.*

³⁵⁸ Other more comprehensive and up-to-date resources would have been included in this report but the HRC was unable to attain these from ICE, despite its compliance with the ICE's formal information request procedure about which representatives were instructed during their meeting with the ICE technical team. *Id.*

The most recent document available on the IDB's website is the plan for the Supplemental Studies for the *El Diquís* (Boruca/Veraguas) Hydroelectric Project, which dates back to 2007.³⁵⁹ The USTDA has record of a request for proposals (RFP) submitted by ICE in early 2008 regarding a contract for a Financial Feasibility Study For The El Diquís Hydroelectric Power Project.³⁶⁰ On December 2, 2009, the USTDA approved a contract proposal responding to this RFP and granted the contract to the International Consulting Corporation (ICC).³⁶¹ On its website, the ICC publicizes that it “signed a contract with the Instituto Costarricense de Electricidad, from Costa Rica, to carry out the ‘Technical Feasibility and International Financial Package for the Hydroelectric Project EL DIQUÍS (630 MW),’ funded by the USTDA.”³⁶²

The entities contracted to carry out ICE's studies, as well as the purposes for which the loans and grants were provided to ICE, all have a technical, financial, and, most relevant for the HRC's concerns here, environmental emphasis. Considering that ICE's external funding and consultants for the PHED do not seem to focus on social impacts—an element required by *Saramaka*—this raises the question of where such information and services are coming from. The IDB's 2007 document about Supplemental Studies for El Diquís provides some insight as to the provider of these funds and assessment services.³⁶³ According to this document, the technical, environmental, financial, and social supplemental studies for the El Diquís dam project will come at a cost of \$4,041,000.³⁶⁴ Of that amount, only \$664,000, or approximately 16% of the cost, would be for the socioenvironmental studies described by the IDB:

This subcomponent...will enable the ICE to prepare key inputs for completing the CEIA (comprehensive environmental impact assessment) and identifying better strategies for socioenvironmental management. The study will therefore constitute a sociocultural baseline. In addition, the studies will include an analysis and proposals for more effective consultation and participation processes (based on ICE processes in effect at the start of the consulting assignment) through mechanisms for institution-strengthening and training on citizen participation and negotiation. They will also include a historical analysis of health conditions in the area of influence, a study of the socioeconomic conditions and culture of the population downriver from the project, as well as additional processes for providing and disseminating information based on ethnographic knowledge of groups living in the area. Socioproductive systems and the use of natural resources in the area of influence will also be analyzed under this subcomponent.³⁶⁵

Although this document's relevance goes primarily to the content of the ESIA's, it is also suggestive of their provenance. It appears from this document that ICE itself was anticipated to

³⁵⁹ IDB Diquís Supplemental Studies Plan, *supra* note 102.

³⁶⁰ United States Trade and Development Agency, “Costa Rica: Financial of El Diquis Hydroelectrico [sic] Power Project (FS),” *Contract Awards (Sector: Energy & Power)* [hereinafter USTDA contract award], available at <http://www.ustda.gov/businessopps/contractawards.asp>. The reference number for this RFP is USTDA No.: 07-51009C. More information about the RFP is available at Federal Business Opportunities, B – Financial Feasibility Study for The El Diquis Hydroelectric Power Project, available at https://www.fbo.gov/index?s=opportunity&mode=form&id=0f46cbc25b63c32ad0efce89eacf77f0&tab=core&_cvie w=0.

³⁶¹ USTDA contract award, *supra* note 360.

³⁶² International Consulting Corporation, News, available at <http://icc-us.com/news/>.

³⁶³ IDB Diquís Supplemental Studies Plan, *supra* note 102.

³⁶⁴ *Id.*

³⁶⁵ IDB Diquís Supplemental Studies Plan, *supra* note 102, section 2.3b.

be the entity in charge of gathering data for the social component of its own ESIA's.³⁶⁶ ICE may have contracted a third party to conduct these studies—indeed, its study guidelines require that it do so—but again, there is insufficient information available to the HRC and the general public about who is preparing the studies. This thus represents another challenge to adequate monitoring and oversight of ICE's operations and makes unclear whether the studies currently in progress by ICE satisfy the independence requirement set out in *Saramaka*.³⁶⁷

ICE's inclusion in the PHED ESIA's of information previously gathered by ICE itself, as opposed to a third party such as a consultant, may also represent problems for the report's independence. *Saramaka* requires that the ESIA's for projects anticipated to affect indigenous peoples be carried out by "independent and technically capable entities," but does not define these terms. The independence of an entity could be established in two primary ways: structural independence and informational independence. For the purposes of the PHED ESIA, an entity might be considered satisfactorily structurally independent if it were an organization that is not part of or substantially or exclusively funded by the Costa Rican state. If ICE has, in fact, hired an outside consultant to prepare the ESIA's for the *El Diquís* project, it is likely that this would satisfy the structural independence requirement.

The informational independence consideration, however, may be more complicated. ICE provided that past studies conducted by ICE itself would comprise a portion of the inputs for the ESIA, which would represent incomplete informational independence. Informational dependence of this type could become problematic if the consultant has no meaningful data-gathering capacity or ability to evaluate information other than that provided by ICE. The rationale driving the Inter-American Court's requirement of independent entities would be undercut if ICE itself were the overwhelming or sole source of information for a structurally independent entity to carry out the ESIA. Although data on this, too, is lacking, ICE must ensure that the technical entity contracted to complete the *El Diquís* ESIA is substantively, rather than just nominally, independent.

Furthermore, the supervision aspect may also be problematic, given that the terms of SETENA's supervision of ICE are very loose. According to the Director/General Secretary of SETENA, Sonia Espinosa Valverde, SETENA's main role arises when ICE has already completed the ESIA. Once the ESIA is completed, ICE will present it to the Teribe peoples, then to SETENA, at which point SETENA will decide if it needs to host a public hearing ("*audiencia pública*"). Public hearings will be held if the data in the ESIA appears to be controversial; however, if the ESIA is very clear about what the facts on the ground are, the hearing and the opinions expressed there will not be dispositive.³⁶⁸ It is, then, unclear that the scope of SETENA's oversight of ICE complies with the requirement in *Saramaka* that the state supervise the ESIA process. To ensure compliance with the requirements of international law, SETENA should be more proactive in supervising ICE's studies, consistently checking in with ICE to make sure that it is on track to gather the information necessary to provide the content for the ESIA, rather than waiting to weigh in at the last minute.

³⁶⁶ Further evidence for this notion is provided by ICE's references to its social team. See *infra* notes 370–37373.

³⁶⁷ It is also not clear that the social impact component of the assessment is robust enough to meet the requirements of *Saramaka*. This issue is discussed in greater detail below.

³⁶⁸ Interview with SETENA officials, *supra* note 136.

The final concern regarding ICE’s preliminary studies has to do with whether they are the sort—scope, content, and character—contemplated by the *Saramaka* judgment. This concern relates in particular to the social content of the assessments, but also has to do with a comparison of ICE’s ongoing studies to the best practices and international standards that the Court references. Although ICE has certainly conducted activities that have a social aspect and members of its team of experts come from disciplines that focus on these issues, it is not clear that the social element receives as much attention as it merits. ICE’s focus in terms of financial resources is overwhelmingly environmental and its rhetoric also favors an environmental rather than social focus. On ICE’s webpage regarding the progress and current status of the project, ICE says that it is “in the phase of doing greater studies, (primarily on the issues of design, social, and environmental) that will allow the completion of the feasibility studies and the final Environmental Impact Assessment.”³⁶⁹ Similarly, the three main cases brought before the *Sala IV* regarding the PHED contain numerous references by ICE to its Environmental Impact Studies (*Estudios de Impacto Ambiental*, EsIAs); however, ICE never refers to a social impact study, as such, or a comprehensive study addressing social *and* economic impacts together, as the Inter-American Court in *Saramaka* understands ESIA’s.³⁷⁰

In fact, substantive references to social studies or expected social effects are also limited. In decision number 2008-01118, ICE represented that “the project has a social team that interacts daily with the different communities, carrying out a continuous process of dissemination and information about the works that are being carried out in the communities, in order to create the links and mechanisms necessary for dialogue, such that the communities can form solid bases on which they can adopt positions and decisions regarding the future implications of the construction of the El Diquís Hydroelectric Project.”³⁷¹ In decision number 2009-06045, ICE made reference to “the team in the Social Area of the Section on Environmental Management of the *El Diquís* Hydroelectric Project.”³⁷² In this same case, ICE also represented that “in the social area, it carried out a socioeconomic census in the area of the reservoir and 500 meters of buffer area, in which it registered basic information about dwellings, public services, demography and information about the plots of land and their production, as well as assessments of the community and the hydroelectric project.”³⁷³

In 2007, ICE submitted to SETENA a document entitled *Terms of Reference: Contracting for the Exhaustive Environmental Impact Study for the El Diquís Hydroelectric Project*, which provides slightly more elaboration about the intended content of its environmental impact study.³⁷⁴ This document includes a section that discusses the environmental diagnostics/baselines for the

³⁶⁹ “Avance de la obra,” *supra* note 138.

³⁷⁰ Decision number 2008-011188, *supra* note 89. Decision number 2008-013560, *supra* note 89. Decision number 2009-06045, *supra* note 89.

³⁷¹ Decision numero 2008-01118, *supra* note 89.

³⁷² Decision number 2009-06045, *supra* note 89.

³⁷³ *Id.*

³⁷⁴ Instituto Costarricense de Electricidad, *Terms of Reference: Contracting for the Exhaustive Environmental Impact Study for the El Diquís Hydroelectric Project*, submitted March 19, 2007 [hereinafter *Términos de Referencia*], available in SETENA file 0843-2007-SETENA.

socioeconomic and cultural environment.³⁷⁵ There ICE provides that it will evaluate characteristics of the environment including demographics; economic activities; infrastructure and public services; public health and sanitary and other living conditions; land use and land tenure; ordering and management of the territory; and water uses.³⁷⁶ It further states that studies will obtain information about aspects such as the directly-affected population and community infrastructure, social and cultural characteristics, indigenous peoples, and archaeological sites and sites of natural value.³⁷⁷ Thus, the elements included in ICE's guidelines as of 2007 map closely those included in the Akwé:Kon Guidelines as key components of social impact assessments.³⁷⁸ While this information suggests that ICE is operating with the correct international standards and best practices *in mind*, it provides no proof as to whether or not ICE's past and present practice actually complies with the guidelines it has set. The HRC has been unable to compare ICE's actual practices with international best practices, which are very similar to ICE's terms of reference, because ICE has denied the HRC access to documents related to ongoing studies.³⁷⁹

A final concern about the lack of social focus of ICE's ongoing studies is presented by the consideration of the institution ostensibly providing supervision of these studies, which is ultimately also expected to evaluate these studies. As discussed above, SETENA is a state institution whose focus is primarily environmental, as its name suggests. This calls into question whether it has the expertise necessary to meaningfully evaluate any studies of social content that ICE may carry out. Furthermore, SETENA's institutional position as a secretariat within the Ministry of Environment, Energy, and Telecommunications may also raise doubts as to how realistic it is to expect substantive scrutiny of an energy project that has been recognized as a national priority.³⁸⁰

The *El Diquís* Hydroelectric Project stands in the center of a Costa Rican national policy aimed at expanding the country's energy resources and furthering its commitment to renewable energy—a policy realized at the expense of the rights of the Teribe indigenous peoples. In addition to the potential environmental and sociological effects the dam will have on the community, in its present planning stages, the project has already caused disturbances to the Teribe peoples and raised serious human rights concerns. Specifically, indigenous rights to information, property, representation, and effective participation in matters related to development on or near indigenous territory provide the basis of concern for the past and present actions undertaken on behalf of the project.

The Human Rights Clinic's fact-finding delegation to Costa Rica and ongoing research between January and May 2010 have revealed a failure on the part of the Costa Rican state to meet its international obligations and protect the rights of the Teribe peoples, in the context of the PHED and beyond. These violations have happened in the legislature, where the creation of an indigenous governance system has eliminated indigenous peoples' potential for self-governance

³⁷⁵ *Id.* at Chapter VII: Description of the Environment – Environmental Diagnostics/Baseline, Socioeconomic and Cultural Environment.

³⁷⁶ *Id.* at 52–55.

³⁷⁷ *Id.* at 56–60.

³⁷⁸ Akwé:Kon Guidelines, *supra* note 200, at paras. 39–51.

³⁷⁹ ICE request for information denial, *supra* note 146.

³⁸⁰ Executive decree number 34312, *supra* note 154.

according to the mechanisms they choose. This has also resulted in the denial of indigenous peoples' right to representation due to particularities of the system, such as membership requirements in ADIs. The state has also proven ineffective at guaranteeing indigenous rights to property and securing for indigenous peoples *de facto* the land that belongs to them *de jure*, allowing the alienation of large portions of indigenous lands and enacting inappropriate means for reclaiming such lands presently in the hands of non-indigenous individuals. Finally, the state has denied the Teribe peoples their right to information by supplying them with inadequate information about the *El Diquís* hydroelectric project, while simultaneously failing to develop an effective communication strategy with the community.

These violations have further happened in the courts, where international law has been incorrectly interpreted, with the effect of denying indigenous peoples their right to effective participation and consultation regarding a project that affects them—the *Proyecto Hidroeléctrico El Diquís*. This report has provided the socioeconomic and historical context necessary for understanding the complexity of problems presented by the current hydroelectric dam project. It has also included the perspectives of a wide range of actors involved in and affected by the project, from community members themselves to the officials in the most relevant state institutions affecting indigenous peoples' rights, in and outside the context of the *El Diquís* dam, in Costa Rica. In this report, the HRC has also identified the specific issues—procedures, practices, institutions, and structures—that represent obstacles for Costa Rica's indigenous peoples' realization of their rights. The HRC has further developed recommendations for the competent and relevant institutions in Costa Rica; following these recommendations will help bring Costa Rica into compliance with its obligations under international law.

APPENDIX I: Letter from the Clinic requesting information from ICE



SCHOOL OF LAW
THE UNIVERSITY OF TEXAS AT AUSTIN

*Human Rights Clinic • 727 East Dean Keeton Street • Austin, Texas 78705
Phone: (512) 232-6477 • Fax: (512) 232-9171 • hrc@law.utexas.edu*

Austin, TX, 17 de marzo de 2010

Sra. Guiselle Soto Madrigal
Centro de Servicio Comercialización
Unidad Estratégica de Negocios Proyectos y Servicios Asociados (UEN PySA)
Instituto Costarricense de Electricidad

Estimada Sra. Soto Madrigal:

Tengo el agrado de dirigirme a Ud. en nombre de la Clínica de Derechos Humanos de la Facultad de Derecho de la Universidad de Texas en Austin. Bajo mi instrucción y supervisión, la Clínica de Derechos Humanos se encuentra documentando aspectos relacionados con la situación del pueblo indígena Teribe. En particular, nos interesa analizar el desarrollo del proyecto hidroeléctrico Diquís y su relación con el pueblo indígena Teribe. El resultado de la investigación será dado a conocer en los próximos meses.

Dado el papel principal que juega el ICE en la materia de nuestra investigación, por ser el organismo técnico competente, nos dirigimos a Usted a fin de solicitarle copia de los documentos que se detallan a continuación:

1. Cartas de compromiso o entendimiento de la comunidad Teribe con el ICE en el periodo 2005 hasta el presente para la realización de tareas de cualquier naturaleza por parte del ICE, contratistas, subcontratistas o cualquier persona o institución que actúe por autorización, delegación o representación del ICE dentro del territorio de la comunidad.
2. Listado de asistencia a reuniones de las comisiones de enlace de Térraba en el período 2005 hasta el presente.
3. Minutas de las reuniones o cualquier otro documento de indique los puntos tratados y acuerdos alcanzados en las comisiones de enlace de Térraba en el período 2005 hasta el presente.
4. Informes regenciales
5. Resultados finales o parciales del Estudio de Impacto Ambiental Preliminar del PH Diquís
6. Documentos que indiquen los pasos adoptados o a ser adoptados para consultar con la comunidad Teribe sobre la utilización de su territorio para el desarrollo, evaluación, ejecución, construcción y funcionamiento del PH Diquís.

Por favor no dude en contactarme si necesitara mas información respecto a nuestra solicitud. A la espera de su respuesta, aprovecho la ocasión para reiterarle nuestra apreciación y estima más grande.

Atentamente,

A handwritten signature in black ink, appearing to read "Ariel Dulitzky".

Ariel Dulitzky

Anjela Jenkins
Brandon Hunter
Susan Orton

APPENDIX II: Letter from ICE declining to provide the requested information

Buenas tarde Anjela, en primer lugar pedirle disculpas por el retraso en emitir nuestra respuesta a su solicitud, pero debo indicarle que la misma ha sido sujeta de un importante análisis, dada la susceptibilidad de la información solicitada por usted.

En este sentido debo indicarle los análisis realizados que indican la condición de la información requerida por usted:

1. De acuerdo con la lista de información requerida hay una importante identificación de que lo enunciado excede lo que ustedes solicitaron en un inicio, pues el día que les atendieron en el PHED, su petición versó exclusivamente sobre la posibilidad de revisar el informe del EsIA preliminar del PHED elaborado por INGETEC en 2005.
2. Sobre esa pretensión en específico (**ítem 5**) el ICE mantiene clasificada dicha información como confidencial, pues ese EsIA contiene una serie de afirmaciones erróneas que conducen a suponer impactos que el mismo estudio no logró demostrar y además, mucho de lo que allí se ha indicado ha cambiado sustancialmente con respecto a lo que se maneja actualmente, por ende, el documento tiene ahora un carácter más bien de antecedente histórico de naturaleza técnica, que de vigencia al momento presente.
3. Con respecto a **ítems 1, 2, 3 y 6**, los documentos indicados igualmente están clasificados como información confidencial pues corresponden a nuestros registros internos de evidencia de un proceso que se encuentra actualmente en estado de construcción (información que forma parte de un proceso aún no culminado).
4. Con respecto al **ítem 4**, referente a la solicitud de acceso a informes regenciales, éstos constituyen documentos de carácter público una vez que han sido puestos en manos de la Secretaría Técnica Nacional Ambiental (SETENA) de Costa Rica, por ende, el expediente completo compilado hasta el momento está disponible en dicha Secretaría para ser consultado para quien se apersona a revisarlo y corresponde al **Expediente N° 366-2005-SETENA**.

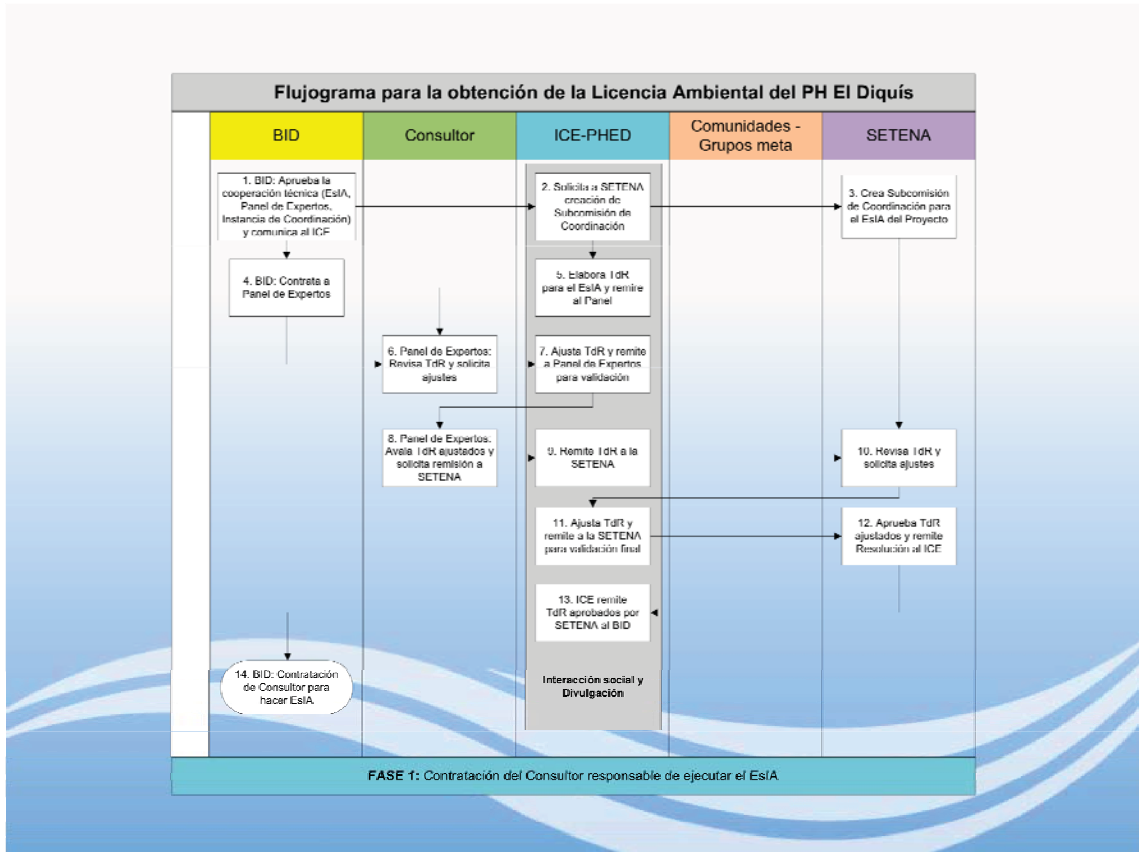
Esta es nuestra resolución y esperamos su comprensión respecto a las condiciones expuestas.

Quedamos a su disposición.

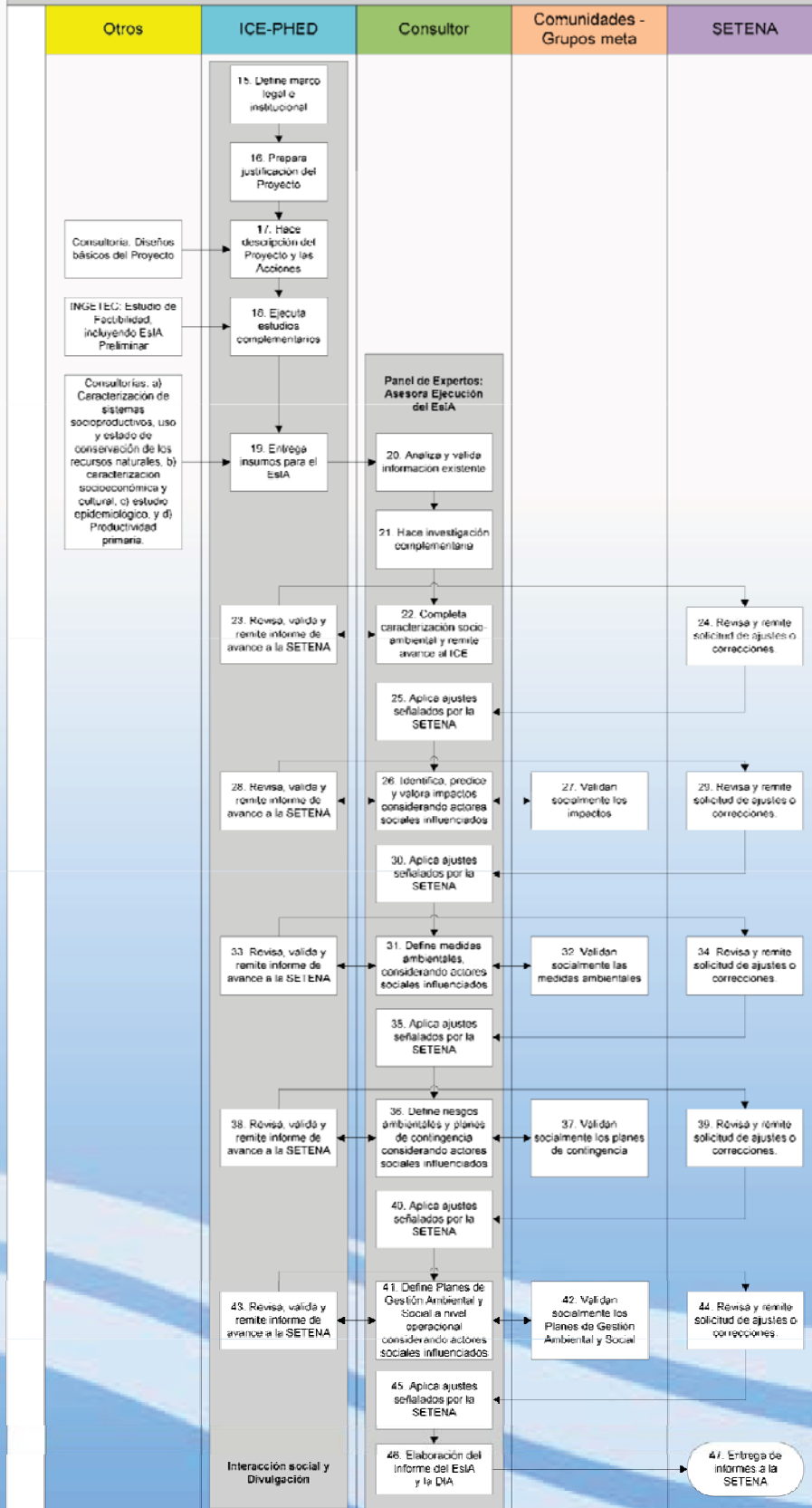


Licda. Guisselle Soto Madrigal - MAP
Directora
Centro de Servicio Comercialización
UEN Proyectos y Servicios Asociados
Sector Electricidad
Tel: 2220-6722 / Fax: 2232-1518
Correo electrónico: gsotom@ice.go.cr
www.grupoice.com

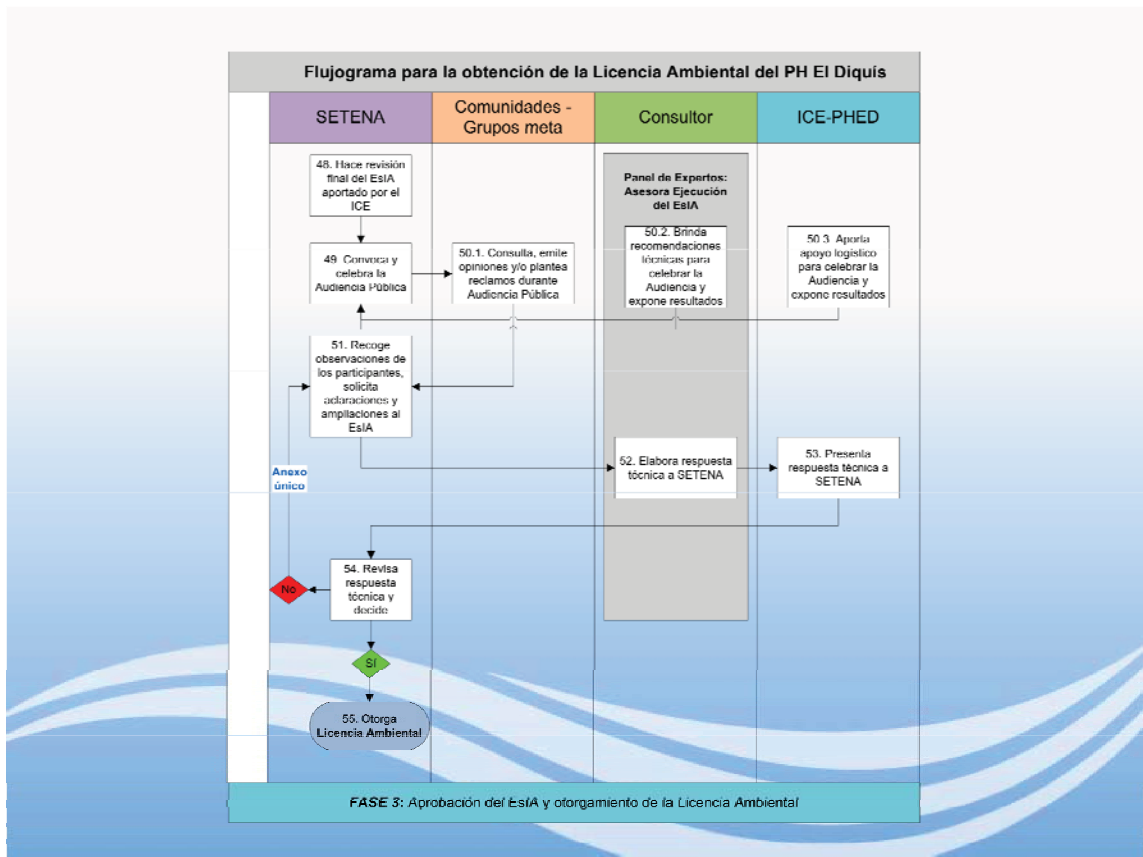
**APPENDIX III: Flowchart on how to obtain the Environmental License for the PHED
(Source: ICE)**



Flujograma para la obtención de la Licencia Ambiental del PH El Diquís



FASE 2: Ejecución del EsIA y presentación a la SETENA





HUMAN RIGHTS CLINIC

THE UNIVERSITY of TEXAS SCHOOL of LAW



Swimming Against the Current

**The Teribe Peoples and
the El Diquís Hydroelectric Project
in Costa Rica**

July 2010