

FPIC Compliance: More in the Law than in Practice

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Introduction

In the Southern Region of Costa Rica, indigenous groups face the adverse impacts on their territories and living conditions of a huge dam the government plans to construct on the Terraba River. Although the Diquís Hydroelectric Project improves on an earlier version, reducing social and ecological costs, it nevertheless means relocating several indigenous communities and the attendant loss of their lands and cultures.

This case study presents the situation of the affected communities and how the government has responded in relation to the application of the principle of free, prior and informed consent (FPIC) on the proposed development project. The analysis takes into consideration the historical aspects of the evolving project, its potential impacts, and the existing legal framework, particularly the domestic standards for the promotion and protection of indigenous peoples' rights as well as international human rights mechanisms including the United Nations Declaration on the Rights of Indigenous Peoples, International Labor Organization Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, and the Inter-American Human Rights System.

The first sections of the paper provide information on Costa Rica, the indigenous peoples in the country, and national and international laws that have a bearing on the recognition of and respect for indigenous rights. This is followed by a discussion of the evolution and effects of the Diquís hydroelectric project and of the principle of FPIC as applied in the Inter-American System and in Costa Rica. The study then draws a series of concluding remarks and recommendations towards compliance by the State with regional and international laws that provide for the free, prior and informed consent of indigenous peoples for any project that may affect them and their territories.

Indigenous Peoples in Costa Rica

Costa Rica is a country in Central America that borders Nicaragua in the north and Panama in the south. Although it has a land area of only 51100 square kilometers (0.03% of the planet's surface) and 589 square kilometers of territorial waters,¹ it is considered one of twenty-five biodiversity hotspots in the world.²

Eight indigenous peoples have been legally recognized in Costa Rica: the Teribe, Brunka, Ngöbe, Bribri, Cabécar, Maleku, Huetar and Chorotega.³ Each group has its own traditions and culture, with varying degrees of conservation of their culture and identity. The latest census (2000) puts the indigenous population at 63876 (see

Table 1) or 1.68 percent of the total national population,⁴ making indigenous peoples a minority group in Costa Rica.

Most indigenous territories are located in areas with the worst economic indicators but in terms of resources are among the richest in the country. Historically, indigenous peoples have been neglected in public policy and investment as illustrated in the case of the Cabécar people in the indigenous territory of Ujarrás in Buenos Aires. While Ujarrás has provided the entire community of Buenos Aires with freshwater for over thirty years, to date it does not have its own aqueduct to provide safe drinking water.

Table 1 Indigenous Population in Costa Rica⁵

<i>People</i>	<i>Population</i>	<i>Percentage of total indigenous population (%)</i>
Cabécar	23251	36.5
Bribri	22740	35.6
Ngöbe	6132	9.6
Boruca	4791	7.5
Teribe	1469	2.3
Huetar	2363	3.7
Maleku	1086	1.7
Chorotega	2044	3.2
Total	63876	100

As in other parts of the world, the indigenous peoples in Costa Rica have also suffered displacement which began as early as the colonial period. During this time, the Southern Region, which is this study's focus, became a strategic area for the Spaniards as they opened a way to Panama in the early 17th century. Due to the importance of this route, indigenous peoples were forced into specific areas called "reductions". Scattered throughout the region, their forcible relocation into reduced areas allowed the colonists to exercise more effective control over them. The Brunka and Teribe people, the main subjects of this study, were among those moved into new locations. The Teribe were driven out of their lands from the Atlantic coast to the South Pacific into the same "reductions" as the Brunka people.

It was only in the late 1950s that the right of indigenous peoples to their lands gained recognition. At this time the government began delimiting indigenous territories, establishing three indigenous reserves in the South Pacific. Today indigenous peoples inhabit 24 legally defined indigenous territories in different regions of the country, with the greater concentration found in the South Pacific and South Atlantic regions (Figure 1). These territories have an aggregate area of approximately 335,000 hectares.



Source: Mesa Nacional Indígena

Figure 1 Indigenous Peoples of Costa Rica and Location of 24 Indigenous Territories

International and Domestic Legal Framework

International Laws applicable to Indigenous Peoples in Costa Rica

Costa Rica has ratified a series of international human rights instruments that apply to indigenous peoples, among these:

<i>International Law/Instrument</i>	<i>Date of Ratification</i>
Convention on the Elimination of All Forms of Racial Discrimination (CERD)	January 4, 1969 ⁶
International Covenant on Economic, Social and Cultural Rights (CESCR)	January 3, 1976 ⁷
International Covenant on Civil and Political Rights (ICCPR)	March 23, 1976 ⁸
Convention on the Rights of the Child	September 20, 1990 ⁹
International Labor Organization (ILO) Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries	April 2, 1993 ¹⁰
Convention on Biological Diversity (CBD)	August 26, 1994 ¹¹
UN Declaration on the Rights of Indigenous Peoples (UNDRIP)	Costa Rica voted in favor of UNDRIP on September 13, 2007

Costa Rica also ratified the Charter of the Organization of American States¹² (in 1948) that puts it under the jurisdiction of the Inter-American Commission of Human Rights (IACHR). Within the Inter-American system, Costa Rica has ratified the American Convention on Human Rights on February 3, 1970,¹³ which sets the framework that defines the human rights that should be respected and ensured by ratifying States. This Convention also creates the Inter-American Court of Human Rights, and determines the functions and procedures of both the Commission and the Court.

Domestic law

The country has a hierarchy of laws, the first and highest of which is the Political Constitution of the Republic of Costa Rica, which enshrines the foundations of the legal system. On the second level are international treaties, which according to Article 7 of the Political Constitution are above national laws:

*Public treaties, international agreements and concordats duly approved by the Legislative Assembly shall have a higher authority than the laws upon their enactment or from the day that they designate.*¹⁴

On the next level are laws passed by the Legislative Power followed by decrees and regulations issued by the Executive Power.

The domestic legal system has constantly been evolving in relation to indigenous peoples and their rights to land, as reflected in the following laws and decrees passed in the course of the last 60 years:

- In 1939, Decree #13 declared the territories that indigenous peoples inhabited as their exclusive and inalienable property.¹⁵ The decree was implemented by the Board for Protection of the Aboriginal Races which had among its objectives to define the boundaries of the indigenous reserves.
- In 1956, the Board of Protection of the Aboriginal Races created the first three indigenous reserves (territories) in Costa Rica, specifically in the Southern region: Ujarrás-Salitre-Cabagra, China Kichá and Boruca-Térraba. These reserves were administered by the Institute of Lands and Colonization (ITCO) created in 1961. It is important to note that when the Board of Protection established these territories in 1956, they were registered in the Public Registry of Costa Rica as private property owned by each indigenous people, but when ITCO was set up in 1961 it took over these properties.
- ILO Convention 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries was ratified by Costa Rica in 1959 by Law #2330.¹⁶ It covers a wide range of issues such as land; recruitment and conditions of employment; vocational training, handicrafts and rural industries; social security and health; and education and means of communication.
- In 1973 Law #5251 created the National Commission of Indigenous Affairs¹⁷ (*Comisión Nacional de Asuntos Indígenas*) as a governmental institution to coordinate the work of all public institutions and indigenous peoples.
- The Indigenous Law #6172, which is in force, upgraded the legal status of indigenous reserves created by Decree between 1956 and 1977. Further, it established indigenous reserves as inalienable, imprescriptible, non-transferable and exclusive to the indigenous communities that inhabit them.¹⁸
- In 1978 Decree #8489 set a regulation to the Indigenous Law which substitutes traditional indigenous structures (recognized in Law #6172) with the Integral Development Associations (*Asociación de Desarrollo Integral, ADI*). The ADIs are official governmental structures established to represent judicially and extra judicially each indigenous territory, contradicting what was established in Article 4 of Indigenous Law #6172.

- In 1982 another modification was made to the Indigenous Law through the Mining Code, established by Law #6797. This law modified Article 6, removing the co-ownership that indigenous peoples and the State had over subsoil resources¹⁹ and giving the State sole ownership to all subsoil resources in the country, including those in indigenous territories. This change to the Indigenous Law was made without any consultation with the indigenous peoples in Costa Rica.
- On March 29, 1982, ITCO was transformed into the Institute of Agrarian Development (*Instituto de Desarrollo Agrario*), with the same prerogative constituent.²⁰
- Due to the integrationist approach of ILO Convention 107, the enabling law was voided when Costa Rica ratified ILO 169 with Law #7316 in 1992.²¹
- In 1999 a constitutional reform was made to Article 75, which declares Spanish as the official language and at the same time recognizes indigenous languages. This recognition is a very important legal precedent, as indigenous languages are acknowledged at the highest level of Costa Rica's legal system.
- The latest legal mechanism regarding indigenous peoples is the Bill for Autonomous Development of Indigenous Peoples (*Proyecto de Ley de Desarrollo Autónomo de los Pueblos Indígenas*) which has been in negotiation for over 15 years. Indigenous peoples are seeking a law that regulates ILO Convention 169 and establishes procedures for relations between indigenous peoples and the State. This bill is further analyzed in a succeeding section.

Diquis Hydroelectric Project and Impacts on Indigenous Peoples

Background

The Diquis Hydroelectric Project, the latest evolution of a dam proposed in the 1970s, is being actively pursued by government for its potential to make Costa Rica an exporter of energy to neighboring countries. Touted to become the biggest in Central America, it requires constructing a dam on the Terraba River in a region inhabited by communities of various indigenous peoples.

At 160 kilometers²² long, the Grand Terraba river is the longest river and among those with the largest flows in the country. The Terraba river basin, covering an area of 5079 square kilometers, is divided into two main valleys crossed by Terraba's two main tributaries: General and Coto Brus rivers. These two rivers converge to create the Grand Terraba River which flows into the Pacific Ocean.



Figure 2 Terraba River

Source: Universidad Nacional - SIBRUIDES

The Terraba river basin represents 53.3 percent of the Brunca region,²³ in which are found the six indigenous territories of Ujarrás, Salitre, Cabagra, Boruca, Térraba and Rey Curré. The region is marked by the worst poverty indicators in the country, with the number of households in extreme poverty in 2007 at 19.3 percent compared to the national rate of 3.3 percent.²⁴ Within the Terraba river basin also lies the indigenous territory of China Kicha and Coto Brus (see Figure 2).

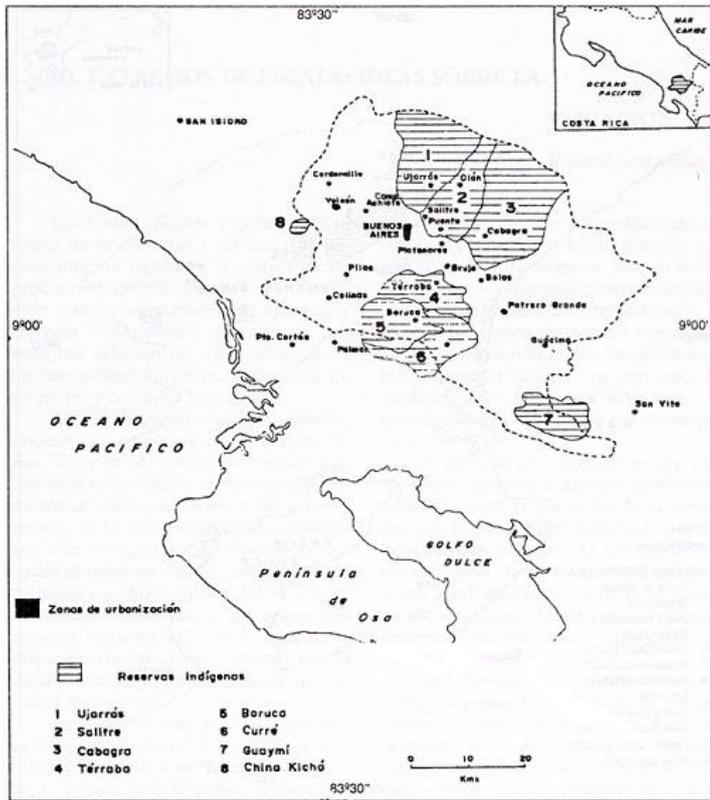


Figure 3 Indigenous Territories in the Terraba River Basin

Table 2 Area of Indigenous Territories in the Terraba River Basin²⁵

<i>Indigenous Territory</i>	<i>Area (km)</i>
Borucas	134.57
Cabagra	286.86
Coto Brus	72.89
Curré	104.24
Salitre	128.06
Terraba	93.27
Ujarrás	200.4

Entrusted with the national development of power sources, especially hydraulic resources, is the *Instituto Costarricense de Electricidad* (ICE), an autonomous governmental institution created by law enacted by the Founding Junta of the Second Republic. The fundamental responsibility of ICE is to direct the use and exploitation of hydroelectric power with the objective to promote the greatest welfare of the Costa Rican people.²⁶ It also operated and controlled all telecommunications services in Costa Rica, until the ratification of the Central American Free Trade Agreement which opened up the telecommunications market. ICE is the sole representative of the government in all matters related to hydropower development, including the construction of the Diquís Hydroelectric Dam.

The First Project: Boruca-Cajón

In the early 70s the Costa Rican government announced the possibility of building a hydroelectric dam on the Terraba river. The plan had the support of Aluminum Company of America (ALCOA), which had found important bauxite sources in the Southern Region²⁷ that required energy-intensive processing. In 1974 the company abandoned its bauxite project due to opposition from different sectors in society, causing the dam project to lose importance.

The Costa Rican government's first initiative on power development through ICE was called the Hydroelectric Project of Boruca (Boruca-Cajón). The project required constructing a dam in an area known as Cajón right on the boundary of the two indigenous territories of Boruca and Curré. The magnitude of its social and environmental impacts was very high, as it necessitated the relocation of various communities including Curré, an entire community of Brunka people who inhabit the surrounding areas of the Terraba River.

The Boruca Project had chain development plans which, according to ICE, meant "sets of hydroelectric projects in cascade, which exploit the hydroelectric potential of the river and its main tributaries, within the frame of a river basin."²⁸ Each of the stages of this cascade meant different impacts to the affected indigenous territories and communities.

In the early 90s, the project gained momentum due to the ratification of the Framework Treaty of the Central American Electrical Market, which offered ICE an opportunity to sell energy to other countries in Central America through the Electrical Interconnection System of Panama and Central America (SIEPAC).²⁹

Revised Version: Diquís Project

Due to technical, environmental and social issues, a reevaluation of the Boruca Project was carried out in 2004 to determine the feasibility of the entire project and to study other alternatives that reduced its social and ecological impacts. As a result of an Environmental Impact Assessment and a Feasibility Study of the Boruca Hydroelectric Project, a new alternative called Veraguas Hydroelectric Project was considered. This new project was to be located in the Terraba's main tributary, the General River.

The new scheme offered a series of advantages in comparison to the Boruca-Cajón project, prompting ICE to carry out a more thorough technical study to determine its feasibility. The study's preliminary results on social, ecologic and infrastructural impacts led to the government decision to discard the Boruca-Cajón project for the Veraguas project.

The Veraguas project consists of a 13-km long tunnel through the Brunka Mountain Range that leads to an underground powerhouse with a generation capacity of 608MW. Additionally a 23-MW generation plant would be installed with the compensation flow, totaling a power generation of 631MW, making it the largest hydroelectric plant in Central America.³⁰

In 2006 a regional contest was carried out by ICE in collaboration with the Ministry of Education to name the project. The winning title was Diquís Hydroelectric Project, which makes reference to the social, cultural, geographical and historical background of the region.³¹

The project appears to have assumed even greater importance. On September 7, 2006 the government declared of public interest the initiative “Peace with Nature,” which commits Costa Rica to become a Carbon Neutral Country by the year 2021.³² The program promotes the use of renewable energies such as hydroelectric power to meet its energy needs.

Project Comparison: Boruca-Cajón vs Diquís

The two projects provided different conditions with varying impacts, especially in regard to relocating indigenous peoples and flooding of indigenous territories. The Diquís project reduces flooding to approximately one-fifth (See

Table 3) and the reservoir area to almost half of those of the Boruca-Cajón project, which do not compromise its generating capacity.

Table 3 Technical Specifications of Boruca-Cajón and Diquís Projects³³

<i>Technical Specifications</i>	<i>Boruca-Cajón</i>	<i>Diquís</i>
Power	709MW	631MW
Total area of the reservoir	10700 hectares 14691*	5494 hectares
Approximate cost	\$1425 million	\$931,3 million
Indigenous territory flooding	3559 hectares	726 hectares
Total population relocation	1943	1068
Relocation of indigenous population	839	0
Relocation of non-indigenous population	1104	1068
Affected archaeological sites	146	108
Area of flooded forests	2500 hectares	600 hectares

*An official map of ICE states the reservoir will have an extension of 14691 ha,³⁴ which is significantly different to data submitted in the Complementary Studies of the Diquís Hydroelectric Project presented to the Inter-American Development Bank.³⁵

Figures 4 and 5 show the magnitude of the project in terms of the indigenous territories that would be flooded (boundaries of indigenous territories in light green). It can be seen that the Boruca-Cajón project would affect Boruca, Cabagra, Curré, Salitre and Térraba while the Diquís project would touch Térraba and China Kichá. The selection of the Diquís project over the Boruca-Cajón project significantly reduces the environmental and social impacts, especially in relation to the relocation of the entire community of Curré.

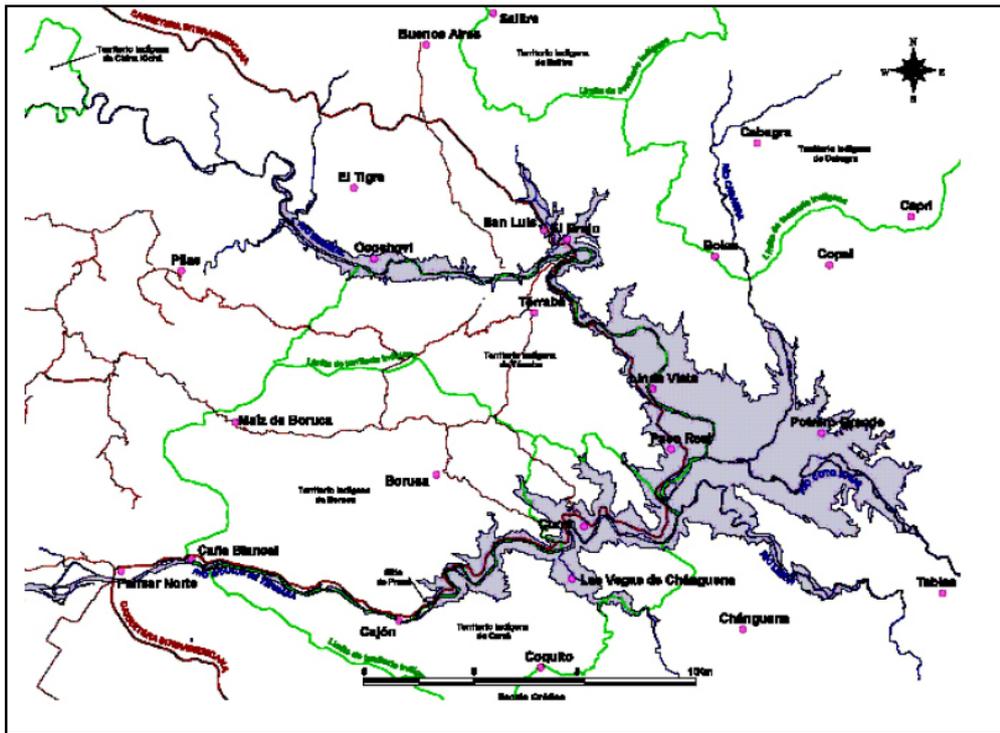


Figure 2 Map of Reservoir with the Dam in Cajón

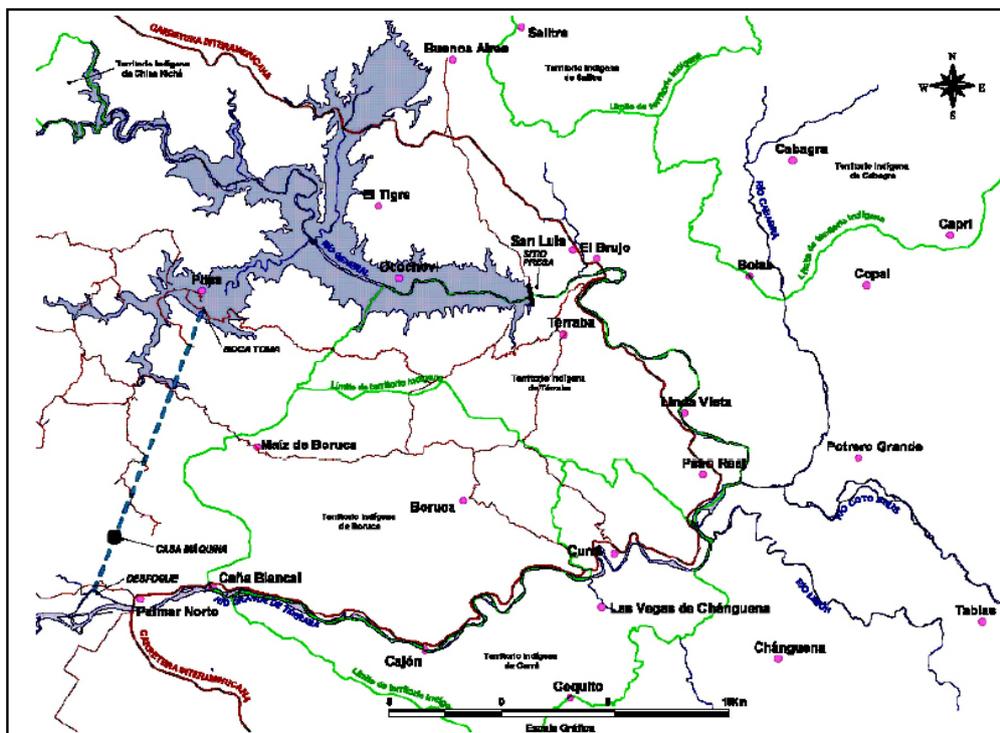


Figure 3 Map of Reservoir with the Dam on the General River

Source: Instituto Costarricense de Electricidad

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On February 6, 2008, the government signed Decree #34312 declaring of national convenience and public interest the studies and works of the Diquís Hydroelectric Project as well as its transmission works to be built by the Costa Rican Institute of Electricity.³⁶ The Decree gives high priority to the project with regard to permits and any other arrangements needed by ICE.

Currently the Diquís project is undergoing completion of the feasibility study and final environmental impact assessment, and parallel to these ICE is conducting an information drive on the project's impacts among the communities to be directly or indirectly affected by it. ICE is expected to offer support to enable the effective consultation of these communities and to strengthen and improve their capacities towards eventually reaching agreements.³⁷

Principle of Free, Prior and Informed Consent

The Costa Rican government has signed international and regional laws and instruments that provide for the exercise of free, prior and informed consent by indigenous peoples on measures and developments directly affecting them, especially one that means their relocation.

The UN Declaration on the Rights of Indigenous Peoples enshrines the principles of free, prior and informed consent, with six articles making direct reference to it.³⁸ In the context of this case study, the following articles address the situation that indigenous peoples are facing in the Southern Region of Costa Rica:

Article 19

*States shall 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.*³⁹

Article 32

*2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*⁴⁰

As stated by the United Nations Permanent Forum on Indigenous Issues (UNPFII), the elements of common understanding of FPIC are:⁴¹

Free - should imply no coercion, intimidation or manipulation;

Prior - should imply consent has been sought sufficiently in advance of any authorization or commencement of activities and respect time requirements of indigenous consultation/consensus processes;

Informed - should imply that information is provided that covers (at least) the following aspects: the nature, size, pace, reversibility and scope of any proposed project or activity; the reason/s or purpose of the project and/or activity; the duration; the locality of areas that will be affected; a preliminary assessment of the likely economic, social, cultural and environmental impact, including potential risks and fair and equitable benefit sharing in a context that respects the precautionary principle; personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others) and procedures that the project may entail.

Consent - Consultation and participation are crucial components of a consent process. Consultation should be undertaken in good faith. The parties should establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect in good faith, and full and equitable participation. Indigenous peoples should be able to participate through their own freely chosen representatives and customary or other institutions. The inclusion of a gender perspective and the participation of indigenous women is essential, as well as participation of children and youth as appropriate. This process may include the option of withholding consent.

The principle of FPIC of indigenous peoples is being applied in a series of processes, especially in the international arena where it is considered an internationally guaranteed human right of indigenous peoples. This allows their full and effective participation as key stakeholders in the issues that could potentially affect them. This principle has enabled indigenous peoples to deal with issues at national levels, improving their relations with States and practicing their right to self-determination, an underlying principle of FPIC.

Common article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights spells out the rights of all peoples to self-determination, to freely pursue their economic, social and cultural development, to freely dispose of their natural wealth and resources and to be secure in their means of subsistence:⁴²

1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.

2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.

As stated earlier, Costa Rica ratified ICCPR in 1976.

FPIC in the Inter-American System

The Inter-American human rights system has a series of legal precedents which are of relevance to the study of the principle of FPIC.

On resettlement of indigenous peoples, for instance, the Inter-American Commission on Human Rights stated as early as 1984 that the “preponderant doctrine” holds that the principle of consent is of general application to cases involving relocation of indigenous people.⁴³ This reference provides a very strong argument in demanding States to comply with existing human rights mechanisms such as ILO 169.

The Inter-American Commission has also held that inter-American human rights law “specially oblige[s] a member state to ensure that any determination of the extent to which indigenous claimants maintain interests in the lands to which they have traditionally held title and have occupied and used is based upon a process of fully informed consent on the part of the indigenous community as a whole. ... [This is] equally applicable to decisions by the State that will have an impact upon indigenous lands and their communities, such as the granting of concessions to exploit the natural resources of indigenous territories.”⁴⁴ Thus the Inter-American Commission has articulated a link between consultation resulting in full and informed consent, and protection of indigenous peoples' property rights.⁴⁵

In three recent cases, all involving indigenous rights over land and resources, the Inter-American bodies have declared a requirement for States to obtain the prior consent of indigenous peoples when contemplating actions affecting indigenous property rights, finding such property rights to arise from and are grounded in indigenous peoples' customary laws and traditional land tenure systems.⁴⁶

The extent to which indigenous peoples have managed to establish the principle of FPIC is noticeable, for instance, in the Inter-American Developmental Bank (IADB) Strategies and Procedures on Socio-Cultural Development. This policy provides that IADB will not support projects affecting tribal lands and territories “unless the tribal society is in agreement.”

The Inter-American Court on Human Rights, in several landmark cases affecting indigenous peoples, similarly made linkages between protection of indigenous peoples' property rights and consultation resulting in full and informed consent. In the *Awas Tingni* case, the Inter-American Court recognized indigenous peoples' collective rights to land and resources on the basis of article 21 of the American Convention on Human Rights, which reads: “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.”

In the case of the *Saramaka People v. Surinam*, the decision of the Inter-American Court adopts an evolving principle of international law and makes it a binding norm in the Americas, including Costa Rica. 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.⁴⁷ This duty to consult also includes:

- A duty on the State and those authorized by it to both accept and disseminate information, and constant communication between the parties;
- Consultations must be undertaken in good faith, through culturally appropriate procedures and with the objective of reaching an agreement;
- Indigenous and tribal peoples must be consulted, ‘in accordance with their own traditions, at the early stages of a development or investment plan, not only when the need arises to obtain approval from the community, if such is the case. Early notice provides time for internal discussion within communities and for proper feedback to the State;’
- The State must ensure that the indigenous and tribal peoples are aware of possible risks, including environmental and health risks, so that the proposed project is accepted knowingly and voluntarily; and,
- Finally, consultation should take account of indigenous and tribal peoples’ traditional methods of decision-making.⁴⁸

For some projects, the State has a duty not only to consult with the Saramaka, “but also to obtain their free, prior and informed consent, according to their customs and tradition.”⁴⁹ In its interpretation judgment, the Court “emphasized that when large-scale 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.”⁵⁰

Regarding the environmental and social impact assessments (ESIAs), the Court states that the prior ESIAs “must conform to the relevant international standards and best practices, and must respect the Saramaka people's traditions and culture.”⁵¹ The associated footnote states that “One of the most comprehensive and used standards for ESIAs in the context of indigenous and tribal peoples is known as the *Akwe:kon 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*.”⁵²

The *Akwe:kon Guidelines* were developed by the States Parties to the Convention on Biological Diversity to facilitate “the development and implementation of their impact-assessment regimes.”⁵³ The guidelines apply “whenever developments are 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.”⁵⁴ Thus, this is the minimum standard that States should conform with.

FPIC in Costa Rica

The indigenous peoples in Costa Rica are seeking to establish the principle of FPIC in all decisions that may affect them, but a gap appears to exist in its practice and implementation.

As articulated by José Carlos Morales,^{*} the indigenous peoples in Costa Rica are on the path to the full recognition of their right to self determination as seen in the developments on the Bill for Autonomous Development of Indigenous Peoples. For the elaboration of the bill, the indigenous peoples in each of the 24 indigenous territories participated in assemblies to elect their representatives who will deliberate and negotiate its text. The members of each territory were previously informed about the election and all members above 18 years could vote.⁵⁵ The election process was facilitated by an indigenous organization and organized with representatives of the Ombudsman, the Legislative Power and the Supreme Elections Court.

However, in the contrasting experience in the Boruca-Cajón Project, which required the relocation of a whole Brunca community in Curré, the Costa Rican government failed to comply with ILO Convention 169, as it never sought the community's consent. Article 16 para. 2 of the Convention states:

*Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent. Where their consent cannot be obtained, such relocation shall take place only following appropriate procedures established by national laws and regulations, including public inquiries where appropriate, which provide the opportunity for effective representation of the peoples concerned.*⁵⁶

As a general principle, Article 6 states:

- 1. In applying the provisions of this Convention, Governments shall:
 - (a) 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;*
 - (b) Establish means by which these peoples can freely participate, to at least the same extent as other sectors of the population, at all levels of decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;**
- 2. The 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.*

Community leaders from Curré denounced the failure of ICE to carry out consultations, since while it promoted assemblies for informing the community about the project it never carried out a formal consultation in good faith specifically aimed at seeking their consent.

In May 2003 the Supreme Court of Justice asserted it is the responsibility of the Cost Rican State to provide indigenous peoples the adequate instruments to guarantee their right to participate in decision-making processes and to organize in elective institutions, administrative organizations and others responsible for policies and programmes of their concern...⁵⁷

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With the current Diquís Hydroelectric Project, groups in Térraba are demanding ICE to carry out consultations in the community in compliance with ILO Convention 169. To date, however, no consultations have been done, because as the ICE spokesman declared, “During this stage the work done is to inform about the generalities of the project; the consultation, negotiation or other stage will be done eventually.”⁵⁸

An additional issue on the Diquís Project is the matter of representatives or representative institutions that the government shall recognize for the consultation process in indigenous territories. A non-traditional organization was imposed on each indigenous territory by Decree #8489 in 1978 known as the Integral Development Association. This is being questioned in indigenous territories as some IDAs have memberships of less than 20 percent of a territory’s population.

Indigenous leaders criticized this move as giving legitimacy to the illegal possession of land by non-indigenous people within the indigenous reserve. This perception was bolstered when ICE set up warehouses for machinery on land occupied by a non-indigenous person.⁵⁹ According to the indigenous law, indigenous reserves are inalienable, imprescriptible, non-transferable and exclusive to the indigenous communities that inhabit them.⁶⁰

In this regard the World Commission on Dams’ final report, entitled *Dams and Development: A Framework for Decision-making*, may be relevant on the vital issue of effective participation. The WCD proposes that the “recognition of rights” and “assessment of risks (particularly rights at risk)” should form the basis of the approach to stakeholder analysis and more effective participatory processes, starting with needs and options assessment early in the planning process. The ‘rights and risks’ approach is seen as fundamental to negotiated processes around not only mitigation, monitoring and management measures, but benefit sharing and other steps to enhance the overall development performance of the dam project. Envisaged as an integrating tool for economic, social, and environmental dimensions, its relevance goes beyond the dams arena to a wider development context as a tool for stakeholder involvement and effective participation.⁶¹

Conclusions and Recommendations

The case study of FPIC and indigenous peoples in the context of the Diquís Hydroelectric Project brought to light several issues related to indigenous peoples’ rights. These are:

- While Costa Rica has demonstrated a political will to respect and promote indigenous peoples’ rights as seen in all the conventions and national laws it has ratified and adopted, its compliance with these standards is poor. In this respect, indigenous peoples and the State should jointly seek ways to effectively bring these standards to a reality. Positive experiences such as the election of delegates for negotiations on the Bill of Autonomous Development should be taken as a minimum standard for future consultations.
- Governmental institutions do not have a broad credibility within indigenous territories, especially because of State negligence as reflected in bad infrastructure, poverty, poor healthcare services and illegal land sales within indigenous territories to outsiders. This situation requires the State to act in good faith in all relations with indigenous communities.
- The impacts of a hydroelectric dam may be very complex and hard to measure, thus, it is important to conduct dialogues to enable all indigenous peoples to know the benefits and risks entailed in the construction of such a dam.
- The evolving principle of international law, specifically in the framework of the Inter-American system, requires Costa Rica to comply with the norms on human rights and indigenous peoples’

rights. Indigenous peoples must demand and be vigilant on the compliance and observance of these norms.

Endnotes

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