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Endangered Protected Areas and Water Resources in Honduras

The case of the Cuyamel II Hydroelectric Dam Project in San Francisco, Atlántida

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1. Documents can be accessed at : https://www.fidh.org/IMG/pdf/22052017_anexo_metodolo_gico_vfinal.pdf

1. INTRODUCTION

The current report assesses the impact on human rights of the San Francisco Energy Company S.A. (CONERSA) Cuyamel II Hydroelectric Project (“Cuyamel II Project”). The dam planned to be built on the Cuyamel River which is the main source of potable water for the Municipality of San Francisco, Atlántida. The project’s approval process initiated in 2001 but its execution was not approved by the National Congress until 2014. However, its construction has been delayed seemingly because of the local population’s resistance to the project, the presence of the Fourth Infantry Battalion since 2013, and the lack of investors. Since its inception, the project has entailed violations of the rights of the people of San Francisco, in particular of the right to water, which was compounded by violations of the right of access to information and to citizen participation, as well as the right to an effective remedy. The current report analyses past, current and potential violations ensuing from the Cuyamel II Project.

The Cuyamel II Project case is important because it is representative of the national and regional context: the growing number of hydroelectric plants in Honduras and Central America is part of an energy supply transformation framework, justified by the fight against climate change, characterised by regional energy integration ambitions, and driven by international investments among other.

Consequently, protected areas have lost protection under the law and this has led to the impairment of communities’ right to water. Moreover, violations of the right to an effective remedy before the law, and of the right to access information, and to citizen participation aggravate the increasing threats to the right to water. The current report looks at the relationship among these elements, and demonstrates how this case is not an isolated situation but a scenario often reproduced at the national and international levels.

The aim of this report is to contribute to bringing the national legal framework in line with international human rights law, so that the existing and potential human rights violations that will be described can be remedied and prevented, and in order to set a precedent at the national and regional level.

A. Methodology used for the human rights impact assessment and objectives

i. General study objectives

The objective of the current human rights impact assessment (HRIA) is to objectively and exhaustively examine the impact of the Cuyamel II Project on the human rights of the inhabitants of the municipality of San Francisco. The chosen methodology gives a central role to the affected community (see section 1.A.ii). The study highlights violations of the rights to water, to information, to citizen participation, and to effective remedy before administrative or judicial authorities. Finally, the study is used to make recommendations that can serve as a basis for dialogue with relevant public and private actors; the ultimate aims being to guarantee effective remedy and the protection and effective enjoyment of human rights.

The significance of this study, beyond the specific case of communities in the municipality of San Francisco, resides in the importance of respecting protected areas, such as national parks and water-producing forests in Honduras. The Cuyamel River case in Atlántida, Honduras is emblematic of how current and potential violations of human rights, and changes in national legislation, have contributed to making the environment throughout the entire country, increasingly vulnerable and to the impairment of the population’s right to water.

This case also illustrates the difficulties the affected community has in accessing information and obtaining effective remedy, both of which weaken their position with respect to that of state authorities and private actors, and which further impairs their right to water. Furthermore, as the project under study is not located in an indigenous territory the population is not able to invoke specific protection instruments such as International Labour Organization (ILO) Convention 169. The current report underscores the extent to which the rights of the San Francisco community are vulnerable. It also highlights, how groups in similar situations also have difficulties asserting their rights to information and participation in the decision-making processes that could affect not only their right to water and health, but also the entire environment their lives depend on. The absence of a clear legal framework for community participation has made it easier for companies and state agencies to violate human rights.

ii. HRIA Methodology (see Annex 1)

The current human rights impact assessment (HRIA) was conducted using an adapted version of *Getting It Right*, which is based on active local community participation. Our analysis is based on international human rights law.² The methodology used provides for a complete overview of how and to what extent the Cuyamel II Project could impact human rights with a view to identify responsibility and make recommendations to ensure effective respect for the human rights of those in affected communities. To reflect as accurately as possible the current situation, the study considers the legal, environmental and social aspects of the conflict and uses information gathered during international fact-finding missions, field visits, interviews, discussion groups, and written exchanges to reflect the views of all the stakeholders. All stakeholders were given the opportunity to comment on the draft report before its publication, and their comments were integrated in the most objective way possible (See Methodology in Annex)

This report and the related research are the product of a collaboration project led by three organisations: the International Federation for Human Rights (*Fédération Internationale des ligues des Droits de l'Homme – FIDH*), the Honduran Centre for the Promotion of Community Development (*Centro Hondureño de Promoción para el Desarrollo Comunitario - CEHPRODEC*)³, and the Pico Bonito National Park Foundation (*Fundación Parque Nacional Pico Bonito, FUPNAPIB*).

Legal and judicial aspects

Firstly, the entire legal framework applying to the project was reviewed, through a study of the international treaties, national laws and specific regulations applicable to the area under study.

Secondly, we compiled and analysed all the administrative and judicial actions undertaken by CONERSA, and the State, including the Army, as well as the claims filed by members of the community. Actions by human organisations acting on behalf of the population to defend their rights.

Lastly, the current situation was assessed against the existing legal framework, with a view to identify the relevant rights and any past, present or possible future violation thereof by the Cuyamel II Project. Some of the violations are due to the State's and the company's failure to apply the law, while others stem from the norms themselves, especially those that have been modified in recent years.

2. See FIDH, *Community-based Human Rights Impact Assessments*, available at <https://www.fidh.org/en/issues/globalisation-human-rights/business-and-human-rights/community-based-human-rights-impact-assessments>

3. See CEHPRODEC web page at <http://www.cehprodec.org/>

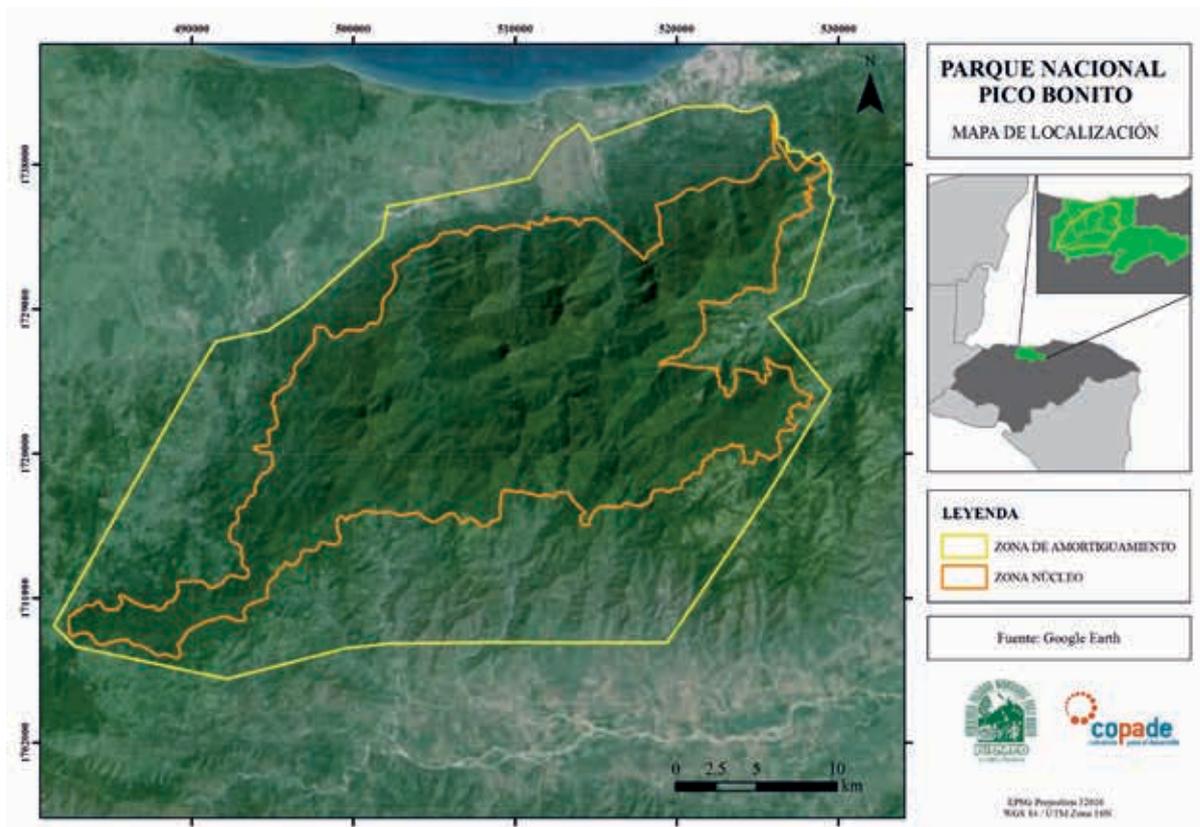
Environmental aspects

Information was collected on the ecological characteristics of the affected area, as well as on the humans aspects of the water situation, e.g. how the population uses water. To do this, a sociological study was conducted that made it possible to consider the specific situation and conditions of the affected population.

Social aspects

The impact assessment included consultation of the population using several social sciences methodologies. A quantitative sociological study was carried out to determine the inhabitants' position on the Cuyamel II Project, and how they saw the other actors involved: the Water Management Boards ("Water Boards", *Juntas de Agua*), the municipality, the army, and the company. Without disregard to the limits inherent to this type of survey, the high number of respondents (280 out of 1,021 households) and the wide geographic area⁴ covered, provide for a highly significant representative sample of San Francisco's inhabitants.

A qualitative study was also conducted. Three focus groups were created: one comprised of local associations, the second of Water Boards members, and a third of cattle ranchers from the area. Additionally, interviews were conducted with civil servants involved in the different stages of the project evaluation process at the national and local levels, with representatives of the company and the business sector, especially the hydroelectric industry, and with members of San Francisco communities. The study also based on a corporate investigation and a context analysis, to identify national and regional actors and economic factors that play a significant role in the development of the hydroelectric industry in Honduras and throughout the region. (See Methodology in Annex)



Geographic location of the Pico Bonito National Park, ©FUPNAPIB]

4. See Map in Annex 1

B. Context: hydroelectric projects in Honduras and the region

To understand the evolution of past, present and potential human rights violations attributable to the Cuyamel II Project, they must be placed in a historical process where different local, national and international actors with different but convergent economic and political interests and objectives co-exist. Local populations must contend with private national and transnational economic interests, and with a wide range of political interests at the municipal, national, but also regional level, in the context of Central America and the entire American continent, in which the federal government of the United States plays a central role. Lastly, there are also international and regional financial institutions who also play a key role in the development of these projects.

i. History and current situation of energy supply in Honduras

In Honduras, the State has a monopoly on electricity distribution through the National Electric Energy Company (ENEE), founded in 1957. Except for the construction of the 300MW Francisco Morazán hydroelectric plant, called "El Cajón" and completed in 1985, growth in the hydroelectric sector remained flat until the 1990s when private sector players entered the market and regulatory changes were made. In 1994, the enactment of the Electricity Sub-Sector Framework Law (*Ley Marco del Sub-Sector Eléctrico*)⁵ allowed the ENEE to buy energy from private producers.

In 1998, the Law on Incentives with Renewable Sources (*Ley de Incentivos con Fuentes Renovables*)⁶ and in 2007, the Law on the Promotion of Electricity Generation with Renewable Resources (*Ley de Promoción a la Generación de Energía Eléctrica con Recursos Renovables*)⁷ created economic and regulatory incentives for private sector participation. In 2008, through Decree 55-2008 President Manuel Zelaya vetoed yet another round of incentives.

On 28 June 2009, Zelaya was overthrown by a military coup and was succeeded by Roberto Micheletti, also a member of the Liberal Party. Presidential elections were held on 29 November 2009 and were won by the National Party candidate, Porfirio Lobo, who took office on 27 January 2010. In the November 2013 election, the National Party retained power when the election was won by the current President, Juan Orlando Hernández. He took office on 27 January 2014.

After the *coup d'état*, the legislative base allowing for the expansion of hydroelectric power was strengthened through the approval of laws and the repeal of regulations, specifically those that prohibit the granting of environmental licences in protected areas;⁸ the aim being to increase the share of hydroelectric energy in the energy matrix in Honduras. To achieve this objective, an international call for tender (no. 100-1293/2009) was issued, and on 3 September 2010, 39 of the 47 Renewable Energy Contracts initially awarded by ENEE were approved by the National Congress. In 2010, numerous companies signed construction and operation contracts which were assigned through calls for tender for hydroelectric projects. Among the winning bidders was CONERSA, whose operation and water supply contracts for the development of the Cuyamel II Project were signed on 22 January 2010.⁹

5. National Congress of the Republic of Honduras, Framework Law of the Electric Sub-Sector, Decree 158-94, 26 November, 1994, available online at <http://www.enee.hn/pdfs/leyesenergeticas/LeyMarcoSubsectorElectrico.pdf>

6. National Congress of the Republic of Honduras, Decree 85-98, 29 April 1998.

7. National Congress of the Republic of Honduras, Law to Promote the Generation of Electric Energy with Renewable Resources, Decree 70-2007, 2 October 2007, available at <http://www.enee.hn/pdfs/leyesenergeticas/LeydePromocionalaGeneraciondeEnergiaElectricaconRecursosRenovables.pdf>

8. For a description of changes made to the legislative framework, See the analysis of laws in chapter 3 of the current report.

9. National Congress of the Republic of Honduras, Decree 375-2013 and Decree 388-2013, 23 July 2014, the decree states that the contracts were signed between the Undersecretary of State in the Offices of Natural Resources and Energy and the engineer Elsie Paz acting as General Manager of CONERSA.

In 2013, Congress approved Decree 138-2013, which implemented a series of reforms to Decree 70-2007 and expanded tax incentives to a broader range of renewable energy producers, as well as to international private and state financing institutions. This was made possible notably by the energy sector's lobbying efforts, – in particular that of the Honduran Association of Electrical Energy Producers (*Asociación Hondureña de Productores de Energía Eléctrica*, AHPEE, formerly known as AHPPER and AHPER) which was created in 2003 to represent the private energy sector and that of the National Energy Commission (*Comisión Nacional de Energía CNE*), with support from Renewable Energies and Energy Efficiency Program in Central America (*Programa Energías Renovables y Eficiencia Energética en Centroamérica - 4E*),¹⁰ and in coordination with several government agencies, such as the Honduran Council of Private Enterprise (*Consejo Hondureño de la Empresa Privada - COHEP*) and the Ministry of Natural Resources and Environment (*Secretaría de Recursos Naturales y Ambiente – SERNA*), now called MiAmbiente.

According to CEHPRODEC, there are at least 177 hydroelectric projects at the moment, of which 46 have been approved, and 36 are already invoicing the ENEE, 2 are up and running, 17 are under construction, and 11 are under study.¹¹ As the Undersecretary of the Ministry of Natural Resources and the Environment (MiAmbiente) pointed out in an interview with the drafters of the current report,¹² the objective of the State, as per the Country Vision 2010-2038 and the 2010-2022 National Plan, is to arrive at an electricity matrix in which energy from fossil fuel only accounts for 40% of production by 2022 and 20% by 2038.¹³ Consequently, MiAmbiente believes it has the duty to change the national energy matrix so as to reduce the country's carbon footprint.¹⁴ As of 1 August 2015, with the opening of 12 solar plants, renewable sources changed the share of the thermal energy generation in the energy matrix. The table below describes the energy matrix in Honduras and is based on data from the Observatory of Natural Property and Human Rights (*Observatorio de Bienes Naturales y Derechos Humanos - OBNDH*).¹⁵

42.33%	889.3	Thermal (Fossil)
28.55%	599.77	Hydroelectric
13.87%	291.21	Solar
8.26%	173.5	Wind
6.19%	130.05%	Biomass
0.84%	17.1	Combined cycle
100.00%	2100.93	Total

10. *Programa 4E, Gobierno de Honduras incentiva la generación de energías renovables en el país* (Program 4E, Government of Honduras Encourages the Generation of Renewable Energy in the Country), 6 March 2013, available online at <http://www.energias4e.com/noticia.php?id=2048> [Consulted on 1 March 2017].

11. CEHPRODEC, Report of the *Observatorio de Bienes Naturales y Derechos Humanos - OBNDH* (Observatory of Natural Property and Human Rights), data updated 31 December 2016, available online at <http://www.cehprodec.org/index.php/proyectos/observatorio/64-la-conroa-Presents-data-on-mining-and-generation-electric-in-honduras-2> [Accessed on 1 March 2017]. As of 2016, when CEHPRODEC created the OBNDH, it began conducting a detailed analysis of the data on mining and hydroelectric projects. The sources for the information compiled by the OBNDH on electricity generation were the ENEE, the Special Unit Renewable Energy Projects (Unidad Especial Proyectos de Energía Renovable - UEPEP) and the Institute of Access to Public Information (Instituto de Acceso a la Información Pública - IAIP). All the information was requested in writing and entered in our databases and then used to generate the reports that are published on our website.

12. Interview with MiAmbiente officials conducted during the 14 December 2016 international mission.

13. Republic of Honduras, Country Vision 2010-2038 and National Plan 2010-2022 (*Visión de País 2010-2038 and Plan de Nación 2010-2022*), p. 47, available online at https://eeas.europa.eu/sites/eeas/files/lc_10.pdf [Retrieved on 1 March 2017], This was reiterated at the meeting with the AHPER during the December 2016 mission.

14. Interview with MiAmbiente officials conducted during international mission on 14 December 2016.

15. *Op. Cit.* See footnote 11.

16. *Op. Cit.* See footnote 11.

To understand the levels of conflict and the role played by hydroelectric power plants in the transformation of the energy matrix and in the relationship between large economic groups and the State, one needs to consider the specificities involved in the building of a hydroelectric plant. Per company representatives, a three-megawatt project, like Cuyamel II, requires a three million USD investment which is recovered after seven years¹⁷ of selling electricity to the ENEE network. Once the capital has been recovered, the plant generates net profits during the remainder of the term of the contract with the State. The term is usually 30 years. On the one hand, this seems to indicate that once the construction license is granted and the contract with the ENEE is signed, these projects are highly profitable for investors and for institutions providing the loans. On the other hand however, this entails high volumes of investment that can only be done by a few families and economic groups in Honduras, and that require foreign funding. The corporate investigation carried out in the framework of this study indicates that generally the biggest generators of hydroelectric and thermal energy in Honduras are the same set of individuals and organisations¹⁸. This explains why the Cuyamel II Project belongs to a company that controls three other hydroelectric projects,¹⁹ and why consultants like Elsia Paz, a CONERSA shareholder with ties to international investment institutions,²⁰ are involved in several projects at the same time.²¹ Competitiveness in the hydroelectric sector could be understood as an expansion and reconversion of these actors' investment from thermal to renewable energy. Lobbying by the AHPEE, an organisation largely created by the very same actors,²² is aimed at opening new markets and should not be seen as a sign of competition among the different power generation sectors.²³

ii. The regional context and the role of foreign investment in hydroelectric power generation in Honduras

The growth of hydroelectric power in Honduras is inscribed in a series of regional institutional and economic development agreements that cover Central America, Mexico and the United States, and the entire American continent.

Regionally, Honduras is part of the Central American Integration System (*Sistema de Integración Centroamericana*- SICA). Founded in 1991, it includes the Energy Coordination Unit (*Unidad de Coordinación Energética* – UCE-SICA), created in 2006 to plan the Mesoamerican Energy Integration Program (*Programa de Integración Energética Mesoamericana* PIEM), which was part of the Mesoamerican Integration and Development Project (*Proyecto de Integración y Desarrollo de Mesoamérica*) known as the "Mesoamerica Project" and formerly known as the "Puebla-Panama Plan". The Puebla-Panama Plan was started by the Mexican government in 2001 to connect southern Mexico with SICA and with the

17. Interviews conducted by FIDH in December 2016. For its part, the AHPEE indicates that 7 to 10 years can pass between the moment a hydroelectric project is identified as feasible and its actual realisation, due among other factors to administrative requirements, and that during this time investors do not secure any type of earnings.

18. The corporate investigation gave information on 35 hydroelectric projects, the majority of which belongs to political elite's families, i.e at least 12 out of 35 projects were linked to Fredy Nasser

19. GREEN Inc., which owns 95% of CONERSA's share, also controls the Santiago, Río Perla and Chinacla hydroelectric projects. See Energy Solutions Partners, Proyectos, <http://www.energysolpartners.com/chinacla.html> [Accessed on May 5th 2017]

20. The corporate research carried out for the current study revealed that Elsia Paz, a founding partner of the AHPER, solicited funds from SREP, which will be donated *inter alia* through the Climate Investment Funds, funded by the World Bank Group

21. The corporate investigation conducted revealed that there are ties between Hidroeléctrica de la Sierra S.A. de C.V. (Hidrosierra), Empresa Inversiones Renovables S.A. de C.V. (INVERSA) and Corporación Hidro Ambiental S.A. de C.V. and Elsia Paz. According to available information about the 4E Program, Elsia Paz is presented as General Manager of these companies. See GIZ, Programa Energías Renovables y Eficiencia Energética en Centroamérica (4E), <http://energias4e.com/directorio/index.php> [Accessed on April 28th 2016]

22. According to the data obtained through the corporate research conducted for the current study, the biggest entrepreneurs in Honduras are among the founders of the AHPER. Some of the founding partners are either stockholders or agents for several companies that develop hydroelectric projects in various regions in Honduras.

23. According to the corporate research for the current report, most private hydroelectric projects in Honduras are controlled by large Honduran entrepreneurs but developed by smaller companies. The most significant form of politico-economic coordination for hydropower producers in Honduras is the AHPER, an industry association founded in 2003 that conducts lobbying and provides technical, legal and financial advisory service

transportation, energy, telecommunications, trade, health, environment, risk management, housing, and food security sectors in neighbouring countries. The main energy initiative is the Central American Electric Interconnection System (*Sistema de Interconexión Eléctrica de los Países de América Central* - SIEPAC) which was completed in 2014 with funding from all the countries involved and international actors.²⁴ It was in great part financed by the Inter-American Development Bank (IDB)²⁵ and the Central American Bank for Economic Integration (CABEL). SIEPAC connects the ENEE grid to a regional grid, allowing Honduras to import and export energy within the Regional Electricity Market (*Mercado Eléctrico Regional* - MER), another initiative coordinated by the Mesoamerica Project. Private hydroelectric projects in Honduras have energy supply contracts with ENEE. Honduras's participation in MER, however, is not significant when compared to its national power generation: in 2014, the country imported 320,360.3 MW and exported only 4,127.6 MW, an insignificant proportion of total energy generated.²⁶ The new SIEPAC regional grid will connect Mexico to the Mexico-Guatemala Electricity Interconnection System, and Colombia to the Panama-Colombia Electricity Interconnection System, both of which are under construction.

The government of the United States is heavily involved in the Mesoamerica Project, which is supplemental to the Dominican Republic-Central America Free Trade Agreement (CAFTA-DR) with the United States of America. The treaty allows US companies to sell equipment and services to the energy sector in the region, especially after the completion of SIEPAC, and is also part of a series of continent-wide energy integration initiatives. The US Department of State Connecting the Americas 2022 initiative (Connect 2022) is an attempt to connect SIEPAC to the Andean Electricity Interconnection System (SINEA) thereby creating a continental electric corridor.²⁷ For the purposes of the initiative, the US government created a series of funding mechanisms for the development of renewable energy in Central America. The Clean Energy Finance Facility for the Caribbean and Central America (CEFF-CCA) is meant to create a financing program through which US government collaborating partners – US Agency for International Development (USAID), US Trade and Development Agency (USTDA) and US Overseas Private Investment Corporation (OPIC) – provide support to private-sector clean energy projects at early stages in their development.²⁸

In Honduras, between 2000 and 2005, USAID financed the regional program Financing of Energy Companies in Central America (FENERCA), administered by E + Co that has a budget of USD 5.3 million. FENERCA was headed by Fernando Alvarado Camacho, who claims to be a founding member of AHPER.²⁹ He also runs the IDB's Honduras Renewable Energy Finance Facility (H-REFF), a private equity fund which is used to supplement funds from the Scaling Up Renewable Energy Program (SREP) and from World Bank Group member, the International Finance Corporation (IFC).³⁰ An example of the connections between the US government and the entrepreneurs behind the AHPER is the fact that

24. This includes a total investment of USD 505 million by the Network Proprietary Enterprise (EPR). EPR is a public-private company comprised of the public energy companies in each of the six Central American countries and Mexico and three private investors, Interconexión Eléctrica S.A. (ISA) in Colombia, Empresa Energética Española SA (ENDESA) in Spain, and Comisión Federal de Electricidad (CFE) in Mexico See: Mesoamerica Integration and Development Project, Central American Electric Interconnection System (SIEPAC), available online at http://www.proyectomesoamerica.org/joomla/index.php?option=com_content&view=article&id=171&Itemid=100 [Retrieved on 17 March 2017].

25. The Inter-American Development Bank provided 50.1% of the funding for SIEPAC.

26. ECLAC, *Centroamérica: estadísticas del subsector eléctrico, 2014* (Central America: statistics of the electricity sub-sector, 2014) available online: http://repositorio.cepal.org/bitstream/handle/11362/39226/S1501181_en.pdf?sequence=1 [Accessed: January 31, 2017].

27. US Department of State, *Connecting the Americas 2022*, available at <https://www.state.gov/e/enr/c52654.htm> [accessed on 26 February 2017].

28. USAID, *Clean Energy Finance Facility for the Caribbean and Central America*, available at <https://www.usaid.gov/where-we-work/latin-american-and-caribbean/clean-energy-finance-facility-caribbean-and-central> [accessed on 26 February 2017].

29. Latin America and Caribbean Council on Renewable Energy, *Fernando Alvarado's Biography*, available at <http://www.lac-coresummit.org/fernando-alvarado> [accessed on 1 March 2017]

30. This information corresponds to the data obtained during the 10 December 2016 inquiry.

in 2016 OPIC granted a loan of USD 135 million to Geotérmica Platanares, SA de CV³¹, a geothermal project controlled by Napoleón Larach³², a founding partner of AHPER. Additionally, in 2013 among OPIC's investment activities in Honduras was a USD 30 million loan from Citibank to Banco del País³³, where Napoleón Larach is a board member³⁴.

Projects such as that of CONERSA in San Francisco are part of a continental process. The personal ties of business owners with regional actors and the importance of hydropower development on the continent could explain how companies are able to obtain environmental licences for hydroelectric projects when they are in protected forest areas and without consultation with affected communities, which is exactly the case in the Cuyamel II Project.

iii. Human rights and environment defenders in danger

In recent years, efforts have been deployed in Honduras to strengthen human rights protection, including the opening of the Office of the United Nations High Commissioner for Human Rights (OHCHR) in November 2016. However, to have an impact, those changes require a long process. Honduras is still characterized by high levels of poverty, inequality and violence. To understand the violence against human rights defenders and environmental rights activists, one must consider the Honduran context which is still characterized by high levels of poverty, inequality and violence.

According to the World Bank,³⁵ in terms of GDP per capita Honduras is among the poorest countries in Latin America and the Caribbean and among those with the highest degree of inequality as measured by the Gini coefficient. In 2013, "almost 65 percent of Honduran households lived in poverty and 43 percent lived in extreme poverty, of which two out of three Hondurans in rural areas. Approximately 80% of Hondurans under the age of 15 live in poor households and approximately one in four are malnourished."³⁶ In 2014, the country had one of the highest crime rates in the world, 67 homicides per 100,000 inhabitants.³⁷ This does not include violence involving robbery, kidnapping and extortion. The high rates of violence are related to the presence of groups involved in drug trafficking, such as the Mara Salvatrucha and Barrio 18, which are also active in other parts of Central and North America. Drug trafficking is linked to high levels of poverty which has left the younger population with few prospects for the future. The violence is also attributable to private and public security forces, both of which have had sporadic ties, to drug trafficking.³⁸ The government reacted to violence by creating a militarized solution, the Public Order Military Police which, according to the Inter-American Commission on Human Rights (IACHR), has not solved problems but

31. OPIC, *Information Summary for the Public: Platanares Geothermal Project*, available at https://www.opic.gov/sites/default/files/files/PublicSummary_Platanares.pdf [accessed on 1 March 2017].

32. National Congress of the Republic of Honduras, Decree 197-2012, 31 January 2013, Available online : <http://www.tzibalnaah.unah.edu.hn/bitstream/handle/123456789/1999/20130131.pdf?sequence=2&isAllowed=y> [Accessed on 15 May 2017]. This decree approved the operation contract for the production, transmission and selling of energy for a hydroelectric project in PLATANARES, Unión municipality, Copán Department. Napoleón Larach in his capacity of president acted as representative of the company Empresa Geotérmica Platanares S.A. de C.V.

33. OPIC, Annual Report 2013, p. 28, Available online : https://www.opic.gov/sites/default/files/files/OPIC_AR2013_final.pdf [accessed on 15 May 2016]

34. BanPais, Board of directors 2016-2018, Available online : <https://www.banpais.hn/junta.html> [accessed on 15 May 2016]

35. See Hernandez Ore, Marco Antonio; Sousa, Liliana Do Couto; Lopez, J. Humberto. 2017. *Honduras - Unlocking economic potential for greater opportunities: systematic country diagnostic*. Washington, D.C.: World Bank Group. <http://documents.worldbank.org/curated/en/519801468196163960/Honduras-Unlocking-economic-potential-for-greater-opportunities-systematic-country-diagnostic>

36. *Ibid.*, p. 2.

37. *Ibid.*, p. 4.

38. UN Special Rapporteur on the Situation of human Rights Defenders, *They Spoke Truth to Power and were Murdered in Cold Blood: Analysis on the Situation of Environmental Human Rights Defenders and Concrete Recommendations to Better Protect Them*, Report A/71/281, 2016, p. 19, available at https://www.protecting-defenders.org/sites/protecting-defenders.org/files/environmentaldefenders_0.pdf ; *Honduras. Los defensores y defensoras de derechos humanos entre la espada y la pared. Informe de misión de investigación*, Observatory for the protection of human rights defenders (joint OMCT-FIDH programme), December 2016, p. 9, https://www.fidh.org/IMG/pdf/informe_honduras.pdf [accessed 19 January 2017].

has generated confusion with regard to the objectives and powers of various state security agencies.³⁹ In addition to the organized crime there are also individual acts of violence that contribute to the atmosphere of concern and feeling of vulnerability among the general population.

Increased investment in natural resources projects, mining, forestry, the agricultural industry, and hydroelectric dams has resulted in an increase in violence against human rights defenders and environmental rights⁴⁰. Since 2010, Honduras has become the most dangerous country in the world for environmental rights activists.⁴¹ At least 111 activists were killed between 2002 and 2014. The list has gotten longer in recent years, and it does not include the large number of murders that go unreported by the affected communities out of fear. The clear majority of these murders are not investigated. The murder rate is representative of the most extreme form of violence in an atmosphere of threats, physical and verbal violence, and defamation campaigns,⁴² to which must be added the progressive criminalisation of rights activism and heavy-handed repression of social movements.⁴³ Human rights defenders are accused of offences, imprisoned, and their freedom of movement is restricted.⁴⁴ According to the Committee of the Detained Disappeared in Honduras (*Comité de Familiares de Detenidos Desaparecidos en Honduras* - COFADEH), between 2010 and 2014, there were at least 3,064 cases of abusive enforcement of criminal law against defenders.⁴⁵ In some of these cases, there is clear collusion between companies, public security forces and members of the political elite.⁴⁶

The violence linked to the defence of human rights and the violence linked to drug trafficking and other illegal activities in Honduras are not easily distinguished. Authorities often attribute acts of violence against rights defenders to criminal groups, and any direct link to political upheaval are minimized or denied. The authorities also routinely justify the criminalisation of defenders by claiming that they are involved in organized crime. The same argument is used to justify both repression and acts of violence committed by the State against defenders, which goes unpunished. The strategy is reinforced by the fact that, given the high levels of crime in Honduras, human rights defenders may indeed be victims of acts of violence that are unrelated to their activism. These situations leave human rights defenders highly vulnerable. Even in the absence of physical violence, covert threat campaigns and public defamation campaigns can be precursors to acts of violence perpetrated by either public security forces or parastatal groups who contribute to creating a general atmosphere of fear.

39. OAS, Inter-American Commission on Human Rights (IACHR), Media Center, Press Releases, 2014, 146A, Preliminary Observations on the Situation of Human Rights in Honduras, December 5, 2014, available online at http://www.oas.org/en/iachr/media_center/PReleases/2014/146A.asp [Accessed on January 19, 2017].

40. This statement does not intend to generalize those impacts to all cases but indicates the apparent correlation between the expansion of investments and the increase of attacks against human rights defenders. Investors from CONERSA and AHPEE have expressed that various successful hydroelectric projects had brought benefits to communities and to the country.

41. Global Witness Limited, Report, (How many More?) *¿Cuántos más? El medio ambiente mortal de 2014: intimidación y asesinato de activistas ambientales y de la tierra, con Honduras en primer plano*, 2015, available at <https://www.globalwitness.org/en/campaigns/environmental-activists/how-many-more/>. See also, on hydropower stations Fernández Guzmán, M. y Mejía Guerra, J. A., *Situación jurídica y técnica de los recursos hídricos del departamento de Atlántida*, Movimiento Amplio por la Dignidad y la Justicia (MADJ), October 2010, available at https://issuu.com/madj/docs/investigaci_n_de_consesi_n_de_r_os_en_atlantida [accessed on 23 January 2017].

42. See, for example, Observatory for the protection of human rights defenders, *Llamado Urgente : Calumnias, injurias y difamación en contra de la Sra. Berta Oliva, coordinadora de COFADEH*, HND/010/1116/OBS 099, 17 November 2016, available at <http://www.omct.org/es/human-rights-defenders/urgent-interventions/honduras/2016/11/d24059/> [accessed on 24 March 2017].

43. *Op. Cit.*, footnote 38 .

44. *Ibid.*

45. Information provided by the COFADEH to the IACHR. OAS, Inter-American Commission on Human Rights (IACHR), Media Center, Press Releases, 2014, 146A, Preliminary Observations on the Situation of Human Rights in Honduras, December 5, 2014, available online at http://www.oas.org/en/iachr/media_center/PReleases/2014/146A.asp [Accessed on January 19, 2017].

46. Global Witness Limited, Report, *Honduras. The deadliest place to defend the planet*, London, January 2017, available at <https://www.globalwitness.org/en/campaigns/environmental-activists/honduras-deadliest-country-world-environmental-activism/>

The approval of the Law for the Protection of Human Rights Defenders, Journalists, Social Communicators and Legal Practitioners (*Ley de Protección de Defensores de Derechos Humanos, Periodistas, Comunicadores Sociales y Operadores de Justicia*) in April 2015, as well as efforts developed by the protection system demonstrate recognition of the vulnerable situation faced by human rights defenders in the country. However, there is still important vacuums, in particular in relation to the autonomy and effectivity of the System, as expressed by the civil society and IACHR⁴⁷.

To date, in San Francisco, Atlántida there have been no acts of physical violence perpetrated against activists opposing the Cuyamel II Project, although some inhabitants have reported receiving threats.⁴⁸ There have been public acts aiming at discrediting community organisations such as CEHPRODEC⁴⁹ and FUPNAPIB, and against members of the Water Board who have been accused of acting solely for their personal financial benefit or of receiving subsidies, instead of acting to protect the rights of the population or of the environment.⁵⁰ Moreover, under these circumstances and given the Honduran context, the presence of the army in the area since 2013 only serves to generate even more tension and increase the population's exposure to risk.

47. Op. Cit., Honduras. Los defensores y defensoras de derechos humanos entre la espada y la pared. Informe de misión de investigación

48. Interview with focus group (See Annexe 1 Methodology), these cases are examined in depth in chapter 3 of the current report.

49. In particular, a flyer distributed through social networks that distorted the objectives of a press conference organized to present a report on the situation of human rights defenders.

50. Interview with FIDH, for the 13 December 2016 mission. The same arguments can be heard in the interview broadcast on television on 23 September 2014, available at https://www.youtube.com/watch?v=OH_hizyVvZc [Accessed on 20 January 20, 2017].

2. GENERAL DESCRIPTION OF THE CUYAMEL II PROJECT

A. The social and environmental characteristics of the Cuyamel River basin

The Cuyamel River micro-basin is located in the northern sector of the Pico Bonito National Park in the municipality of San Francisco in the Atlántida department. The analysis that follows is based on the study conducted to create the management plans for the Pico Bonito National Park⁵¹ and for the Cuyamel River micro-basin.⁵²

The micro-basin is composed of naturally low fertility Choloma soil with a depth of 20-40 cm (97.3%), with a high risk of collapse and landslides on slopes with more than 50% grade; the risk is higher when the natural vegetation is gone.⁵³

Six ranges of slopes have been identified on the surface of the micro-basin, where 70% of the area is fragile low fertility soil with slopes ranging from a 50% grade to more than a 100% grade. The rest of the area is comprised of flat or hilly terrain.

Due to these characteristics, the area is considered to be highly vulnerable. The fragility of the soils and the slopes make it even more susceptible to landslides and floods in periods of extreme drought or heavy rains, phenomena that are increasingly seen as a result of climate change, and which creates high risks for agricultural activities and other community livelihoods. People in the community confirm that river flows in dry times have decreased substantially, forcing the community to carry out works for retention and accumulation of water and thus mitigate the impact of drought caused by the lack of rain. This practice has been carried out from 2009 to the present, and the most critical months are the period between April and June of each year.

The function of three types of micro-basin zones were identified using as a basis the characterisation of the micro-basin and the criteria and priorities of the communities: 1) a “protection zone”, whose objective is to keep the forest in its natural state with no or minimal human impact so that it can fulfil its water quantity and quality functions; 2) a “buffer zone” to control agricultural, forestry and ecotourism activities within the area, and keep farmers within the current limits of agricultural land and thus slow down encroachment on natural areas; and 3) a “communal zone” which includes the area where the communities of San Francisco, La Frutera, Micely, Boca de Toro, and Buena Vista, are located and where the activities are controlled and regulated through an environmental sanitation plan. For the first two zones, because of the steepness of the slopes and the type of soil, management plans prohibit any type of industrial activity.

The Cuyamel River micro-basin has enormous ecological diversity that must be preserved for its intrinsic value, but its geographical features make it highly fragile. The Pico Bonito National Park is the second largest national park in the country, and is classified by Honduras as one of the ten priority areas for biodiversity conservation. Internationally it is recognized as a Key Area for Biodiversity (KBA) and as a Zero Extinction Area (ZEA) due to the presence of species considered to be in critical danger according to the World Wildlife Fund for Nature (WWF). A total of 14 endangered species present in the area are on the Red List of the International Union for the Conservation of Nature and Natural Resources (IUCN).

51. Established between FUPNAPIB and AFE-COHDEFOR, and approved by resolution COHDEFOR JI-MP-011-2004, in April 2004.

52. Established with FUPNAPIB, local governments and AFE-COHDEFOR, approved by resolution GG-PMCH-039-2006, to analyse the legal status of both Management Plans, See chapter 3 of the current report.

53. The information on the land in this area is taken from the land maps made for the Broadleaf Forest Development Project (Proyecto Desarrollo del Bosque Latifoliado - PDBL) in 1990.

Among these, four are considered critically endangered, three threatened, and seven are considered vulnerable to extinction. In addition, there are 12 species of fauna that are threatened with extinction.⁵⁴



Cuyamel River, municipality of San Francisco, Atlántida. @FUPNAPIB

The construction phase of a hydroelectric plant in this area could have very negative effects on the environment⁵⁵ because the felling of trees and opening of access roads could increase the risk of land subsidence and landslides. Consequently, the river bed could become silted thus increasing the risk of winter flooding in the lower parts of the river basin. The diversion and/or decrease of the course of the river could cause a reduction in, or complete stoppage of the water supply to a segment of the river. It could also modify the structure of the river due to changes in water temperature and in the transported materials, which in turn could cause changes to the physical and chemical properties of the water. Such changes could be deadly for fish and aquatic fauna that require an uninterrupted and stable amount of water. A robust impact study is required, given the type of risk and **the lack of comprehensive records on ecosystem biological diversity in Honduras, which currently makes it impossible to clearly determine the degree of impact these types of projects have on ecosystems.**⁵⁶

Furthermore, these changes could have serious impacts on other species on the same level of the food chain as aquatic animals. The project involves the building of a run-of-the-river dam with a much smaller channel for the fauna that would not survive the passage through the dam. However, altering the river's flow and the transport of sediment downstream generally causes major ecological harm. Life around the river is determined by, and evolves in accordance with, the amount of water flowing in the river. Changes in river flow can, in some cases, considerably imbalance the ecosystem and cause erosion.⁵⁷ In the context under discussion, the risks to the environment and to the communities' right to water are very high.

54. Leonel Marineros, *Importancia, Salud Dimensión y Representatividad de los Ecosistemas Presentes en el Parque nacional Pico Bonito*, 2011, Procorredor – ICF/Subvención 01.

55. See, on these issues, Department of Watersheds and Environment (Departamento de Cuencas Hidrográficas y Ambiente) opinion DCHA-003-2012, 31 January 2012.

56. Interview with former Director of COHDEFOR's Department of Protected Areas, February 13, 2017, who explained that COHDEFOR never strongly opposed the realization of such projects but considered that the companies were not willing to invest the resources necessary to carry out a comprehensive impact study that would identify the exact conditions which would allow hydroelectric plants to operate without endangering the bio-diversity of ecosystems and especially in protected areas.

57. Jocellyn Medallo and Alexandre Andrade Sampaio, Coalition for Human Rights in Development, *Ongoing Trends in Hydropower*, June 2016, available at <http://rightsinddevelopment.org/project/trends-the-rise-of-hydropower/> [accessed on 28 March 2017]

The Cuyamel River is the main source of drinking water⁵⁸ for five communities,⁵⁹ more than one thousand households, located in the municipality of San Francisco. The Cuyamel II Project could significantly affect the water consumption of more than 7000 people.⁶⁰ Community members have expressed concern about water pollution and the risks of reducing river flow, and have explained that these changes in ecosystem could have the same consequences on community health and well-being as those suffered by people in neighbouring villages.⁶¹ The quantitative study of the people in the community conducted as part of the current human rights impact study demonstrated good water quality and its importance for the health and basic well-being of the inhabitants of the area. When asked how often water was available, 96.38% of the respondents stated "every day", 1.64% "every two days", and the remainder of the responses were "some days", "from time to time", "other" or "no answer". When asked about the quality of the water supplied, 83.93% of the respondents stated "good quality", 12.42% stated that it was "adequate", and the remainder responded "water contaminated", "do not know", or "no answer". When asked about how they use the water, 96.07% of respondents use it to cook, 82.62% drink it, 92.13% to wash themselves, and 91.48% use it for cleaning. In contrast, the water supplied is used less to irrigate orchards (24.26%), for livestock (8.52%), agriculture (7.87%), and industry (6.89%).

The Cuyamel II Project is a potential hazard to the communities because it calls for the building of a dam and other infrastructure upstream from the communities' water supply. The resulting decreases in water quantity will lead to soil erosion and to pollutants either being directly thrown into the river or reaching the river by runoff during the building of the dam. During the operation phase of the hydroelectric plant, the misuse and processing of oils and PCBs (polychlorinated biphenyl) could contaminate the water. This would cause irreparable losses and damages for the communities who depend on water and on the other environmental services provided by the Cuyamel River micro-basin. And, the cost of restoring the natural state of the river can far exceed any possible financial compensation.

There are also risks that arise from the presence of an army battalion since 2013 near the micro-basin and in the area where the water supply system is located. The Fourth Infantry Battalion moved into the Buffer Zone in 2013 without any third-party control over the possible impact of its activities on water quality. It created difficulties for the members of the Water Board trying to do their job of monitoring drinking water for the community. In a subsequent section of the current report we describe how even MiAmbiente were stopped from verifying the state of project construction by the battalion who had also denied access to the officials and representatives of the community. Additionally, the lack of information on the presence of the battalion raises questions about the risks generated to the Cuyamel River by the construction of military barracks without the authorization required by law (see section 3).

58. Interview with Eliana Salinas, deputy mayor of San Francisco Atlántida, 23 September 2016.

59. The Cuyamel River micro-basin supplies drinking water to the communities of San Francisco, La Frutera, Micely, Boca de Toro and Buena Vista.

60. FUPNAPIB, Workshop on Small Hydroelectric Plants, December 2007.

61. Focus Group conducted for the current study, See Annex 1 Methodology.

CHRONOLOGY OF THE CUYAMEL II DAM PROJECT

The Cuyamel River is the main source of water for six communities

Legend

TIMELINE OF THE PROJECT

- Protection of the river
- Progression of the dam project

ACTORS

- Local communities
- State of Honduras
- Army of Honduras
- Company INDECO
- Company CONERSA

1987

▶ The Pico Bonito National Park was declared a "Permanent Protected Zone"

2003

▶ San Francisco communities demonstrate against the dam for the first time

2001

◀ INDECO starts applying for permission to build the Cuyamel II dam inside the Pico Bonito National Park

2008

▶ Cession of the Cuyamel II dam project from INDECO to CONERSA

2009

▶ CONERSA continues the dam project, and changes certain characteristics but not its location

4 february 2010

▶ Derogation of standards banning construction in protected areas
▶ The Ministry of Natural Resources and Environment approves the Cuyamel II dam project

march 2010

▶ The affected communities file several complaints, to have, inter alia, the environmental license revoked.

august 2010

▶ The Cuyamel II project is not approved by the Congress because of fraud allegations

2013

▶ The 4th Infantry Regiment establishes its base in the micro-basin protected zone and restricts the communities' access to their source of water

july 2014

▶ Congress approves the dam project

between 2011 and 2012

▶ Advice from experts within the Ministry of Natural Resources and Environment re-iterate the environmental risks associated with the project

january 2012

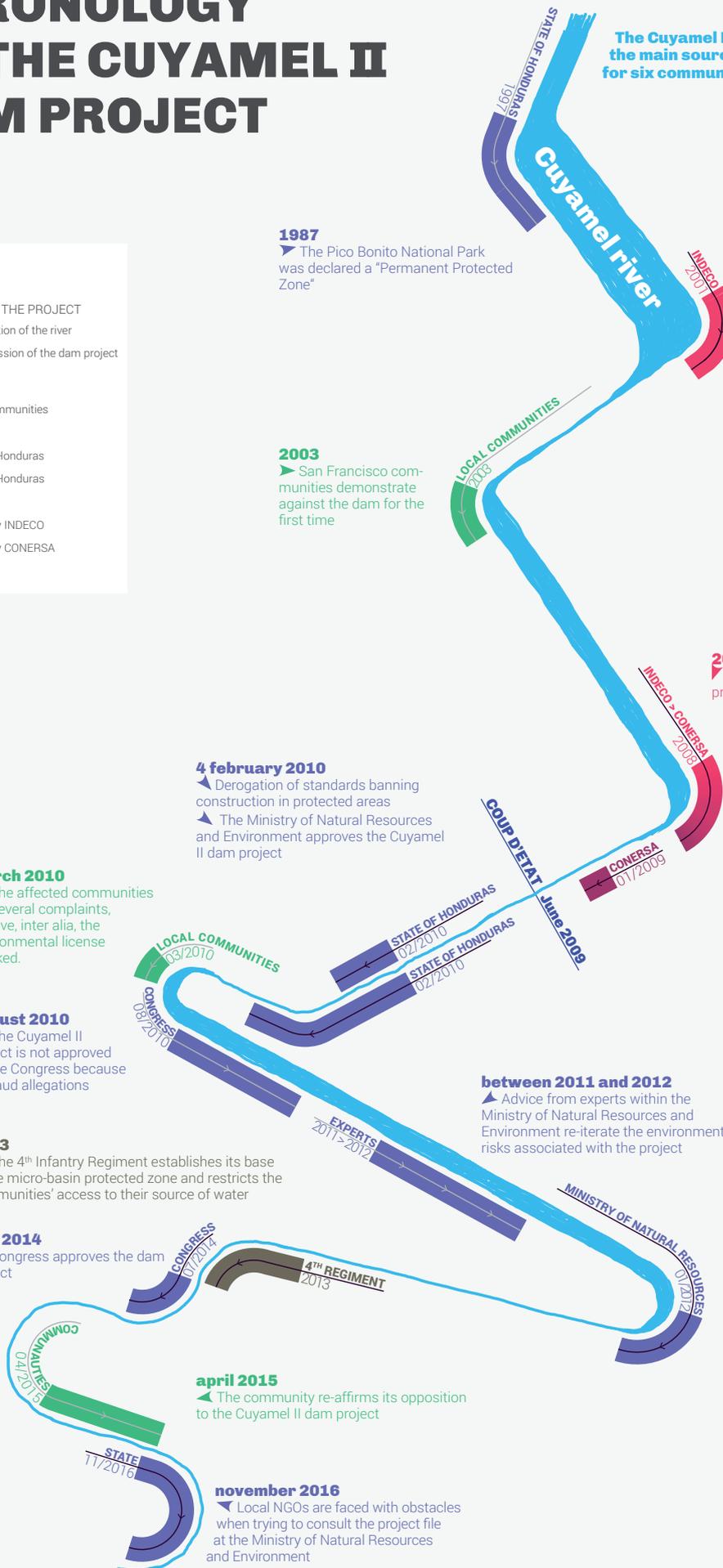
▶ Legal advice from the Ministry of Natural Resources and Environment considers the dam project to be legally viable

april 2015

◀ The community re-affirms its opposition to the Cuyamel II dam project

november 2016

◀ Local NGOs are faced with obstacles when trying to consult the project file at the Ministry of Natural Resources and Environment



Design : Maxime Zoffli

B. Timeline for the Cuyamel II Project 2001-2017

i. Access to potable water prior to the Cuyamel II Project

The Cuyamel River has been the main source of water for five communities in the department of Atlántida (San Francisco, Micely, Buena Vista, La Frutera, and Boca de Toro) since the previous century. In 1921, the multinational corporation Vaccaro Bros., which had operations in the Cuyamel River area, established facilities to generate potable water for its operations and for the population. In 1943, the company ceded water management to the incorporated San Francisco Municipality.

As of the 1980s, the population consolidated public control of drinking water by building a gate to protect the chlorinating system, and in 1997 an easement agreement was signed with the owners of the Hacienda Vista Hermosa, which provided right of passage for persons monitoring the water. Parallel to this process, actions were undertaken to guarantee the protection of the area's ecosystem. On 1 June 1987, the Pico Bonito National Park was designated as a Perpetual Protected Area under the Bosques Nublados Law.⁶² In 1998, the population, with the objective of protecting access to drinking water, had the State declare (through the State Forestry Administration, AFE-COHDEFOR or "COHDEFOR") the Cuyamel River micro-basin as a Protected Forest Area (*Área de Vocación Forestal Protegida*).⁶³ In 2001, a Water Board was created in accordance with the applicable statutes. The Water Board is officially responsible for the management of access and protection of drinking water. It obtained legal status in 2002. Since 2001, two attempts have been made to build a hydroelectric plant on the river, without any form of consultation and clearly against the opinion of the inhabitants.

ii. 2001-2007 Rejection of the Cuyamel II Project and affirmation of the right to water

In 2001, Industrias Ecosostenibles SRL (INDECO), represented by José Gerardo Ochoa Cantero, asked SERNA for permission to conduct a feasibility study for a 4.4 MW hydroelectric plant and a potable water-bottling plant. According to representatives of the community, this was done without consulting the population. The population took legal action to defend their rights⁶⁴ and organised demonstrations. During that same period, legal protection for the area was strengthened. In 2003, Agreement 635-2003 categorised three-megawatt hydroelectric plants in category 3 which require an Environmental Impact Assessment (EIA). Moreover, management plans were established for the Cuyamel River⁶⁵ sub-basin in 2002, and for the Pico Bonito⁶⁶ National Park in 2004.⁶⁷ FUPNAPIB was highly involved in the drafting and implementation of both plans, which explicitly exclude the construction of industrial projects or hydroelectric plants.⁶⁸ The Pico Bonito National Park management plan establishes zones and their respective regulations as follows:

- 1) in the **core zone and protected forest areas**, activities that alter the original ecosystem, military manoeuvres, and the construction of dams for the generation of electricity are prohibited; and
- 2) in the **buffer zone**, the construction of any type of infrastructure without the respective mitigation and environmental impact measures and the construction of roads and access roads are prohibited. Although the construction of dams for domestic and industrial water supply are authorized, dams to produce electricity are prohibited.⁶⁹

62. National Congress of the Republic, Bosques Nublados Act, Decree 87-87, 1 June 1987, available online at <http://extwprlegs1.fao.org/docs/pdf/hon42044.pdf> [accessed on 24 March 2016].

63. COHDEFOR, Resolution number GG-PMF-043-1998.

64. See Chapter 3.

65. The management plan for the Cuyamel River sub-basin, approved by resolution of COHDEFOR GG-PMCH-039-2006.

66. The management plan for the Pico Bonito National Park, approved by resolution COHDEFOR JI-MP-011-2004.

67. See Section 3.a on the content of the plan and its renewal.

68. See Section 3.a.

69. *Op. Cit.*, footnote 66, p. 51-55.

The Cuyamel River sub-basin management plan prohibits:

- 1) in the **core area**, military manoeuvres, the building of roads or trenches, the construction of dams for the generation of hydroelectric power without the consent of the community and without complying with the requirements established by law; and
- 2) in the **buffer zone**, the construction of any type of infrastructure without adequate mitigation and environmental impact measures.⁷⁰

When the feasibility study started and the first steps were taken to obtain the environmental licence for the Cuyamel II Project in 2003, the population expressed its opposition to this project because of the possible adverse impacts – during the feasibility study some of the trees in area were felled.⁷¹

In 2007, after a field visit by the authorities in charge of technical matters, the project was declared unfeasible. The reasons given were that: it was located within a specially protected area (designated as a Protected Forest Area) for water supply to the communities, and in the Pico Bonito National Park; the micro-basin concerned supplies six communities and could put the water supply to the population at risk; the Forestry Law⁷² prohibits the felling of trees and shrubs within 150 meters from a buffer zone of protected water supply of communities; the project includes the building of a ditch in the upper part of the micro-basin to construct the dam; the interests of the project and those of the protected areas of the park and the micro-basin are mutually exclusive given the technical rules and legal regulations that apply to the zone and that among the activities prohibited by the management plan of the Pico Bonito National Park is the opening of ditches or roads and the construction of dams for the generation of hydroelectric power.⁷³ Despite the fact that none of these elements have essentially changed, both administrative authorities and Congress have approved the project.

iii. 2007-2014 The Approval of the Cuyamel II Project and the impairment of rights

As of 2007, the mechanism for protection of forest areas described in the previous section dwindled. The Electricity Renewable Energy Promotion Act (*Ley de Promoción a la Energía Eléctrica con Recursos Renovables*)⁷⁴ approved in October 2007, established that only activities from category 1 projects (from zero to three megawatts) must be reported to the environmental registry, and that only categories 2 and 3 projects require an EIA.

In 2008, INDECO applied for authorization to transfer its rights over the Cuyamel II Project to CONERSA. In 2009, CONERSA requested a continuation of the procedure for environmental licensing from SERNA, which included project modifications. The capacity of the plant was reduced to three megawatts⁷⁵ and the building of a water-bottling plant was discarded, but the modified project was still located in the protected area of the Pico Bonito National Park and in the Cuyamel River micro-basin.

70. *Op. Cit.*, footnote 65, p. 25-27

71. The Municipality, *Notice of opposition to the Cuyamel II Hydroelectric Project*, August 08, 2007. Also, prior to the issuance of the license, when the project had just started, the Water Board and members of the Community Board of Trustees of San Francisco, Atlántida, had filed complaints with the Public Ministry opposing the construction of an access road to the higher part of the Cuyamel River basin for which trees were cut down; See complaint filed by IDHAMO with SERNA against the environmental license granted to CONERSA, 24 March 2010.

72. *Op. Cit.*, *Ley Forestal*, (Forest Law), article 70 establishes the mandatory nature of management plans (approved by the ICF); See also *Ley General de Ambiente* (General Environmental Law), article 36 which states that protected areas are subject to management plans.

73. DECA, *Technical Opinion* 144-2008, 6 February 2008, p. 3-5; and DAPVS, *Technical Opinion* DAPVS-045-2007, 13 August 2007; See Sections 2.a and 3.a. of the current report.

74. *Op. Cit.*, *Ley de Promoción a la Generación de Energía Hidroeléctrica con Recursos Naturales* (Law for the Promotion Hydroelectric Power Generation using Natural Resources), approved by Decree 70-2007 of 2 October 2007.

75. SERNA, *Request for the continuation of the environmental license process - Partial relocation and an updated qualitative environmental diagnosis are presented - a certificate issued by the municipality of San Francisco is presented - documents presented* 7 January 2010.

From 2009 to 2015, and especially after the 28 June 2009 coup d'état, legislation was modified to favour and facilitate the granting of environmental licences, thus weakening legal guarantees for protected areas. In December 2009, the Regulation of the National Environmental Impact Assessment System (*Reglamento del Sistema Nacional de Evaluación de Impacto Ambiental*, hereinafter the SINEIA Regulation) was amended via an Executive Power Agreement,⁷⁶ further reducing environmental requirements for hydroelectric projects.

From 2008 to 2011, Elsie Paz was once again AHPER President; she had been President from its founding in 2003 until 2005.⁷⁷ AHPER lobbying activities at the national level seemingly contributed to amendments to the legislation on hydroelectric plants, which included the reduction of environmental restrictions. **In 2010, an agreement (*Acuerdo*) was issued that made it possible to award licences for projects in protected areas.⁷⁸ The same day that the agreement was approved, SERNA granted an environmental licence to CONERSA.** The Cuyamel II Project, however, remained at a standstill. The National Congress did not approve it because the inhabitants of the municipality of San Francisco claimed that the signatures of 175 subscribers of the water system, including members of the Water Board, had been falsified in a document presented to prove the population's alleged support for the project.⁷⁹

In parallel, AHPER also seems to have played a role in the review of initially negative opinions of the Cuyamel II Project. AHPER is alleged to have influenced the administrative authorities responsible for the initially negative technical opinions that were later not taken into consideration, thereby allowing the issuance of the licence.⁸⁰ As part of the licensing process, the administrative authorities issued conflicting opinions on the boundaries of the Pico Bonito National Park and on the status of the micro-basin. The technical authorities recognised the broad boundaries of protected areas and reiterated the risks inherent to the project, but the legal authorities determined that there was no reason to stop the development of the project.⁸¹

The questioning of the boundaries and existence of the protected areas was exacerbated by the fact that the 2004 Pico Bonito National Park management plan only lasted five years, and the authorities did not respond in writing to the request for renewal submitted in 2009. This situation created a vacuum that generated even greater legal uncertainty and vulnerability for the park and the neighbouring communities.⁸²

In 2010, among the series of legal actions undertaken by the population was a complaint filed with SERNA against the environmental licence issued to the Cuyamel II Project.⁸³ SERNA accepted the complaint, noting that state agencies had issued several contradictory opinions: some concluded that the project was environmentally unviable because it was located in a protected area, while others concluded that it was legally feasible because the limits of the Pico Bonito National Park covered a more restricted area and that, despite the micro-basin having been registered by COHDEFOR, the resolution to create the micro-watershed was considered but had not been ratified by Congress and was therefore invalid.⁸⁴

76. Executive Power, *Regulation of the National Environmental Impact Assessment System (SINEIA)*, Agreement 189-2009, 31 December 2009; See Section 3.a.

77. See section 1.b.ii.

78. SERNA, *Agreement 233-2010*, article 1, 04 February 2010.

79. An investigation was opened by Congress but no steps were taken to shed light on the facts and the contracts for water supply and concessions were finally approved four years later by the Congress itself. Claims were also filed with the Public Prosecutor's Office, however these investigations have not advanced. See Section 3.c.

80. Annex provided by the director of DECA to technical report 56/2010; See section 3.a.ii.

81. See section 3.a.ii.

82. *Ibid*

83. SERNA, *Complaint filed for granting environmental license of the Cuyamel Project II to the company Compañía de Energía de San Francisco SA of C.V. (CONERSA) that affects five communities of San Francisco Atlántida*, 18 March 2010.

84. See, for further discussion of this problem, Section 3.a.

In March 2014, the Congress approved the Cuyamel II Project operation and water supply contracts, despite the complaint against the environmental licence had not been ruled on, without having resolved the situation created by the alleged falsification of signatures, and without the company obtaining the support of the communities, who continued to repeatedly and openly expressed their rejection of the project by taking legal actions and holding demonstrations.⁸⁵

The vulnerability of the right to water increased with the seizure of the Hacienda Vista Hermosa by the Office for the Administration of Seized Property (*Oficina Administradora de Bienes Incautados* - OABI) in January 2013. After accusing the owners of the area of collaboration with drug traffickers, the OABI assigned the property to the Secretary of State in the Office of National Defence (SEDENA). The Fourth Infantry Battalion, which reports to SEDENA, proceeded to build military installations on the property, contrary to what is stipulated in the management plans, and without waiting for the required licences and permits which had been requested from the municipality.

This militarization directly jeopardizes the quality of the water because the Water Board is unable control what the Army does on its installations, it does not know how waste is being managed, and its presence has created conflicts and hindered access for the members of the Water Board to the water system for maintenance of the micro-basin. These issues are discussed in section 3.

iv. 2014-2017 A situation that threatens the right to water

The actions undertaken by the community against the presence of the military, against the issuing of the environmental licence, and against national congressional approval of the Cuyamel II Project have been mostly unsuccessful. (See section 3.c.) The community has clearly stated its opposition to the project in public meetings and in municipal declarations. Even though two cases remain pending – one against MiAmbiente and the other before the CAFTA-DR Secretariat of Environmental Affairs (SEA) –, the Honduran Congress approved the operation and water supply contracts on 23 July 2014.⁸⁶ This would indicate that the attitude of the State since 2009 has been to facilitate the advancement of the project, and to halt or dismiss any complaint filed by the population. Currently, the only legal formality stopping the construction of the dam is that the company has yet to obtain a municipal approval for construction. According to the company, the physical presence of the Army is stopping construction, as is the high level of conflict because it drives away potential investors.⁸⁷ The Army's presence is also an obstacle to on-going complaint proceedings because the commander has occasionally limited access to the micro-basin zone of civil servants sent by MiAmbiente to verify the state of the project's advancement.⁸⁸

C. The Company and the hydroelectric power industry

CONERSA is the company that obtained the permit to build the Cuyamel II Project in 2010. To understand how the company functions, one must delve into the persons who created the company. The company is typical of the structure used for these types of projects and falls within the sphere of the persons running most hydropower plants and projects in Honduras. The current section looks at the company, its shareholders, and AHPEE.

85. On 02 August 2010, a protest was held in front of the National Congress to oppose the approval of national water supply and construction contracts. Later, in September 2011, a march was held to protest the granting of concessions for rivers in the department of Atlántida. This led to the organisation of the forum "Because water is a human right, the Cuyamel River is ours and nobody else's." In 2014, demonstrations persisted in the form of cultural activities and community efforts that ultimately led to the Cuyamel River being declared community heritage.

86. SAA CAFTA-DR, Environmental Communication no. CAALA / 13/004 Cuyamel II, 23 August 2013, available on line at http://www.saa-sem.org/es/registro/registro_page/25 [accessed on 24 March 2017].

87. Interview of the representatives of the company with FIDH, 13 December 2016.

88. See Section 3.c.

i. CONERSA

The Cuyamel II Project began in 2001 with a request for a permit to conduct a feasibility study filed with SERNA (currently MiAmbiente) by Industrias Ecosostenibles SRL (INDECO), whose legal representative was José Gerardo Ochoa Cantero.⁸⁹ After SERNA rejected the project on 7 November 2007, the authorisation for the feasibility study registered in file 17-E-2001, for the Environmental Licence registered in file 425-A2007, and for Registered Water Use Agreement registered in the file 09-C-2007, for the Cuyamel II Project, were transferred to CONERSA.⁹⁰ CONERSA was registered as a legal entity on 27 March 2008, Elsie Paz and the company Grupo de Energías Renovables Inc. (GREEN) were listed as its shareholders, with a 5% and 95% stake respectively.⁹¹ GREEN was registered in Panama under the names of two subscribers owning one share each, Berta Acoca de Patton y Oriel Francisco Kennion, almost at the same time as CONERSA. GREEN's President is the same person who acted as the legal representative for INDECO, José Gerardo Ochoa Cantero. The company simply changed its name, but remained in the same hands.

The three directors of GREEN Inc., are José Gerardo Ochoa Cantero, President; his sister Cecilia María Ochoa Cantero, Treasurer; and their mother, Rosario Cantero Rodríguez, Secretary.⁹² GREEN controls three other hydroelectric projects (PH, *proyectos hidroeléctricos*) in Honduras: PH Chinacla, PH Perla River, and PH Santiago. In December 2016, Elsie Paz, claimed that there were no investors for the Cuyamel II Project.⁹³

GREEN was incorporated a few days before CONERSA. The authors of the current report were unable to obtain any information in Panama on GREEN shareholders because of Panamanian restrictions on the release of this type of information. The members of senior management who were interviewed refused to provide this type of information.⁹⁴ This seems to indicate that the main objective was to create a legal structure that would make access to information on the company, its shareholders, and its investors more difficult. (See section 3.B.2.)

In 2014, the registered address for CONERSA was Colonia La Reforma, Calle Movimiento Familiar Cristiano No. 331, Tegucigalpa.⁹⁵ The telephone number was registered as 220-6731. These are the modified contact details of AHPEE, which is located at Colonia La Reforma, Calle Movimiento Familiar Cristiano No. 1331 and the telephone number is the same as that of CONERSA.⁹⁶ In order to place CONERSA in a context that is wider than that of the small number of people that comprise it, we need to consider their social networks, specifically those of Elsie Esther Paz Macías and José Gerardo Ochoa Cantero, who have active roles in the hydroelectric sector. This is particularly true of Elsie Paz who has played an important role in AHPER. Both José Gerardo Ochoa Cantero and Elsie Paz are players in the Honduran hydroelectric industry. Elsie Paz had a fundamental role in the activities of the AHPER,

89. Company registered under number 34 of volume 585 of the Registry of Commercial Property of the City of Tegucigalpa MDC, on 05 May 2005.

90. CONERSA was registered with the Chamber of Commerce and Industries of Tegucigalpa (Centro Asociado), in the Mercantile Registry under number 173 with of the registration number 2500753 in the "Comerciante Sociales" register on 27 March 2008.

91. This information corresponds to the data obtained in December 2016, the percentage may have changed since then.

92. The Renewable Energy Group, (Grupo de Energías Renovables Inc. , GREEN INC) is a company under the law of Panama. See: Public Registry of Panama, Ficha 605650, *Pacto social de la sociedad denominada GRUPO RENOVABLE DE ENERGÍA INC. (GREEN INC.)*, 25 February 2008, www.registro-publico.gob.pa [accessed in October 2016]

93. Interview with Elsie Paz during the 13 December 2016 mission.

94. In the interview with the authors of this report on December 2016, CONERSA was represented by the agronomist David Erazo, acting as director, and legal counsel René Guevara, acting as proxy for the company. FIDH had been directed to these two persons by José Gerardo Ochoa Cantero, in an email sent on 11 December 2016 because he would not be in the country for the interview.

95. National Gazette, No. 33,486, Republic of Honduras, *Decree No. 375-2013*, 23 July 2014.

96. AHPEE, *home page*, <http://www.ahper.org/index.php/contact-us.html> [accessed 14 March 2016]. At the writing of this report we still did not have the correct address for CONERSA; the legal complications created by this situation are discussed in Chapter 3.

currently called AHPEE, this places her at the heart of the social networks that make up the entire hydroelectric industry in Honduras.

Elsia Esther Paz Macías⁹⁷

Elsia Paz is an industrial engineer by training, and has worked in the hydroelectric industry in Honduras since 1999.⁹⁸ She coordinates several important activities in the industry as director and founding partner of the consultancy Energy Solutions Partners. She was the President and a founding member of the Honduran Association of Small Renewable Energy Producers (AHPER, predecessor of AHPEE) from 2003 to 2005 and then again from 2008 to 2011. From 2008 to 2010, she was President of the Federation of Renewable Energies of Central America and the Caribbean (FERCCA). She describes herself as an important consultant for the reform of the Framework Law of the Electric Sub-Sector. From 2009 to 2011, she was a Latin American Observer for two World Bank funds: the SREP Fund (Scaling Up Renewable Energy Program) and the Climate Investment Fund; a position that would have allowed her to have these funds invest hydroelectric projects in Honduras. Elsia Paz is an agent for at least three of the four companies controlled by GREEN, among them CONERSA. As President and member of AHPER, she lobbied for the sector but seemingly also for her own business interests, as can be surmised from the fact that AHPER's address was used as headquarters for CONERSA.⁹⁹ When speaking in public, and during the interview with the authors of this report,¹⁰⁰ she insisted on denying any human rights violations linked to environmental conflicts, arguing that the murders that occur in the country are linked to drug trafficking or land conflicts between the inhabitants, and that NGOs describe these as political conflicts for the sole purpose of obtaining international financing for themselves.

José Gerardo Ochoa Cantero¹⁰¹

José Gerardo Ochoa Cantero is an entrepreneur involved in several hydroelectric and mining projects in Honduras. His mother and sister are, along with him, directors of GREEN. His mother, Rosario Cantero Rodríguez, was consul general of Honduras in Hamburg, Germany, from 1990 to 1993¹⁰² and again from 2002 to 2006.¹⁰³ His sister, Cecilia María Ochoa Cantero, filled the same position from 1994 to 1998.¹⁰⁴

José Gerardo Ochoa Cantero is linked to the following companies and hydroelectric plants: Empresa Generadora Santiago SA de C.V., (Santiago Hydroelectric Project), Corporación Hidro Ambiental SA de C.V., (Río Perla Hydroelectric Project), CONERSA (Cuyamel II Project), and La Sierra Hydroelectric Plant, SA de C.V., (Chinacla Hydroelectric Project).¹⁰⁵ Ochoa Cantero is, along with Rosario Cantero Rodríguez,

97. This profile was mainly based on the information obtained through the corporate research carried out for this report.

98. Energy, Sol Partners, Elsia Paz Experience 1999-2014, available on line at <http://www.energysolpartners.com/docs/CVElsiaPaz2014.pdf> [accessed on 20 January 2017].

99. The address listed for CONERSA in 2014 was Colonia La Reforma, Calle Movimiento Familiar Cristiano No. 331, Tegucigalpa. The telephone number was 220-6731. This is wrong contact information of the AHPEE, which is located on the Street Christian Family Movement No. 1331, telephone number 2220-6731. See: National Gazette, No. 33,486, Republic of Honduras, *Decree No. 375-2013*, 23 July 2014.

100. Interview conducted in the framework of the FIDH mission, 13 December 2016.

101. This profile is mainly based on the information obtained through the corporate research conducted for the current report.

102. STAATSANZEIGER für das Land Hessen, 15 November 1996, available on line at <http://starweb.hessen.de/cache/STANZ/1993/00046.pdf> [accessed on 1 March 2017].

103. Ministerium für Inneres Kommunales des Landes Nordrhein-Westfalen, *Berufskonsularische Vertretung der Republik Honduras, Hamburg*, available on line at https://recht.nrw.de/lmi/owa/br_vbl_detail_text?anw_nr=7&vd_id=6161&ver=8&val=6161&sg=1&menu=1&vd_back=N [accessed on 1 March 2017].

104. Makrolog recht für Deutschland, *Amtsblatt des Saarlandes Teil I*, available on line at http://www3.recht.makrolog.de/bglplus/2011/home.nsf/Kaufen?openform&normid=sl_abl_1994S418B419a_H13®ion=land.

105. German-Honduran Chamber of Commerce and Industry, *Zielmarktanalyse*, available at : http://www.erneuerbare-energien.de/EEE/Redaktion/DE/Downloads/Publikationen/AHK_Zielmarktanalysen/zma_honduras_2013_alle.pdf?__blob=publicationFile&v=1 [accessed on October 2016].

also an agent for the Honduran mining company Recursos Minerales, SA de C.V., (REMINSA), which has been linked to social conflicts.¹⁰⁶ Ochoa Cantero appears to have many other economic interests in Honduras. For example, he has been involved in a protracted legal dispute with the municipality of La Ceiba, in the Atlántida department, over valuable beach properties between La Ceiba and Sambo Creek.¹⁰⁷

ii. The Honduran Association of Electrical Energy Producers (AHPEE)

AHPEE is a non-profit civil association, incorporated on 23 January 2003.¹⁰⁸ The association's official objective is to promote the development of renewable energies in Honduras.¹⁰⁹ The association was initially called the Honduran Association of Small Renewable Energy Producers (AHPPER) and the Honduran Association of Renewable Energy Producers (AHPER).¹¹⁰ Among its clearly stated activities are the dissemination of information, participation in working groups for the reform of the legal framework for the renewable energy industry, and support to the industry and private companies - both in relation to authorities and in the search for financing. This organisation was actively involved in the changes to legislation,¹¹¹ and interceded on behalf of CONERSA when it appealed the initial decision of the Institute of Forest Conservation (ICF) in 2010.¹¹²

AHPEE is funded by its members and has also received funding and technical and legal assistance from international funders, such as the 4E Program in Central America.¹¹³ The policy counterpart of Program 4E is the Central American Integration System (*Sistema de la Integración Centroamericana* - SICA), and specifically its Energy Coordination Unit (*Unidad de Coordinación Energética* - UCE-SICA).¹¹⁴

AHPEE is clearly a visible mechanism at the service of the renewable energy industry, nationally and internationally. As mentioned above, the renewable energy industry is connected to the fossil-fuel energy industry and the same people are usually involved in both. While none of the most important Honduran families seem to be involved with the Cuyamel II Project, actors at the national level, such as Elsie Paz

106. Honduprensa, *Investigan la minera que opera en San Antonio de Conchagua* (Investigation on mining company operating in San Antonio de Conchagua), 13 March 2014, available on line at <https://honduprensa.wordpress.com/tag/inhgeomin/page/2/> [Consultado el; 20 January 2017]; Gissela Rodríguez, *Vecinos se oponen a la minería a cielo abierto*, El Heraldo, 26 April 2014, available on line at <http://www.elheraldo.hn/regionales/699340-218/vecinos-se-oponen-a-la-mineria-a-cielo-abierto> [accessed 20 January 2017].

107. La Prensa, *Caso de Playa del Perú irá al Congreso Nacional* (Playa del Perú Case to go Before the National Congress), 14 August 2008, <http://www.laprensa.hn/honduras/556198-97/caso-de-playas-del-peru-ira-al-congreso-nacional> [accessed 24 March 2017] El Ceibeño, *La Ceiba: Cercan terrenos en playas Perú* (La Ceiba: Parcels of Land Fenced off in Perú Beaches), 24 May 2013, <http://www.elceibeno.hn/laceiba/320720-149/la-ceiba-cercan-terrenos-en-playas-peru> [accessed on 20 January 2017].

108. AHPEE, *home page*, <http://www.ahper.org/>

109. The original statutes of the AHPPER indicate that the association has as one of its objectives "To promote the development of electricity generation and rural electrification in the country through renewable sources in a sustainable and clean way as a means to contribute to human development" and "Protect and restore the environment".

110. According to AHPEE, the association changed its name from AHPPER to AHPER because the statutes initially only accepted projects with an energy production under 15MW, and in order to reflect the increase in the development of larger projects.

111. Noticias del Programa 4E, *Gobierno de Honduras incentiva la generación de energías renovables en el país* (Government of Honduras encourages the generation of renewable energy in the country), 06 September 2013, available on line at <http://www.energias4e.com/noticia.php?id=2048> [accessed 14 March 2017].

112. Paragraph 2 of the application received by SERNA on 7 January 2010 for the continuation Environmental Licensing process for the Cuyamel II Project contains a description of how AHPPER, represented by Elsie Paz, met with ICF officials to discuss possible solutions to the negative decisions on hydroelectric projects located in protected areas. They had been handed down negative decisions in the case of the Cuyamel II Project, but also on several other occasions when they had applied for licenses for similar projects.

113. 4E is a German Foreign Aid (GIZ) programme. GIZ confirmed to FIDH that the 4E programme had limited cooperation with AHPPER since 2012. GIZ pointed out that there has never been any contact between the 4E programme and Elsie Paz, and indicated that the 4E programme has never been connected to the Cuyamel II Project.

114. Programa 4E Energías renovables y Eficiencia Energética en Centroamérica, *home page*, <http://www.energias4e.com/elprograma.php> [accessed on 20 January 2017].

and Ochoa Cantero, are directly involved. AHPEE's representatives, repeatedly stated that CONERSA did not appear as a member in its records. In an interview they also argued that, they personally, were not part of the association in 2010 and could not comment on whether the association had acted on behalf of CONERSA.¹¹⁵ The representatives of CONERSA, however, affirmed that the company is a member of AHPEE. AHPEE representatives said they were unable to provide a record of all members, and that both businesses and NGOs could freely request membership.

However, prior to the arrival of the current representatives with whom the research team could meet, Elsie Paz's participation in both entities (CONERSA and AHPER), as well as the use of AHPER's address as headquarters of CONERSA, could indicate a possible collusion between the two entities.

The same lack of transparency also arises regarding the role of human rights in the growth of the renewable energies sector. During the interview, the representatives of the AHPEE indicated that they have started to include human rights into their activities.¹¹⁶ They started by publishing a map of all the legislation that companies must comply with when building and equipping hydroelectric power plants.¹¹⁷ Recently, they began a training project. At the training seminar on social and environmental issues held at International Centre for Hydropower in November 2016, 23 of its members occupied the over 30 available slots. In the interview, they also explained that the basic human rights reference used, in which they acknowledged not to be "experts", is the Industrial Guide of Human Rights (*Guía Industrial de Derechos Humanos*), published in 2015 by the employers' association, the National Association of Industrialists (*Asociación Nacional de Industriales - ANDI*).¹¹⁸ They also explained that companies did not have to comply with the guidelines in order to obtain or maintain membership; they are solely used as a source of information by interested members.

D. The communities of the municipality of San Francisco and the Cuyamel II hydroelectric plant project

The quantitative survey conducted with the population of San Francisco unequivocally demonstrates that most of the inhabitants are opposed to the Cuyamel II Project.¹¹⁹ Most of the population believes that the project will not generate jobs, will not increase the amount of water available to the community, rather that it will put water supplies at risk, and will not make water cheaper. On the contrary, it will be more expensive and privatized. Finally, the resounding rejection of the hydroelectric project, even by persons not familiar with the details, reflects the general distrust of the population with respect to the behaviour of the hydroelectric sector in Honduras.

115. FIDH interview of AHPEE representatives, 13 December 2016.

116. Among other through the *Guía Industrial de Derechos Humanos*, Asociación Nacional De Industriales, 2015, available at: <https://gallery.mailchimp.com/6c87e6f271aafbbf9f8bda920/files/Guia-Industrial-de-Derechos-Humanosl.pdf>), and the book *Libertad Empresarial y Derechos Humanos*.

117. Global Environment Facility (GEF), Central American Bank for Economic Integration (BCIE), United Nations Development Program (PNUD), *Proyecto « Acelerando las Inversiones en Energía Renovable en Centroamérica y Panamá (ARECA)*, 2012. This guide was sent to the authors via email in follow-up of 13 December 2016 meeting.

118. ANDI, *Guía Industrial de Derechos Humanos*, <https://gallery.mailchimp.com/6c87e6f271aafbbf9f8bda920/files/Guia-Industrial-de-Derechos-Humanosl.pdf> [accessed on 23 January 2017].

119. A quantitative sociological study was conducted to determine the position of the inhabitants with respect to the Cuyamel II Project, as well as their impression of the actors involved. Responses were obtained from 280 of the 1,021 households. A qualitative study was also conducted using a survey with three focus groups. See Section 1, Methodology.



Osiris Garcia, Head of the San Francisco Municipal Environmental Unit: "I feel powerless, because we have been fighting for so many years to get the Environmental Licence cancelled, and this issue still hasn't been resolved."
@FUPNAPIB

The answers to some of the questions asked in the social surveys reveal the community's reservations about the risks of the negative impact that the Cuyamel II Project will have, as shown by the results below.

Do you know of any project that could affect water resources in your community?

No response	little	Have heard mentioned	No	Yes
0.33%	6.23%	50.82%	23.28%	19.34%

Do you believe that the hydroelectric plant on the Cuyamel River will generate new jobs for the community?

No response	Does not know	No	Yes
14.10%	0.00%	66.89%	19.01%

Do you believe that the hydroelectric plant on the Cuyamel River will increase water supply for the community?

No response	Does not know	No	Yes
15.08%	0.00%	79.67%	4.92%

Do you believe that the hydroelectric plant on the Cuyamel River will lower the price of electricity for the inhabitants?

No response	Does not know	No	Yes
16.07%	0,33%	63.60%	20.00%

Do you believe that the hydroelectric plant on the Cuyamel River will lead to the privatisation of water resources for San Francisco?

No response	Does not know	No	Yes
14.42%	0.66%	6.89%	78.03%

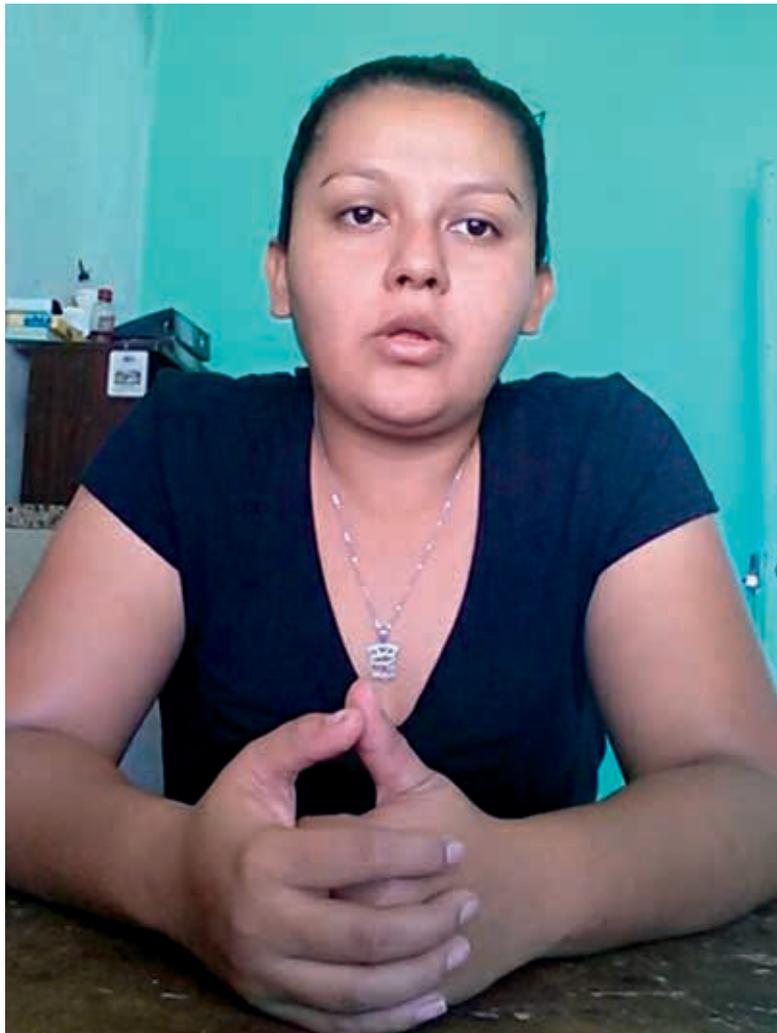
Do you believe that the hydroelectric plant on the Cuyamel River will increase the cost of water related services in San Francisco?

No response	Does not know	No	Yes
11.14%	0.33%	9.84%	78.69%

Do you approve of having the Cuyamel River Project in the community?

No response	Does not know	No	Yes
2.30%	0,00%	95.08%	2.62%

The focus group study revealed the same level of rejection from livestock producers, members of employer associations, and members of the water boards. The arguments used against the project are usually the danger to the ecology and to the health of the inhabitants, the risk that the quantity and quality of water will affect agricultural production, and the risk of water being privatised, making it more expensive and less abundant. This risk is considerable because, as one of the participants to the focus groups explained, even without the planned dam "from 7:30 am onwards, in summer, we have no water", which means that the construction of a hydroelectric plant "would lead to the rationing of water" which would affect household activities and consumption, as well as subsistence agricultural and livestock activities. Some of the respondents shared the same opinions when it came to the right to water and the history that connects inhabitants to their source of potable water, which is seen as community heritage that everyone should benefit from: the people, the animals and all living beings.



Isliá López, Treasurer, San Francisco Water Board: "As a representative of the San Francisco Community, we will continue to fight for the Cuyamel River and against the construction of hydroelectric plants and any death project they may want to build." © FUPNAPIB

There were two other interviews with municipal authorities, one with the Deputy-Mayor and the other with the Director of the Environment Unit (UMA- *Unidad de Medio Ambiente*). Both women agreed that the municipality was committed to opposing the building of the dam and have refused to issue a construction permit. Both political leaders explained that this commitment, which was agreed upon during a town-hall meeting (*cabildo abierto*) conducted in September 2015, was one of the election campaign promises that helped them to win their seats.

The people of San Francisco have clearly demonstrated their opposition to the Cuyamel II Project, which has been made possible by failures to apply the law, and by violations of the rights to information, to citizen participation, and to effective remedy, in a context where the laws that protect the right to water are increasingly made weaker.

3. ANALYSIS OF THE IMPACT ON HUMAN RIGHTS

A. The right to water

i. Legislative framework of the right to water

At the **international level**, the right to water is enshrined in the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR).¹²⁰ Under the terms of the UN Committee on Economic, Social and Cultural Rights (CESCR), the right to water "clearly falls within the category of safeguards essential to ensure an adequate standard of living, in particular because it is one of the fundamental conditions for survival."¹²¹ International standards enshrine specific obligations regarding access to drinking water. One of the first treaties to recognise this type of obligation was the Convention on the Rights of the Child,¹²² ratified by Honduras in August 1990.¹²³

The protection of the right to water encompasses more than guaranteeing access. The treaties mentioned give States the obligation to guarantee access to drinking water because it is a necessary for the life and health of all persons. On that basis, from the conditions required for quantity, health, quality, and accessibility¹²⁴ arise the following obligations: (1) maintain a continuous water supply that is sufficient to cover the consumption and personal and domestic use of each person; (2) to be healthy the water must be free of microbes, parasites, chemicals, and radiological substances that may be harmful to health; (3) water supply services must be physically accessible to the entire population; and, (4) access to water must be equitable and non-discriminatory.¹²⁵ Additionally, States must respect, protect, facilitate, and promote the work of human rights defenders and other members of civil society so that vulnerable or marginalized groups can exercise their right to water.¹²⁶ States must also guarantee protection from human rights violations committed on national territory by third parties, including companies. States must prevent, punish and remedy any harm or damages that are the consequence of violations of human rights.¹²⁷

The **UN Guiding Principles on Business and Human Rights** establish the responsibility of companies to respect human rights and exercise due diligence to avoid any action or omission that may result in the violation of human rights.¹²⁸ This obligation extends to the risks involved in their business relationships. Specifically, the United Nations High Commissioner for Human Rights has affirmed the essential role of private actors in protecting the right to water and the importance of ensuring that business activities

120. The **International Covenant on Civil and Political Rights** (ICCPR) establishes the right to life in article 6.1; And the **International Covenant on Economic, Social and Cultural Rights** (ICESCR) also implicitly recognises the human right to water through the right of everyone to an adequate standard of living and to the enjoyment of the highest attainable standard of physical and mental health.

121. UN Committee on Economic, Social and Cultural Rights (CESCR), General Comment No. 15: *The Right to Water (Arts. 11 and 12 of the Covenant)*, 20 January 2003, E/C.12/2002/11, [accessed 18 April 2017].

122. United Nations General Assembly, Convention on the Rights of the Child, resolution 44/25 of 20 November 1989, 44th Session, Article 27.3.

123. For list of countries and ratification status See: UNTC, Convention on the Rights of the Child, available online at https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=IV-11&chapter=4&clang=_en [accessed on 9 March 2017].

124. *Op. Cit.*, footnote 121, (CESCR), General Comment No. 15.

125. *Op. Cit.*, footnote 121, (CESCR), General Comment No. 15.

126. *Op. Cit.*, (CESCR), General Comment No. 15, para 37.

127. OHCHR, Guiding Principles on Business and Human Rights ("Guiding Principles"), HR / PUB / 11/04 New York and Geneva 2011, Principle 1.

128. *Op. Cit.*, (OHCHR), Guiding principles, Principle 18.

do not compromise access to safe drinking water and sanitation.¹²⁹ Should any violation of the right to water, or rights related to it occur, the State must guarantee access to justice and companies must cooperate with proceedings.¹³⁰

Given that the right to water is intrinsic to environmental protection and to the adequate conservation of natural resources, including water, it is highly appropriate to list the relevant international conventions that have been ratified by the State of Honduras: The Convention on Biological Diversity,¹³¹ which requires States to create protected areas and regulate activities authorised inside and outside of these areas to ensure the sustainable management and maintenance of biodiversity; and the Convention for the Conservation of Biodiversity and Protection of Wilderness Areas in Central America, which obliges States Parties *inter alia* to "identify, select, create, manage and (...) strengthen wildlife refuges, or other protected areas **as means to ensure the conservation of the main ecosystems of the isthmus, and in priority those that contain water-producing forests**", in addition to developing strategies for the effective implementation of protected area plans.¹³² What can be inferred from these norms is that there is an indissoluble connection between the State's obligation to create protected areas and the need to protect water-producing ecosystems and, consequently, the right to water and the health of all individuals.

At the **regional level**, the Additional Protocol to the American Convention on Human Rights in the area of economic, social and cultural rights establishes the right of all persons to live in a healthy environment and to have access to basic public services,¹³³ and establishes the obligation of States to promote the protection, preservation, and improvement of the environment.¹³⁴ The IACHR has defined the right to water as an essential human right, because it is a necessary condition to live a life with dignity and because of its interdependence with other rights, such as the rights to life, to a healthy environment, and health.¹³⁵ In a 2015 report on the impact of extraction industries on indigenous peoples and Afro-descendant communities, the IACHR noted the link between the lack of access to drinking water in the region and the implementation of extractive operations and water scarcity and pollution. Growing pressure on water sources is partly due to the monopolisation and overexploitation of water resources by extraction companies and, in particular, the construction of dams.¹³⁶

The right to water is also protected at the **national level**. The Constitution of the Republic of Honduras, in article 16, second paragraph, stipulates that "the international treaties concluded by Honduras with other States, once they enter into force, form part of national law". The right to water and related rights enshrined in the treaties mentioned above are thus protected by domestic law and must therefore be respected and guaranteed by the State. Article 145 of the Constitution¹³⁷ **recognises the fundamental**

129. HRC, *Report of the United Nations High Commissioner for Human Rights on the scope and content of the relevant human rights obligations related to equitable access to safe drinking water and sanitation under international human rights instruments*, A/HRC/6/3, 16 August 2007, para. 30-31, available on line at http://www2.ohchr.org/english/issues/water/iexpert/docs/A-CHR-6-3_August07.pdf [accessed on 9 March 2017]

130. *Op. Cit.*, (OHCHR), Guiding principles, Principle 19 and the relevant commentary.

131. UN *Convention on Biological Diversity (CBD)*, Nairobi 21 May 1992, ratified by Honduras through Legislative Decree No. 30-95 of 1995, article 8.

132. SICA, *Convention for the Conservation of Biodiversity and Protection of Wilderness in Central America*, ratified by the Republic of Honduras through Decree 183-94 dated 27 December 1994, articles 17 and 19.

133. OAS General Assembly, *Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights Protocol of San Salvador*, Article 11.1 El Salvador, 17 November 1988, ratified by Honduras 14 November 2011.

134. *Ibid.*, Article 11.2

135. IACHR, IACHR Annual Report 2015, Chapter IV. *Access to Water in the Americas: An Approach to the Human Right to Water in the Inter-American System*, OEA / Ser.L / V / II.Doc. 48/15, 31 December 2015, para. 26, available online at <http://www.oas.org/en/iachr/docs/annual/2015/doc-en/informeannual2015-cap4a-agua-en.pdf> [accessed on 9 March 2017].

136. IACHR, *Indigenous Peoples, Afro-descendant communities and natural resources: protection of human rights in the context of extraction, exploitation and development*, OEA / Ser.L / V / II Doc. 47/15 31 December 2015, para. 292, 293, 294, available online at <http://www.oas.org/en/iachr/reports/pdfs/extractiveindustries2016.pdf> [accessed on 9 March 2017].

137. This article was introduced by the National Congress through Decree 232-2012 of 25 January 2013.

right to water as a human right which includes the right to adequate supply, quality, and quantity, and the right to the protection of water resources. To make it effective the State is required to preserve water sources and the environment, thus protecting public health and human life. Article 340 of the Constitution states that the rational use of resources is useful and needed by the public, and imposes on the State the obligation to regulate the use of resources bearing in mind public interest when allocating of resources to individuals. Thus, the corpus of laws approved by the Honduran State must allow for the protection inherent to the human right to water.

The rights enshrined in the Constitution and international treaties are transposed into decrees and laws that establish protection measures in concrete terms. In the case of Honduras, the main provisions are contained in: the Framework Law for the Drinking Water and Sanitation Sector and its regulations (*Ley Marco del Sector de Agua Potable y Saneamiento y su reglamento*), the Forestry Law, Protected Areas and Wildlife (*Ley Forestal, Áreas Protegidas y Vida Silvestre*) approved by Decree 98-2007 of 19 September 2007,¹³⁸ the General Water Law (*Ley General de Aguas*) approved by Decree 181-2009 of 14 December 2009,¹³⁹ the Health Code (*Código de Salud*) approved by Decree 65-91 of 6 August 1991, the Law of Territorial Ordinance (*Ley de Ordenamiento Territorial*) approved by Decree 180-2003,¹⁴⁰ and the General Law of Environment approved by Decree 104-93 of 30 June 1993.

The general principle used to determine the content of these laws is preferential use of the water resources for human consumption.¹⁴¹ It is on this basis that laws specifically establish the prohibitions and requirements for the use of water resources, particularly in environmentally fragile areas and in areas where rivers and watersheds are the main source of drinking water for communities. Therefore, any type of activity in areas legally recognised as sources of water supply is prohibited.¹⁴² In addition, article 33 of the General Environmental Law "prohibits human settlements, military bases, industrial facilities, or any other facilities in the areas that could affect water supply resources for populations" and requires an EIA prior to the building of any hydroelectric plant that would use surface or ground water on a large-scale.¹⁴³

138. National Congress of the Republic of Honduras, (*Ley Forestal, Áreas Protegidas y Vida Silvestre*, "Ley Forestal") Forest Law, Protected Areas and Wildlife ("Forestry Law"), approved by Decree 98-2007 of 19 September 2007, available at <http://www.roatanmarinepark.com/wp-content/uploads/2009/10/Ley-Forestal.pdf> [accessed on 9 March 2017].

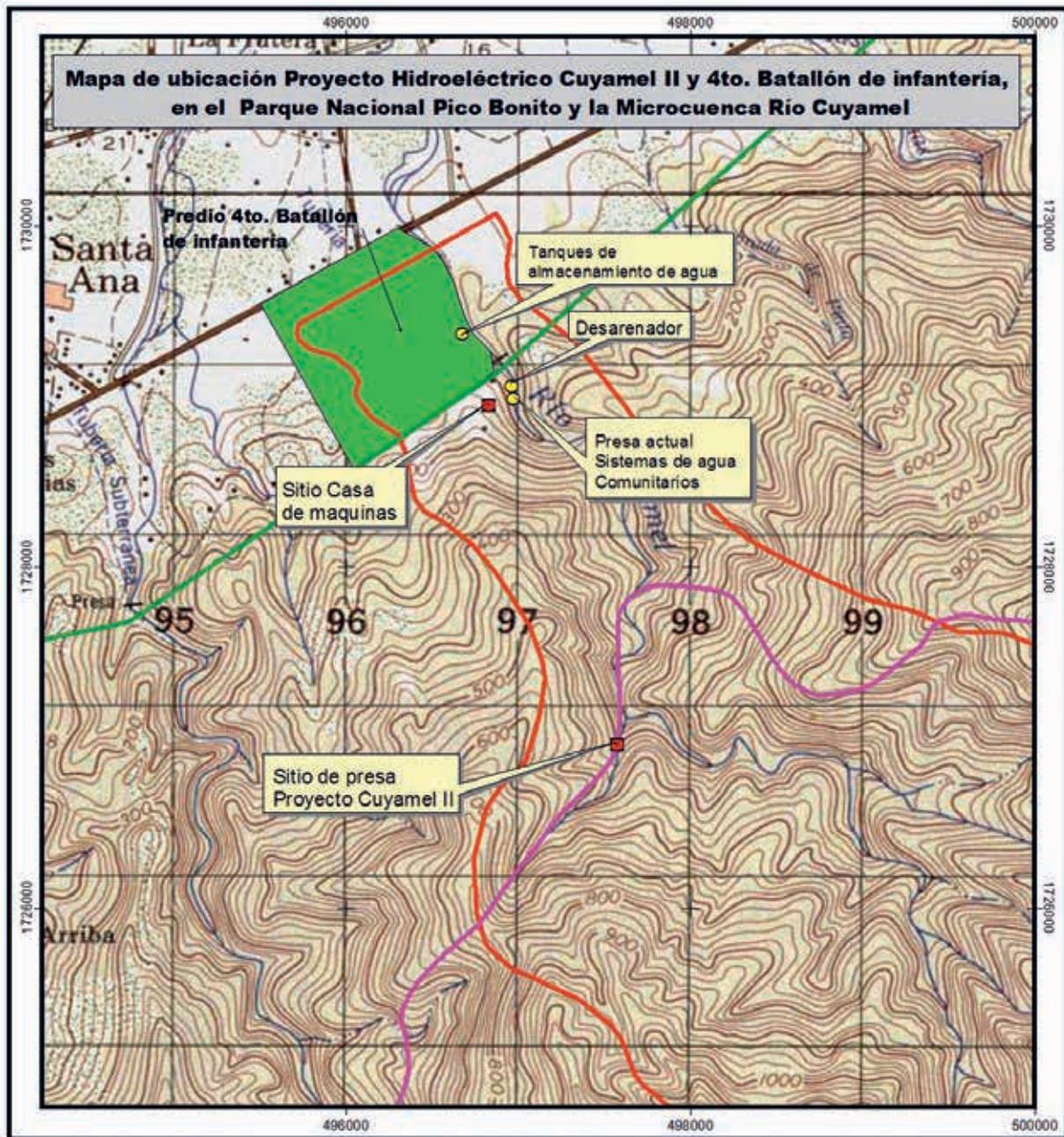
139. National Congress of the Republic of Honduras, General Water Law, approved by Decree 181-2009, 14 December 2009, available at <http://www.sanaa.hn/leytransparencia/PDFs/REGULACION/Leyes/Ley%20General%20de%20Aguas.pdf> [accessed 9 March 2017].

140. National Congress of the Republic of Honduras, *Ley de Ordenamiento Territorial*, approved by Decree 180-2003 of 28 November 2003, article 90, available at <http://extwprlegs1.fao.org/docs/pdf/hon41355.pdf> [accessed on 9 March 2017].

141. *Ibid*, article 90.

142. "*Estas áreas [adyacentes] estarán determinadas por el espacio de la cuenca comprendido desde (50mts) abajo del 'nacimiento, hasta el parte aguas comprendida en la parte alta de la cuenca. Cuando exista un nacimiento en las zonas de recarga hídrica o cuenca alta dentro de un Área que no tenga declaratoria legal de zona abastecedora de agua, se protegerá un área en un radio de doscientos cincuenta metros (250 mts) partiendo del centro del nacimiento o vertiente; [...]*" (These [adjacent] areas shall be determined by the area of the catchment basin starting (50 m) below the spring to the higher part of the watershed. In cases where there is a spring in a recharge area or a in high catchment area that has not been legally declared a recharge zone, an area within a radius of two hundred and fifty meters (250 m) will be protected starting from the centre of the spring or the slope;"), See *Op. Cit.*, Forestry Law, article 123 (1).

143. *Op. Cit.*, *Ley General de Ambiente* (General Environment Law), article 38.



<p>LEYENDA</p> <ul style="list-style-type: none"> ■ Puntos Hidroeléctrica Cuyamel II ● Puntos Sistema de agua Limite zona núcleo Limite zona de amortiguamiento Mic. Río Cuyamel Predio 4to. Batallón 	<p>INFORMACIÓN GENERAL</p> <p>Ubicación: Municipio San Francisco, Atlántida Parque Nacional Pico Bonito Fuente: Hojas Cartográficas del IGN, No. 1604, levantamiento de campo con GPS. Elaborado por: Ing. Jehovany Cruz FUPNAPIB, 29/03/2017</p> <p>DESCRIPTOR CARTOGRÁFICO</p> <p>Proyección: Universal Transversa de Mercator (UTM). Datum: WGS84 Esferoide de Clarke 1866</p>	<div style="text-align: center;"> </div> <p style="text-align: center;">Esc.: 1:30,000</p> <div style="text-align: center;"> </div>
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ii. Violations of the right to water perpetrated by the State

a. Building hydroelectric plants in protected areas and their impact on the right to water

In addition to the previously described environmental risks created by the project because of soil and ecosystems fragility in the area,¹⁴⁴ international bodies have also warned about the environmental impact of run-of-the-river hydroelectric plants. When expressing their fears about the project, the community also clearly described these risks.

The idea that run-of-the-river hydroelectric plants have little impact¹⁴⁵ has recently been debunked. In fact, they can be highly detrimental to ecosystems and to the access to basic services for communities living downstream from the dams.¹⁴⁶ Hydrological changes due to the cumulative effects of small hydroelectric plants can exceed the negative impact of large hydroelectric plants.¹⁴⁷ In fact, the term "run-of-the-river" has been deemed inaccurate and misleading, because the lack of a generally accepted definition that has led to the term being used to designate anything from micro hydroelectric plants that provide electricity to remote cities, to the mega Belo Monte dam in Brazil.¹⁴⁸

The United Nations High Commissioner for Human Rights, Zeid Ra'ad Al Hussein, has drawn attention to the need to establish links between investment and infrastructure projects and the protection of human rights through processes such as public consultation and discussion with affected communities, policies whereby financial institutions explicitly commit to respect human rights, due diligence using clear indicators and action plans that are adapted to the context, increased transparency from companies, and the establishment of effective remedy mechanisms. These processes and mechanisms mainly aim at strengthening protection and guarantees for human rights defenders who are struggling to ensure that hydroelectric plant projects do not violate the rights of communities and whose lives are in danger.¹⁴⁹

The surveys and interviews conducted for the purposes of the current study show that community members agree that water resources are threatened¹⁵⁰. The majority felt that the threats mainly stem from projects for mining and hydroelectric plants. When queried as to how they would be affected, they generally felt that there would be negative effects on the quality and quantity of water and that this would in turn influence their health and quality of life, and the local economy. (See Section 2.D).

To explain their fears, the respondents described the enormous negative effects of the San Juan hydroelectric plant, which has similar characteristics to the Cuyamel II Project, and is situated between the la Masica and Esparta municipalities in the department of Atlántida. Through visiting the area where the San Juan and other hydroelectric plants have been built, and through discussions with affected communities and local councillors, they could witness the important adverse impacts that this project had generated were identified.¹⁵¹ A member of the community explained that: "Before it was a river of

144. See Section 2 of the current report.

145. International Rivers, *Swindling Rivers: Run-of-River Hydro*, 17 February 2016, available on line at <https://www.internationalrivers.org/resources/10332>.

146. *Ibid.*

147. See Kiber, K.M. and D.D. Tullos (2013), *Cumulative biophysical impact of small and large hydropower development in Nu River, China*, Water Resour. Res. 49, doi:10.1002/wrc.20243.

148. *Op. Cit.*, footnote 145, p. 2.

149. Zeid Ra'ad Al Hussein, El Nuevo Herald, *Reduciendo el riesgo de la infraestructura para las personas* (Reducing Infrastructure Risk for People), 5 March 2017, available on line at <http://www.elnuevoherald.com/opinion-es/article136834433.html> [accessed 28 March 2017].

150. For more informations on the methodology applied for the sociological survey, see Annex 1, Methodology (available in spanish). It's interesting to underline that MiAmbiente also used community's survey as an inquiry method for its environmental audits.

151. FUPNAPIB and community members also visited the La Gloria hydroelectric plant, situated on the river Bejucales, in the municipality of Balfate in the Colón department.

with a high water flow and today you can wade across it". Other members of the community feared that the loss of this important community commodity, the only source of water, could in the long run have an impact on health. "We would drink contaminated water; if oil and acid get into the water the effects would appear years later". Others said that "water will be rationed". Community members also highlighted cases where projects that were not properly managed from the start generated deforestation and affected the water sources and for this reason they fear that the same will happen to the Cuyamel River micro-basin. These fears are aggravated by the fact that, even if the Cuyamel II Project had planned for mitigation measures, the community and the Water Board claim that they did not have access to them as they have not been shared with the local population.



Environmental impacts of the hydroelectric projects visited @FUPNAPIB

In the same vein, one of the environmental analysts from MiAmbiente for the Atlántida region stated that **while the positive effects of building hydroelectric plants in Honduras are related to the reduction of carbon emissions and creating jobs, these benefits do not outweigh the high level of environmental risks that are generated.** Based on his experience in the region, projects that are inadequately executed, without adequate supervision when roads are built and layers of vegetation are removed, have a significant impact on water resources.

In the case of the Cuyamel II Project, the very location of the hydroelectric plant upstream of the community's water supply system in and of itself puts the right to water and the priority use for human consumption on the back burner, and gives priority to its use for economic and/or industrial purposes.

b. The authorisation of the Cuyamel II Project: successive modifications of the legal framework and administrative errors that violated the communities' right to water

Considering the legal guarantees described above, to demonstrate how this situation endangers the right to water of communities in the municipality of San Francisco, an analysis is required of the circumstances that led to the authorization of the Cuyamel II Project within the protected areas of the Pico Bonito National Park and the Cuyamel River micro-basin. The analysis clearly shows that authorisation was granted (1) in a context of regressive changes to the legal guarantees for protected areas and for environmental licences, and (2) through a process marked by a series of irregular administrative actions which impaired the communities' right to water.

The impact of successive changes to the national legal framework

The Honduran government has progressively amended environmental regulations for protected areas, and for the granting of environmental licences for hydroelectric plant projects. These amendments were

implemented mainly through executive "agreements", which were not approved by Congress,¹⁵² which is the only branch of government with the power to create, decree, interpret, reform and repeal laws.¹⁵³ These "agreements" contradict and weaken laws previously passed by Congress, thus contravening the hierarchy of norms.¹⁵⁴

One of the main changes to the legal framework was the adoption of new regulations for SINEIA.¹⁵⁵ This set of regulations is essential for the protection of water resources because it specifically creates the obligation to conduct an EIA prior to obtaining a licence for projects that may have a negative impact on the environment and on the rights of local communities.¹⁵⁶ In 1994, SINEIA regulations required an EIA for all hydroelectric plant projects, particularly those located in protected areas. The regulations were modified in 2007, 2010, and 2015. These modifications introduced the classification of hydroelectric projects according to their size and production capacity, and eliminated the obligation to conduct an EIA for projects considered to be of low- or moderate-impact, even in cases where the projects concerned are in protected areas.¹⁵⁷ In some cases, regulations require only a qualitative environmental diagnosis or adherence to good practices guidelines. But these measures are insufficient and cannot ensure the protection of the right to water and, where appropriate, the adoption of necessary mitigation measures. Without an EIA, communities are exposed to the approval of projects that, despite being of small or medium size, can have considerable adverse environmental and social impacts.

Conditioning the obligation to conduct an EIA on the size of a project is problematic because there are scientific studies that have determined that hydroelectric plant projects, large or small, have cumulative biophysical effects and therefore should be required to conduct an EIA. In fact, it has been demonstrated that the cumulative effects of small hydroelectric projects can exceed the effects of large hydroelectric plant projects, especially when it comes to hydrological changes.¹⁵⁸

The weakening of the legal framework and of environmental protection guarantees opened the doors to the approval of hydroelectric plant projects in protected areas, and to the progressive decrease of protection for ecosystems, thus undermining right to water protections through the elimination of legal requirements for the permits that act as safeguards for the rights of the communities. These

152. With the exception of the *Ley de Promoción a la Generación de Energía Hidroeléctrica con Recursos Naturales* (Law on Promotion of the Generation of Hydroelectric Power with Natural Resources), approved by Decree 70-2007 of 2 October 2007, which also introduced changes concerning EIAs, but was the only act approved by Congress.

153. Constitution of the Republic of Honduras, articles 213 and 245

154. National Congress of Republic of Honduras, *Ley General de la Administración Pública* (General Law on Public Administration), Decree 146-89 of 29 October 1986, article 7 establishes hierarchy, article 8 determines the entities and public administration bodies that cannot perform acts that diminish, restrict or distort the rights and guarantees recognised by the Constitution of the Republic, available online at <http://www.poderjudicial.gob.hn/CEDIJ/Leyes/Documents/LeyGeneralAdministracionPublica.pdf> [accessed on 9 March 2017]; and the Constitution of the Republic of Honduras, article 245.11 which states that agreements, decrees, regulations, and resolutions issued by the President must be in accordance with the law.

155. SINEIA Regulations contain provisions that define the purpose, scope, and functioning of the SINEIA which was created by the General Environmental Law to ensure the sustainable development of the country and the welfare of future generations by aligning private investment activities with the need to protect the environment. These are regulations that were not approved by the Congress but nonetheless contain provisions that introduced changes that contradict the General Environmental Law that the regulations are meant to apply.

156. The implications of these changes to the law that affect participation and access to information are discussed in part 3b of the current paper.

157. The categories of hydroelectric projects were first established in the Law on the Promotion of Hydropower Generation with Natural Resources (Decree 70-2007) of 2 October 2007 which, through article 18, amended the General Environmental Law by introducing three categories of projects. This law was adopted before the coup, and triggered a series of modifications that would aggravate and intensify after the coup d'état. Subsequently, SINEIA regulations were modified, first by Agreement 189-2009 of 31 December 2009, articles 30, 33, and 34 establish the general categorisation and parameters for each category, and Agreement 1714-2010 of 23 February 2011, which contains a table of categories for all types of projects. Subsequently, an amendment was introduced through Agreement 008-2015 of 14 September 2015 and Agreement 016-2015 of 6 October 2015, that redefined project categories and limited the EIA requirement to Category 4 projects (Hydroelectric power plants with a production capacity above 30MW).

158. See Kiber, K.M. and D.D. Tullos (2013), *Cumulative biophysical impact of small and large hydropower development in Nu River, China*, *Water Resour. Res.* 49, doi:10.1002/wrc.20243.

reforms constitute a violation of the principles established in the General Law of the Environment that call for EIAs, particularly in the case of energy generation projects and specifically for those located in protected areas and natural reserves.¹⁵⁹ Furthermore, these changes contravene the environmental principle of prevention enshrined in the international treaties ratified by Honduras because EIAs are the main instrument used to apply the principle.¹⁶⁰

The laws on protected areas were greatly weakened. The repeal of Agreements 001-96¹⁶¹ and 158-2009 prohibiting the granting of environmental licences in protected areas, through the introduction of Agreement 233-2010¹⁶² of 22 January 2010, **opened the door to the issuance of environmental licences for hydroelectric projects located in natural parks and legally protected water supply areas, such is the case of the Cuyamel II Project, which obtained an environmental licence on the very same day this Agreement was introduced.** Requests for such projects had multiplied, despite COHDEFOR's repeated negative opinions on projects located in protected areas.¹⁶³

All these reforms constitute a violation of the principle of progress in the protection of the right to water which is enshrined in national¹⁶⁴ and international¹⁶⁵ instruments, and aims to prevent governments from reducing the rights of communities by modifying applicable norms. The concept underpinning the principle is that neither legal statutes nor the jurisprudence can be modified if this leads to the lessening of existing protection standards.¹⁶⁶

The following analysis evidences the weakening of national legal protections for the right to water licences. According to the information gathered by the Natural Resources and Human Rights Observatory 100% of the 36 hydroelectric plants that are currently operating, would have been required to conduct an EIA before 2007. Between October 2007 and 2010, because of changes to the law, only 13% of these projects would be required to carry out an EIA, 47% would have only conducted a qualitative environmental diagnosis, and 39% would only have had to register in the environmental registry. As of 2010, with the introduction of the new regulations, **an EIA would not be required for 91% of these projects. Only the largest projects would require an EIA, a mere 8%.**

Owing to its immense natural wealth and highly vulnerable territory,¹⁶⁷ the State of Honduras needs clear regulations that lay out the environmental licensing process in detail and that provide for EIAs that are conducted, evaluated and monitored by an interdisciplinary team of qualified experts capable of determining the positive and negative impacts of any project.

159. *Ley General de Ambiente*, available online : [http://portalunico.iaip.gob.hn/Archivos/SERNA/Regulaciones\(normativa\)/Leyes/2015/Ley%20General%20del%20Ambiente%20Honduras.PDF](http://portalunico.iaip.gob.hn/Archivos/SERNA/Regulaciones(normativa)/Leyes/2015/Ley%20General%20del%20Ambiente%20Honduras.PDF), article 5, 28A and 78 (amended by the law on administrative simplification).

160. *Op. Cit.*, footnote 131, CBD, Art.14.1.a.

161. SERNA, *Agreement 001-96*, 17 October 1996, article 1 establishes that SEDA shall not handle requests for environmental licences for protected areas.

162. SERNA, *Agreement 233-2010*, 4 February 2010, article 1.

163. *Op. Cit.* footnote 56. Interview with former Director of COHDEFOR's Department of Protected Areas, 13 February 2017.

164. *Op. Cit. Ley General de la Administración Pública*, article 8.

165. OAS, American Convention on Human Rights (ACHR), San José, Costa Rica, 22 November 1969, articles 26 and 29; *Op. Cit.*, ICESCR, Article 502; CAFTA-DR Chapter 17.

166. Mario Peña Chacón (Editor), *El principio de no regresión en Iberoamérica*, Gland, Switzerland, available at <https://portals.iucn.org/library/sites/library/files/documents/EPLP-084.pdf> [accessed on 9 March 2017].

167. According to the Climate Risk Index, prepared annually by the Germanwatch, Honduras is among the countries most affected by extreme weather events. These climatic phenomena include tropical storms and depressions, hurricanes and droughts, and the consequences of these events can be aggravated by the existence of a hydroelectric plant. See Germanwatch, S. Kreft, D. Eckstein, L. Junghans, C. Kerestan and U. Hagen, *Global Climate Risk Index 2015. Who Suffers Most From Extreme Weather Events? Weather-related Loss Events in 2013 and 1994 to 2013*, available at: <http://germanwatch.org/en/download/10333.pdf> [accessed on 24 March 2017].

The reforms discussed above have progressively reduced the requirements for safeguarding the right to water, and have limited the mechanisms for the protection and exercise of rights, leaving communities extremely vulnerable to actions undertaken by the State and businesses. The impairment of the right to water recently worsened because of the adoption, in 2015,¹⁶⁸ of a new SINEIA regulation that promotes the implementation of a digital platform and a simplified environmental licensing system "which will reduce the environmental licensing process to one week for projects that benefit the most vulnerable sectors of the country."¹⁶⁹ This will lead to even greater impairment of the right to water because it reduces verification mechanisms such as on-site inspections to determine existing and potential environmental impacts.

Administrative errors in the issuance of environmental licences

A concrete example of the consequences of the changes discussed above is the Cuyamel II Project. The Honduran government issued an environmental licence, and signed and approved contracts for operation and water supply for the Cuyamel II Project (1) without requiring an EIA, (2) in disregard of the technical recommendations of various authorities, and (3) in violation of environmental legislation for protected areas applicable at the time the licence was requested.

Firstly, **SERNA did not request an EIA prior to the approval of the environmental licence as required by the SINEIA regulation applicable at the time** the licence request was submitted.¹⁷⁰ The regulations define an EIA as:

*"[...] the process of analysis that serves to identify, predict, and describe the possible positive and negative impacts of a proposed project, to identify mitigation measures for negative impacts, and to establish a plan for periodic monitoring and follow-up."*¹⁷¹

An EIA is mandatory for electricity generation projects,¹⁷² and for all projects located in protected areas.¹⁷³ According to the SINEIA regulation applicable to the request for the Cuyamel II Project licence, an EIA cannot be replaced by a qualitative environmental diagnosis¹⁷⁴ and must be carried out in accordance with the procedure set out in said regulation.¹⁷⁵

The seriousness of this violation is tied to the importance of EIAs as the main means of applying the environmental principle of prevention. The Convention on Biological Diversity requires State parties

168. SERNA, *Agreement 008-2015*, 14 September 2015 ; MiAmbiente, *Agreement 016-2015*, 6 October 2015.

169. Governance and Decentralization Cabinet, *Nuevo Sistema de Licenciamiento Ambiental Simplificado Ayudará a Mejorar la Competitividad de Honduras*, 19 October 2015, available on line at <http://www.gobernabilidad.gob.hn/index.php/2014-03-03-12-51-37/item/1351-nuevo-sistema-de-licenciamiento-ambiental-simplificado-ayudara-a-mejorar-la-competitividad-de-honduras> [accessed 9 March 2017].

170. Given that the environmental license application for the Cuyamel II Project was filed on 30 May 2007, at a time when the SINEIA Regulation adopted on 5 March 1994 was in force, and which establishes that all electricity generation projects and projects located in protected areas must conduct an EIA (regardless of size or production capacity). On 1 January 2010, a new SINEIA Regulation came into effect and was published in the Official Gazette. This regulation, however, is not applicable to the Cuyamel II Project as the licensing process began in 2007, when the SINEIA Regulation of 1994 still applied. This assessment is based on the provisions contained in article 1 of the Administrative Procedure Law: "The organs and entities of the public administration shall be subject to this Law, when they declare, recognise or limit the rights of individuals" and, correspondingly, pursuant to Article 153, which establishes that "cases filed before the entry into force of this Law shall be handled and resolved in accordance with the provisions in force up until now". In addition, this interpretation is in accordance with Article 96 of the Constitution of Honduras which enshrines the principle of non-retroactivity of the law.

171. SERNA, *SINEIA Regulation of 1994*, also referred to as the applicable SINEIA regulation (*Reglamento SINEIA aplicable*), 5 March 1994, article 3, para. e.

172. *Op. Cit.*, Ley General de Ambiente, articles 5 and 78 (modified by *Ley de Simplificación Administrativa*).

173. *Op. Cit.*, Ley General de Ambiente, article 28A (enacted by Decree 181-2007 of 10 July 2010).

174. *Op. Cit.*, footnote 171, SINEIA Regulation, 5 March 1994, article 39.

175. This involves, first and foremost, a process that is public and participatory in nature and that allows interested members of the public to participate as of the early stages of the process (definition of EIA terms of reference) to the final stage (drafting of relevant mitigation measures), as well as in public discussions aimed at disseminating information in a clear way.

to establish procedures that require EIAs for projects that may have significant adverse effects on biological diversity, with a view to avoiding or minimizing side effects and, where appropriate, to allow public participation in such procedures.¹⁷⁶

The issuance of an environmental licence for the Cuyamel II Project constitutes a violation of applicable national legislation and of the principle of prevention as defined in the international treaties ratified by Honduras.

Secondly, the environmental licence was granted on 22 January 2010 **without consideration being given to the negative opinions issued by competent technical authorities who raised concerns over the environmental risks created by the Cuyamel II Project.**

On 7 November 2007, the ICF established that the Cuyamel II Project: was located within a specially protected community water supply area; was registered as a Protected Forest Area; was located in the buffer zone for the Pico Bonito National Park; did not take into consideration the risk that the construction of the project implied for the communities who consume the water from the micro basin; contravened the ban on the felling of trees near community water supply basins; and was incompatible with the technical and legal instruments for the use of protected areas, in particular with the rules established in the management plan.¹⁷⁷ Based on this opinion and on actions undertaken by the community to express their opposition to the project,¹⁷⁸ on 6 February 2008 the DECA issued a technical report¹⁷⁹ **stating that the Cuyamel II Project was environmentally unviable, and classifying it in category 4 due to the risk of significant adverse effects.**

Later, on 7 January 2009 CONERSA decided to reactivate the environmental licensing process by submitting a request for continuation that contained modifications to the initial project.¹⁸⁰ Following this request, a new SINEIA should have been convened¹⁸¹ to evaluate the feasibility of the project, but this did not happen. The ICF carried out an on-site inspection¹⁸² to determine the feasibility of the project, without convening the SINEIA. Following the inspection, the DECA issued an opinion stating that the findings of the ICF inspection were not in the file and expressing the need to forward the file with the new information to the ICF so that it could rule on the feasibility of the project.¹⁸³

On 22 January 2010, despite existing doubts, SERNA, without consulting the ICF, granted the environmental licence to the Cuyamel II Project.¹⁸⁴ This decision clearly contravened environmental

176. *Op. Cit.*, CBD, article 14.1.a.

177. ICF, *Dictámen Técnico* (Technical Opinion) *DAPVS-045-2007*, 13 August 2007, reference: DECA, *Informe Técnico* (Technical Report) *144/2008*, 6 February 2008.

178. i.e. The Municipality of San Francisco, *Acta de oposición al proyecto hidroeléctrico* (Statement of opposition to the hydroelectric plant project), 8 August 2007; on 2 August 2010, a protest was held in front of the National Congress to oppose the approval of national water supply and construction contracts. Later, in September 2011, a march was held to protest the granting of concessions for rivers in the department of Atlántida. This led to the organisation of the forum "Because water is a human right, the Cuyamel River is ours and nobody else's." In 2014, demonstrations persisted in the form of cultural activities and community efforts that ultimately led to the Cuyamel River being declared community heritage.

179. DECA, *Dictámen técnico 144-2008*, 6 February 2008, pp. 3-5.

180. SERNA, *Request for the continuation of the environmental license process - Partial relocation and an updated qualitative environmental diagnosis are presented - a certificate issued by the municipality of San Francisco is presented - documents presented* 7 January 2010.

181. Including representatives of the public and NGOs as set out in SINEIA Regulation of 5 March 1994, article 4.

182. DECA, *Dictámen técnico* (Technical Opinion) *59/2010*, 15 January 2010.

183. DECA, *Dictámen técnico* (Technical Opinion) *59/2010*, 15 January 2010, attached to this report is a decision of the Director of the DECA that analyses the content of the file and concludes (despite Technical Report 59/2010 that deems the project not feasible) that the boundaries of the park are those set in the Law of Bosques Nublados, consequently the project is located outside of the area, that the management plan of the Pico Bonito National Park has expired, that the characteristics of the project have been modified, and that the file includes a note from the Mayor's Office indicating to Elsie Paz the mayor's approval of the project.

184. SERNA, in *Resolution 215-2010*, 22 January 2010, declares the INDECO request for an environmental licence and the transfers the rights to CONERSA admissible.

legislation that required SERNA to act in coordination with other institutions and to consider requirements and recommendations before issuing an environmental licence.¹⁸⁵ But above all, it violated the prohibitions in the Forestry Law, which establishes that areas adjacent to water courses in recharge areas or elevated catchment basins are subject to special protection which includes **the banning of all types of activity**,¹⁸⁶ and the General Environmental Law, which **"prohibits human settlements, military bases, industrial facilities, or any other facilities in the areas that could affect water resources for populations"**.¹⁸⁷ The ultimate purpose of this legislation is to ensure respect for the principles of prevention and precaution enshrined in international law¹⁸⁸ to safeguard the environment and the rights of communities potentially affected by business activities and, in the present case, the right to water.

Violations of environmental regulations that were the result of the issuance of the licence for the Cuyamel II Project, that the ICF had warned of in their negative opinion, were clearly established during the hearing for the complaint filed by the affected communities of San Francisco on 24 March 2010.¹⁸⁹ In an opinion dated 13 January 2012, the ICF repeated their warnings of the high ecological and social risks inherent to the project:¹⁹⁰

"[...] would have a negative impact on the existing ecosystem in the Rio Cuyamel Protected Forest Area, such as loss of vegetation, increased erosion and, consequently, a reduction in the quality of water for consumption by the communities who benefit from the micro-basin, consequently these activities would not be in accordance with the objectives and scope defined for Protected Forest Areas such as the Rio Cuyamel micro-basin."

Although the project risks were subsequently reconfirmed¹⁹¹ during the environmental proceeding for the complaint filed by the community, at the drafting of the current paper, the environmental licence had not been revoked.

The fact that it has not been revoked is even more problematic because, to justify the validity of the licence, **the boundaries for protected areas have been called into question, thus creating considerable risk - not only for the Pico Bonito National Park - but also for all protected areas for which licences**

185. *Op. Cit.*, *Ley General de Ambiente*, article 10 and *Ley de promoción a la Generación de Energía con Recursos Renovables* (Decreto 70-2007), article 19. However, during a meeting in the Office of Trade and Environment in Tegucigalpa on Friday, February 17, 2017, MiAmbiente stated that the director of DECA had sufficient powers to make the decision and to recognise the feasibility of the project.

186. "These [adjacent] areas shall be determined by the area of the catchment basin starting (50 m) below the spring to the higher part of the watershed. In cases where there is a spring in a recharge area or in an elevated catchment area that has not been legally declared a recharge zone, an area within a radius of two hundred and fifty meters (250 m) will be protected starting from the centre of the spring or the slope;" See *Op. Cit. Ley Forestal*, article 123 (1).

187. *Op. Cit.*, *Ley General de Ambiente*, article 33.

188. *Op. Cit.*, CBD, Article 14.1.a; UN, United Nations Framework Convention on Climate Change, Article 3.3 (ratified by the Climate Change Act, Decree 26-95).

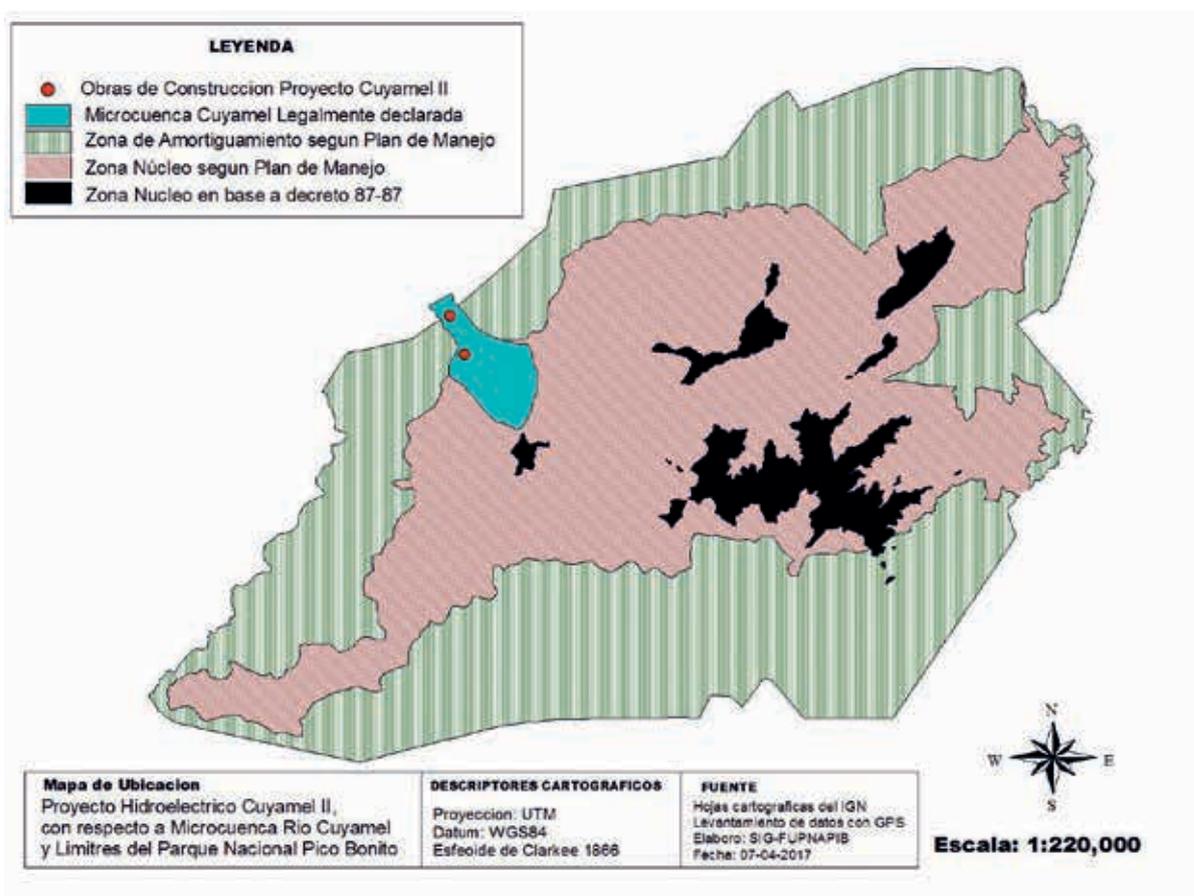
189. For more details See Section 3.c

190. ICF, *Dictámen técnico* (Technical Opinion) DCHA-003-2012, 13 January 2012.

191. i.e. CIPF, *Dictámen Técnico* (Technical Opinion) *IPF-0453-2011*, of 16 December 2011: states that the Cuyamel II Project is located within the buffer zone of the Pico Bonito National Park (according to the limits indicated in the management plan) and within the boundaries of the Cuyamel river basin; Department of Protected Areas of the ICF, Technical Opinion DAP-006-2012, 5 January 2012, states that: (1) the works are located within the core of the Pico Bonito National Park (PBNP) according to management plan limits, (2) the water tank and the machine room are located in the PBNP buffer zone, according to management plan limits, (3) but all works are located outside the limits of the park defined by Decree 87-87; (4) is located within the recharge area for the micro-basin where hydroelectric dams are prohibited; DCHA-003-2012, 13 January 2012 claims that the Project would have a negative impact on the ecosystem in the protected forest area of the Cuyamel River such as loss of vegetation, increased erosion and consequently reduction in the quality of the water for consumption by communities who benefit from micro-basin; DECA, Technical Opinion 223/2014, 13 February 2014: confirms the previous technical opinions (Technical Opinion 1221/2013 of 22 July 2013 that takes into account DAPVS technical opinion DAP-134-2013 and the Department of Watersheds and Environment Technical Opinion DCHA-04-2014) that concluded that **the project is not feasible**.

could be requested for similar projects. Given that environmental legislation and the regulations¹⁹² for the Pico Bonito National Park and the Cuyamel River micro-basin clearly prohibit the construction of hydroelectric plants,¹⁹³ the tactic used to have the project approved was to put forward a legal argument that called into question the validity of the geographical limits for protected areas.

Legal counsel for ICF argued¹⁹⁴ that that the boundaries of the Pico Bonito National Park as set out in the management plan, which was the result of a three-year long process that involved community consultation and technical considerations, **were not valid** and that the Bosques Nublados Law should apply.¹⁹⁵ While the Bosques Nublados Law establishes the general parameters used to define protected areas, its strict application **would result in the creation of a protected area that would only cover 5% of the area currently protected according to the Pico Bonito National Park management plan; an area so small that, according to the experts, it would be ecologically unsustainable.**¹⁹⁶



Location of the elements of the project with respect to the core and buffer areas of Pico Bonito National Park @FUPNAPIB¹⁹⁷

192. Management plans are the instruments for regulating activities and the use of resources found in protected areas in the territory of Honduras, with a view to ensure the sustainability of ecosystems, and are based on technical and administrative criteria. According to article 70 of the Forestry Law, these plans are mandatory. The management plan for the Pico Bonito National Park was approved by resolution COHDEFOR JI-MP-011-2004 and the management plan for the Cuyamel River micro-basin was approved by the resolution of COHDEFOR GG-PMCH-039- 2006.

193. *Op. Cit.*, Forestry Law, article 109, "Under no circumstances shall licences and permits be granted for the use of natural resources in core protected areas or in buffer zones; the only economic activities that can be authorised are those that are in accordance with the management plans and operational plans previously approved by the ICF," Management Plan of the Pico Bonito National Park, pp. 51-55; Management plan for the Cuyamel River sub-basin, pp. 25-27.

194. ICF, Legal Department, Legal Opinion AL-166-2008. See also Annex of the director of the DECA to Technical Report 56/2010, ICF, Legal Department, Legal Opinion, 31 January 2012; ICF, Legal Opinion, nos. 944-949, file no. 2007-A-425, 2014.

195. National Congress of the Republic of Honduras, *Ley de Bosques Nublados*, approved by Decree 87-87, June 1987.

196. *Op. Cit.*, Interview with former Director of COHDEFOR's Department of Protected Areas.

197. A similar map was submitted to the SAA-CAFTA see : SAA-CAFTA, Additional Information to the Response of the Government of the Republic of Honduras to Communication CALAA/17/004 (Cuyamel II HN), 25 May 2015, p.8.

In view of this argument, we need to bear in mind that the same Cloudy Forests Law requires the adoption of a management plan, a requirement also contained in the Forestry Law.¹⁹⁸ Consequently, a management plan is an instrument that sets out objectives and implements the law and, therefore, has legal validity, which was re-confirmed with the approval of the COHDEFOR.¹⁹⁹ Failure to apply the management plan constitutes a breach of environmental norms and jeopardizes the protected area and its resources, particularly water resources. In accordance with the provisions of Article 321 of the Constitution, it is plausible that the interpretation of the law by ICF Legal Counsel is invalid. Moreover, COHDEFOR repeatedly requested that SERNA provide the file so that the limits established in the plan could be approved by Congress²⁰⁰. The file was lost on several occasions and was never sent before Congress. The negligence of the authorities created the legal vacuum that contributed to the approval of the Cuyamel II Project.

Legally challenging the validity of limits that have been in effect since 1987 is also contrary to the principle of progressiveness²⁰¹ because it constrains the environmental rights the community has been entitled to for years, and the regulations to which they have adapted their practices in order to ensure the sustainability of the Pico Bonito National Park. At the time, the limits of natural parks were established in management plans and through resolutions issued by COHDEFOR.²⁰² Challenging established limits would, therefore, put at risk the entire National System of Protected Areas in Honduras, and could lead to a breach of the obligations, established in international treaties ratified by Honduras, to create a system of protected areas, and to create and properly manage national parks.²⁰³

Also, the State's failure to renew the management plan for the Pico Bonito National Park created an important legal vacuum that left the community vulnerable with respect to the protection of its natural resources. In the arguments put forward by the director of the DECA, after the issuance of the Technical Report 59/2010, the expiration of the management plan is used to justify the decision to grant the licence.²⁰⁴ But the negligence of the State cannot be used in its favour, on the contrary, it constitutes a violation of the Forestry Law,²⁰⁵ of the General Environmental Law,²⁰⁶ and of the treaties mentioned above. Furthermore, given that until 2016 FUPNAPIB had carried out management, protection, and conservation activities in the park based on the management plan, and has drafted, in collaboration with the ICF, the annual operational plans for the park²⁰⁷ as well as a co-management agreement,²⁰⁸ it is possible to claim that the State tacitly approved the management plan. Furthermore, ICF staff working in the Department of Protected Areas and Wildlife told FUPNAPIB that the application for renewal had been approved.²⁰⁹

198. *Op. Cit., Ley Forestal* (Forest Law), article 70 establishes that Management Plans are mandatory (approved by the ICF); See also *Ley General de Ambiente* (General Environmental Law), article 36 states that protected areas are subject to management plans.

199. General Management, AFE-COHDEFOR, *Resolution GG-PMCH-039-2006*, 3 March 2006.

200. *Op. Cit.*, Interview with former Director of COHDEFOR's Department of Protected Areas.

201. See *Op. Cit.*, ACHR *CADH*, articles 26 and 29; *Op. Cit.*, ICESCR, article 5.2; CAFTA-RD, Chapter 17.

202. *Op. Cit.*, Interview with former Director of COHDEFOR's Department of Protected Areas.

203. *Op. Cit.*, *CBD*, article 8; *Op. Cit.*, *Convention for the Conservation of Biodiversity and Protection of Wilderness in Central America*, article 17.

204. DECA, *Dictamen técnico* (Technical Opinion) 59/2010, 15 January 2010 and the annex of the director of the DECA.

205. *Op. Cit., Ley Forestal* (Forest Law), article 113, assigns to the ICF responsibility for the, "drafting and updating of Management Plans and Operative Plans for Public Protected Areas and Wildlife; as well as the monitoring of their proper implementation, either directly or through third parties [...]". See also articles 20 and 70.

206. *Op. Cit., Ley General de Ambiente* (General Environmental Law), article 36.

207. Annual operational plans were prepared in 2011, 2012, 2014-2015, and 2016-2017.

208. This agreement was signed in August 2014 and is valid for five years.

209. This information was communicated orally by FUPNAPIB when they met with the ICF to inquire about the advancement of the renewal process for the Pico Bonito National Park management plan. Subsequently, in February 2017, the ICF regional office was asked to provide a document attesting to the fact, they responded by saying that the authorities were willing to provide the document if it can be found in the ICF file.

Legal counsel for the ICF questioned the validity of the establishment of the Cuyamel River micro-basin as a Protected Forest Area, on the basis that COHDEFOR **did not comply with all legal requirements**, such as the publication of the declaration in the Official Gazette "La Gaceta".

However, according to the law, the ICF (formerly COHDEFOR) can establish protected areas under the General Forestry Regulations. Based on the powers granted by the Forestry Law ²¹⁰in force at the time of the issuance of the resolution for the recognition for the Cuyamel River micro-basin as a protected area, the General Director of COHDEFOR had the authority to issue resolutions establishing protected forest areas. These powers are detailed in the General Forest Regulations²¹¹ which states in article 26 that the establishment of forest areas is the responsibility of the General Management of COHDEFOR, and in article 28 that all forests and forest lands declared as such are subject to AFE-COHDEFOR, with all the ensuing legal effects. The General Forestry Regulation does not indicate that the resolutions of the General Management must be published in the Official Gazette "La Gaceta". The claim made by legal counsel for the ICF²¹² that publication in *La Gaceta* is *sine qua non* of validity is excessive. In certain cases, articles 11 and 13 establish that the classification of forest areas will be done by the executive power through an Agreement issued by SERNA and published in "La Gaceta", however, this does not affect COHDEFOR's powers to carry out the work described in articles 26 and 28 of the General Forestry Regulations.

What the arguments concerning the approval of the licence and the absence of its revocation demonstrate is that **the administration has given priority to purely legal arguments over the technical considerations of experts that have identified the environmental and social risks of the project**. This has made the community vulnerable and has affected the mechanisms aimed at protecting the right to water. **The likelihood that this project will reduce the amount of water available for human use and consumption and that it will permanently affect the ecosystem constitutes an undeniable risk to the communities' right to water, because the project can permanently affect access to sufficient quantities and adequate quality of water**. Without adequate protection of fragile water-producing ecosystems, the health and livelihood of dependent communities are in grave danger. The legal loopholes generated by legislative changes, coupled with the administrative actions described in the current report, demonstrate the risks that arise when the regulatory framework is weak, and economic and political interests in electric energy growth increase.

c. The adverse effects caused by the militarization of the area and the activities of the military

Since 2013, the military has occupied Hacienda Vista Hermosa, the land crossed by community members to access the Cuyamel River micro-basin. The land was confiscated by the authorities and transferred to the SEDENA, to which the Fourth Infantry Battalion reports. The transfer of land to the Fourth Infantry Battalion (1) occurred in an irregular manner and (2) has clearly affected the communities' right to water. According to CONERSA, the presence of the military in the area is one of the reasons why construction of the Cuyamel II Project has not started.²¹³

210. National Congress of the Republic of Honduras, *Ley Forestal*, Decree 85/71, 4 March 1972, available on line at <http://www.fao.org/forestry/12751-03a4c2a9b891d2de3b2cd43b5ae1acd2e.pdf>.

211. President of the Republic, *Agreement No. 634/84*, Reglamento general forestal ("General Forestry Regulations"), 9 April 1984, available on line at <http://extwprlegs1.fao.org/docs/pdf/hon9420.pdf> [accessed on 16 March 2017].

212. ICF, *Opinión legal* (Legal Opinion), *Fanny Julissa Hernandez Aceituno, Legal Counsel*, no. 70-7230, January 2012.

213. This is what Elsia Paz stated at the meeting with the FIDH delegation on 13 December 2016. At the same meeting, Paz also stated that in any case, if the project was not built by the company, it would probably be built by the Army. In a meeting held on 17 February 2017, MiAmbiente confirmed the Army had prevented on-site inspections to verify that the company had not started construction, which is what has prevented the complaint filed by the Communities against the granting of the environmental licence from advancing.



Members of the community demonstrating in front of Fourth Infantry Battalion camp. @FUPNAPIB

Irregularities and the transfer of the land by the OABI to the Fourth Infantry Battalion

On 17 January 2013, the Administration Office of Confiscated Property (OABI) registered the seizure of Hacienda Vista Hermosa, 100 hectares registered to Agropecuaria Vista Hermosa, SRL, in La Frutera, Village of Santa Ana, municipality of San Francisco.²¹⁴ The company, located at the entrance to the site where the Cuyamel II Project is planned, belonged to Enrique Ernesto Alemán Martínez, Cesar Arnulfo Alemán Estreber, Delmy Leonor Alemán Martínez, and Neyra Lizeth Alemán Martínez. According to the OABI, the authorities discovered that the hacienda was a cocaine laboratory, and found maritime communication equipment on the premises, evidence that allegedly linked it to a drug trafficking network.²¹⁵ The seizure was the result of information provided by the US Drug Enforcement Agency in August 2012.

The 17 January 2013 decision by the court that hears cases of definite deprivation of property in the city of La Ceiba, in favour of the State of Honduras, concerning the Vista Hermosa Hacienda, ordered the OABI to proceed in accordance with article 78 of the Law on Definitive Deprivation of Property of Illicit Origin, under which the value of the property should be distributed in cash by auction in the manner provided for by law. However, this was not done, instead the OABI transferred the property, on 31 October 2013, to the SEDENA, the body to which the Fourth Infantry Battalion reports,²¹⁶ despite not having the authority to carry out the transfer. The decision placed the community in a vulnerable position because it led to the installation of the Fourth Infantry Battalion near the micro-basin, and effectively to a militarization of the area of influence of the National Park and the micro-basin, which has had adverse effects on the communities' right to water and on the fragile environment of the protected area, and put at risk the micro-basin and water quality and consequently water supply for the community.

214. Recorded in Volume 1732, no. 56 of the del Instituto de la propiedad Hipotecas y Anotaciones Preventivas (Institute of Property Mortgages and Preventive Annotations) of La Ceiba, Atlántida.

215. Oficina Administradora de Bienes Incautados (Administration Office for Confiscated Property) *Expediente 039-012*, Juzgado de Letras de Privación de Dominio de Bienes de Origen Ilícito con Jurisdicción Nacional

216. According to statements made by OABI officials to the San Francisco Water Board, the transfer document exists and is in SEDENA's possession.

The adverse effects generated by the activities of the Army

On 18 November 2013, the Army asked the Municipality of San Francisco Atlántida for the authorisation and relevant permits to clear the land that had been seized, and to build military installations on the premises. The Army constructed military barracks without being known to have obtained the required authorisations, which entail conducting an EIA,²¹⁷ obtaining an environmental licence,²¹⁸ and obtaining a construction permit from the municipality. During an interview, MiAmbiente stated that the Army was not bound by these obligations because it was carrying out activities linked to national security.²¹⁹

The Army also cordoned off the area, thus denying the access to the inhabitants and the members of the Water Board who traditionally had access to the micro-basin. The members of the San Francisco Water Board currently face limitations to conduct maintenance activities for the micro-basin including chlorinating the water used by San Francisco residents. This could lead to serious health problems. The Battalion commander has sporadically and seemingly in an arbitrary manner denied requests for access to the micro-basin made by the members of the Water Board, and on at least two occasions also denied access to MiAmbiente to verify the progress of the construction of the hydroelectric plant. This information is needed for the advancement of the complaint filed by the communities against the granting of the environmental licence.²²⁰

Faced with this situation, the Water Boards of the affected communities carried out a series of actions aimed at requesting the Commander of the Battalion to initiate talks with a view to have their historical easement restored for the land now in the hands of the Army.

Because their attempts were unsuccessful, they had to petition the Municipal Court of Peace (mediator) to demand the Commander to appear before the court, in order for them to discuss the restitution of people's right of passage to the micro-basin. At a hearing held on 7 August 2014, the Commander denied the request of the members of the Water Board. Finally, the Army agreed to authorise permanent access for no more than two persons at a time so that they can chlorinate the water. Since then, according to individuals in charge, those who have been given access must go to the Battalion's headquarters, show proof of identification, and wait approximately 20 minutes to be accompanied by military escorts. They are only allowed to perform maintenance activities on the system. There are not only restrictions on the number of people who can enter, but also on the frequency, and there is a schedule which must be abided by. Although two people from the Water Board have been authorised to perform system repairs, there are activities that require more than two persons, such as inspections to protect the area and of the fencing. These require authorisation from the Battalion, which can lead to delays that put the community's access to water at risk in case of system damage that affects the functioning of the micro-basin. These limitations also affect the organisation of educational and recreational activities in the areas adjacent to the river.²²¹

217. According to the Army, in its written response to questions from the authors on 23 January 2017, "the facilities of the Fourth Infantry Battalion were built in the municipality of San Francisco and the possible environmental impacts were assessed in order to fulfil the constitutional peace-time mission and, through great efforts, to combat the scourge of drug trafficking, ordinary crime, and the degradation of the ecosystem, an activity that protects the rights of the communities of San Francisco, Atlántida."

218. *Ley General de Ambiente* (General Environment Law), articles 5 and 78, "All public and private projects, before being started, must have an EIA".

219. Meeting with MiAmbiente, 17 February 2017.

220. Municipality of San Francisco, *Constancia de la imposibilidad de realizar inspección de campo debido a la oposición del comandante del Cuarto Batallón a la entrada*, (Report to certify the inability to conduct field inspections due to the decision of the Battalion Commander to deny access) 8 September 2015, the representatives of the following bodies were present: MiAmbiente, FUPNAPIB, MADJ, ICF, Municipality of San Francisco, and SANAA.

221. However, the Army stated in writing to the investigation team that there has been no violation of the right to water or restrictions on freedom of movement. To support this claim it refers to the appeal filed by Adalid Mendoza on 1 June 2015, alleging an infringement of the right of easement of transit and aqueduct, and which was denied by the Constitutional Chamber on 26 August 2016.

On July 1, 2015, a writ of amparo was filed requesting the protection of the right of easement and passage to the micro-basin through the land that had been transferred to the Fourth Infantry Battalion. The Ceiba Appeals Court rejected this request on 3 July 2015, determining that the limitations on access, and the presence of the military, did not violate the rights of the community.

The Army has built military facilities near the river, but the population cannot verify if the facilities or the waste generated are affecting or risk affecting the quality of the water. Although the Water Board cannot confirm possible sources of pollution in the area, the restrictions on access and the lack of an EIA prior to the its installation are elements that lead us to believe that the pollution is an important risk. In addition, members of the Water Board affirm having found rubbish near the river and the water management system on several occasions. They also indicate having had issues with regard to the potability of water, which forced them to increase the amount of chlorine used in order to meet the legal requirements on water quality. The lack of information on the Army's management of waste water or solid waste creates a considerable risk that is aggravated by the denial of access to the persons in charge of controlling compliance with environmental measures that were implemented prior to the construction of the military installations. This lack of information also prevents any causal relation being established between these facts and the Army's presence.



Fence on the land occupied by the Fourth Battalion that restricts access to the Cuyamel River micro-basin." @FUPNAPIB

Furthermore, the Water Board indicated that they found that some damage had been made to the water system, and that camera traps had been installed without informing or consulting the Water Board. They also reported that the land markers around the micro-basin have disappeared which, according to regulations,²²² are there to protect the land. The representatives of the Army deny having removed them, despite being the only persons with access to the area without the supervision of a third party.²²³

The Fourth Infantry Battalion is headed by Colonel Jose Reyes and is part of the 105th Brigade, based in San Pedro Sula. Colonel Reyes refused to organise a meeting with the drafters of this report for the purposes of research.²²⁴ However, the Army agreed to respond to questions in writing.

222. *Op. Cit., Ley Forestal*, article 122 which makes the demarcation of the micro catchment basins compulsory.

223. According to testimony provided by a member of the community.

224. They only provided a written response sent via email on 23 January 2017, Oficio 0163-2017.

It is difficult to establish a link between the presence of the Fourth Infantry Battalion and the Cuyamel II Project. From a technical point of view, the engine room planned for hydroelectric plants would be located on the land transferred to the Army. According to representatives of CONERSA, the military presence makes it even more difficult to build the plant. The Army has stated that it has no link with the companies involved in the project, and that it is not in a position to grant a right of usufruct or easement for the construction of the hydroelectric plant.²²⁵ However, Elsia Paz said that if the project is not built by the company, it could be built by the State, or even by the Army.²²⁶ This explains why the members of the community expressed, during the focus groups, their fear of a link between the militarization of the area and the possibility of building the dam without the community having the possibility to exercise any type of control. The community has already begun to suffer the consequences of the restrictions imposed by the Army, and believe that rather than protect the population, the Army will protect the company.

The irregular transfer of land, the lack of a building permit, the community's lack of information regarding activities that are carried out, and the ensuing adverse effects leave the local community highly vulnerable. The sporadic and arbitrary obstruction of access to the micro-basin by members of the community and by MiAmbiente officials has already had consequences on the population's right to water by limiting their access to water. All these factors combined generate a climate of uncertainty regarding the consequences of military activities on the ecosystem, and the status of the hydroelectric plant project.

iii. Violations of the right to water perpetrated by the company

The facts described above have put at risk the population's right to water from the Cuyamel River. While States have a duty to respect, protect, and fulfil human rights obligations, corporations have a responsibility to respect all internationally recognised human rights, as set out in the UN Guiding Principles. The Guiding Principles require companies to act with due diligence to identify, prevent, and remedy the risks that their activities cause or may cause to human rights. Companies must respect human rights. This means that they must: "Avoid causing or contributing to adverse impacts on human rights through their own activities, and address such impacts when they occur" [and] "Seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."²²⁷

Changes to the description and specifications of the Cuyamel II Project, particularly regarding production capacity, were concurrent with changes in legislation. This created confusion regarding the requirements for obtaining the licence applicable to the Modified Cuyamel II Project, and ultimately allowed the company to benefit improperly from a situation²²⁸ where there was reduced legal protection for the rights of local communities. Notwithstanding, the UN Guiding Principles state that corporations must respect internationally recognised human rights principles to the greatest extent possible, even if it contradicts national legislation.²²⁹ CONERSA failed to fulfil its responsibility to respect human rights when it failed to perform an EIA, which should have been conducted through a process that ensures adequate community participation to determine the most appropriate mitigation measures, or to modify the project by taking into account the concerns expressed by the members of the community.

These facts show that CONERSA acted contrary to the requirements of applicable law and failed to perform due diligence, because to prevent negative impacts, the process involves a human rights impact

225. Written response from the Joint Chiefs of Staff received via email on 23 January 2017, Oficio 0163-2017.

226. Meeting with Elsia Paz held on 13 December 2016.

227. *Op. Cit.*, "Guiding Principles", principles 11-13.

228. See *supra* footnote 170, for explanation of argument on why current law and new SINEIA regulation are not applicable to the request for licence in the case of the Cuyamel II Project.

229. *Op. Cit.*, "Guiding Principles", principle 23.

assessment (HRIA) as well as an EIA. The UN Guiding Principles on Business and Human Rights have established that the due diligence process :

*"should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed."*²³⁰

In this regard, given that environmental authorities warned of the risks tied to project through several opinions, **by ignoring these risks**, and **by accepting the final decision granting the licence, CONERSA did not act with due diligence and consequently aggravated the vulnerability of the community and increased the risk related to the right to water**. The result is a violation of the right to water and a breach of the company's obligation to perform a proper EIA prior to obtaining a licence. Furthermore, the fact that the CONERSA failed to act, in view of the technical opinions that concluded that the project was not environmentally viable,²³¹ also constitutes a breach of its responsibilities.

B. The rights to information and citizen participation

i. Legislative framework for the rights to information and citizen participation

The rights **to information and citizen participation** have been widely **recognised internationally**. As of 1946, the General Assembly of the United Nations, through Resolution 59 (1) of 1946, states that "freedom of information is a fundamental human right [...] and the cornerstone of all freedoms." Numerous states have since recognised that the right to access information necessarily goes hand in hand with the adoption of democratic participation mechanisms. The basis for these rights is Article 19 of the International Covenant on Civil and Political Rights (ICCPR)²³² which protects the right to freedom of expression.

Regionally, Article IV of the American Declaration of the Rights and Duties of Man, adopted in 1948, states that, "Every person has the right to freedom of investigation, of opinion, and of the expression and dissemination of ideas, by any medium whatsoever [...]." The American Convention on Human Rights (ACHR) states that, "**This right includes freedom to seek, receive, and impart information and ideas of all kinds**, [...]"²³³ Using the Convention as a basis, the Inter-American Court of Human Rights and the Inter-American Commission on Human Rights have both given broad scope to this right by recognising its social dimension as well as its individual, passive and active dimensions, from which derive a series of rights that are protected under Article 13 of the Convention.

In this regard, the Commission has consistently reiterated the value of access to information as a way of promoting the objectives aimed at developing increasingly transparent and effective democracies.²³⁴ A direct correlation can be established between the need for access to information and the consolidation of a democracy, bearing in mind that transparency on the part of the State builds an informed society capable of playing an active role in political life, by contributing to a democracy based on respect for all human rights. This is why citizen participation and, particularly, access to information, are included in Article 13 of the United Nations Convention against Corruption as mechanisms for preventing and combating corruption.²³⁵

230. *Op. Cit.*, "Guiding Principles", principle 17.

231. Violations stemming from lack of consultation with the community and lack of access to information are discussed in Section 2.b. of the current report.

232. *Op. Cit.*, ICCPR, article 19.2.

233. *Op. Cit.*, ACHR, article 13, Freedom of Thought and Expression.

234. IACHR, *Advisory Opinion OC-5/85*, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (ACHR, articles 13 and 29), 13 November 1985, Ser.A., No. 5

235. UN, *United Nations Convention Against Corruption*, article 13.b (instrument ratified by Honduras on 23 May 2005)

Additionally, Principle 10 of the Rio Declaration on Environment and Development establishes the need for citizen participation and access to information for the making of decisions that concern the environment, especially in the case of activities that could endanger it.²³⁶ The ESCR Committee has specifically underscored the importance of respecting public participation in processes that may affect the exercise of the right to water. Therefore, the Committee believes that it is essential to create mechanisms for full and equal access to information on water, water services and the environment, regardless of whose possession the information is in, be they public authorities or private parties.²³⁷

It is important to note that the above mentioned international norms apply to all populations, including non-indigenous populations.

Nationally, articles 72 to 76 of the Constitution of the Republic of Honduras enshrine the rights to freedom of thought and freedom of expression. Article 80 enshrines the rights of any person or association to submit petitions to the authorities, for reasons of individual or general interest, and the right to obtain a prompt response within a period established in law. Article 5 sets down the principle of participatory democracy as the basis for the administration of the State. These rights have been transposed from international law into the Constitution, and are thereby constitutional rights.

In 2006, the Law on Transparency and Access to Information was approved with a view to guarantee the effective exercise of these rights.²³⁸ Article 3, paragraph 6, and Article 17, paragraph 6 of this law define "classified information": **"the classification of information is called for when potential damage is greater than the public's interest in having the information, or when the disclosure of the information may put at risk or damage, *inter alia*, the country's economic, financial or monetary stability, or governability."** In contrast, Article 13 paragraph 19 states, that "[I]nformation on the activities of private companies that are the exclusive suppliers of public goods or services, or that enter into contracts financed with State resources or funds will be disclosed through the public entity with which the contracts have been signed." But, as the IACHR Special Rapporteur on Freedom of Expression warned, articles 17 and 39, if broadly interpreted, could hinder the effective exercise of the right of access to information.²³⁹

Additionally, laws relating to the environment and natural resources, such as the General Environmental Law, the Forestry Law on Protected Areas and Wildlife, the General Water Law, the Municipalities Law, and the General Mining Law also contain provisions for consultation and citizen participation.²⁴⁰

ii. Violations of the rights to information and to participation perpetrated by the State

The rights of the community to information and to participation were hampered during the entire process to grant an environmental licence for the Cuyamel II Project. Restrictions on rights were made possible by (1) changes to environmental regulations, and (2) failure to apply the rules for environmental licensing that provide for the participation of affected communities. The effects of these restrictions

236. *Rio Declaration on Environment and Development*, Principle 10.

237. CESCR, *General Comment 15*, on the right to water, para 48.

238. Approved on 27 November 2006, published in the Official Gazette on 30 December 2006 by Decree 170-2006.

239. OAS, IACHR, *2008 Annual Report*, Volume III, para 146, 25 February 2009. available in Spanish on line at <http://www.cidh.oas.org/annualrep/2008sp/INFORME%20ANUAL%20RELE%202008.pdf>,

240. i.e. The *Ley de Aguas* (Water Law) in articles 3 (4) and (5) establishes that the management of water resources must be done through the effective participation of citizens in the conservation, protection, and sustainable use of the environment. In that regard, the law on Land Management, in article 5, establishes participative management and joint decision-making and execution, as basic elements of land management. See also General Environmental Law, articles 11 (h) which requires SERNA to create an Environmental Information system, and articles 102 and 103 which establish the principle of citizen participation and the right to information on the state of the environment, and on all decisions or operations that may affect it. Finally, the *Ley de Municipalidades* (Law of Municipalities) establishes the principles of public meeting (*cabildo abierto*) and municipal plebiscite (*plebiscito municipal*).

on rights persisted, namely by (3) making it difficult to obtain the information contained in the licence application file,²⁴¹ which is the primary and fundamental source for information such as the technical project description, administrative procedures undertaken for the environmental licensing process, and decisions on any claims lodged to oppose the granting of the environmental licence.

Changes to environmental regulations that restrict participation and access to the information

The law concretely provides for opportunities and mechanisms for community participation in several ways; however, the numerous changes to the law mentioned above have progressively reduced these mechanisms. Successive amendments to the SINEIA Regulation described in the section above also directly impair the right of the public and of NGOs to participate in the making of decisions for environmental licences.

Firstly, the restructuring of the SINEIA limited participation. With the entry into force of the new Regulation adopted under Agreement 189-2009, NGOs and the general public were relegated to SINEIA support bodies and excluded from the constituent body.²⁴² Consequently, interested NGOs and the public are neither called to participate in, nor kept informed of the environmental licensing process.

Secondly and similarly, the SINEIA Regulation that was adopted in 1994 established - at the review phase of the licensing process and upon the request of the public, NGOs, or the authorities²⁴³ - the obligation to make public the completion of EIAs and to have the findings presented at public fora and public meetings for the purposes of discussions and exchanges of ideas. In the new regulations, this requirement²⁴⁴ is limited to Category 4 projects because they are the only ones that require an EIA.²⁴⁵ And, even in those cases, the requirement to hold open meetings for discussion was changed by article 52 of Agreement 189-2009 to apply to only those cases where public meetings were explicitly included in terms of reference, or are requested by SERNA or SINEIA authorities. The public, however, cannot request a public meeting.

Finally, although Agreement 189-2009 reiterates the public nature of the information concerning EIA processes,²⁴⁶ article 27 allows project sponsors to have some of the EIA documents submitted to SINEIA classified as confidential.²⁴⁷ This provision makes it difficult to reach the objective of involving the public as of the very early stages of the EIA process, as provided for in the Agreement: project sponsors must include in the EIA all of the mechanisms used for participation, and must propose methods for consultation during the EIA revision stage.²⁴⁸ In the case of the Cuyamel II Project, this piece of legislation was used to limit access to certain documents in the file.²⁴⁹

Clearly, affirming this principle of the public nature of EIA processes without providing the means to apply it, or on the contrary limiting these is not enough to guarantee the right to information. The effects of these provisions are contrary to the Law on Transparency and Access to Information, according to

241. The SERNA file on the licence for the Cuyamel II Project contains all the documents submitted by the company for the licensing process. This includes *inter alia* the EIA, a general description of the project, the technical and legal opinions of the competent authorities regarding the location and feasibility of the project, complaints or pronouncements sent by the community. This is why, for members of the community, the file is the most important source of first-hand information about the possible effects the project would have on them.

242. *Op. Cit.*, Agreement 189-2009, 31 December 2009, articles 7 and 8.

243. 1994 SINEIA Regulations, article 60.

244. *Op. Cit.*, Agreement 189-2009, 31 December 2009, articles 7 and 8, and Agreement 008-2015 of 14 September 2015.

245. 2010 SINEIA Agreement, article 28.

246. *Op. Cit.*, Agreement 189-2009, 31 December 2009, article 20.

247. *Op. Cit.*, Agreement 189-2009, 31 December 2009, article 27.

248. *Op. Cit.*, Agreement 189-2009, 31 December 2009, articles 87 and 88.

249. See *infra*, "difficulties accessing information in the file".

which reasons for classifying documents must be limited, and information on companies entering into contracts with the State must be made public.²⁵⁰

These reforms are proof of how the State has circumscribed mechanisms for participation and access to information, and has made it increasingly difficult for members of civil society and organisations to actively defend their rights. Consequently, safeguards have been reduced and this has grievously increased the vulnerability of the communities. Limiting community participation is a serious breach of the international obligations described above, and in the long term will lead to the weakening of democratic monitoring and protection mechanisms for human rights and the environment, which may in turn, lead to potentially violent conflict and corruption.

Limitations on the participation of communities in the process

Guidelines on how public consultation should be conducted for environmental licensing in cases where the affected population is not an indigenous people are contained in the SERNA Environmental Assessment and Control Manual. The manual defines the consultation as **"a process of disclosure of information that allows for the opportunity for discussion with, and input from, the people concerned, the ultimate goal being to have the social dimension taken into consideration in the final decision on the environmental viability of the project."**²⁵¹ This opportunity must involve: 1) inviting the persons interested in the project, 2) giving the party seeking a licence the opportunity to present the project, 3) giving the persons who oppose or support the project the opportunity to express their point of views, and 4) engaging in an open discussion on the positive and negative effects of the project. The facts analysed below demonstrate, however, that this manual is not enough, as it only applies to certain cases, and leaves the population in most cases without the means of participating in the process.

Members of the San Francisco communities claim that they have not been adequately consulted and that there have been irregularities in the licensing process that are the direct consequences of the implementation of amendments to the new SINEIA Regulations described in the previous section.



Members of the Cuyamel River Water Board, @ FUPNAPIB

250. *Op. Cit., Ley de Transparencia y Acceso a la Información Pública* (Law on Transparency and Access to Public Information), article 3, para. 6, and article 17, para. 6.

251. SERNA, *Manual de Evaluación y Control Ambiental de la SERNA elaborado por el SINEIA* (SERNA Manual of Environmental Assessment and Control drafted by the SINEIA), 2009, pp. 68-70.

On 12 November 2009, a public meeting was²⁵² organised allegedly to clarify any doubts concerning technical and environmental aspects related to how the company was going to ensure that water quality and quantity would be sufficient. However this was seemingly limited to a single presentation made by Elsie Paz that contained incomprehensible information about the project.²⁵³ The presentation did not address fundamental issues and was limited to a defence of the project, without consideration for the interests and concerns of the community. Consequently, there was no clear information to base an open dialogue on the potential positive and negative effects of the project. At the end of the public meeting, the community reaffirmed its rejection of the project. The position of the community was also communicated in writing to SERNA,²⁵⁴ who decided to disregard it and grant the environmental licence. The community's repeated statements in opposition to the project, reaffirmed through official communication to the SERNA and through public meetings²⁵⁵, were even communicated to the Congress, but the Cuyamel II Project's contracts were approved nonetheless.

It is interesting to underline that during an interview, the AHPEE representatives agreed that the current normative framework was not detailed enough *vis-a-vis* community consultation processes.²⁵⁶

There are also contradictions between the community's repeated disapproval of the project expressed through public meetings, the mayor's claim that he never endorsed the Project, but rather only authorised a meeting to provide information to the community;²⁵⁷ reference made to a letter, supposedly in the file, in which the Town Hall approves the project and that was used to justify the approval of the licence;²⁵⁸ as well as an alleged agreement signed by a fake water board that was used as proof that the project had been approved by the communities.²⁵⁹

This example is indicative of the weakness of the existing regulatory framework, and demonstrates how the existence of a Manual of Environmental Assessment and Control is not enough to guarantee the rights to information and citizen participation for all communities affected or potentially affected by investment projects. **Specific, concrete, and binding norms that contain detailed conditions for access to information and participation for non-indigenous communities are necessary.** The rights of every affected community to access information and participate in decisions that affect their lives must be protected, in accordance with Principle 10 of the Rio Declaration, which emphasizes the importance of citizen participation in protecting the environment.

252. This public meeting was organised because during presentation of the project by the company to the Municipality, it was agreed that a presentation would be made before all segments of the municipality's population with a view to provide a detailed presentation of the project. It was made clear that this would be a meeting to provide information and not to approve the project. Summary of Minutes no. 17 read out during the public meeting held on 9 September 2010. Representatives from CONERSA, MiAmbiente, and the ICF participated in this meeting.

253. Based on information provided by FUPNAPIB and members of the community.

254. Official communication dated 8 August 2007 issued by the municipality rejecting the hydroelectric project. The rejection is also mentioned in ICF Technical Opinions, e.g., Technical Opinion DAP-006-2012, 5 January 2012, p. 2, para. 4; DECA, Technical Report 144-2008, 6 February 2008, p.4, states that, "Folios 257 to 261 of the file contain a statement from the Water Management Board and municipal representatives of San Francisco, as well as the representatives of the of the Water Boards for the communities of Micely, Boca del Toro, and Buena Vista, where they flatly reject, for the second time, the building of said project in the Cuyamel River basin".

255. In addition to the 12 November 2009 public meeting, the community reaffirmed its opposition to the project during a meeting on 8 March 2010, and statements made on 9 September 2010 and 26 April 2015.

256. Interview with AHPEE representatives, December 13th 2016

257. Municipality of San Francisco, Minutes No. 20 of the Public Meeting of 9 September 2010: the minutes reflect that, during the Public Meeting, the mayor maintained that he had never approved the Cuyamel II Project, but rather had insisted on the need to consult community.

258. See *Op. Cit.*, annex of the director of the DECA to Technical Report 59/2010.

259. Municipality of San Francisco, Minutes No. 20 of the Public Meeting of 9 September 2010: the minutes reflect that, during the Public Meeting, the mayor maintained that he had never approved the Cuyamel II Project, but rather had insisted on the need to consult community.

Furthermore, SINEIA was not convened and an EIA was not carried out prior to the granting of the environmental licence for the Cuyamel II Project. Doing both would have allowed for wider community participation in the environmental licensing decision for the hydroelectric project. Failure to convene the SINEIA, as provided for in the 1994 SINEIA Regulations, prevented NGOs and the public - both of which are SINEIA constituent bodies - from participating.²⁶⁰ The lack of an EIA also denied NGOs and the general public the opportunity to have their concerns included in the terms of reference for an EIA,²⁶¹ and, once the EIA was completed, to voice their doubts and objections to its findings.²⁶² They were also denied the opportunity to request that the DECA make changes to an eventual EIA to include previously unaddressed, but important, impacts and/or mitigation measures.

Difficulties encountered to access information in the environmental licence file

On several occasions, members of the research team working on the current report encountered difficulties when requesting information contained in the environmental licence file from the authorities. The initial request for a copy of the file was made by a lawyer, Jersi Lazo, on 28 September 2016. On 12 October 2016, MiAmbiente responded by providing some of the contents of the file,²⁶³ but also indicating that in application of Resolution 023-2008 issued by the Access to Public Information Institute and of SERNA Agreement 725-2008 the information "was the exclusive property of the sponsor or owners of the projects"²⁶⁴ consequently, organisations that are not parties to the process do not have access. Agreement 725-2008, cited by the administration as the basis for its decisions reads as follows:

"Declares as confidential information regarding the following administrative processes: technical studies contained in applications for power generation projects using renewable resources and hydrocarbons, geophysical surveys, illustrations, plans, sketches, three-dimensional maps of geography, topography, architecture or science adjoined to said applications and submitted to the Secretariat of Natural Resources and Environment (SERNA), with the exception of information directly related to studies or assessment of the environmental impact of the project."

On 31 October 2016, another request was filed for photocopies of the file's contents, including documents not classified as confidential per the regulations mentioned above. In response, photocopies of some of the documents in the file were sent.²⁶⁵

The photocopies that were received only provided a fragmented overview of the licensing process, and left doubts that prevent the public and NGOs from effectively exercising their rights to information and participation. From the outset, they are at a disadvantage with respect to the State and the company who do have knowledge of the contents. For its part, CONERSA confirmed that they did have a complete copy of the file in their possession.²⁶⁶ MiAmbiente did, however, suggest consulting the file on the premises of the Secretariat. Even though NGOs could gain knowledge of the file's contents, the time allowed for consultation is very limited given that environmental licensing files are very extensive and contain about a thousand pages.²⁶⁷

260. SINEIA Regulations, 5 March 1994, article 7.

261. SINEIA Regulations, 5 March 1994, art 46.

262. SINEIA Regulations, 5 March 1994, art 60.

263. OIP/UT, Document No-024-2016, 12 October 2016, response to the request for information sent by legal counsel, Jersi Jehovanny Lazo.

264. *Idem*. OIP/UT, Document No-024-2016, 12 October 2016, response to the request for information sent by legal counsel, Jersi Jehovanny Lazo.

265. MiAmbiente, Document no. OIP/UTG N0 037-2016, 15 November 2016.

266. Meeting with CONERSA, 13 December 2016.

267. File no. 425-A-2007.

Accessing the file has been complicated for members of the research team, but it has also been difficult for the complainants themselves. IDAMHO, which filed the complaint with SERNA, has not been able to obtain photocopies of documents considered "classified", and has only been able to review some of the contents while consulting the file in the offices of MiAmbiente.²⁶⁸

Not being able to access classified information is very limiting, given the relevance of the construction of a hydroelectric plant for the public. Especially since it is planned in a protected area that is particularly fragile because of its ecological characteristics, and further, because the area has been set aside for the conservation of resources. These limitations on access to information appear disproportionate when **one compares the importance of the rights at risk in such cases to the company's economic interests** in classified technical studies, plans, sketches, and maps, etc. of an investment project. These restrictions are excessive, not only because they go beyond the rigorous limits set by Honduran legislation²⁶⁹ for classifying information, but also because they are unjustified as per international law.

At the Inter-American level, the grounds and conditions under which it is possible to establish limitations to the right of access to information have been set out in detail. For States to act in accordance with the ACHR, **any limitations that are adopted must be exceptional, provided for in law, protect a legitimate purpose, be proportionate, narrow, and justified.**²⁷⁰ The Declaration of Principles on Freedom of Expression reads that, "This principle allows only exceptional limitations that must be previously established by law in case of a real and imminent danger that threatens national security in democratic societies."²⁷¹ The fact that these documents are owned by the company is not sufficient ground to deny access to information to communities that may be negatively impacted by such projects. This argument has no legal basis²⁷² and is aimed solely at protecting the intellectual property rights of companies, without balanced consideration for the interests of communities requesting these documents. Moreover, the Inter-American Court of Human Rights has established in its jurisprudence that it is not necessary to prove a direct interest or be directly concerned to access information of general interest,²⁷³ which means that the Honduran NGOs that requested the entire file have that right, and that the State has violated access to information rights by imposing disproportionate and unjustified limitations that are not provided for in law.

iii. Violations of the rights to information and public participation perpetrated by the company

The Company, for its part, has not respected the rights to public participation and information. Not only is the information about CONERSA scarce and difficult to obtain, there also appears to be evidence of misuse and manipulation of information to speed up the process and obtain the licences and contracts necessary for the commissioning and running of the plant.

Firstly, **information regarding CONERSA and its shareholders is rather opaque and difficult to obtain.** This is mainly because its majority shareholder, GREEN is registered in Panama, a country in which access to records and information about companies is known to be restricted. In fact, recent publications have

268. Exchanges with members of the IDHAMO concerning the complaint filed against the issuing of the environmental license.

269. *Op. Cit.*, footnote 250, article 17.

270. Spanish version: <http://www.cidh.oas.org/relatoria/section/Estudio%20Especial%20sobre%20el%20derecho%20de%20Acceso%20a%20la%20Informacion.pdf>

271. IACHR, Declaration of Principles on Freedom of Expression of the Inter-American Commission on Human Rights, Principle 4. <http://www.oas.org/en/iachr/expression/showarticle.asp?artID=26>

272. *Op. Cit.*, footnote 250, article 17.

273. IACHR, the *Case of Claude Reyes et al. vs. Chile, para. 77.*

revealed that companies around the world strategically register in Panama²⁷⁴ to benefit from legislation that severely restricts access to information.²⁷⁵

It is worth remembering that the incorporation of GREEN in Panama took place only a few days before CONERSA was created, which would indicate the intention to hinder access to the information concerning the company's real shareholders. Moreover, it has prevented the community and local organisations from accessing detailed information on CONERSA's majority shareholder and limits accountability requirements.

Secondly, as explained above, **communities claim to have never received clear and sufficient information about the project.** The community claims that it was not adequately consulted because the information provided by the company was limited to technical information, and that no real discussion took place. The persons interviewed claim that the company's actions were limited to demonstrating and attempting to convince them of the positive aspects of the project, and when they rejected the project, **"they even called us ignorant for not accepting."** Members of the community also claim to have no knowledge of the EIA or mitigation measures envisaged. This is evidence of the hostile relationship between the two parties, and the lack of willingness to have discussions within the process framework. Per the community, the information obtained on the project came mainly from the members of the Water Boards, who on several occasions warned them of actions undertaken without their knowledge and that were detrimental to their interests. The company maintains that the information meeting they had planned was only attended by three members of the community.²⁷⁶ The company also admitted that probably one of the reasons the community did not approve the project was a lack of information.²⁷⁷ This situation is not limited to the Cuyamel II Project, the community claims to have no information regarding two other hydroelectric plant projects planned for the Pico Bonito National Park.

Thirdly, the company allegedly submitted forged documents attesting to the community's approval of the project, despite its repeated objections to the same.²⁷⁸ Although Technical Report 59/2010 mentions that the file contains a note from the Office of the Mayor of San Francisco addressed to Elsie Paz expressing the approval for the project, at municipal meetings the mayor maintained that he never gave his approval and that he had only expressed, to CONERSA, his agreement for the holding of a project information meeting.²⁷⁹ Also, the communities allege that the documents presented, with the signature of the Water Board, to prove the communities' approval were fake, because the persons who signed were not the real directors of the Board. The company maintains that the people who signed were introduced by the mayor as members of the Water Board and further claims that the confusion was due to the alleged succession of changes in the members of the board that the company described as very common.²⁸⁰ According to the Water Board the members of the board had not changed, and the company had the obligation to verify the identities of the signatories against the municipality's Water Board register.

These actions constitute breaches of the company's duty to perform due diligence on the consequences of its activities on human rights and, in particular of the duty to carry out substantive consultations with potentially affected groups and other stakeholders, and of the duty to assess existing or potential risks that arise from Company activities, as established in principle 18 of the UN Guiding Principles on Business and Human Rights.

274. International Consortium of Investigative Journalists (ICIJ), *Panama Papers*, available online at <https://panamapapers.icij.org/video/>

275. Because GREEN, the majority shareholder in CONERSA, is registered in Panama, the research team was only able to obtain very limited information about the company.

276. *Op. Cit.*, meeting with CONERSA in December 2016, for the purposes of research conducted for the current report.

277. *Op. Cit.*, meeting with CONERSA in December 2016, for the purposes of research conducted for the current report.

278. i.e. Official communication dated 8 August 2007 issued by the municipality rejecting the hydroelectric project, 8 August 2007; Municipality of San Francisco, Minutes No. 20 of the Public Meeting of 9 September 2010

279. Public Meeting, 9 September 2010, during which the part of Minutes no.17 of 15 July 2009 on the meeting of the mayor with Elsie Paz was read out.

280. *Op. Cit.*, meeting with Elsie Paz from CONERSA in December 2016, for the purposes of research conducted for the current report.

C. The right to effective remedy

i. Legal framework for the right to an effective remedy

Internationally, the International Covenant on Civil and Political Rights (ICCPR)²⁸¹ and the Universal Declaration of Human Rights²⁸² enshrine the right of every individual to effective remedy for human rights violations. **Regionally**, the ACHR²⁸³ states that remedy must be effective, prompt, and simple to ensure the protection of all fundamental rights enshrined in international treaties, as well as in the constitution and law. The IACHR has stated that this right “[...] constitutes one of the basic pillars, not only of the ACHR, but of the State itself in a democratic society within the meaning of the Convention.” The Inter-American Court of Human Rights has stated that this right “[...] is one of the fundamental pillars not only of the American Convention, but of the very rule of law in a democratic society in the terms of the Convention.”²⁸⁴

For protection to be effective, suitable remedy must be available. It is not enough to have avenues for recourse; they must also be adequate to establish whether a violation of human rights has occurred, and provide for remedy.²⁸⁵ To be considered effective, recourse mechanisms must provide redress and remedy accessible to all individuals without having to overcome inordinate obstacles in the exercise of their rights.

The United National Human Rights Committee (HRC) in General Comment No. 31²⁸⁶ indicates that individuals must have access to remedy. Remedies must consider the special vulnerability of certain categories of persons. The HCR also indicates that the requirements for effective remedy also apply to judicial and administrative measures, because both are instrumental in the fulfilment of rights.

Finally, in environmental matters, it is worth highlighting Principle 10 of the Rio Declaration on Environment and Development: “Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

Nationally, Articles 90 and 80 of the Honduran Constitution provide for procedural safeguards and enshrine the right to submit petitions to the authorities, for reasons of individual or general interest, and to obtain a prompt response within a period set in law. For administrative matters, article 168 of the *Ley de Procedimiento Administrativo* (Law of Administrative Procedure)²⁸⁷ establishes a period of 60 days for the resolution of administrative claims.

ii. Violations of the right to effective remedy perpetrated by the State

Community members lodged complaints for the violations described above before judicial and administrative bodies, either directly or through Water Boards. Most investigations remain open, proceedings are ongoing, and in some cases, there has been no substantial progress made to guarantee the exercise of rights or to provide remedy for damages. There is a significant risk that the State will be

281. *Op. Cit.*, ICCPR, article 2.3.

282. *Op. Cit.*, The Universal Declaration of Human Rights (UDHR), article 8.

283. *Op. Cit.*, ACHR, article 25.

284. Inter-American Court of Human Rights, the Case of Castillo-Páez v. Peru, Judgment of 3 November 1997, para. 82-83; the Inter-American Court of Human Rights, the Case of Suárez-Rosero v. Ecuador, Judgment of 12 November 1997, para. 65.

285. Inter-American Court of Human Rights Case of Durand and Ugarte v. Peru Judgment of 16 August 2000, para.102; Inter-American Court of Human Rights, Case of Cantoral-Benavides v. Peru, Judgment of 18 August 2000, para. 164.

286. UN Human Rights Committee (HRC), *General Comment no. 31 [80], The nature of the general legal obligation imposed on States Parties to the Covenant*, 26 May 2004, para. 15-18, CCPR/C/21/Rev.1/Add.13.

287. National Congress of Republic of Honduras, *Ley Procedimiento Administrativo* (Law of Administrative Procedure), Decree 152-87 of 1 December 1987.

able to challenge the right to effective, prompt and simple remedy by not giving adequate attention to some of the complaints. There have been instances where complaints have not been investigated, of delays in processing complaints, and of failures to register oral complaints.

First, on 24 March 2010, **after the issuance of the environmental licence for the Cuyamel II Project, a complaint was lodged with the SERNA to "denounce [the] granting of an environmental licence for the Cuyamel II Project** to the commercial enterprise CONERSA, which affects five communities of San Francisco Atlántida." The complaint was deemed admissible by the relevant authorities and proceedings were started in April 2010. Subsequently, the case was transmitted to the departments of the DECA competent to decide on the matter. During the proceedings, Technical Opinion 580/2012 was issued and the DECA took note of the contradictions of various public authorities highlighted in the technical opinion with respect to the location of the project in the protected zones of the micro-basin and the Pico Bonito National Park. Subsequently, per the minutes of the municipality of San Francisco dated 8 September 2015, the SINEIA²⁸⁸ was convened to resolve the case. The SINEIA, however, did not make a field visit to verify if the project was underway because they were stopped from entering the micro-basin by the commander of the Fourth Infantry Battalion at that time, Juan Flores Matute.²⁸⁹ The commander advised them to request access to the micro-basin 15 days in advance via email. Denial of access to the area to civil servants requiring access for the purposes of inspection and verification seem to have occurred repeatedly, at least twice. In summary, there has been no major progress in the investigation and the case is still pending. It is clearly taking too much time to decide the case. Further, the authorities have not acted diligently, because despite the technical opinions describing the risks inherent to the project, no temporary protection measures have been taken while waiting for the problem of access to the site to be resolved.

Second, **in 2010, 2013, and 2014, the community lodged three oral complaints with the National Human Rights Commissioner (CONADEH)**, at their national office and at the La Ceiba office. By order of filing, the complaints concern the environmental licence for the Cuyamel II Project, the activities of the Fourth Infantry Battalion in the area, and the transfer of the title to the Vista Hermosa Hacienda. The members of the community have not been notified of any progress with the complaints, except for the complaint against the Army, for which Adalid Mendoza, President of the Water Board of San Francisco, was called in for questioning in 2015. According to the CONADEH, Rene Alberto Flores was also questioned, and a field visit was organised. The Water Board however indicated that it did not have any information regarding such a visit and interview, and confirmed that it had not seen any progress with this complaint since 2015.

In March 2017, when members of the community attempted to follow up on the complaints, the authorities were unable to find any records of them or to provide information on their progress to the plaintiffs. The head of the CONADEH office in La Ceiba explained that, without a complaint number or a receipt, it would be impossible to find the file, which exemplifies the difficulties that community members and representatives may encounter when trying to follow up on complaints, especially for those who are unfamiliar with the requirements. This, coupled with the lack of efficiency of certain mechanisms, effectively limits access to justice.

A member of the community lodged a complaint with the Committee for the Defense of Human Rights (CODEH) for verbal threats after being questioned by one of the CONERSA businessmen. This complaint has not progressed, and Water Board members continue to say that they live in an atmosphere of fear.

288. Present at the meeting of the SINEIA were the representatives of UMA, DECA-MiAmbiente, ICF, SANAA, FUPBAPIB, businesses and municipal water boards, the presiding municipal alderman, and the TRC department.

289. *Op. Cit.*, Municipality of San Francisco, Constancia, 8 September 2015.



Adalid Mendoza, President of the San Francisco Water Board: "Our dearest wish is that the entire town of San Francisco unite to defend the municipality's natural resources, so that we can hand them down to future generations."

Third, several similar complaints were filed with the State Prosecutor's Office.

In 2003, the first complaint was filed against the activities (felling of trees and installation of the camp) in preparation for a feasibility study conducted by INDECO without community consultation. According to members of the community, the only action taken on the complaint was a hearing held on 14 June 2004 with the Environmental Attorney's Office in La Ceiba, where some points were agreed to, with the understanding that the investigation would continue. However, the prosecution closed the case because allegedly the respondent and the Water Board had reached an agreement. Adalid Mendoza, President of the San Francisco Water Board claims that there was no written agreement. However, the State Prosecutor's Office closed the case on the basis that the claimant and the Water Board had reached an agreement with the company.²⁹⁰

On 18 March 2010, Adalid, in his capacity as President of the San Francisco Water Board and Osiris García, President of the Micelys, Boca del Toro and Buena Vista communities filed a complaint²⁹¹ for abuse of power against SERNA officials for granting an environmental licence even though the population had repeatedly expressed their disapproval of the project. On 5 September 2012, the Office of the Special Prosecutor on Corruption, through the "filter and purification" unit, dismissed the complaint on the grounds that there were technical opinions that are favourable to the licence, and that the ICF legal opinion of 2012 stated that the project is outside of the protected area. An appeal was filed against the dismissal of the complaint and requesting to have the investigation pursued. In response to the appeal, the Special Public Prosecutor's Office issued two technical opinions explaining that the licensing process should have included citizen participation. Finally, on 31 July 2013, the General Directorate of Public Prosecution reversed the dismissal, declared the complaint admissible and referred the case back to the Office of the Special Prosecutor on Corruption to continue the investigation. However, at the time of writing the current report,²⁹² based on information obtained by members of the community, there

290. This information was provided by members of the Board who were giving this information orally when they went to the Office of the Prosecutor to obtain information on how the case was progressing.

291. Registration no. 080120109627.

292. February 2017.

is no information available on any actions that may have been taken since the complaint was declared. The Government of Honduras, in its response to the CAFTA-DR's Secretariat for Environmental Matters (SEM), confirmed that that was the case.²⁹³

On 13 November 2012, a criminal complaint was lodged in La Ceiba,²⁹⁴ for usurpation of official functions and of identity, involving the falsification of the seals and signatures of the San Francisco Water Board. According to the community, the State Prosecutor Ministry only held two meetings. He did not make the investigation progress or respond to the complaint in writing. Per the members of the community, the authorities in charge of the investigation argued that they could not travel to the area because of lack of vehicles and fuel. Also, it was pointed out that high prosecutor turnover has prevented this investigation from moving forward.

Fourth, for the same facts (falsification of documents presented by the company to obtain contracts for operation and water supply on 3 September 2010), during the process for International Call for Tender No. 100-1293 / 2009 (in which 47 Renewable Energy contracts awarded by ENEE were submitted before the National Congress, including the contract with CONERSA), community members expressed concern about the alleged forgery of signatures and seal of the San Francisco Water Board. Because of the concerns raised, the contract was not published in the gazette that same day and Congress ordered an investigation. The investigation that was needed to verify such allegations did not take place, and four years later, on 23 July 2014, Congress approved the contract.²⁹⁵

All these events involving judicial and administrative authorities demonstrate the worrying lack of effective remedy for breaches of the rights of the local affected population. Cases have yet to be resolved due to procedural delays, or because investigations were never started or have not progressed significantly. **These circumstances are indicative of a breach of the State's obligation to provide prompt and effective remedy through which communities can obtain protection and reparation measures for the violations suffered; the lack thereof impairs communities' right to effective remedy.**

Furthermore, some of the cases discussed in this report have been decided, but most of the decisions have been against the complainants. For example, on 24 August 2014, the Water Board lodged a complaint before the *Juzgado de Letras de Privación de Dominio de Bienes de Origen Ilícito* (Court for Seizures of Illegally Acquired Property), requesting a review of the process for awarding the title to the Vista Hermosa Hacienda to verify its legality, and requesting that the transfer of the title be revoked. The request was declared inadmissible by the Judge of the *Juzgado de Letras de Privación de Dominio de Bienes de Origen Ilícito*. As a consequence, an appeal was filed on February 20, 2015. However, it was also declared inadmissible. An appeal was then filed on April 16, 2015, but was declared inadmissible.

Similarly, on 24 September 2014, members of the Water Board (represented by IDAMHO) applied to the *Sala Constitucional de la Corte Suprema de Justicia* (Constitutional Chamber of the Supreme Court of Justice against Legislative) for judicial review for the constitutionality of Decree No. 375-2013 on the contract for the Operation of an Electric Power Plant on the Cuyamel River, declared as being part of the heritage of the Municipality of San Francisco, and No. 388-2013 on the contract for the use of national waters for the Cuyamel II Project. In a judgment dated 27 April 2015, the *Sala Constitucional de la Corte Suprema de Justicia* decided to uphold *ex officio* the decision dated 7 October 2014 that determined the admissibility of the claim challenging constitutionality and declared the claim inadmissible because the decrees being challenged are neither general in nature nor generally applicable norms.

293. CAFTA-DR, Secretariat for Environmental Matters (SEM), *Response from the Government of Honduras to Communication CALAA/13/004(CUYAMEL_HN)*, 24 June 2014, available on line at http://www.saa-sem.org/es/registro/registro_page/25

294. Petition no. PROV-0101-2012-08751

295. National Congress of the Republic of Honduras, Decree 375-2013, 23 July 2010.

Legal recourse remains difficult to undertake for populations and organisations with limited resources, even in those cases where authorities handed down favourable decisions, and even more so given the delays and difficulties encountered by the numerous claims and petitions filed by the communities compared with the relative efficiency of the issuance and acceptance processes in place for environmental licences and the operating contracts. This underscores the need to generally examine the conditions for access to justice in Honduras, particularly in cases involving companies operating in the energy sector.

4. CONCLUSION

The approval process for the Cuyamel II Project has violated or threatened the rights of the population of San Francisco. The rights to information and citizen participation have been violated: the population has not been able to actively participate in the evaluation of a project that may fundamentally affect their right to water. The situation has been aggravated by the fact that the community has not had access to prompt and effective judicial recourse: legal claims have been largely ignored, hampered, or rejected. This has made the community even more vulnerable with respect to their right to water. The presence of the Fourth Infantry Battalion in the protected area of the micro-basin and in the buffer zone for the Pico Bonito National Park has directly jeopardised the rights of the population. These events have occurred in a context where the national legal framework has regressed and does not provide protections that are in accordance with international human rights legal norms for the right to water, and the rights to access to information and citizen participation.

The State failed to fulfil its human rights obligations: the legal framework for the protection of the right to water is inadequate, there have been administrative and legal irregularities in the evaluation, awarding of concessions, licensing and complaints processes for the Cuyamel II Project and for the Army's activities. **CONERSA also failed to fulfil its responsibility to respect human rights**, and has benefited from changes in laws and irregularities.

To date, neither the State nor the company have taken steps to change the situation. Attempts by the company and the State to initiate a dialogue for the purposes of the current report took place in a general atmosphere of defamation campaigns against human rights and environmental defenders²⁹⁶; and although headway was made with respect to access to information since the beginning of the current study, it has been slow and remains under the arbitrary control of the administration, the population cannot exercise their rights because it does not have access to effective remedy.

This case is emblematic because it **underscores the adverse effects of the transformation of the Honduran legal framework that has been taking place since 2007 on the protection of the right to water and the environment, particularly in protected areas, and with respect to access to information for the inhabitants affected by hydroelectric plant projects**. In Honduras, several of these cases have given rise to serious breaches of civil and political rights, including killing, bodily harm, threats, and defamation campaigns, especially against human rights defenders and environmental activists. The high degree of conflict connected to hydroelectric projects is the consequence of a legal framework that is not protective enough and of violations to the rights to information, citizen participation and effective remedy before justice, which makes it possible to ignore the point of view of the affected populations. The potential violation of the right to water in the case studied in this report has already become a reality in other cases.

The recommendations contained in the current report are intended to help bring the national legal framework in line with international human rights law and to remedy the abuses committed by public authorities and the company during the course of the Cuyamel II Project, thus setting a national and regional precedent. The recommendations also alert international, regional, and national financial institutions of the need to perform greater due diligence in relation to the privatisation and deregulation of the energy and renewable energy sectors. Further, they emphasise the imperativeness of ensuring

296. Community members and FUPNAPIB have been subject to imprecise declarations from actors, mainly enterprises, that have acted without consideration for the general interest work provided by those organizations and for the rights of defenders which stand for human rights of communities. See: https://www.youtube.com/watch?v=OH_hlZyVvZc&feature=youtu.be

that the projects that are financed do not lead to violations of human rights and environment laws. They must refrain from any involvement until the necessary guarantees are provided.

The Cuyamel II Project is an emblematic case which alerts of the potential human rights violations and environmental damage that could be seen with other hydroelectric projects in the country, in particular those that already have been approved to be built in the Pico Bonito National Park.²⁹⁷ It must prompt all relevant stakeholders to take immediate measures in order to protect Honduras' water sources and protected areas.

297. The Santiago and Río Perla hydroelectric projects, which are also majority-owned by GREEN, were approved respectively on 8 June 2010 (supply contract 077-2010 between ENEE and Empresa Generadora Santiago, SA de C.V. (EGESA)) and 3 June 2010 (supply contract 066-2010 between the ENEE and the Empresa HIDROELÉCTRICARÍO PERLA SA de C.V. (HIDROPERLA). See: <http://www.enee.hn/index.php/planeacion-y-redencion-de-cuentas-enee/contrataciones>

5. RECOMMENDATIONS

1. Recommendations for the Government of Honduras

1.1 *Recommendations on the right to water*

On environmental regulation in general:

- 1.1.1 Ensure consistency between national environmental laws and international human rights and environmental protection principles enshrined in treaties ratified by Honduras;
- 1.1.2 Ensure that changes in environmental laws and standards, and simplification of licensing and contracting procedures, required for the construction and operation of a hydroelectric plants, do not violate the principles of prevention and progressive improvement, or impair the human rights of local communities and the environment;
- 1.1.3 When modifying environmental licensing regulations, refrain from eliminating or weakening steps that provide guarantees for the rights of the communities; and
- 1.1.4 Strengthen human rights protection mechanisms with respect to the awarding of concessions and granting of licences for hydroelectric plants, particularly in relation to access to information and citizen participation, with the view to improve the balance of power between companies and communities.
- 1.1.5 Prohibit the construction of all types of infrastructure for industrial purposes within protected areas;
- 1.1.6 Use clear technical criteria to define broadly, but precisely, the boundaries of protected areas, taking into account what is established in management plans, through a binding legal instrument whose validity cannot be ignored or challenged by private actors or public authorities;
- 1.1.7 In decisions regarding the feasibility of hydroelectric plants, priority should always be given to arguments based on real risks (identified by technical experts) based on the ecological characteristics of the land and the relation populations have with water resources in the area; conversely, priority should not be given to purely legal analyses of existing legislation;
- 1.1.8 Establish, definitively and immediately, legal boundaries, as defined in the current management plan, for the core area of the Pico Bonito National Park, which have been recognised and accepted by local authorities, civil society organisations and communities, to guarantee the protection and conservation of ecosystems essential for the production of water for human consumption, to maintain plant and animal diversity and environmental quality of life in general, this recommendation extends to all protected areas for which boundaries are not clearly defined or established in legislative decrees;
- 1.1.9 Respect the micro-basin declaration on the supply of water for human consumption, to guarantee in perpetuity the protection and conservation of water sources;
- 1.1.10 In defining the boundaries of protected areas, carry out an appropriate consultation process with the communities and use management plans for such areas as a reference document; and
- 1.1.11 Ensure that the management plan for the Pico Bonito National Park is renewed publicly and in writing to ensure the management of natural resources in accordance with the regulations established therein, preserving natural resources and, in particular, water sources that allow neighbouring communities to access drinking water.

Recommendations for Environmental Impact Assessments (EIAs):

- 1.1.12 Clearly establish the obligation to conduct an EIA carried out, elaborated and monitored by a multidisciplinary team of qualified independent experts, for all hydroelectric projects, regardless of their size or production capacity, and refrain from adopting new regulations that provide for exceptions to EIAs;
- 1.1.13 Re-involve NGOs and the public, as constituent bodies, in the SINEIA to ensure that the interests of these actors are considered and that they can exercise their protection and monitoring functions whenever environmental licences are issued for projects that may have an impact on their human rights and their surroundings; and
- 1.1.14 **Cancel the environmental licence granted to the Cuyamel II Project** in view of the violations and of the real and potential effects on the human rights of the San Francisco communities and on the environment.

Recommendations regarding the impacts derived from the actions of the Office for the Administration of Seized Property (OABI):

- 1.1.15 Cancel the transfer of the land by the OABI to the Fourth Infantry Battalion because it was done in violation of the General Environmental Law, of the Law on Definitive Deprivation of Property of Illicit Origin, and of the management plan; and
- 1.1.16 In the future, ensure that land confiscated by OABI within forest or water supply protected areas is transferred to private or public persons with the capacity to ensure compliance with the laws on activities in these areas, and, in particular prevent that these persons use these resources for industrial purposes.

Recommendations regarding the impacts on the activities of the Fourth Army Battalion:

- 1.1.17 Ensure that, under all circumstances, security imperatives do not constitute a justification for the Army's failure to comply with current environmental and human rights norms;
- 1.1.18 Ensure that members of the San Francisco Water Board have free and effective access to the micro-basin and can effectively carry out essential maintenance activities to fulfil the right to water of local communities;
- 1.1.19 Allow access to state agents to perform their functions of environmental monitoring and verification of compliance with applicable laws; and
- 1.1.20 Investigate immediately, exhaustively, and transparently allegations of environmental crimes and damage to the protected area perpetrated by the Fourth Infantry Battalion.

1.2 Recommendations regarding the rights of access to information and citizen participation

- 1.2.1 Ensure participation and access to information, for all inhabitants, on all projects that may affect them or their environment, regardless of the size or of other characteristics of said projects, so that inhabitants can contribute to the monitoring and protection of the environment and defend their human rights;
- 1.2.2 Establish a clear legal framework that allows for the effective participation of affected populations in decision-making processes that may affect their lives, including non-indigenous populations, and specifically regulate the modalities and financing of participation processes, with the objective of ensuring that all inhabitants who may be affected or whose environment may be affected can participate effectively, meaningfully and transparently;

- 1.2.3 Continue to participate actively in the regional process for the development of a regional instrument for the implementation of Principle 10 of the Rio Declaration on Environment and Development;
- 1.2.4 Establish a legal framework that allows the public and affected or potentially affected communities, to have access to licence application files, limit the possibility of having documents declared confidential or classified, and always consider these communities as one of the parties to the process, especially in cases of projects involving the use of natural resources as they are a common good; and
- 1.2.5 Strengthen the legal framework providing for access to information by ensuring consistency between the law and the rules implementing it and by adopting a restrictive interpretation of confidential or classified information in cases where there is a real risk to national security.

1.3 Recommendations on the right to an effective remedy

- 1.3.1 Take measures to ensure effective access to justice for all inhabitants affected by abuses connected to business activities;
- 1.3.2 Ensure that administrative and judicial proceedings are reasonable in duration and that investigations into reported activities are undertaken promptly and are impartial and effective to ensure the right to equality before the law, judicial protection and effective remedy;
- 1.3.3 Take measures to ensure that the Water Board, the SINEIA team, the CAFTA-DR EMS team, or any other entity that needs to carry out monitoring or investigative activities can access the zone occupied by the Fourth Infantry Battalion;
- 1.3.4 At CONADEH, establish a complete and easily accessible registry for all complaints made in writing or verbally, and facilitate the access for community members to this registry and to records of complaints;
- 1.3.5 Ensure the advancement of investigations by the Office of the Special Prosecutor on Corruption regarding the complaint²⁹⁸ of abuse of authority against SERNA officials for the issuance of the environmental licence;
- 1.3.6 Refrain from repeatedly changing the prosecutors heading cases related to this or other complaints lodged against the granting of concessions, licences or operation of projects that may have a social and environmental impact for the communities; and
- 1.3.7 Ensure adequate remedy and guarantees of non-repetition are provided for in the adjudication of the cases before MiAmbiente and the anti-corruption prosecutor.

1.4 General recommendations

- 1.4.1 Increase the effectiveness of prevention, investigation and prosecution of all forms of aggression against human rights defenders and recognise the legitimacy of their work;
- 1.4.2 Allocate sufficient resources to the enforcement of the Ley de Protección de Defensores de Derechos Humanos, Periodistas, Comunicadores Sociales y Operadores de Justicia (the Law on the Protection of Human Rights Defenders, Journalists, Social Communicators and Justice Operators), and adopt the necessary measure to reinforce the autonomy and efficiency of the Protection System, in collaboration with civil society; and
- 1.4.3 Address and exhaustively investigate allegations of corruption connected to extraction industries, including through collaboration with the *Misión de Apoyo*

²⁹⁸. Registered through the number 080120109627

2. Recommendations for the company CONERSA and other companies

2.1 General Recommendations

- 2.1.1 To fulfil its responsibility to respect all internationally recognised human rights, even when faced with requirements that contradict national legislation; and
- 2.1.2 To perform due diligence in the field of human rights, i.e., adopt measures and processes that actively allow the identification, prevention, and mitigation of real and potential adverse impacts on human rights directly related to company operations, commercial relations, products or services, including in cases where they have not contributed to generating them, businesses must be accountable for how they address and manage these adverse effects, and if they contributed to the impairment of human rights companies must provide or participate in providing remedy.

2.2 Recommendations concerning the right to water

- 2.2.1 Respect in all circumstances the highest environmental and human rights norms, regardless of any regressive changes in national norms;
- 2.2.2 Conduct an EIA to determine, on the basis of technical criteria and through a participatory and inclusive process, the environmental and human rights risks created by the project, and establish appropriate mitigation measures; and
- 2.2.3 Comply with the decisions of the administrative authorities and in particular with the technical opinions issued by these authorities, even if they are contrary to the interests of the company.

2.3 Recommendations regarding the right of access to information and citizen participation

- 2.3.1 Establish fora for dialogue that guarantee the legitimate, effective, and transparent participation of all right holders who may be affected by real or potential risks generated by the company's activities. To this end, companies must ensure that:
 - affected communities have adequate and effective access to comprehensive information about the project and its consequences on their rights;
 - communities have access to independent legal advisors and technicians prior to decision-making;
 - a legitimate dialogue process takes place in which affected communities have the opportunity to share their concerns and these concerns are taken into consideration;
 - participation is carried out in an appropriate and continuous manner, at each stage of the project;
 - the information provided to the communities is clear and comprehensible, and includes explanations of both the positive impacts and the real and potential negative impacts of the project; and
 - traditionally excluded actors such as minorities and women can participate meaningfully in the decision-making process, and that all meetings are held in the local language and are culturally appropriate.

Recommendations to international financial institutions and other agencies that finance energy sector projects in Central America

- 3.1 Refrain from financing projects planned in protected areas;
- 3.2 Perform more thorough human rights due diligence to ensure that clients respect international human rights and environmental protection norms, prior to assigning funds; this may mean abstaining from financing any hydroelectric project in Honduras until sufficient guarantees are obtained that such funding will not contribute directly or indirectly to human rights or environmental violations;
- 3.3 Abstain from participating in and supporting legislative reforms that result in the reduction of human rights guarantees for communities and, on the contrary, ensure that company support is a safeguard for human rights norms and environmental protection.

6. METHODOLOGICAL ANNEX

Available in spanish at : https://www.fidh.org/IMG/pdf/22052017_anexo_metodolo_gjico_vfinal.pdf

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299. See <https://oncallscientists.aaas.org/es>

300. See <http://empowerllc.net>

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FUPNAPIB

The Pico Bonito National Park Foundation (FUPNAPIB) is a non-governmental and non-profit environmental organization legally registered in 1993. It is made up of women, men and young people who are committed to improving people's lives in a sustainable manner. We intend that the inhabitants of the Pico Bonito National Park (PNPB) protect and manage their territories for their rational use from a comprehensive management approach.

CEHPRODEC

The Honduran Center for the Promotion of Community Development (CEHPRODEC) is a non-governmental organization that monitors compliance with Economic, Social, Cultural and Environmental Rights in Honduras. To this end, it promotes development alternatives in the communities through the strengthening of individual and collective capacities to generate their own apprehension of reality, and to elaborate and manage their objectives. CEHPRODEC carries out training actions on human rights and accompanies defenders of the land and of territories who are threatened and persecuted for their role of territorial defense. It also coordinates the National Coalition of Environmental Networks and Organizations of Honduras (CONROA).

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