

The Proposed Diquís Dam and Its Compliance with International Law
Memo to Cedarena and AIDA
July 23, 2009

Heather Needelman, Kendra Patterson, Stefano Di Lucca

Task: Research whether the Diquís dam being proposed is in compliance with applicable international law (particularly WCD recommendations, Conservation on Biological Diversity, and UN guidelines for forced displacement)

Introduction

The Instituto Costarricense de Electricidad's (ICE) proposed Proyecto Hidroelectrico Diquís (PH Diquís) will be located on the General River in southern Costa Rica. Preliminary reports indicate the project consists of a 179 m dam, a power station with a capacity of 3500 GW/year, a 13.2 km tunnel for transporting water from the reservoir to the power station, and second tunnel for returning the discharged water from the power station to the Terraba River. According to an action of *amparo* submitted to the Constitutional Court of Costa Rica, the dam will flood an area of 6009 ha. It is estimated that this flooding will cause the loss of 948 ha of forest and will affect various endemic and non-endemic species or flora and fauna. Below the dam, year round flow will be reduced by approximately 50%, which will mimic dry season levels.

Flooding will affect approximately 600-1000 ha of indigenous territory belonging to the Terraba and Chin Kicha indigenous groups. Flooding will also displace approximately 1068 non-indigenous people, small-scale farmers from the communities of Ceibo, Las Pilas, Remolino, Llano Grande, Lo Gloria, La Tinta, Ocochovi, and Colinas.

After being used for hydropower generation, the waters from this project will be discharged approximately 16 km upstream from the Terraba-Sierpe wetland. This wetland has been a Ramsar site since 1996 and is part of the Osa Conservation Area. It is estimated that PH Diquís could lead to a loss of at least 315 ha of wetlands.

This memo was written with the intention to analyze whether, to date, ICE has complied with international law and other international recommendations in the development of PH Diquís. It should be noted that ICE has not yet completed an Environmental Impact Assessment for the proposed project, therefore many of the conclusions drawn in this memo are preliminary. Below, we review ICE's compliance with the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction, the Convention on Biological Diversity, the Ramsar Convention on Wetlands of International Importance, and the final report of the World Commission on Dams.

International Instruments

UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction

Indigenous communities in Costa Rica represent 1% of the present population. Their status as a minority and indigenous group automatically makes them a vulnerable population in need of protection regarding their cultural preservation and in receiving genuine respect of their unique human rights. The indigenous and *campesino* communities in the instant case have a right to be provided information regarding the Diquís Dam construction that would impact their land and give them the opportunity to participate in this decision. At present, the Secretaría Técnica Nacional Ambiental (SETENA) has initiated an Environmental Impact Assessment (EIA) for ICE but has not contacted or provided notice to the affected communities regarding development of the Diquís Dam. Involvement in the planning process encompasses exhausting legal remedies, which can only be done after being provided relevant information regarding impacts of the Diquís Dam. Article 4 of the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction defines forced displacement as:

“an involuntary displacement of individuals, groups and communities from homes and/or lands and common property resources that were occupied or depended upon, thus eliminating or limiting the ability of an individual, group or community to reside or work in a particular dwelling, residence or location, without the provision of, and access to, appropriate forms of legal or other protection.”

According to the provided definition of forced displacement, ICE is in violation of the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction if the affected communities in the instant case have not been consulted with or included in the assessment or planning process of the Diquís Dam. It is probable that the affected communities will be subject to involuntary displacement because SETENA’s EIA approval will make it difficult for them to have their grievances taken seriously. Since ICE’s premise of the Diquís Dam proposal is towards promoting interests of the public good, it seems contradictory if SETENA gives ICE approval after conducting the EIA absent the informed consent of the affected communities.

Since the Diquís dam proposal has been initiated on the grounds of promoting the public good or interest, the benefits of hydroelectricity tend to shroud its detrimental impacts on the affected communities and on the natural resources these populations rely on for their sustenance. Even though the Diquís Dam proposal has been planned under the pretext of serving the public interest, approximately 1068 people will be displaced, and many more will be affected by the project. Assuming that ICE considers the interests of the affected populations as part of the public interest, their interests regarding the Diquís Dam proposal ought to be considered before the EIA is approved. Without the affected communities’ participation, ICE is disregarding the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction. For purposes of this section, participation does not solely mean informing the affected communities about plans to displace them. Instead, participation necessitates informing them of the impacts of the Diquís Dam construction, along with incorporating them into the decision as to how the dam will affect their livelihoods and presenting them with viable alternatives and/or mitigating measures. At the current stage in the Diquís dam proposal, the affected communities have not been consulted or even informed of the details of their probable displacement.

ICE may make light of this probable development-based eviction because of their goal to promote the interests of the public good by making electricity more accessible to other

populations. However, the interests of the affected communities are typically not the interests that ICE plans to protect by constructing the Diquís Dam. Instead, indigenous and other rural communities tend to be marginalized by development projects. Article 7 of the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction argues that forced evictions intensify inequality, social conflict, segregation and “ghettoization” and invariably affect the poorest, most socially and economically vulnerable and marginalized sectors of society, in particular, indigenous communities. Article 7 accurately portrays the reality of some development projects on indigenous communities when they are incompetently planned without either informing the indigenous community of ICE’s intentions of development or receiving their informed consent. Similarly, Article 39 stresses the need for dialogue and consultation with “vulnerable and marginalized groups” due to the sense that the interests of these communities are not taken into account during the planning stages of development projects intended to benefit others. Since it appears that the affected communities in the instant case have not been consulted, they may interpret ICE or SETENA’s silence as a lack of respect or concern for their livelihoods and be less willing to offer their informed consent, which may have been easier to achieve earlier in the assessment process.

Costa Rica has a responsibility to protect indigenous and other affected communities that have a cultural tie with the land they inhabit. Article 25 asserts that states should take immediate measures aimed at conferring legal security of tenure upon those persons, households and communities currently lacking such protection, including all those who do not have formal titles to home and land. Therefore, it is imperative for SETENA to investigate the affected communities’ cultural, social, and monetary ties with the land throughout the span of the EIA rather than as a last stop on their checklist.

Further, Article 12 applies to the instant case because it details what the obligations of the government of Costa Rica are, including:

“the obligation to refrain from violating human rights domestically and extraterritorially; to ensure that other parties within the State’s jurisdiction and effective control do not violate the human rights of others; and take preventive and remedial steps to uphold human rights and provide assistance to those whose rights have been violated.”

Since these obligations are continuous and simultaneous, ICE or SETENA may not violate international laws, especially since SETENA is a government agency. When governmental agencies such as ICE have violated human rights or when there is a clear indication that they will, the Supreme Court of Costa Rica has a legal and moral obligation to evaluate the facts and apply the law rather than assuming that ICE is taking proper actions regarding the minority community inhabited within its jurisdiction.

Moreover, Article 38 specifies that Costa Rica should explore fully all possible alternatives to evictions. All potentially affected groups, in this case the indigenous and other affected communities, as well as others working on their behalf, have the right to relevant information, full consultation and participation throughout the entire process, and to propose alternatives that authorities should duly consider. In the event that agreement cannot be reached on a proposed alternative among concerned parties, an independent body having constitutional authority, such as a court of law, tribunal or ombudsperson should mediate, arbitrate or adjudicate as

appropriate. In the instant case, it is presumed that the affected communities, along with their representation and international environmental non-profit organizations, such as Cedarena and AIDA, have not been provided with relevant information or reasonable alternatives that ICE has considered.

Convention on Biological Diversity

As a Contracting Party of the Convention on Biological Diversity, Costa Rica is bound by its articles. The Diquís dam, to be built on the General River in the Terraba Basin, may violate several or more of these articles.

The Diquís dam will significantly impact the environment of three specific sites: the area that will be inundated by the reservoir, the General River (which feeds into the Grande de Terraba River) and the downstream wetland Terraba–Sierpe, a Ramsar site and part of the Osa Conservation Area (ACOSA). The impacts on these sites are as follows:

- *The reservoir:* Diquís dam will inundate approximately 6000 hectares of land, with a resulting loss of habitat. The new reservoir will be a lentic (still water) system, unsuitable for Costa Rica's biodiversity, which is adapted to river systems.¹ In addition, the reservoir will inundate land where local communities conduct their livelihoods.
- *The General and Terraba Rivers:* Water caught in the reservoir will be transported to an off-site location for electricity production, and then fed back into the river some 21 kilometers downstream. Only about 10 percent of natural water flow will be allowed to continue down the natural river course² (according to ICE, it will be 45 percent). A 10 percent flow is not enough to maintain the rivers' biodiversity. A 45 percent flow would significantly impact biodiversity in both rivers and on riparian land.
- *The Terraba–Sierpe Wetland:* Post-use, the water will be fed back into the Terraba River 16 kilometers upstream of the wetland. The water will be of lesser quality than it would have been if allowed to flow down the natural river course, and it will be fed into the river on a constant schedule that will homogenize the wetland's water supply at wet-season levels year round. This will make salinity levels drop, thus eliminating flora and fauna adapted to the estuarine conditions. In addition, over 300 hectares of wetland will be lost.

The Convention on Biological Diversity specifies in Article 8 that Contracting Parties shall:

Regulate or manage biological resources important for the conservation of biological diversity whether within our outside protected areas, with a view to ensuring their conservation and sustainable use.

¹ Dan Moscovici and Craig Wenger, "Planning for Scale: Plan Puebla Panama and the Diquís Hydroelectric Project," *Panorama* (Spring 2008): 65.

² *Ibid* 64.

In addition, the same article states that Contracting Parties shall:

Endeavour to provide the conditions needed for compatibility between present uses and the conservation of biological diversity and the sustainable use of its components.

If the impacts of the Diquís dam are as stated above, the Diquís dam will be in violation of these two sections of Article 8. Inundating 6000 hectares of land and making it into an environment to which Costa Rica's flora and fauna are not adapted is not consistent with "conservation and sustainable use." Neither is reducing a river's flow by either 10 or 45 percent or turning an estuarine wetland into a freshwater ecosystem.

Also in Article 8, the Convention specifies that Contracting Parties shall:

Subject to its national legislation, respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity and promote their wider application with the approval and involvement of the holders of such knowledge, innovations and practices and encourage the equitable sharing of the benefits arising from the utilization of such knowledge, innovations and practices.

Article 14 of the same Convention states that Contracting Parties shall:

Introduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures.

The Diquís dam is clearly in violation of these articles, as there has been no significant public participation on the part of the indigenous or *campesino* inhabitants of the area to be inundated in either the planning of the dam or the Environmental Impact Assessment (EIA) process. As Article 8 specifies, indigenous people involved in traditional lifestyles are to be consulted in order to promote their practices; their knowledge is to be used to encourage the protection of biological diversity in the areas in which they reside as well as the wider community of Costa Rica. Costa Rica's national legislation further confirms the right to a healthy environment in Article 50 of the Constitution.

The Terraba–Sierpe Wetland represents a special case in that it is both part of Costa Rica's national system of conservation areas (located within the Osa Conservation Area [ACOSA]) and an area of international conservation interest through its designation as a Ramsar site (see Ramsar section below). The Convention on Biological Diversity specifies that Contracting Parties shall:

Develop national strategies, plans or programmes for the conservation and sustainable use of biological diversity or adapt for this purpose existing strategies, plans or programmes which shall reflect, *inter alia*, the measures set out in this Convention relevant to the Contracting Party concerned.

While Costa Rica has followed this article in that it has designated the Osa Conservation Area as a protected site, by allowing the Diquís dam to be built it is not following through on the “conservation and sustainable” use that this implies. It is thus violating this article, as well as its own national-level conservation program.

Ramsar Convention on Wetlands of International Importance

As stated above, the Diquís dam will have the following impacts on the Terraba–Sierpe Wetland: water flow will be homogenized, salinity levels will drop, and over 300 hectares will be lost. The first two impacts in particular will have significant negative impacts on native flora and fauna. This wetland is of international significance because it contains a mangrove ecosystem, which are threatened with obliteration worldwide: this is presumably why Costa Rica requested that it be designated a Ramsar site.

It is the latter impact, however, that is most significant in view of the Ramsar Convention. A loss of habitat or change in area of a Ramsar site violates the treaty, and compensation for such losses is required. Article 4 of the Convention states that:

Where a Contracting Party in its urgent national interest, deletes or restricts the boundaries of a wetland included in the List, it should as far as possible compensate for any loss of wetland resources, and in particular it should create additional nature reserves for waterfowl and for the protection, either in the same area or elsewhere, of an adequate portion of the original habitat.

Unfortunately, Costa Rica will not be able to fulfill its obligation to “compensate for any loss of wetland resources” if the Diquís dam is built, as mangrove systems function in a delicate balance of salt and freshwater that is only available in the areas in which they grow. The waterfowl that live in mangrove systems are adapted to them and cannot simply be put somewhere else.

As this article specifies, a Contracting Party may “delete or restrict” the boundaries of a Ramsar site if it is in its “urgent national interest.” While Costa Rica reserves a sovereign right to develop electricity production in the way it sees fit, it is neither in its urgent national interest to specifically use hydropower, nor build a dam at this specific site. Therefore, building the Diquís dam will be in violation of the Ramsar Convention both because the Terraba–Sierpe Wetland is not replaceable, and destruction of a part is not in Costa Rica’s urgent national interest.

Final Report of the World Commission on Dams

The report of the World Commission on Dams is a guide to best practices that should be met to ensure that projects like PH Diquís are both environmentally and socially friendly. Given that this report does not constitute binding international law, ICE is not obligated to comply with the provisions of this report. However, the report was created to avoid conflicts during project planning, such as those presented in the appeal to the Constitutional Court submitted by parties affected by PH Diquís.

The WCD's planning and management are focused on the following:

- Groups involved in or affected by the project should be clearly identified.
- There should be greater investment in early stages of projects in order to exclude unsuitable projects as soon as possible.
- Feasibility studies should be socially and environmentally sound.
- Open and meaningful participation of all involved parties in all phases of a project should be promoted.
- The developer should accept the responsibility for mitigating environmental and social impacts.
- Commitments agreed to by all parties should be followed through upon.
- Lessons learned from past projects should be applied to new projects.

The first four points above apply to PH Diquís. ICE has conducted studies to identify the groups involved in the project and has superficially involved such groups in the information gathering process. What is not clear is the extent to which the affected groups have been involved and whether they have been involved since the conception of the project.

Additionally, the WCD report identifies five issues that are critical when considering options for water and energy. These are:

- Needs assessment
- Alternatives
- Project preparation
- Project implementation
- Operation of the project

The first two issues are those of interest in this case because the project is in currently in its preliminary stages.

The first point emphasizes justifying the need for a particular project. This involves evaluating whether future demand for services requires the development of the proposed project, or whether there exist equally valid alternatives to the proposed project. ICE has complied with evaluating the current capacity of the system and creating projections for future demand. Their evaluations have demonstrated that in the future there will be a shortage of electricity if new projects are not developed. ICE has neglected, however, to develop alternatives for power generation, instead basing their energy plan on hydropower development throughout the country. This is why ICE advocates for hydroelectric projects and claims that if said projects are not approved, the agency will not be able to supply enough energy to meet the country's needs. ICE should not take this stance and should seek alternatives in the event that a hydroelectric project is not approved.

Another issue on which ICE has not adhered to the WCD recommendations is that of public approval of the project. ICE lacks public approval not only for PH Diquís, but for other projects in its development plan, which have met with resistance from various groups. Additionally, the WCD acknowledges the importance of indigenous groups, and states that any action to be included in the development plan that could affect these groups must have the consent of the group. ICE failed to obtain this consent, which is demonstrated by the fact that an action of

amparo to stop the project was submitted to the Constitutional Court on behalf an indigenous group. It is assumed that the group that submitted the appeal represents all of the affected indigenous communities and is therefore expressing the opinion of the majority.

The second point – the need for evaluation of alternatives - is perhaps the WCD recommendation with which ICE has achieved the least compliance. Plans for development must include the evaluation of all alternatives, a process that should involve the participation of all affected people. ICE failed to comply with this recommendation in that there was no participation of groups that could be affected by hydroelectric projects in determining whether hydropower is the best solution for the national electricity problem.

Even if ICE were to follow the recommendations of the World Commission on Dams, it is not certain that PH Diquís would be seen favorably by the group who submitted the appeal to the Constitutional Court. Nevertheless, working with the affected communities from the very conception of a project allows planners to understand whether there will be strong opposition to the project. Although this implies a greater initial investment, it makes it possible to know whether it is worthwhile to continue investing in the project, or whether opposition is so strong that to continue to invest in it would be a needless expenditure of money.

Recommendations

UN Special Rapporteur

When SETENA initiates its social impact assessment regarding the indigenous community, it is recommended that it comply with Article 37 of the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction, which strongly recommends that development processes involve the participation of all affected parties. Further, Article 37 suggests that ICE provide appropriate notice to the affected populations. It is recommended that ICE put more effort into informing the affected communities about the proposal rather than publishing notice in a local newspaper. It could be argued that the affected residents are not consumers of the local newspaper. Therefore, it is unjust for ICE to state that they gave the communities valid notice while only having it appear in a newspaper that they know will probably not be seen by most of the population. Article 37 further states that appropriate notice should be given to all potentially affected persons, not just one person who may pick up a newspaper on the day that the notice happens to appear in the local newspaper. Also, such notice should inform the affected persons about public hearings regarding the proposals and possible alternatives, including effective dissemination by the authorities of relevant information in advance, including land records and proposed comprehensive resettlement plans specifically addressing efforts to protect vulnerable groups including a times for affected persons to attend public meetings. This is necessary for the affected communities to have an opportunity to challenge the eviction decision and/or to present alternative proposals and articulate their demands and development priorities.

The UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction Article 32 states that “eviction-impact” assessment should also include exploration of alternatives and strategies for minimizing harm. However, SETENA has not begun eviction

impact assessment because it is in the stage of environmental assessment. Therefore, the alternatives and strategies for mitigating harm are inconclusive and have not been investigated. When SETENA first investigates whether there are mitigating factors or alternatives then there will be a clearer picture of the status of the proposal of the Diquís Dam.

Since it appears that SETENA has not initiated an evaluation regarding resettlement options, it is recommended that when it does, it comply with Article 16 of the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction. Specifically, when and if resettlement is certain to occur, the affected communities in the present case must be appropriated “alternative land of better or equal quality and housing that must satisfy the following criteria for adequacy: accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education.” As a matter of efficiency, it is recommended that such rights are not just articulated in promises, but instead are specified in a binding contract between the government of Costa Rica and the attorney or representative for the indigenous community. Also, under Article 41(c),(f),(g), the government should require ICE, a governmental agency to pay for any associated costs, including all resettlement costs; the amount of time and financial cost required for travel to and from the place of work and that access to essential services should not place excessive demands upon the budgets of low-income households; and relocation sites must not be situated on polluted land or in immediate proximity to pollution sources that threaten the right to the highest attainable standards of mental and physical health of the inhabitants.

Based on Article 40 of the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction, ICE must first demonstrate that there were no alternatives or mitigating measures if and when ICE decides to initiate an eviction of the affected communities. Hence, ICE must demonstrate that the Diquís Dam is necessary for the general welfare including the welfare of the indigenous and *campesino* communities, in that its construction was simply unavoidable. Prior to any decision to initiate an eviction, authorities must demonstrate that the eviction is unavoidable and consistent with international human rights commitments protective of the general welfare.

It is presumed that SETENA has not determined whether an eviction will take place. However, in the instance that ICE receives approval and subsequently decides to evict the affected communities in the present case, the appropriate internationally accepted norms for eviction ought to be explicitly followed. For this reason, it is strongly recommended that Article 41 of the UN Special Rapporteur on Adequate Housing Basic Principles for Forced Displacement and Eviction is complied with:

“Any decision relating to evictions should be announced in writing in the local language to all individuals concerned, sufficiently in advance. The eviction notice should contain a detailed justification for the decision, including on: (a) absence of reasonable alternatives; (b) the full details of the proposed alternative; and (c) where no alternatives exist, all measures taken and foreseen to minimize the adverse effects of evictions. All final decisions should be subject to administrative and judicial review. Affected parties must also be guaranteed timely access to legal counsel, without payment if necessary.”

Convention on Biological Diversity and Ramsar Convention on Wetlands

Careful attention needs to be paid to the impacts this dam will have on ecological systems, and whether it follows the “conservation and sustainable use” mandate of the Convention on Biological Diversity. As discussed above, indications are that it is in violation of the Convention because of the significant damage it will have on the environment. Alternatives should be investigated, and a thorough Environmental Impact Assessment (EIA) needs to be completed.

The EIA needs to include public participation of the indigenous community from the very beginning. Not doing so is in flagrant violation of the Convention on Biological Diversity, which states that indigenous knowledge should not only be sought out, but used in environmental management plans. Any environmental management plan of this indigenous area, including a dam that will inundate the land, should be carried out with an equitable sharing of benefits with the indigenous inhabitants in mind. This implies that the indigenous inhabitants should either have a stake in the dam, its output, or be equally compensated in some way.

If this dam is built, Costa Rica will be in violation of the Ramsar Convention, because the wetland the dam will impact is irreplaceable and no compensation for the loss of land area and waterfowl habitat is possible. It should seriously be considered why Costa Rica chose to request a Ramsar designation for this wetland in the first place, and if it is willing to damage its international standing as an eco-conscious country and the integrity of the Convention and other Ramsar sites by building the Diquís dam.

World Commission on Dams

It is clear that ICE has not followed the recommendations of the World Commission on Dams, therefore it would be appropriate for ICE to reassess its methodology for developing hydroelectric projects. Because the report gives recommendations on how to manage a project in conjunction with the affected communities, many of the obstacles that have occurred during this and other similar projects could be avoided by following the guidelines of the report.

It could be assumed that ICE’s decision-making is based solely on the capacity for energy generation of the river where a given hydroelectric project will be developed, rather than on a larger set of factors, including environment, population, and indigenous communities, among others. The result of this mentality is that ICE’s hydropower projects continue to be developed and problems are simply solved as they arise. By not considering the impacts of these projects in advance, human rights are violated and the guidelines specified in international treaties and conventions such as the Convention on Biological Diversity and the Ramsar Convention on Wetlands of International Importance are not followed.

This is why new voices, approaches, and perspectives should be incorporated into the decision-making process. The process must begin with a clear agreement on shared values, objectives, and development goals. The core values that should guide this process are defined in the report:

- Equity
- Efficiency
- Participatory decision-making
- Sustainability
- Disclaimer

These five points appear throughout the report. The consistent violation of these points was of great concern to the WCD when reviewing the cases used to prepare the report. This is the change that is desired in new projects.

The path ICE should follow during the planning of new projects is set by the WCD. The context under which future developments will be improved should consider the knowledge and understanding of the benefits and impacts of any large dam. In the future, ICE should not simply think about mitigating impacts. Rather, ICE should seek solutions that avoid impacts to the extent possible, and only as a last resort choose a project with a large impact, taking care to develop said project in accordance with the recommendations of the WCD.