DANGER: RIGHTS FOR SALE

THE INTEROCEANIC GRAND CANAL PROJECT IN NICARAGUA AND THE EROSION OF HUMAN RIGHTS

AMNESTY INTERNATIONAL

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Backcover photo: *A house in a community in Nicaragua's Caribbean coast. Photo taken in June 2016. © Tom Laffay for Amnesty International*

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CONTENTS

1. EXECUTIVE SUMMARY **4**

2. METHODOLOGY **9**

3. BACKGROUND **10**

4. THE IRONCLAD LEGAL FRAMEWORK OF THE INTEROCEANIC GRAND CANAL **14**

Law 800 14

Law 840 16

Master concession and implementation agreement in respect of the Nicaragua Canal and development project 23

5. POSSIBLE EVICTIONS WITHOUT INFORMATION OR CONSULTATION **29**

Law 840's hasty and opaque approval process 30

Effective participation throughout the process? 35

6. CONCLUSIONS AND RECOMMENDATIONS **48**

1. EXECUTIVE SUMMARY

The history of Nicaragua will remember 13 June 2013 as a momentous date. On that day, the National Assembly adopted the "Special Law for the Development of Nicaraguan Infrastructure and Transport in respect of the Canal, Free Trade Zones and Associated Infrastructure" (Law 840). This Act gave the go-ahead for the granting of the concession for and the design and the development of one of the most ambitious engineering projects in the world: The Interoceanic Grand Canal and its associated sub-projects (the Project).

According to the plans proposed by its backers, the Nicaraguan Interoceanic Grand Canal (GIC) will cross the country from east to west, dividing it in two. It is estimated that it will measure approximately 275.5km in length and will require an investment of approximately US$50 billion. The path of the GIC will cross part of Lake Nicaragua or Cocibolca, the largest freshwater reservoir in Central America.

The Project is more than just a waterway across Nicaragua. According to Law 840, the canal is a sub-project of a set of other infrastructure projects which include: two ports, an oil pipeline, a dry channel for the construction of a railway line, two free trade areas, an airport and whatever infrastructure the investor deems is necessary for the development and operation of one or more sub-projects.[1] As a result, the consequences of the GIC will not be limited to the impact of the waterway. Civil society organizations have pointed out that the scale of the project means that hundreds of thousands of people will be affected. One of the effects of most concern is the possible mass evictions. A process to ensure effective participation, which affords easy, quick and effective access to adequate information and provides genuine consultation mechanisms involving all those who may be affected and their representatives is, therefore, essential.

In this report, Amnesty International highlights how Nicaragua has pushed ahead with the approval and design of a mega-project that puts the human rights of hundreds of thousands of people at risk, without consultation and in a process shrouded in silence. Amnesty International has noted that, despite national regulations and international human rights standards, Law 840 was approved in a way that has been described by various national actors as irregular, extremely fast, opaque and lacking real and genuine consultation. The state's actions constitute an unacceptable failure to respect its international human rights obligations.

Amnesty International's analysis begins with a study of the legal framework put in place to regulate the Project, which reveals that human rights standards, especially with regard to the process of expropriation, have not been respected. The report then goes on to examine how the law governing the project takes precedence over other national legislation by modifying or repealing any provision or legislation that opposes it. The complete subordination of national legislation to a trade agreement does not augur well for human rights. Nicaragua's international human rights commitments cannot and should not be adapted around trade agreements.

In addition, the project's legal framework should not privilege the interests of the concession-holder and investors at the expense of human rights. On the contrary, it should preserve and strengthen human rights guarantees and avoid at all costs provisions that grant privileges and protections in favour of the investor while restricting or qualifying the rights of the people affected.

Amnesty International spoke to over 190 peasant farmers (*campesinos*) living in various communities near the projected route of the canal. Their statements revealed a profound concern at the lack of access to the information necessary to understand the details of the Project and all its impacts, especially those related to future expropriations and mass evictions.

According to independent studies of civil society organizations, along the announced route of the canal, approximately 24,100 households (some 119,200 people) in the area will be directly impacted.[2] However, the data may change due to the inclusion of other sub-projects or infrastructure designed or notified subsequently.

In a project that promises to have such a massive impact nationally, genuine consultation is one of the guarantees that the state must ensure. However, the peasant farmers who spoke to Amnesty International categorically asserted that there had been no participation in genuine and effective consultations. As a result, at least 90 demonstrations have been organized by communities to demand the repeal of Law 840 and respect for their human rights.

The authorities cannot ignore the fact that the risk of losing one's home and farmland also implies the risk of depriving people of their family environment, social networks, livelihood, adequate food and employment opportunities, as well as hindering access to education and water, among other services. Given that such a broad

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[1] Law 840, "Special Law for the Development of Nicaraguan Infrastructure and Transport in respect of the Canal, Free Trade Zones and Associated Infrastructure" Adopted by the National Assembly on 13 June 2013. Art.2.

[2] Alexander von Humboldt Centre, *Valoraciones socio ambientales de la ruta seleccionada para la construcción del Gran Canal Interoceánico por Nicaragua. Executive summary*, September 2014, p. 11 and Red Nicaragüense por la Democracia y el Desarrollo Local, *Los efectos socioeconómicos del canal interoceánico a nivel municipal*, May 2015, p. 9.

range of rights could be affected, it is vital that there is an effective participation process that is robust and comprehensive. The word "effective" seeks to provide protection against processes that appear on the surface to abide by human rights requirements, but where there is in fact no genuine intention to change a decision which has already been taken. The process put in place by the Nicaraguan state is far from that required by international standards.

Despite public protests, legal appeals and requests for information, the state refuses to initiate a meaningful dialogue with people who may be affected and their representatives. Human rights organizations have denounced the unnecessary and excessive use of force, disproportionate violence and unlawful detentions by police targeting people who take part in peaceful public demonstrations against the negative impacts of the Project and its legal framework. In addition, human rights and environmentalist organizations have reported acts of harassment, intimidation and retaliation against human rights defenders who have expressed concerns about the future impacts of the project.

Nicaragua has an irrefutable obligation to implement a series of guarantees grounded in human rights principles and standards.

MAIN RECOMMENDATIONS

TO THE NICARAGUAN GOVERNMENT (INCLUDING THE NICARAGUA CANAL AND DEVELOPMENT PROJECT COMMISSION)

- Impose a moratorium on the implementation of all aspects of the work on the Project until legal and procedural safeguards are in place that comply with human rights standards, including effective consultation of those who will be affected and prevent forced evictions.
- Implement, immediately, a process to disseminate information and engage in genuine consultation on the Project.
- Based on the results of a process of genuine consultation of all the people who could be affected and their representatives, initiate a renegotiation with the concession holder and other relevant parties of the Master Concession and Implementation Agreement in respect of the Nicaragua Canal and Development Project (MCA) and other agreements relating to the Project, with the aim of setting up a legal framework that ensures respect for human rights and environmental integrity, and protection from forced evictions.
- Support the repeal of national legislation on the Project – including the MCA and other agreements related to the Project – and ensure the establishment of a regulatory framework for the Project based on effective and genuine prior consultation that ensures respect for human rights and environmental integrity, and protection from forced evictions.

TO THE NATIONAL ASSEMBLY

- Repeal national legislation on the Project, including the MCA and other agreements relating to the Project, and ensure the establishment of a regulatory framework for the Project, based on effective and genuine prior consultation, that ensures respect for human rights, environmental integrity, and protection from forced evictions.
- Avoid the future approval of legislation that contravenes Nicaragua's international obligations and violates or jeopardizes the human rights of its people.

TO THE SECURITY FORCES

- Guarantee and respect the right to freedom of expression and peaceful public protest of those who want to express their position to and concerns about the future impacts of the Project.
- Refrain from acts that constitute intimidation, harassment and reprisals against human rights defenders and community leaders who have expressed their concerns about the future impacts of the Project.

TO THE CONCESSION-HOLDING COMPANY AND OTHER CONTRACTORS

- Cease all work on or related to the Project until the necessary measures have been taken to ensure full respect of the human rights of those who will be affected, including prior consultation.
- Refrain from invoking or making use of indemnity or stability clauses in relation to any legal changes or measures introduced by the state that are aimed at ensuring respect for and protection of human rights in the context of the Project.
- Based on the results of a process of genuine consultation of all those who could be affected and their representatives, initiate a renegotiation, with the state, of the MCA and other agreements regarding the Project in order to establish a legal framework that ensures respect for human rights and protection from forced evictions.

TO THIRD-PARTY STATES WHO ARE POTENTIAL INVESTORS OR SERVICE PROVIDERS

- Countries interested in investing in or providing services to the Project should assess the commitment of the Nicaraguan state to comply with international human rights standards and proactively initiate a dialogue with the Nicaraguan authorities to ensure that the Project complies with, and does not lead to violations of, Nicaragua's international human rights obligations.
- Carry out a thorough analysis of the Project that includes a study of incidences of possible evictions, in line with human rights standards, to avoid contributing to or exacerbating human rights violations. In line with their own human rights obligations, the countries concerned must ensure that the Project is implemented in such a way as to respect and promote human rights.

Amnesty International's recommendations are set out in full and in detail at the end of this report.

Passengers transporting goods on a boat in Puerto Príncipe, Región Autónoma de la Costa Caribe Sur (RACCS), Nicaragua. June 2016. © Tom Laffay for Amnesty International

2. METHODOLOGY

SCOPE OF RESEARCH

This report is the result of extensive research involving semi-structured interviews, focus groups and a thorough analysis of documentation. An Amnesty International team visited Nicaragua on two occasions in 2016. During these visits, the team travelled hundreds of kilometres and visited municipalities and communities close to the projected route of the Interoceanic Grand Canal in the departments of Rivas, Río San Juan and the South Caribbean Coast Autonomous Region (Región Autónoma de la Costa Caribe Sur, RACCS). In the capital, Managua, the team interviewed academics, environmentalists and key human rights defenders.

Amnesty International gathered statements from a wide variety of people. At least 190 people described to the research team how their lives have been affected by the approval of the Project, in a context where their voices have been consistently ignored by the Nicaraguan state.

Amnesty International requested interviews with a scientist and an environmentalist who, according to the media, have issued positive statements about the Project and its impacts. However, these interviews were not granted or were cancelled at the last moment.

The research also included interviews with members of Indigenous and Afro-descendant communities in the RACCS. Information and data were gathered during these interviews and will be presented in a future publication.

STATE SILENCE

During 2016, Amnesty International repeatedly wrote to central government officials and members of the Nicaragua Canal and Development Project Commission requesting interviews. After fruitless negotiations, Amnesty International regrets that the Nicaraguan government has not agreed to share information about a project that it claims will have positive impacts on the country and its people. This is particularly regrettable in a context in which analysis of the little information that is publicly available is confusing, contradictory or incomplete.

ACKNOWLEDGEMENTS

Amnesty International is grateful to the hundreds of *campesinos* and members of Indigenous and Afro-descendant communities who invited us into their homes, introduced us to their families and shared their experiences with us. The organization would also like to thank members of the National Council for the Defence of Our Land, Lake and Sovereignty (Consejo Nacional en Defensa de Nuestra Tierra, Lago y Soberanía), civil society organizations and human rights defenders who provided invaluable information and documentation for this report.

3. BACKGROUND

OVERVIEW

Nicaragua is a Central American country with a landmass of 130,375.87km^2 bordered by the Caribbean to the east and the Pacific Ocean to the west. According to the most recent National Census, in 2005 it had a population of 5,142,098 and this was projected to rise to 6,262,703 by 2015.[3] There are seven Indigenous Peoples and two Afro-descendant communities in Nicaragua, estimated to comprise 12% of the population.[4]

The idea of constructing a Canal in Nicaragua is not new. There have been various attempts in Nicaragua's history to turn such a project into reality. The Project, described by its supporters as the greatest civil engineering project in history, would cross the country from east to west, dividing it in two. It is estimated that the canal would be some 275.5km long.[5] According to the company which has been granted the concession for the Project, the canal will cross 105km of Lake Nicaragua (Cocibolca) and will require an investment of approximately US$50 billion. According to the concession holder, the construction will take five years from the start of the main construction work.[6]

According to the Nicaraguan government's 2012-2016 National Human Development Plan (Plan Nacional de Desarrollo Humano, PNDH), the Project is a development strategy that takes advantage of the country's geography and the available water. The PNDH states that the Project has the potential to bring about a several-fold increase in the country's GDP, which would bolster state resources for poverty reduction and the elimination of extreme poverty. According to the PNDH, the Nicaraguan project will complement the Panama Canal by providing a transit route that is accessible to ships whose size or depth is greater than can be accommodated by the expanded Panamanian waterway.[7]

On 7 July 2014, the chosen route for the Nicaraguan canal[8] was made public and on 22 December 2014, a ceremony was held to mark the "Start of Construction".[9] However, at the time of writing, no major work on the canal or its sub-projects was reported to have been initiated.

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[3] Government of Nicaragua, National Institute of Development Information, *Statistical Yearbook 2014*. Available at: http://www.inide.gob.ni/Anuarios/Anuario 2014.pdf (last accessed 21 July 2016).

[4] IBIS and the Government of the Territorio Rama-Kriol, *Atlas and experiences of the Territorio Rama-Kriol*, August 2005-April 2012, p. 6.

[5] *Canal de Nicaragua: Environmental and Social Impact Assessment, Executive Summary* p. 10, available at: http://hknd-group.com/portal.php?mod=view&aid=243 (last accessed, 10 April 2017).

[6] *HKND Noticias,* First Edition, November 2015, pp. 12 and 18. Available at: http://hknd-group.com/upload/pdf/20151124/HKND%20Bolet%C3%ADn%20nov.%202015.pdf (last accessed 17 July 2016).

[7] Government of Nicaragua, *National Human Development Plan 2012-2016*, Version in national consultation, 4 March 2013. pp. 199-200, available at http://www.ni.undp.org/content/nicaragua/en/home/library/mdg/publication_1.html (last accessed 25 July 2016).

[8] See http://hknd-group.com/portal.php?mod=view&aid=83 and http://www.laprensa.com.ni/2014/07/07/nacionales/202195-hknd-presenta-ruta-del-gran-canal-de-nicaragua (last accessed 10 April 2017).

[9] See http://hknd-group.com/portal.php?mod=view&aid=146 and http://www.bbc.com/mundo/noticias/2014/07/140708_economia_canal_nicaragua_cifras_nc (last accessed 10 April 2017).

LEGAL FRAMEWORK[10]

On 13 June 2013, the National Assembly approved the Special Law for the Development of Nicaraguan Infrastructure and Transport in respect of the Canal, Free Trade Zones and Associated Infrastructure (Law 840). Law 840 approves and authorizes the signing of the Master Concession and Implementation Agreement in respect of the Nicaragua Canal and Development Project (MCA) between the Nicaraguan government and two companies: Empresa Desarrolladora de Grandes Infraestructuras S.A (EDGI)[11] and the HK-Nicaragua Canal Development Investment Co. Limited (HKC), the latter based in Hong Kong.[12] In addition, Law 840 establishes that the exclusive concession will last for 50 years from the beginning of operations, extendable for a similar period.[13]

Subsequently, on 14 June 2013, the MCA was concluded. According to Law 840, the MCA now forms part of the legislative framework regulating the canal project. On 29 January 2014, the National Assembly passed a law amending the Nicaraguan Constitution (Ley de reforma parcial de la Constitución Política de la República de Nicaragua). Among other things, the amendment empowers the state to "enter into contracts or grant concessions for the construction and rational exploitation of an interoceanic canal".[14] Finally, the Environmental and Social Impact Assessment (ESIA) commissioned by the concession holder from the company Environmental Resources Management (ERM), was presented to the Nicaraguan Government in May 2015 and approved in November of the same year. As a result, the project obtained its environmental permit.[15]

COMPLAINTS AND CRITICISMS

Since the creation of the Project's legal framework, the project has become a central topic of political and social discussion in Nicaragua. Various sectors of civil society have questioned the design and approval of the project's legal framework, complaining of secrecy and a lack of transparency and consultation. In this context, environmental and human rights organizations pointed out that Law 840 was passed after a hasty legislative process that was marked by an atmosphere of misinformation and a total absence of analysis and public discussion.[16]

Given the scale of the Project, human rights organizations anticipate that it will have a significant impact, causing serious damage to the environment, to the water supply, to adequate housing and to livelihoods. These impacts could undermine the exercise of human rights. As a result, in March 2015, a group of 11 human rights

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[10] The English version of the Nicaraguan legislation quoted in the report is a translation of the original in Spanish for information purposes only and it's not an official translation (the Master Concession and Implementation Agreement it's the only document which has an official English version available). In case of a discrepancy, the Spanish original prevail.

[11] According to the MCA, this company was incorporated in Nicaragua and acquired by a subsidiary of HKND Group Holdings Limited in order to promote the implementation of the Project and entering into the agreement as "Original Sponsor", MCA, Recital E. According to the same Agreement, HKND Group Holdings Limited is a holding company incorporated by HK Nicaragua Canal Development Investment Co Limited in the Cayman Islands, MCA, Recital D.

[12] Law 840, "Special Law for the Development of Nicaraguan Infrastructure and Transport in respect of the Canal, Free Trade Zones and Associated Infrastructure", approved by the National Assembly on 13 June 2013. Article 1. More information about the company and the Project can be found at http://hknd-group.com/

[13] Law 840, Article 3.

[14] Law 854, "Law to partially amend the Constitution of the Republic of Nicaragua", approved by the National Assembly on 29 January 2014, Article 102.

[15] *HKND Noticias*. First Edition November 2015. p. 1. Available at: http://hknd-group.com/upload/pdf/20151124/HKND%20Bolet%C3%ADn%20nov.%202015.pdf (last accessed 17 July 2016).

[16] Document "Argumento de las organizaciones peticionarias ante la Comisión Interamericana de Derechos Humanos¨. Hearing before the Inter-American Commission on Human Rights, 154th period of sessions, 16 March 2015.

organizations went before the Inter-American Commission on Human Rights to denounce the multiple economic, social, cultural and environmental impacts that would put at risk the ecological balance, social fabric, cultural heritage and livelihoods and subsistence of residents who will be affected by the Project.[17]

In addition, organizations denounced the unnecessary and excessive use of force, disproportionate violence and unlawful detention by police officers targeting people taking part in peaceful public demonstrations protesting at the negative impacts of the Project and its legal framework. In addition, after the results of the ESIA were made public, scientists and human rights organizations reviewed and commented on aspects of the study.[18]

Indigenous and Afro-descendant Rama-Kriol communities have complained about the lack of consultation and violations of their right to free, prior and informed consent with respect to a project that could affect an important part of their territory.[19]

CIVIL SOCIETY MOBILIZATION AND ORGANIZATION

Following the approval of Law 840, a *campesino* social movement was formed which, in November 2014, established the National Council in Defence of our Land, Lake and Sovereignty (National Council).[20]

The National Council is a campesino and a community organization, initially composed of inhabitants of areas that could be affected by the Project because of their location. Subsequently, representatives from communities in other parts of the country reportedly also joined. To date, the National Council has spearheaded at least 90 peaceful marches demanding that the Nicaraguan state repeals Law 840 law and respects human rights. In addition, legal mechanisms have been invoked seeking the revocation of the legal framework regulating the Project.

In the same context, the Cocibolca Group was established, which provides a national platform for NGOs and academics seeking to raise awareness of the scale of the Project and its impact on institutions, the environment, equity and the quality of life of Nicaraguans.[21]

The Nicaraguan Academy of Sciences has also been crucially important in the debate and discussion of the impacts of the Project. It has produced key documents examining and analysing the Project. Many other human rights organizations, such as the Nicaraguan Centre for Human Rights, have also raised their voices to denounce the lack of participation and consultation, restrictions on freedom of expression and the future negative impacts that could result from the development and implementation of the canal project.

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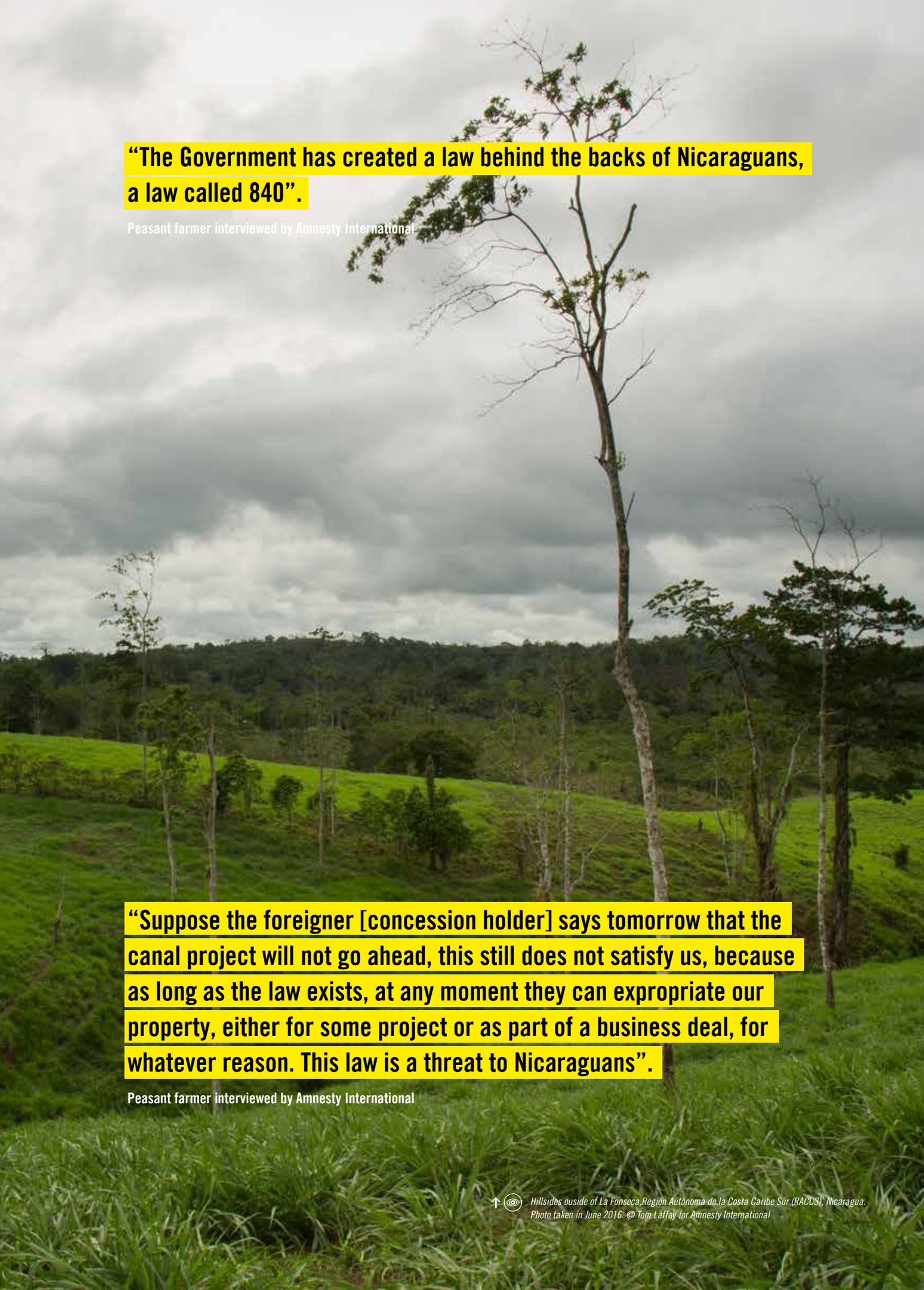
[17] Document "Argumento de las organizaciones peticionarias ante la Comisión Interamericana de Derechos Humanos¨. Hearing before the Inter-American Commission on Human Rights, 154th period of sessions, 16 March 2015.

[18] See: "Critical Uncertainties and Gaps in the Environmental- and Social-Impact Assessment of the Proposed Interoceanic Canal through Nicaragua." Available at https://academic.oup.com/bioscience/article/66/8/632/2464045/Critical-Uncertainties-and-Gaps-in-the (last accessed 10 April 2017) and Centro Nicaragüense de Derechos Humanos y Federación Internacional de Derechos Humanos, *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisisten,* September 2016 / No.680e.

[19] Amnesty International, *Nicaragua side-lines local communities over multi-billion dollar canal*, 9 February 2016. Available at https://www.amnesty.org/en/latest/news/2016/02/nicaragua-side-lines-local-communities-over-multi-billion-dollar-canal/

[20] Nicaraguan Centre for Human Rights and the International Federation of Human Rights, *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisten*. September 2016 / No.680e. p. 41.

[21] The Cocibolca Group comprises: the POPOL NA Foundation, the Alexander Von Humboldt Centre, CALPI, FUNDENIC-SOS, Fundación del Río, Fundación Luz en la Selva, Red por la Democracia y el Desarrollo Local y Gobierno Comunal Creole de Bluefields, http://www.grupococibolca.org/sobre-nosotros/ (last accessed 9 October 2016).



“The Government has created a law behind the backs of Nicaraguans, a law called 840”.

Peasant farmer interviewed by Amnesty International

“Suppose the foreigner [concession holder] says tomorrow that the canal project will not go ahead, this still does not satisfy us, because as long as the law exists, at any moment they can expropriate our property, either for some project or as part of a business deal, for whatever reason. This law is a threat to Nicaraguans”.

Peasant farmer interviewed by Amnesty International

Hillsides ouside of La Fonseca,Región Autónoma de la Costa Caribe Sur (RACCS), Nicaragua. Photo taken in June 2016. © Tom Laffay for Amnesty International

4. THE IRONCLAD LEGAL FRAMEWORK OF THE INTEROCEANIC GRAND CANAL

To understand the scope of the canal concession, at least three legal instruments need to be considered: Law 800, Law 840 and the MCA. All three were approved in less than a year. The analysis of the legal framework presented here addresses just a few aspects of the legal labyrinth that regulates the Project. However, Nicaraguan organizations and jurists have done extensive studies on the subject, which inform this section of the report.

LAW 800

Law 800, entitled "Law on the Legal Regime for the Interoceanic Grand Canal of Nicaragua and for the Creation of the Nicaragua Interoceanic Grand Canal Authority", represented the first step in the legal life of the Project and created the Nicaragua Interoceanic Grand Canal Authority (the Authority). This law declared "the Grand Canal of Nicaragua, including relevant studies, design, construction and operation a priority and a matter of supreme national interest".[22]

According to Law 800, passed in July 2012, the Authority will represent the Nicaraguan state in "the creation and establishment of a company for the construction and operation of the Grand Canal of Nicaragua".[23] The law states that the Authority will be responsible for determining the regulatory regime of the Great National Company of the Nicaragua Grand Canal (Empresa Gran Nacional de El Gran Canal de Nicaragua, EGN), 51% of whose net profits would be paid to the Nicaraguan state.[24]

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[22] Law 800, entitled the Law on the Legal Regime for the Interoceanic Grand Canal of Nicaragua and for the Creation of the Nicaragua Interoceanic Grand Canal Authority", approved by the National Assembly on 3 July 2012, Article 1.

[23] Law 800, Article 1.

[24] Law 800, Article 3.

It seems that, at that time, the intention was to create a company that was both publicly and privately owned and that the state would be a majority shareholder, holding more than half of the shares.[25] Thus, the EGN, supported and created by the Authority, would be responsible for building and operating the Interoceanic Grand Canal.[26]

On 5 September 2012, just two months after Law 800 was approved, the Authority and the HKC company signed a Memorandum of Understanding according to which the Authority and the Nicaraguan government authorized HKC to devise and manage the financing of the Grand Canal Project. In addition, it authorized HKC's participation in the construction, operation and administration of the Canal project.[27] This Memorandum, which bypassed the EGN, effectively overturned the original plan and authorized a private company to carry out the actions initially assigned to the EGN. Likewise, the subsequent Law 840 amends or expressly repeals references to the EGN in Law 800. As a result, it seems that the idea of implementing the project with the participation of EGN has been abandoned.

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[25] Law 800, Article 15.

[26] Law 800, Article4.e.

[27] Published in the Official Gazette (*La Gaceta*), on 5 July 2013. Available at: http://www.lagaceta.gob.ni/gaceta-125-viernes-5-de-julio-2013/ (last accessed 26 January 2016).

LAW 840

In June 2013, the National Assembly approved Law 840, the Special Law for the Development of Nicaraguan Infrastructure and Transport in respect of the Canal, Free Trade Zones and Associated Infrastructure.[28]

Law 840 approves and authorizes the signing of MCA between the Government of Nicaragua and the companies EDGI and HKC[29] and "modifies and supersedes any law or provision and any other legislation, regulation or requirement of any governmental entity[30] that expressly or tacitly opposes or is incompatible with the terms of the MCA".[31] This clearly indicates that from its entry into force, this law is intended to become the overriding norm governing issues linked to the canal and its sub-projects.

This can also have important implications in the field of human rights. The current wording of the law can be interpreted to mean that any new or existing regulation on environmental issues or human rights that could be considered incompatible with it would no longer apply. This would weaken and endanger the national system for the protection of human rights.

NICARAGUA CANAL AND DEVELOPMENT PROJECT COMMISSION

Law 840 created the Nicaragua Canal and Development Project Commission (the Commission) whose responsibilities include representing the Nicaraguan government on issues related to the canal project and its sub-projects. This Commission will be responsible for exercising the rights and obligations of the Nicaraguan government, derived from the MCA. All the powers granted by Law 800 to the Authority pass to the Commission.[32]

According to Law 840, the Commission's functions include "signing the MCA, any agreements anticipated therein and any other agreements that may be deemed necessary, in the name of and representing each government entity".[33] In addition, the Commission has the power to issue "all the consents which may be required by the investor or any part of the sub-project", without requiring the consent and approval of the Regional Council or corresponding municipality.[34] This has been criticized by Nicaraguan jurists who consider that "Law 840 and

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[28] Law 840, the Special Law for the Development of Nicaraguan Infrastructure and Transport in respect of the Canal Free Trade Zones and Associated Infrastructure, approved by the National Assembly on 13 June 2013.

[29] Law 840, Article 1.

[30] Law 840, Article 1.d. states that: "For the purposes of this Act, the term 'Governmental Entity' shall have the definition established in the MCA, excluding the courts." For its part, the MCA, in section 1.1, states that "'Government Entity'" means the Government or any governmental agency or any national, state, regional, provincial, local, county, city, town, village, municipal or other instrumentality, authority, department, ministry, commission, board, bureau agency, inspectorate, or any political subdivision of any thereof, including any person exercising statutory authority or legislative, judicial, taxing, regulatory or administrative functions of or pertaining to any of the foregoing entities, including any minister, official, court, tribunal, central bank or public or statutory body (whether autonomous or not), of Nicaragua (including, for the avoidance of doubt, any licensing authority, taxing authority or public registry) and including any agent or representative acting on behalf of any of the foregoing entities; provided that, for the avoidance of doubt, each of the Authority and the Commission shall be deemed a Government Entity".

[31] Law 840, Article 24.

[32] Law 840, Articles 4, 5 and 7.

[33] Law 840, Article 5.c.

[34] Law 840, Articles 5.f and 5.h.

the MCA granted powers to the Commission which are contrary and completely opposed to both to the division of powers, as well as to the proper division of the administration of the Nicaraguan State overall".[35]

In environmental matters, Law 840 states that the Commission is the body responsible for the supervision of the rational and sustainable use of natural resources, the protection of the environment and biodiversity of the area affected by the Project.[36]

THE INTEROCEANIC GRAND CANAL PROJECT

Law 840 regulates not only specific aspects of the Interoceanic Grand Canal, but also considers the Project to include, in addition to the canal, the following sub-projects: two ports, an oil pipeline, a dry canal for the construction of a railroad, two free trade zones, an airport and all the infrastructure that the investor deems necessary for the development and operation of one or more sub-projects.[37] That effectively allows for the inclusion within its mandate of as many infrastructure projects as are required by the investor. As a consequence, the geographical remit of Law 840 applies well beyond the future route of the waterway.

In addition, by including a non-exhaustive, open list of possible new infrastructure projects, it creates an atmosphere of uncertainty about which areas of the country will be affected. In other words, the law was passed in the absence of absolute certainty about what routes, territories, populations and natural resources would be affected by the combined sub-projects.

In fact, there is also information that the sub-projects include holiday resorts, several roads, the construction of a power plant and a cement factory.[38] In addition, according to the ESIA, works will include the creation of the so-called "Lake Atlanta" which would flood an area of approximately 40,000 hectares.[39]

THE ROUTE OF THE SUB-PROJECTS

Law 840 does not establish a route or exact area for the development and operation of the sub-projects that it lists. For its part, the MCA, in the definition of some sub-projects, states that they will be developed "in areas, and on a route, to be set out in the Sub Project Development Plan". The waterway route was publicly announced more than a year after the adoption of Law 840.[40]

EXPROPRIATION PROCEDURE

One of the roles assigned to the Commission by Law 840, is carrying out the expropriation of properties required by the concessionaire in order to implement all or part of the project.[41] According to Law 840, it is entirely at the concessionaire's discretion to decide whether and when to submit a request to the Commission for the expropriation of a required property.[42]

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[35] Mónica López Baltodano, Appeal of Unconstitutionality, 25 verdades sobre la concesión del canal interoceánico de Nicaragua, August 2013, p. 137.

[36] Law 840, Article 4.

[37] Law 840, Article 2.

[38] See: http://hknd-group.com/portal.php?mod=list&catid=24 (last accessed 4 February 2016).

[39] Canal de Nicaragua: Environmental and Social Impact Assessment, Executive Summary, p. 12.

[40] See http://hknd-group.com/portal.php?mod=view&aid=83 and http://www.laprensa.com.ni/2014/07/07/nacionales/202195-hknd-presenta-ruta-del-gran-canal-de-nicaragua (last accessed 10 April 2017).

[41] Law 840, Articles 5.d and 12.

[42] Law 840, Article 12.

"It is in the public interest of the people of the Republic of Nicaragua that the expropriation be carried out of any property or rights over property that is deemed reasonably necessary to carry out all or part of the project... whether the property be privately owned, the communal property of the Autonomous Regions or Indigenous communities or the property of any governmental entity".

Law 840, Article 12.

LAND EXPROPRIATION

"The Government of Nicaragua has approved the expropriation of approximately 2,900km² of land for the canal, of which approximately 1,188km² (451km² of dry land) would be temporary and 1,721km² (908km² of dry land) would be permanent. The resulting displacement of human populations is one of the Project's most significant impacts".

ESIA Executive Summary, p. 51.

The expropriation process set out in the law is one of the aspects of the project that was of particular concern among the potentially affected communities Amnesty International was able to meet. There was concern at the amount of future compensation for expropriation. According to the law, the amount of compensation will be the property's cadastral value[43] (that is the rateable value set the by municipal authorities) or the fair market value,[44] whichever is the lower. In other words, the law expressly states that the compensation payable will be the most disadvantageous for the owner.

According to the analyses carried out by human rights organizations, in Nicaragua "the cadastral value is a reference value that is used for tax purposes, but it is well below the market value at which properties are bought and sold. Therefore...this represents a derisory payment with respect to the actual value of the land and will make it impossible for those affected to restore their economic situation."[45]

"We feel we are being affected because the law says that they will pay for property according to the cadastral value. That shocked us, because in this area cadastral [rateable] values are generally well below the real price of property".

Peasant farmer interviewed by Amnesty International

However, contrary to the provisions of Law 840, a spokesperson for the Commission was quoted in the media as stating that the cadastral value of property will only be a reference point.[46] The lack of clarity in the information given is causing even greater uncertainty with respect to this aspect of the expropriation process. What is clear is that the law has not been modified despite the statements made.

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[43] The cadastral value "is calculated in accordance with the requirements of the valuation procedures and regulations established by the National Cadastre Commission of Nicaragua for the respective Municipality" (Law 840, Article 12.f). It is also defined as "an amount equal to the value of such property for the purposes of the payment of income taxes as determined by the relevant Tax Cadastre" (MCA. 1.1 Definitions).

[44] The fair market value is "the value at which the required property would be transferred in an arms' length sale between unaffiliated parties on an open market" (Law 840, Article 12.f).

[45] Nicaraguan Centre for Human Rights and the International Federation of Human Rights, *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisten*, September 2016 / No.680e. p. 12.

[46] See http://www.laprensa.com.ni/2015/01/11/nacionales/1715826-talavera-canal-no-va-por-el-tule-talavera-canal-no-va-por-el-tule (last accessed 8 April 2017).

On the value of compensation, the Inter-American Court of Human Rights has established that:

> "This Tribunal reiterates that in cases of expropriation, the payment of a compensation constitutes a general principle of international law, which derives from the need to find a balance between the public interest and that of the owner. Said principle has been acknowledged in the American Convention in its Article 21, which states that in order to deprive someone of their property a 'just compensation' must be granted..."
>
> Inter-American Court of Human Rights, Case of Salvador Chiriboga v. Ecuador, Judgment of 3 March 2011, para. 60.

On this point, human rights principles establish that "the State must provide or ensure fair and just compensation for any losses of personal, real or other property or goods".[47] In other words, compensation should be provided for any economically assessable damage, as appropriate and proportional to the gravity of the violation and the circumstances of each case, such as physical or mental harm; lost opportunities, in particular employment, education and social benefits; material damages and loss of earnings; moral damage; and costs required for legal or expert assistance, among others. Furthermore, cash compensation should not replace real compensation in the form of land and common property resources. [48]

Accordingly, the setting of compensation levels should be via a comprehensive process which takes into account various elements to determine the amount in a fair and balanced way. The criterion established by Law 840, on the other hand, is clearly to pay the lowest amount without taking into account other harms that go beyond the loss of land. Also, as will be examined later in this report, compensation must be guaranteed without discrimination, regardless of whether the person has a title to the property or not.

Legal recourses

> "The owner(s) of the required property will have no right to object to the decision, or to the timing, scope or to any other aspect of the expropriation other than the amount of compensation for the expropriation".
>
> Law 840, Article 12.h.

Law 840 does not provide for the possibility of lodging a legal appeal or objection regarding an expropriation decision. It seems that once an expropriation order has been issued, it cannot be reviewed in any forum or under any circumstances. As a result, those who may be affected will have no legal protection and no access to an effective remedy that provides protection for their rights.

Regarding the administrative mechanism available for challenging the amount of compensation, the law states that the objection must be accompanied by an alternative proposed sum and a valuation report on the property and the amount.[49] The law also states that the alternative amount proposed must be equal to the cadastral value or the fair market value, if the latter is lower.[50] Consequently, even though there is an option to lodge an objection to the amount, the compensation paid will never exceed the minimum amount possible.

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[47] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 60.

[48] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 60.

[49] Law 840, Article 12.h.

[50] Law 840, Article 12.h.

In addition, the law states that any decision by the Commission may be subject to administrative review, but only regarding those aspects linked to the amount of compensation.[51] Again, the decision to expropriate is excluded from the review process. This is a clear violation of international principles that all final decisions related to evictions must be subject to administrative and judicial scrutiny.[52]

In the event that a person refuses to hand over possession of a required property, the Commission may submit a request to a district judge. According to Law 840, the judge should "issue an order allowing the Commission to take immediate possession of such property".[53] The affected person, within the process, can only oppose the amount of compensation. The judge's ruling is subject to appeal, but this will not suspend taking possession of the property.[54]

The fact that taking possession of the property is not suspended while the appeal is heard runs counter to human rights principles which state that: "States must ensure that individuals, groups and communities are protected from eviction during the period that their particular case is being examined before a national, regional or international legal body".[55]

> **"All persons threatened with or subject to forced evictions have the right of access to timely remedy. Appropriate remedies include a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation..."**
>
> Basic Principles and Guidelines on Development-Based Evictions and Displacement, para. 59.

In addition, according to the law, neither the investor nor any part of the sub-project "will be subject to civil actions as a result of failing to fulfil their obligations".[56] They will also not be subject to criminal proceedings.[57] The response of many of those interviewed by Amnesty International to these provisions was to ask: What domestic legal recourse will owners have to demand the payment of compensation in the event that the investor or any part of a sub-project defaults?

Such a broad, vague clause in the law has made those who may be affected fear that it will be applied to them when they try to demand that any damages or compensation be paid. The state must clarify the scope of the law and establish that the right to access to justice of those affected is not jeopardized.

The legal framework of the project should not give priority to the interests of the concessionaire and investor at the expense of the human rights of those who will be impacted by the project. On the contrary, the legislation should preserve and strengthen human rights and avoid at all costs provisions that grant privileges and protections in favour of the investor while restricting or qualifying the rights of the people affected to take the necessary legal actions to protect their rights.

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[51] Law 840, Article 12.o.

[52] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 41.

[53] Law 840, Article 12.j.ii.

[54] Law 840, Article 12.j.vi.

[55] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 36.

[56] Law 840, Article 13.

[57] Law 840, Article 13.

"We understand that under the law, the company is immune in this country; it faces no administrative, criminal or civil sanctions. Law 840 says that they will not face any criminal sanctions for any breach of contract. So, if they don't pay us, where do we go to complain?"

Peasant farmer interviewed by Amnesty International

"If later the foreigners [concession holders] like the place we are relocated to, then they are well within their legal rights to throw us out of there as well, because they have the right, the law says that they can't even be taken to court. Our lands, our lakes have been totally surrendered to them".

Peasant farmer interviewed by Amnesty International

A man sitting at a meeting about the Nicaraguan Interoceanic Canal.
© Tom Laffay for Amnesty International

Beneficiaries of compensation payments

Another aspect that has given rise to concern is that the law refers to the "owner" or "owners" as those who will receive compensation payments for expropriation.[58] The law does not refer to the situation of those who do not formally have legal title or are merely tenants. If compensation is granted without ensuring that there is no discrimination and regardless of whether those affected have a legal title, this would constitute a violation of international human rights principles.

THE RIGHT TO COMPENSATION

All those evicted, irrespective of whether they hold title to their property, should be entitled to compensation for the loss, salvage and transport of their properties affected, including the original dwelling and land lost or damaged in the process.

Basic Principles and Guidelines on Development-Based Evictions and Displacement, para. 61.

A spokesperson for the Commission was quoted in the media as stating that evidence of possession is sufficient grounds for compensation.[59] However, as long as Law 840 does not guarantee this, nothing ensures that these are not merely empty promises.

"The land expropriation and involuntary resettlement process to date has not met international standards. The Project risks losing its social license to operate and could jeopardize the viability of the Project by not following international standards. Law 840 is not consistent with international standards in respect to compensation and by limiting the rights of property owners to contest many aspects of the expropriation process".

ESIA, Executive Summary, p. 52

LEGAL SCOPE AND CONSTITUTIONAL ASPECTS

The text of Law 840 establishes its legal supremacy and puts this law, and the MCA, in a superior position in terms of the legal hierarchy in Nicaragua. This is clear from the way in which Law 840 states that any law, code, decree having force of law, regulation, ordinance or resolution issued by any government entity which contradicts or impedes the fulfilment of the obligations or the exercise of the rights contained in the provisions of the MCA will no longer apply.[60] It would appear that according to Law 840, the entire Nicaraguan legal framework must conform to the objectives and provisions of Law 840 and the MCA.

On the other hand, the law provides that "the Government must ensure complete and timely compensation to any party involved in a sub-project for all damages or losses suffered by any part of sub-project, in each case without duplicating the payment, as a result of a declaration that it is unconstitutional or violates the terms of an international treaty to which the Republic of Nicaragua is a state party and which prohibits, or otherwise impedes or frustrates the enforcement and omission required of any government entity under the terms of the MCA or this law". The legal text adds that all necessary alternative measures must be taken in order to achieve the same outcome as that which has been blocked.[61]

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[58] Law 840, Article 12.b and 12.l.

[59] See http://www.laprensa.com.ni/2015/01/11/nacionales/1715826-talavera-canal-no-va-por-el-tule-talavera-canal-no-va-por-el-tule. (Last accessed 8 April 2017.)

[60] Law 840, Article 17.b.

[61] Law 840, Article 18.

It is clear that the Interoceanic Grand Canal Project is shielded from the law, including from appeals of unconstitutionality. It is worth noting that in August 2013 different sectors of Nicaraguan civil society filed more than 30 appeals of unconstitutionality before the Supreme Court of Justice. The appeals were signed by more than 180 citizens. According to local activists, this makes Law 840 the subject of more Supreme Court appeals than almost any other piece of legislation.[62] In December 2013, in a joint decision on the appeals, the Supreme Court noted that Law 840 was passed with enough votes and that it protects and recognizes Nicaraguan sovereignty.[63]

> "To accomplish the objectives and purposes of this Act, all governmental entities shall take any action necessary to ensure that all Government obligations are met and that the rights of the concession holder and any other party to the sub-project established in the MCA will not be affected in any way, including, but not limited to, the approval, implementation, compliance with and enforcement of any administrative regulations necessary to allow and facilitate the project".[64]

MASTER CONCESSION AND IMPLEMENTATION AGREEMENT IN RESPECT OF THE NICARAGUA CANAL AND DEVELOPMENT PROJECT

According to Law 840, the MCA, concluded on 14 June 2013, is considered part of the country's body of law and, therefore, its fulfilment must be ensured.[65] However, members of the Nicaraguan legal community have stated that the officials who signed the MCA (the Authority, the Commission and the President of the Republic) have no legislative powers and that the power to make laws vested in the National Assembly is not transferable.[66] They add that, while Law 840 authorizes the subsequent signing of the MCA, this should not be understood as transferring the power to legislate.[67]

The MCA was signed a day after the adoption of the Law 840. Therefore, text in Law 840 indicating that all the terms of the MCA are incorporated into legislation, was in effect incorporating an agreement that had yet to be signed and whose provisions might not be yet finalized.

Some important aspects of the MCA are set out below:

LEGAL STABILITY

The text of the MCA makes repeated references to the importance of having a complementary legal and constitutional framework that does not hinder, but rather facilitates, the implementation of the MCA.[68] It indicates

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[62] Alexander von Humboldt Centre, Estudio jurídico sobre la concesión del Canal Interoceánico y otros mega-proyectos en Nicaragua, December 2014. p. 63.

[63] Supreme Court, 10 December 2013, Judgment No.30, available at: http://www.poderjudicial.gob.ni/prensacjcm/notas_prensa_detalle.asp?id_noticia=4242 (last accessed 4 February 2017).

[64] Law 840, Article 8.

[65] Law 840, Article 17.a.

[66] Nicaraguan Centre for Human Rights and the International Federation of Human Rights, *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisten*, September 2016 / No.680e. p. 9.

[67] Mónica López Baltodano, *Appeal of Unconstitutionality, 25 verdades sobre la concesión del canal interoceánico de Nicaragua*, August 2013, pp. 77 and 78.

[68] MCA. Section 9.1, p. 5202.

that a change in national law could potentially be a "Destabilizing Event Situation".[69] In such circumstances, where there is a negative impact on the implementation of the MCA or associated agreements, the government must, following a claim from any party to an affected sub-project, ensure indemnification and pay compensation.[70] This has caused concern, since it could discourage the state from passing legislation that has a positive impact on respect for and guarantees of human rights that is interpreted as posing a potential obstacle to the implementation of the MCA. Thus, the MCA states that: "unless each Party expressly agrees otherwise, the Government will procure that any Change in Law does not result in, cause or constitute a Destabilising Event Situation."[71]

In addition, the MCA states that: "It is the intention of the Parties that an amendment to the Political Constitution and any other legislation"[72] be presented to the National Assembly to ensure that provisions of the MCA are a legal, valid, binding and enforceable obligation of the government. According to the text, these amendments must be presented to the Nicaraguan National Assembly in order to obtain the full force of statute as soon as possible. This has been criticized as "deciding on the legislature and the reforms that it must approve", subverting any independence that could be claimed between the Executive and the Legislature".[73] Subsequently, on 29 January 2014, the National Assembly approved a partial amendment of the Constitution, which includes conferring on the state the power to "contract or grant the concession for the construction and rational exploitation of an interoceanic canal".[74]

POLITICAL FORCE MAJEURE EVENTS

According to the MCA, situations such as riots, public disorder or violent demonstrations may be considered political *force majeure* events, if they occur in Nicaragua or are directly related to the country or any Government Entity.[75]

In the case of such force majeure events, the government must ensure payment of the amount necessary to cover all the fixed costs of the Key Entity[76] for the period during which such Sub-Project is unable to be (or otherwise is materially restricted or impeded from being) developed or operated in a manner consistent with the detailed operating budget.[77]

Including a provision that assigns these types of penalties to the state may jeopardize the exercise of freedom of expression. For example, in order to avoid the possible payment of the penalty, the authorities could overly restrict the use of peaceful demonstrations by citizens as a form of protest. It is vital that under no circumstances should such clauses result in unlawful limitations on the right to freedom of expression and peaceful protest. Nicaragua's international human rights commitments cannot and should not be impacted to accommodate trade agreements.

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[69] MCA. Section 1.1, Definitions, p. 5188.

[70] MCA. Section 13, Destabilizing Events, p. 5207.

[71] MCA. Section 12, Stability of law, p. 5206.

[72] MCA. Section. 9.1, Legislation, p. 5203.

[73] Mónica López Baltodano, *Appeal of Unconstitutionality, 25 verdades sobre la concesión del canal interoceánico de Nicaragua*, August 2013, p. 186.

[74] Law 854, the Law to Partially Amend the Constitution of the Republic of Nicaragua", approved by the National Assembly on 29 January 2014, Article 102.

[75] MCA, Section 14, *Force Majeure*, p. 5208.

[76] "Key Entity" means, in respect of a Sub Project, each of (i) the Original Sponsor or its Affiliates and, if different, the relevant Sponsor and its Affiliates, and (ii) each Sub Project EPC Contractor". For more details see the MCA, Section 1.1, Definitions. p. 5191.

[77] MCA, Section 14.6, Payments During Political Force Majeure, p. 5209.

NON-VIABLE SUB-PROJECTS[78]

The MCA states that the relevant Sponsor[79] has discretion to determine, at any time prior to the Sub-Project Financial Closing, that the Sub-Project is not viable (whether for commercial, technical, legal, political or any other reasons) or that such Sub-Project should not be developed or operated. In such cases, the Sponsor shall have the right to terminate the concession for that Sub-Project.[80]

This raises the unavoidable question: If the canal waterway is considered to be a Sub-Project, is it possible that it could be declared non-viable and therefore not implemented, without this entailing the suspension of other Sub-Projects? For many of those interviewed by Amnesty International, the answer is yes. If this were the case, the failure to implement the canal waterway sub-project would not remove the risk of areas of the territory being used for the construction of other infrastructure projects. Therefore, the risks of expropriation would remain latent, as would the possible effects on other natural resources. Regrettably, as Amnesty International was not able to meet the Nicaraguan authorities, it was not given the opportunity to put this important question to the government directly.

> "Suppose the foreigner [concession holder] says tomorrow that the canal project will not go ahead, this still does not satisfy us, because as long as the law exists, at any moment they can expropriate our property, either for some project or as part of a business deal, for whatever reason. This law is a threat to Nicaraguans".
>
> Peasant farmer interviewed by Amnesty International

EXPROPRIATION

> With respect to Sub-Projects, the Commission shall guarantee the exclusive (transferable) right to possess, occupy, use or perform any activities upon all government-owned and privately-owned real property which may be reasonably necessary or desirable to Develop and Operate such Sub Project. Similarly, it shall also ensure the unfettered right to use for the purpose of the Development and Operation of the relevant Sub-Project, land, air and maritime space where construction works related to such Sub-Project will be performed.
>
> MCA, Clauses 8.1.a and 8.1.b

The extent of the Commission's obligations under the MCA is a cause of concern. The phrase all the properties that "may be reasonably necessary or desirable" is very general and poses a significant risk of broad discretion in determining the lands that will be used and may be subject to expropriation.

> Insofar as sub-project routes and areas are neither defined nor known, the concession could potentially include expropriation of any part of the territory.

[78] According to the definitions in the MCA, sub-project means the waterway and other infrastructure such as the airport, free trade zones, ports and the dry canal, among others. MCA. Section 1.1. Definitions. P. 5192.

[79] According to the MCA, the Original Sponsor is the Empresa Desarrolladora de Grandes Infraestructuras (a signatory to the MCA). It also states that the Sponsor in respect of any sub-project is (i) the Original Sponsor, or (ii) any other person designated by the Original Sponsor from time to time to be the Sponsor of such Sub Project for purposes of this Agreement as set out in Schedule 2 (Schedule of Sponsors). MCA, Section 1.1. Definitions, p.5191 and 5192, and the List of Sponsors published in the Official Gazette on 18 June 2013.

[80] MCA, Section 15.1, Non-Viable Sub-Project, p. 5209.

In this regard, international human rights courts have established that legislation governing the deprivation of the right to property must be clear, specific and foreseeable.[81] And furthermore, that every limitation to such right must be exceptional.[82] The text of the MCA, far from being clear, sows doubts about the application of the criteria in the selection of territories. In addition, given that the routes and final areas covered by the sub-projects have not been announced publicly, this scenario only causes insecurity and unpredictability.

On the other hand, in the case of expropriation, the MCA contains even worse news for those who could be affected since it establishes that the value of the expropriation must be calculated "without reference to, and no value ascribed to, (a) any improvement undertaken or immovable objects added (if applicable) after the date of this Agreement".[83] This is a breach of international human rights principles, which require the state to ensure full and fair compensation and reparation.[84]

The MCA also notes that the payment of the compensation, in the event of a transfer of property to the Sponsor, will be made to the property owners.[85] However, like Law 840, it does not provide additional clarification establishing who will be considered "owners", with the very real risk that those who do not have formal titles will be excluded from this provision, despite having lived and worked on the land for decades.

APPROVAL OF SUB-PROJECTS

When a Sponsor submits a request to the Commission to hold a meeting "with a view to the Government entering into one or more Sub-Project Concession and Implementation Agreement(s)",[86] the Commission undertakes to meet and negotiate within seven days and to enter into an agreement "as soon is reasonably practicable (and in any event within thirty (30) days of the delivery of such request)".[87]

Given the kind of infrastructure listed in the MCA as sub-projects, these deadlines are clearly insufficient to carry out a meaningful analysis of the social, economic and environmental implications in the context of a genuine and effective consultation process. It is even more implausible if one considers that many of these sub-projects could affect vast areas of land, many families and important natural resources.

Obviously, this is very convenient for any investor and prioritizes the interests of private investors over the rights of those who could be affected. In addition, the aforementioned articles are silent on the possibility of consultation or participation in the approval process. All sub-project approval processes must ensure the effective consultation of those affected, as well as a reasonable time for public scrutiny.[88]

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[81] European Court of Human Rights, *Case of Beyeler v. Italy*, Judgment of 5 January 2000, cited by the Inter-American Court of Human Rights in the *Case of Salvador Chiriboga v. Ecuador*, Judgment of 6 May 2008, Preliminary Objection and Merits, para. 64.

[82] Inter-American Court of Human Rights in the *Case of Salvador Chiriboga v. Ecuador*, Judgment of 6 May 2008, Preliminary Objection and Merits, para. 65.

[83] MCA. Section 1.1, Definitions, p. 5189.

[84] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 21.

[85] MCA. Section 8.3, Compensation, p. 5202.

[86] MCA. Section 6.2, Sub-Project Concession and Implementation Agreement, p. 5199.

[87] MCA. Section 6.2, Sub-Project Concession and Implementation Agreement, p. 5199.

[88] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 37.

This analysis of the legislation governing the Project is rooted in the human rights obligations set out in international treaties to which Nicaragua is a party, such as the International Covenant on Civil and Political Rights,[89] the International Covenant on Economic, Social and Cultural Rights[90] and the American Convention on Human Rights.[91] Moreover, the complete subordination of national legislation to a trade agreement does not augur well for human rights. It is clear that the legal framework of the Interoceanic Grand Canal and its sub-projects breaches human rights standards.

[89] Accession by the State of Nicaragua, 12 March 1980.

[90] Accession by the State of Nicaragua, 12 March 1980.

[91] Ratified by Nicaragua, 25 September 1979.

“While development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights”.

Vienna Declaration and Programme of Action, 1993

Children playing on the shores of Nicaragua’s Caribbean coast. Photo taken in June 2016.
© Tom Laffay for Amnesty International

5. POSSIBLE EVICTIONS WITHOUT INFORMATION OR CONSULTATION

FORCED EVICTIONS

"The term 'forced evictions'...is defined as the permanent or temporary removal against their will of individuals, families and/or communities from the homes and/or land which they occupy, without the provision of, and access to, appropriate forms of legal or other protection".[92]

The UN Commission on Human Rights has established that "the practice of forced eviction constitutes a gross violation of human rights, in particular the right to adequate housing."[93]

The Committee on Economic, Social and Cultural Rights considers that the procedural protections which should be applied in relation to forced evictions include: (a) an opportunity for genuine consultation with those affected; (b) information on the proposed evictions, and, where applicable, on the alternative purpose for which the land or housing is to be used, to be made available in reasonable time to all those affected; and (c) provision of legal remedies.[94]

Projections vary as to the impact the canal will have on those living near the possible route. According to the ESIA, in September and October 2014 the concession holder[95] conducted a census which found that approximately 30,000 people (7,210 families) would have to be physically or economically displaced as a result of the project.[96]

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[92] See http://hknd-group.com/portal.php?mod=view&aid=83 and http://www.laprensa.com.ni/2014/07/07/nacionales/202195-hknd-presenta-ruta-del-gran-canal-de-nicaragua (last accessed 10 April 2017).

[93] UN Commission on Human Rights, Resolution 1993/77, para. 1.

[94] UN Committee on Economic, Social and Cultural Rights General Comment 7 (1997). The right to adequate housing (paragraph 1 of Article 11 of the Covenant), Forced evictions, para. 15.

[95] As defined in the *Canal de Nicaragua: Environmental and Social Impact Assessment*, HK-Nicaraguan Canal Development Investment Co. Limited (together with the Empresa Desarrolladora de Grandes Infraestructuras S.A. and affiliates) is the Project sponsor, p. 1

[96] *Canal de Nicaragua: Environmental and Social Impact Assessment – Executive Summary, p. 51.*

For their part, civil society organizations point out that, according to the announced route, there are approximately 24,100 households (some 119,200 people) in the area who will be directly impacted.[97] However, the data may change due to the inclusion of other sub-projects or infrastructure designed or notified subsequently.

The figures above give a sense of the scale of the Project and dimensions of what could become mass evictions. For this reason, it is important that effective participatory processes are deployed that provide adequate information and consultation mechanisms.

LAW 840'S HASTY AND OPAQUE APPROVAL PROCESS

"The Government has created a law behind the backs of Nicaraguans, a law called 840."

Peasant farmer interviewed by Amnesty International.

According to international human rights principles, "Urban or rural planning and development processes should involve all those likely to be affected"[98] who "have the right to relevant information, full consultation and participation throughout the entire process".[99] In addition, Nicaragua has an obligation to guarantee the right of all individuals to request access to state-held information, as part of the right to freedom of thought and expression.[100] The Inter-American Court of Human Rights has stated that:

> "the State's actions should be governed by the principles of disclosure and transparency in public administration that enable all persons subject to its jurisdiction to exercise the democratic control of those actions... Access to State-held information of public interest can permit participation in public administration through the social control that can be exercised through such access".
>
> Inter-American Court of Human Rights, Case of Claude-Reyes et al. v. Chile, 19 September 2006, para. 86.

Nicaraguan legislation also guarantees public participation in the law-making process. The Law on Public Participation states that, as part of the law-making process, the legislative committee studying an initiative will implement a programme of public consultations. It goes on to state that "this could refer to public and private institutions; not-for-profit civil associations; trade unions; cooperatives; women's, youth and community organizations; regional and municipal governments; municipal and departmental consultation mechanisms; individuals who represent the interests of a group or any organization or specialist; and all those associated with the purpose of the law in question". [101]

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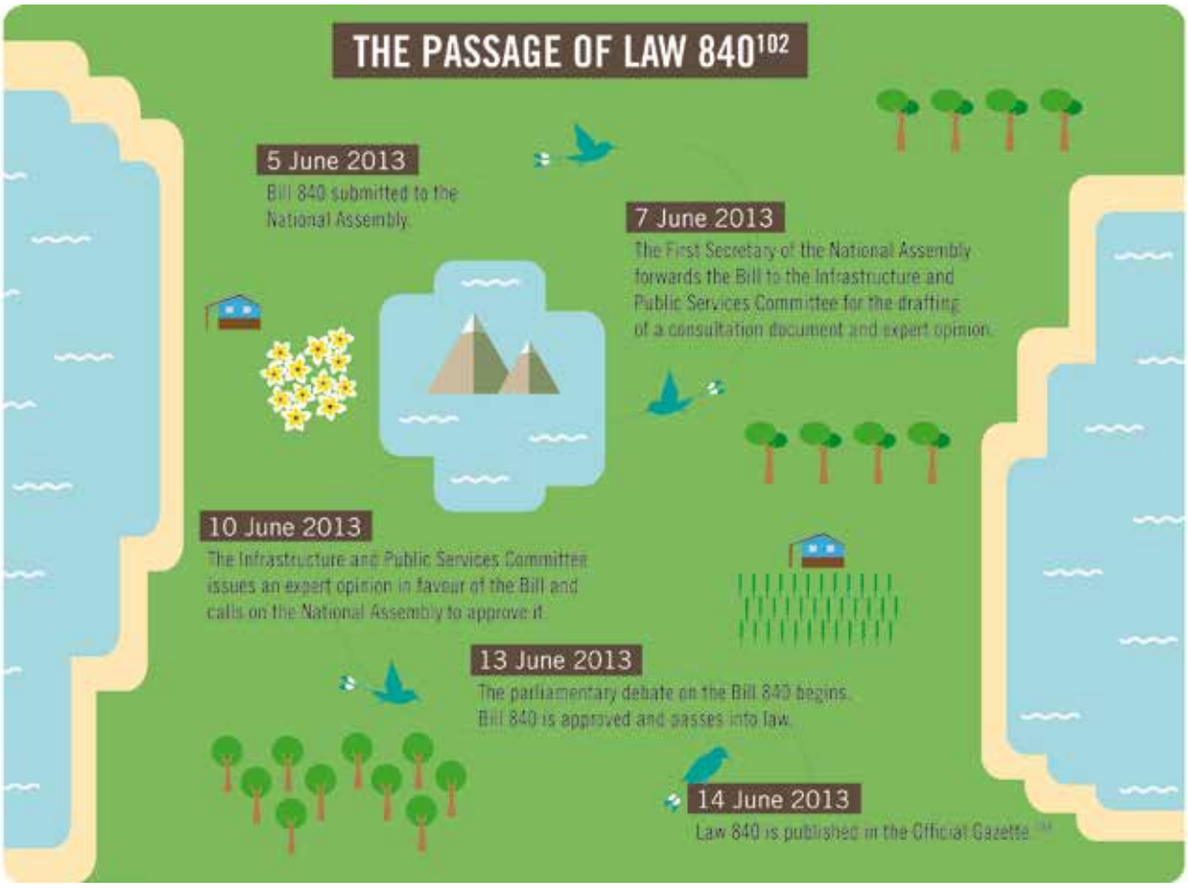
[97] Alexander von Humboldt Centre, *Valoraciones socio ambientales de la ruta seleccionada para la construcción del Gran Canal Interoceánico por Nicaragua*. Executive summary, September 2014, p. 11 and Red Nicaragüense por la Democracia y el Desarrollo Local, *Los efectos socioeconómicos del canal interoceánico a nivel municipal*, May 2015, p. 9.

[98] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 37.

[99] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 38.

[100] Inter-American Court of Human Rights *Case of Claude-Reyes et al. v. Chile*, Judgment of 19 September 2006, para. 77.

[101] Law 475, Law on Public Participation, Article 15.



Law 606 also points out that during the examination of a draft law, "consultation with the body or bodies that will implement the law, those at whom the law is directed and their representatives and those who will use it is obligatory".[104] If such consultations were not carried out, this could be considered sufficient cause to declare the expert opinion on a bill to be inadequate during the plenary discussion, at the request of any member of the parliament and with approval of the plenary.

In the case of Law 840, the accelerated so-called consultation process involved vastly more limited participation than that stipulated in law. According to the Opinion document of the Infrastructure and Public Services Committee,[105] consultation with representatives of the American Chamber of Commerce began on 7 June 2013. In addition, the consultation involved the President of the Grand Canal Authority, the Private Secretary for National Policy, the CEO of the Administrative Company of International Airports (Empresa Administradora de Aeropuertos Internacionales) and the Co-Director of the Nicaraguan Institute for Territorial Studies. The opinion also notes that the technical team of the National Assembly's Production, Economics and Budgetary Committee was consulted.

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[102] Some references are available at http://www.asamblea.gob.ni/trabajo-legislativo/diario-de-debates/ (last accessed 7 February 2017)

[103] The MCA refers to the existence of a document signed between HK Nicaragua Canal Development Investment Co. Limited, the Empresa Desarrolladora de Grandes Infraestructuras S.A and the Authority, dated 5 June 2013. The MCA states that by signing this document, the three entities undertake to implement the MCA as soon as possible (and if possible by 14 June 2013) once the Authority is mandated in law to execute the MCA and the Agreement becomes a legal obligation (page 4985 of the Official Gazette, which published the MCA in Spanish). The text of the letter suggests that by 5 June 2013 the signatories were already sufficiently certain that Law 840 would be in place and the MCA signed by 14 June 2013.

[104] Law 606, Organic Law on Legislative Powers, Article 111.

[105] Available in the *Diario de Debates de Leyes de la Asamblea Nacional* at: http://www.asamblea.gob.ni/trabajo-legislativo/diario-de-debates/ and http://www.asamblea.gob.ni/90980/dictaminan-favorablemente-iniciativa-de-ley-especial-para-el-desarrollo-de-infraestructura-y-transporte-de-el-gran-canal/

Furthermore, on 10 June 2013, the opinion states that an invitation was extended to the National Council for Private Enterprise (Consejo Superior de la Empresa Privada). On the same day, the following also appeared: the Secretary of the President for Atlantic Coast Development, the Coordinator for South Atlantic Autonomous Region Government and the First Secretary of the Board of Directors of the Council for the South Atlantic Autonomous Region.

According to civil society organizations, after the Infrastructure and Public Services Committee delivered its opinion in favour of the law, the plenary discussion in the legislature "determining the fate of the country for more than 100 years" lasted approximately three hours.[106]

"When the granting of the Interoceanic Canal concession was approved in 2013, it took us all by surprise, because the government had not consulted, or given people a chance to comment and submit opinions on it. For an Academy of Sciences, it is deeply regrettable that a project of this type should go ahead without the Academy even being consulted, or having an opportunity to have any input on a subject that, from our perspective, is so relevant to technical and scientific issues... But it was clear that there is no interest in consulting the opinions of experts or the public in general. That was clear by the way they went about the process, which was extremely fast, involved few people and was very hastily approved by parliament".

Dr Jorge Huete-Pérez, Vice President of the Nicaraguan Academy of Sciences and President of the Scientific Community of the Caribbean (Comunidad Científica del Caribe, CCC).

"When we became aware of the initiative, and the really astonishing way in which it was approved by the National Assembly, we became concerned about the environmental impacts versus the potential benefits that this investment could have for the country".

Víctor Campos, Director of the Alexander von Humboldt Centre in Nicaragua.

"As members of civil society, we first learned about draft Law 840 when it came before the National Assembly and opposition members of parliament made public that it had been presented. Everyone started to try to find the draft law. To start with it wasn't anywhere to be found; we couldn't get hold of it, it was not accessible. Then the same thing happened with the Master Concession and Implementation Agreement."

Mónica López Baltodano, Director of Fundación Popol Na.

It is clear that by consulting with only two trade bodies, thus bypassing *campesinos* whose lands are at risk of expropriation as well as the whole range of Nicaraguan organizations listed in the Law on Public Participation, those entitled to be involved in the process for the approval of Law 840 were left out. This not only breaches Nicaraguan law, but also Nicaragua's international human rights obligations.

Campesinos told Amnesty International that before Law 840 was adopted, they had no access to any official details about its possible content, let alone a chance to participate in a serious consultation process. Some people said all they heard via media linked to the government was "how beautiful the canal would be". They also noted that after Law 840 was approved, they had sought to inform themselves about its scope, with the help of NGOs and reports in some of the independent media.

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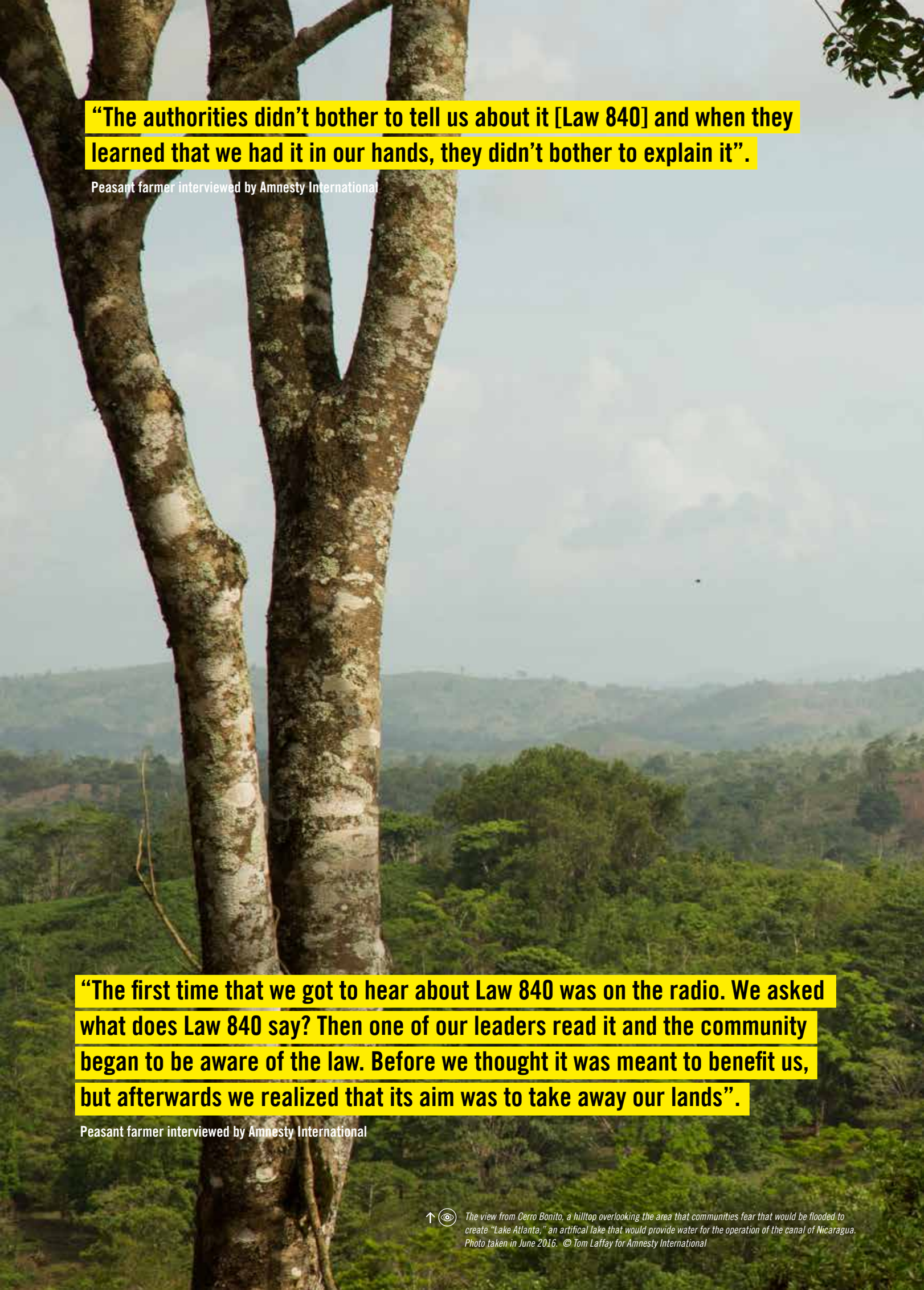
[106] Nicaraguan Centre for Human Rights and the International Federation of Human Rights, *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisten*. September 2016 / No.680e. p. 32.



“The authorities didn’t bother to tell us about it [Law 840] and when they learned that we had it in our hands, they didn’t bother to explain it”.

Peasant farmer interviewed by Amnesty International

“The first time that we got to hear about Law 840 was on the radio. We asked what does Law 840 say? Then one of our leaders read it and the community began to be aware of the law. Before we thought it was meant to benefit us, but afterwards we realized that its aim was to take away our lands”.

Peasant farmer interviewed by Amnesty International

The view from Cerro Bonito, a hilltop overlooking the area that communities fear that would be flooded to create “Lake Atlanta,” an artifical lake that would provide water for the operation of the canal of Nicaragua. Photo taken in June 2016. © Tom Laffay for Amnesty International

“When we were able to get hold of Law 840, when it became law in 2013, then we were able to find out that the law affected us directly. There was no consultation on the law; it was immediately sent and published”.

Peasant farmer interviewed by Amnesty International

“We went to the Mayor’s office, but they did not give us the information. We went to an office that was supposed to have been put there so we could go and ask for information, but they never explained anything”.

Peasant farmer interviewed by Amnesty International

On the shores of Lake Nicaragua with the twin peaks of Ometepe Island in the distance. Photo taken in June 2016. © Tom Laffay for Amnesty International

On the basis of the list of those consulted in the process of drawing up Law 840 and the testimonies gathered by Amnesty International, it is clear that the state has not complied with the requirement to inform, consult and allow the participation of stakeholders, including those who may be directly affected. A proposed law, which aims to regulate one of the most ambitious engineering structures in the world and envisages a group of significant sub-projects, requires more than an alleged consultation completed in a couple of days and involving mainly state and business stakeholders.

ARTICLE 50 OF THE CONSTITUTION OF THE REPUBLIC OF NICARAGUA

Citizens have the right to participate on equal terms in public affairs and state administration.

In the formulation, implementation, evaluation, supervision and monitoring of public and social policies, as well as public services, the participation of the individual, family and community shall be ensured, the law shall guarantee their effective participation, nationally and locally.

"All this irregular, unconstitutional, illegitimate and irresponsible procedure...shows that the President of the Republic and that National Assembly have no interest in building national consensus".

Mónica López Baltodano, Director of Fundación Popol Na.[107]

EFFECTIVE PARTICIPATION THROUGHOUT THE PROCESS?

THE RIGHT TO INFORMATION AND TO MEANINGFUL CONSULTATION AND PARTICIPATION SHOULD BE RESPECTED AT ALL STAGES OF THE PROCESS

"Being informed about decisions of direct relevance to you and your family, having access to plans and projects, being able to meaningfully interact with the authorities and provide input in decision-making are basic human rights... Indeed, States have an obligation to ensure the effective participation of and consultation with the affected communities and groups, such as IDPs [internally displaced people] (Guiding Principles 14 and 28), minorities or indigenous peoples, who have a right to participate in decisions affecting them and the regions in which they live".

UN HABITAT, Forced Evictions Fact Sheet No. 25 Rev 1, 2014, p. 30.[108]

Evictions affect and disrupt the lives of individuals, families and entire communities. In the case of the Project, which includes the waterway and other sub-projects, it is clear that a group of infrastructure projects designed to cross an entire country would affect the lives of hundreds of thousands of families. Not only do people risk losing their home and farmland, but they may also be deprived of their family environment, social networks, livelihoods, adequate food and employment opportunities, and this may also hinder access to services including education, health and water, among others. Given that such a broad range of rights could be affected, it is vital that there is

[107] Mónica López Baltodano, *Appeal of Unconstitutionality, 25 verdades sobre la concesión del canal interoceánico de Nicaragua*, August 2013, p. 76.

[108] The same point has also been made in the Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 38

an effective, robust and comprehensive participation process. The word "effective" seeks to provide protection against processes that appear on the surface to abide by human rights requirements, but where there is in fact no genuine intention to change a decision that has already been taken.

Examination and inclusion of the perspectives of all those who could be affected by the construction of mega-infrastructure projects is an essential input for any state that genuinely seeks to identify and mitigate all the potential harms.

GENUINE CONSULTATION

The Committee on Economic, Social and Cultural Rights considers that the procedural protections which should be applied in the context of forced evictions include an opportunity for genuine consultation with those affected and information on the proposed evictions to be made available in reasonable time.[109] It has also stated that public participation must be an integral part of decision-making processes that may affect the exercise of rights, such as the right to water[110], health[111], and adequate and equitable working conditions[112]. These are some of the rights that could well be put at risk given the scale of the Project. The Human Rights Committee has stated that the right of citizens to take part in the conduct of public affairs encompasses public debate and dialogue with their representatives. This participation is supported by ensuring freedom of expression, assembly and association.[113]

However, as we will see in this section, the lack of information and prior and genuine consultation regarding those who may be affected and their representatives has not been limited to the legislative phase of the project. Following the adoption of the Law 840, human rights organizations and communities living in the vicinity of the projected route have continued to complain about state secretiveness.

Two elements are indispensable for effective participation: access to information and the existence of genuine and effective consultation mechanisms. Both have been absent from the Nicaraguan process.

"Here in the countryside, we have not been given information by the government; all they say is that they are going to build the canal".

Peasant farmer interviewed by Amnesty International.

[109] UN Committee on Economic, Social and Cultural Rights. General comment No. 7, para. 15.

[110] UN Committee on Economic, Social and Cultural Rights. General comment No. 15, para. 48.

[111] UN Committee on Economic, Social and Cultural Rights. General comment No. 14, paras 11, 17 and 54.

[112] UN Committee on Economic, Social and Cultural Rights. General comment No. 23, para. 56.

[113] Human Rights Committee General comment No. 25 (57) 1/, para. 8.

INFORMATION ABOUT THE PROJECT

For a project which promises to have such massive impacts at the national level, providing information alone is not enough. However, this should be considered the first indispensable step that the state authorities should take. For information to be effective, it must be communicated in a timely fashion, in an appropriate manner, provided at each step of the process and technical terms should be expressed in a clear and simple way. As the Human Rights Committee has stated: "To give effect to the right of access to information, States parties should proactively put in the public domain Government information of public interest."[114]

Similarly, the Inter-American Court of Human Rights has pointed out that it is essential that the State authorities are governed by the principle of maximum disclosure "which establishes the presumption that all information is accessible, subject to a limited system of exceptions".[115] Thus, access to information is an essential precondition for public participation.

Some of the communities interviewed indicated that they learned about the existence of the project or the risk that they could face expropriation when people, most of them foreign, accompanied by police and the military visited their communities to measure their land. Several interviewees added that people had entered their homes and land without their consent. This is a breach of the right not to be subject to arbitrary or unlawful interference in a person's privacy, family or home.[116]

Regarding the route of the waterway, those interviewed said that they had never received information in an appropriate and effective manner from the government nor had they been able, using the appropriate channels, to obtain accurate information about the final route and the possible impact on their homes and agricultural land. The existence of a website with a map cannot be considered the best way to convey this sort of detailed information. In addition, following the announcement of the route of the waterway, the media reported proposed modifications to it.[117] This has generated yet more uncertainty and concern among those who may be affected, who are left wondering when they will be informed of the details of the definitive route using media that is appropriate and accessible for *campesino* communities.

Information and the relationship between the government authorities and those potentially affected are so poor that the inhabitants of the communities reported the government had used teachers and medical brigades to obtain information about the profile of families and the lands where they live and grow crops.

"They walked around measuring all the houses, some did not agree to them coming, but other accepted it. They said that anyone who didn't have their house measured would be left with nothing; they wouldn't get paid".

"They have forced teachers to get information from children about parents, farmers and everyone".

"They were doing this study, but in secret, calling sick people to receive medication...but it was to get information from them, their ID numbers, signatures and all that, where they lived, their property and how big it was".

Peasant farmers interviewed by Amnesty International.

[114] United Nations Human Rights Committee, General comment No. 34 (CCPR/C/GC/34), 2 September 2011, para. 19.

[115] Inter-American Court of Human Rights, *Case of Claude-Reyes et al. v. Chile*, Judgment of 19 September 2006, para. 92.

[116] International Covenant on Civil and Political Rights, Article 17. Accession of Nicaragua: 12 March 1980.

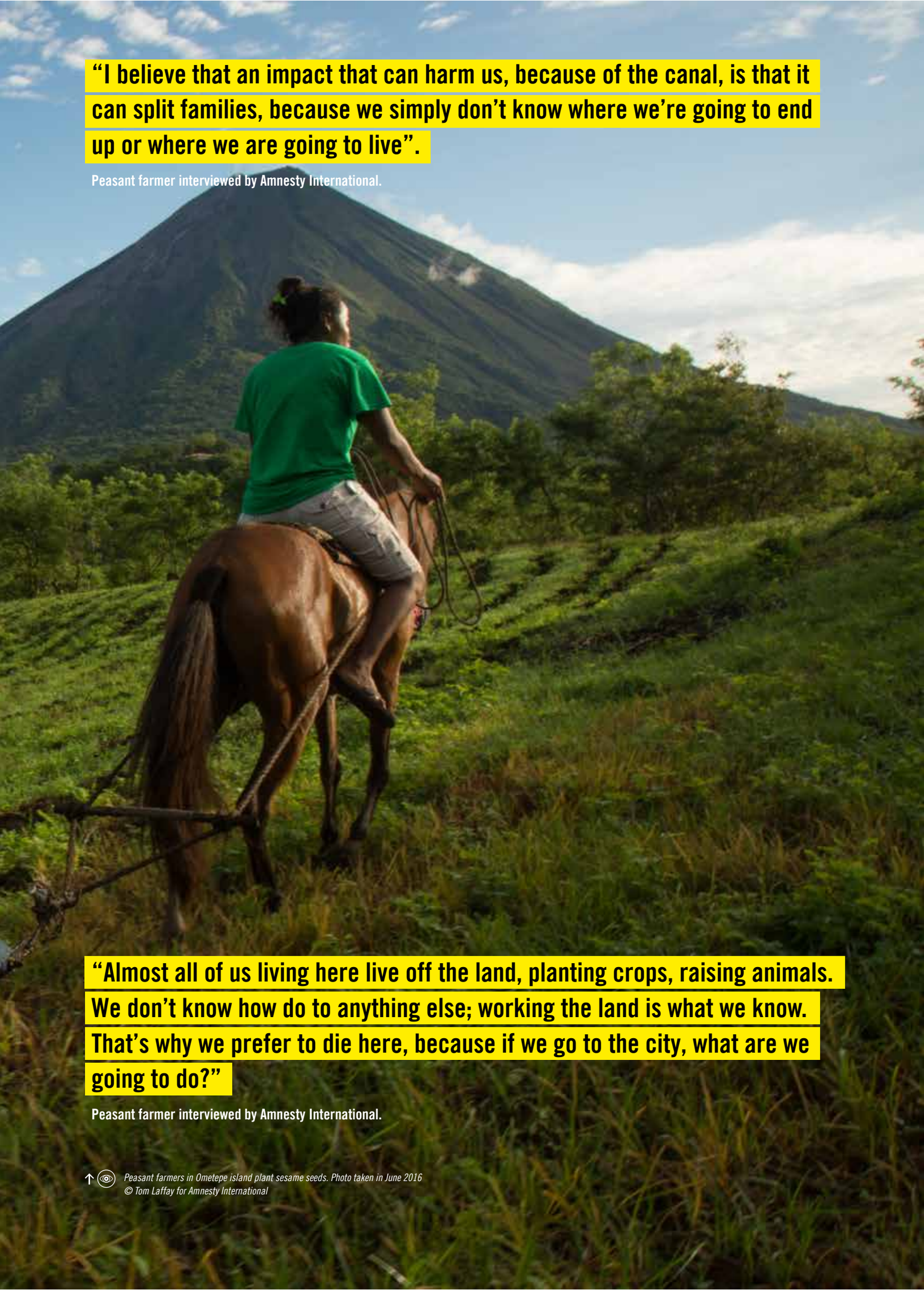
[117] Some examples:http://www.laprensa.com.ni/2015/01/11/nacionales/1715826-talavera-canal-no-va-por-el-tule-talavera-canal-no-va-por-el-tule, http://www.laprensa.com.ni/2015/09/28/nacionales/1909628-el-tule-queda-dentro-del-area-gran-canal, http://www.nacion.com/mundo/centroamerica/Empresa-busca-cambiar-canal-Nicaragua_0_1503849602.html and http://www.elnuevodiario.com.ni/nacionales/371561-hknd-anuncia-cambios-minimos-ruta-canal/ (last accessed 4 April 2017).

“We don’t want to go because we don’t want to go to another place that we do not know; we don’t know what that other is place like. We love our land because it is our land that feeds us”.

Peasant farmer interviewed by Amnesty International

“There are 12 children in our family. None of us has the skills needed to work on the canal. What’s going to happen to us, we’ll be completely without work. At this point, how are we going to get the skills to be able to get a job on that canal. The canal is no use to us, nor to Nicaragua.”

Peasant farmer interviewed by Amnesty International



“I believe that an impact that can harm us, because of the canal, is that it can split families, because we simply don’t know where we’re going to end up or where we are going to live”.

Peasant farmer interviewed by Amnesty International.

“Almost all of us living here live off the land, planting crops, raising animals. We don’t know how do to anything else; working the land is what we know. That’s why we prefer to die here, because if we go to the city, what are we going to do?”

Peasant farmer interviewed by Amnesty International.

Peasant farmers in Ometepe island plant sesame seeds. Photo taken in June 2016
© Tom Laffay for Amnesty International

Another aspect, where the lack of detailed information and hard facts causes concern among the inhabitants of the communities interviewed is the proposed future relocation process. Although information about the plans for resettlement, the future offer of houses and job opportunities in the project has been circulated,[118] those who live in areas near the projected route told Amnesty International that they did not know the details of the relocation process or other kinds of compensation. In addition, they expressed concern about the possible place of relocation and the kind of conditions that will be offered to them. Among their fears are: that they will not be able to continue to raise crops and livestock, that their means of subsistence will be put at risk and that their family and neighbourhood networks will be fractured.

Furthermore, they are also concerned that the MCA states: " the Government shall procure that no Key Entity shall, and shall use its best endeavours to ensure that no Government Entity shall, in respect of any Sub Project Assets, have any obligation to any person in connection with the relocation and resettlement of any people or communities currently situated in areas to be utilised by or in connection with the relevant Sub Project (including any obligation in respect of the restoration of the economic or social position of any such people or communities)".[119]

Nicaragua cannot ignore that fact that international principles oblige the state to ensure the right to resettlement. According to international standards:

"All persons, groups and communities have the right to resettlement, which includes the right to alternative land of better or equal quality and housing that must satisfy the following criteria for adequacy: accessibility, affordability, habitability, security of tenure, cultural adequacy, suitability of location, and access to essential services such as health and education".

Basic Principles and Guidelines on Development-Based Evictions and Displacement, para. 16.

The MCA seems to openly contradict these standards. Therefore, Nicaragua must amend its legislation and relevant policies to ensure that the expropriation process respects international standards and avoid violations of the right to adequate housing or other human rights.

Also, in the event of a future relocation process, Nicaragua must respect international principles that oblige the state to explore all possible alternatives to evictions and to ensure that all those who may be affected are given the information to which they are entitled and are able to participate fully as well as to put forward alternatives that are given serious consideration by the authorities. Equally, it is essential that those affected receive sufficient information on the processes and resettlement plans, as well as information on the use of the houses or sites subject to evictions.[120]

However, the state's actions to date are far from complying appropriately with Nicaragua's obligations, and those who may be affected continue to live with the uncertainty created by disinformation and the absence of genuine consultation.

As this section shows, it is clear that those who may be affected have not had easy, prompt and effective access to detailed information on a project that will impact the lives of hundreds of thousands of people. The dissemination of information about the Project is crucial and imperative to ensure respect for the right of access to information, but also to ensure the protection of other rights which are put at risk in this type of project, such as the right to water, to health, to adequate housing and to decent work, among others. Nicaragua cannot and must not continue to ignore its human rights commitments.

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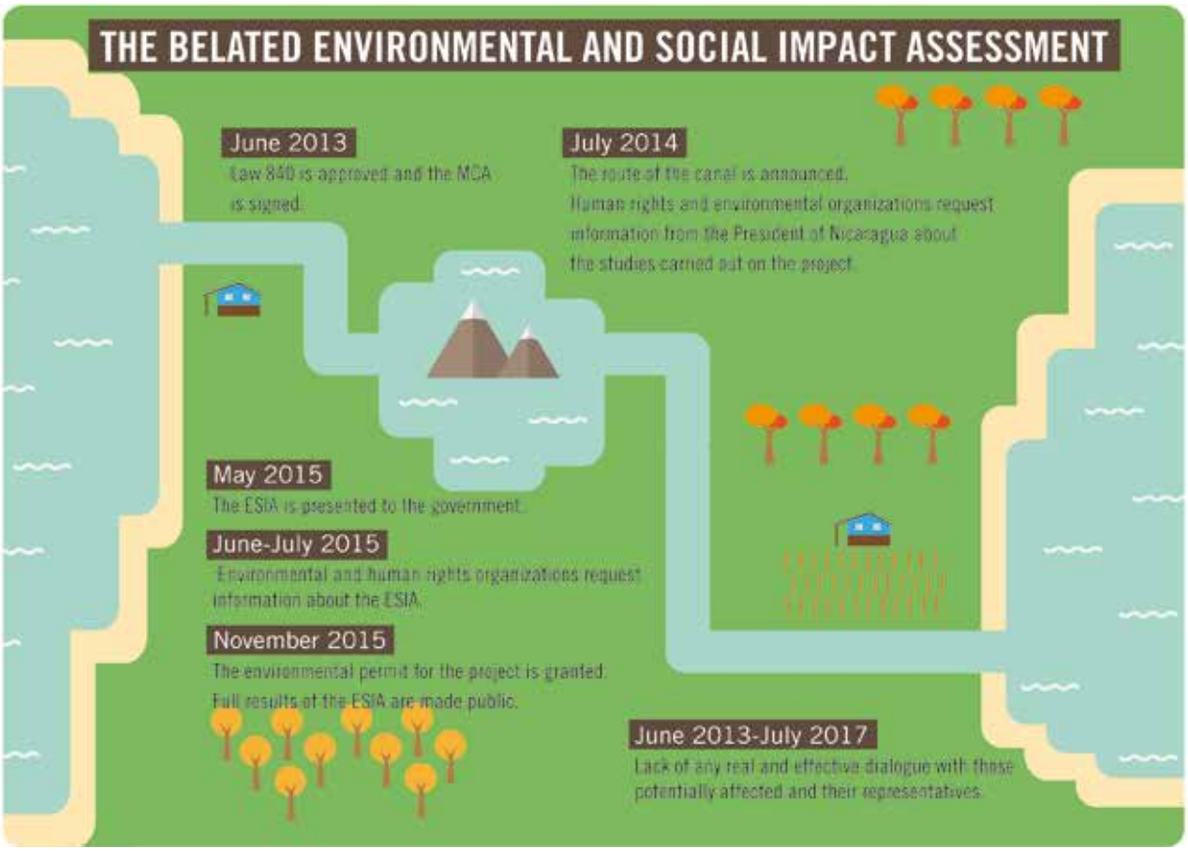
[118] See http://www.nacion.com/mundo/centroamerica/Empresa-busca-cambiar-canal-Nicaragua_0_1503849602.html y http://www.elnuevodiario.com.ni/nacionales/366287-hknd-estudia-cambios-canal/ (last accessed 9 April 2017).

[119] MCA. Section 8.3 Compensation. p. 5202.

[120] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), paras 38 and 56.

ACCESS TO THE ENVIRONMENTAL AND SOCIAL IMPACT ASSESSMENT AND THE SO-CALLED CONSULTATION PROCESS



According to international human rights standards, states must undertake "comprehensive and holistic impact assessments...prior to the initiation of any project that could result in development-based eviction and displacement".[121] The Rio Declaration on Environment and Development states that an environmental impact assessment must be undertaken for any proposed activities that are likely to have a significant adverse impact on the environment.[122]

Similarly, Nicaraguan legislation states that projects that "may cause a major potential environmental impact, are subject to an environmental impact study"[123] and adds that the environmental assessment is an instrument of a preventive nature "by which environmental concerns are integrated into decision-making" and in which public participation plays an important role.[124]

In the case of the Project, the design and approval of its legal framework has not only been the subject of innumerable complaints about lack of transparency and participation, but it was also put in place prior to the approval of the ESIA. As a result, it is clear that there has been a lack of real will on the part of the Nicaraguan government to initiate a process of effective participation. Any action that sought to document, avoid and raise awareness of the potential impacts of the project should have been initiated before the decision to implement the concession was made by the approval of Law 840 and the signature of the MCA.

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[121] Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18), para. 32.

[122] Rio Declaration on Environment and Development, Principle 17.

[123] Decree No.76-2006, Environmental Assessment System, Article 15.

[124] Decree No.76-2006, Environmental Assessment System, Recital IV and Article 33.

On several occasions, environmentalists and human rights organizations have urged the Nicaraguan authorities to give them access to information about the results of the ESIA. For example, in July 2014, a group of organizations, including members of the Cocibolca Group, sent a communication to President Daniel Ortega asking for the technical, environmental and social studies that were carried out to support the decision-making on the canal project. To date they have received no clear and effective response from the relevant authorities.[125]

Irregularities in the ESIA process are not limited to the fact that its results were presented to the government two years after the adoption of Law 840 and the signing of the MCA. According to information from human rights organizations, environmental organizations and press reports, the full text was made public only in November 2015, at least six months after the ESIA was submitted to the government and after the environmental permit for the project had been issued. Prior to that, the public only had access to the Executive Summary.[126]

In that context, between June and July 2015, civil society organizations wrote three times to different representatives of the government and of the Nicaragua Canal and Development Project Commission. In these communications, they requested a copy of the full text of the ESIA and stated that they understood from media reports that the results of the study had been presented on 31 May 2015.[127] According to these organizations, once again, they did not receive an effective reply to their requests for information of public interest. Subsequently, they submitted a request for a copy of the full text of the ESIA, using the procedure established by the Office for Access to Public Information from the Ministry of Environment and Natural Resources. However, according to media reports, the application was rejected immediately.[128]

In October 2015, the Cocibolca Group, an umbrella group of civil society organizations, reported that it had submitted a letter to the President of Nicaragua containing its analysis of the ESIA Executive Summary and demanding that the law governing the Project be repealed. Among the concerns raised in the letter were the absolute secrecy surrounding the decisions of the Commission, the lack of consultations prior to the granting of the concession and the "sham" consultations that took place after the signing of the MCA.[129]

Despite these repeated efforts and requests for information, the organizations have yet to report any progress in establishing an effective dialogue with the government.[130]

According to information from the HNKD Group, from September to October 2015 the Nicaraguan government held nine meetings in which public consultation was supposedly undertaken on the ESIA report, involving about 3,000 people.[131] These so-called consultations about the ESIA were carried out before the full text of the ESIA was publicly available. It is unprecedented for the Nicaraguan authorities to claim to be carrying out genuine and effective consultations on a document which was not in the public domain. Access to complete and timely information is essential to ensure effective participation in the processes of consultation; without that, the exercise is a sham.

Estimates of the number of people who may be affected by the project range from 30,000 to 119,200, as noted previously. Therefore, the number of people who attended the so-called consultations is small and inadequate. In addition, there is concern about the way in which those present were invited. Human rights organizations have complained about the lack of participation and inclusion of those living along the projected canal route, as well

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[125] Mónica López Baltodano, *La entrega de un país*, "Chapter IV".

[126] Cocibolca Group, 50 valoraciones del *Grupo Cocibolca respecto al resumen ejecutivo del EIAS del proyecto del Canal Interoceánico de Nicaragua*. p. 2 and http://www.laprensa.com.ni/2015/11/08/nacionales/1933066-estudios-del-canal-a-escrutino.

[127] Mónica López Baltodano, *La entrega de un país*, "Chapter IV".

[128] http://www.laprensa.com.ni/2015/07/29/nacionales/1874286-marena-niega-acceso-a-eias

[129] Mónica López Baltodano, *La entrega de un país*, "Chapter IV".

[130] Nicaraguan Centre for Human Rights and the International Federation of Human Rights. *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisten*, September 2016 / No.680e.

[131] *HKND Noticias*. First Edition, November 2015, p. 6. Available at http://hknd-group.com/upload/pdf/20151124/HKND%20 Bolet%C3%ADn%20nov.%202015.pdf (last accessed 5 April 2017)

as the failure to invite and admit other national actors who have expressed their concern about the future negative impacts of the project. Organizations also noted that in September 2015, the representative of an important NGO platform tried to enter one of the so-called consultation events, but was not allowed in.[132] Similarly, the media described access to the event as discretionary and reported that two media outlets were denied entry.[133]

In addition, many of the *campesinos* interviewed reported that they did not have detailed information about the ESIA and its results. The ESIA is currently published on the web.[134] However, the interviews conducted during the research for this report indicate that the hundreds of pages of technical information have not been explained to *campesinos* living near the projected route in detail, in accessible language, in their localities and with the necessary technical assistance. Those people who said they knew about the existence of the ESIA and some of its results, mainly obtained the information from human rights and environmental organizations, not directly from the Nicaraguan authorities. In addition, local organizations report that the full text of the environmental permit issued by the Ministry for the Environment and Natural Resources, is not publicly available. Therefore, they have been unable to analyse its contents properly.

"I say that this government is holding us captive, because there are almost no radio or television stations that say what is happening in this country. We, the majority of the people, do not know the result of the environmental study that they did".

Peasant farmer interviewed by Amnesty International.

In addition, some *campesinos* commented that government representatives visited areas close to their communities on two or three occasions and all agreed that these meetings had not provided them with detailed information about the project and its potential impacts, and that a genuine and effective consultation process was not carried out. Those interviewed said that they asked direct questions at the meetings, but their concerns did not receive a response. They also commented that fundamental aspects, such as the process of expropriation, the payment of compensation and relocation were not addressed in depth and the main message was that the implementation of the project was imminent and that there was no possibility of going back.

"They only invited people [to the meetings] so they could sign. People arrived, they played a video on the TV that presented the same information as you get in the media about the canal. And that was it. They didn't explain that there was a law".

Peasant farmer interviewed by Amnesty International.

Regarding the dissemination of information and the consultation process, the ESIA itself acknowledges that: "Additional efforts are needed to help stakeholders better understand the Project and the extent to which they and other resources of interest would be affected by the Project".[135] According to the ESIA, because of criticism of the lack of transparency, it is important that the public has sufficient time to review the ESIA and understand the possible effects of the project. The ESIA goes on to say that "additional information and direct consultation is especially needed with those people living within the expropriation boundary who would be physically or economically displaced".[136]

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[132] Nicaraguan Centre for Human Rights and the International Federation of Human Rights, *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisten*. Septiembre 2016 / no.680e. pp. 38 and 39.

[133] See https://confidencial.com.ni/bloquean-acceso-a-consulta-publica-del-canal/ (last accessed April 2017).

[134] See http://hknd-group.com/portal.php?mod=view&aid=294 (last accessed 4 April 2017).

[135] *Canal de Nicaragua: Environmental and Social Impact Assessment*, Executive Summary, p. 30.

[136] *Canal de Nicaragua: Environmental and Social Impact Assessment*, Executive Summary, p. 30.

Expropriations and evictions are sometimes carried out without any real justification. The "public interest" and the "common good" are terms commonly used to justify them. Decisions based on these arguments must meet a set of requirements that protect human rights. For example, information about the decisions and the criteria used to justify them must be public and transparent and subject to consultation and participation. Genuine consultation forms part of the procedural guarantees that must be respected at all stages.[137]

By implementing so-called consultations without any real willingness to change a decision that has already been taken, Nicaragua would seem to have implemented a process intended to give the impression of respecting rights, when in fact it lacked a genuine will to guarantee them.

"There was no consultation that was even half-way serious, nothing, it was virtually imposed".

Dr Vilma Núñez, President of the Nicaraguan Human Rights Centre

IN SEARCH OF REAL CONSULTATION

The lack of consultation has led to the organization of at least 90 marches led by the National Council in Defence of our Land, Lake and Sovereignty since 2014. Thousands of *campesinos* and people from dozens of communities in various parts of Nicaragua have taken part, demanding that their rights be respected and Law 840 repealed.

Human rights organizations, environmentalists and *campesino* leaders have reported that the government, far from offering real spaces for dialogue and effective participation mechanisms, has reacted violently, repressing some peaceful marches and harassing community representatives and human rights defenders.[138] Amnesty International has repeatedly called on Nicaragua to respect and guarantee the right to freedom of expression and peaceful protest.[139] It has also called on the state to refrain from acts of harassment and reprisal against human rights defenders.[140]

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[137] UN HABITAT, Forced evictions Fact Sheet No 25/Rev. 1, 2014. Many of these elements are also contained in the Basic Principles and Guidelines on Development-Based Evictions and Displacement, Annex I to the Report of the Special Rapporteur on adequate housing as a component of the right to an adequate standard of living (A/HRC/4/18).

[138] Nicaraguan Centre for Human Rights and the International Federation of Human Rights, *Concesión del Canal Interoceánico en Nicaragua: grave impacto en los derechos humanos. Comunidades campesinas movilizadas resisten*. September 2016 / No.680e. pp. 41-49.

[139] *Nicaragua: la libertad de expresión y el derecho a la manifestación pública y pacífica debe ser garantizada por el Estado*. 29 November 2016. AMR 43/5245/2016 and Nicaragua: *The state must guarantee the security and integrity of communities peacefully demonstrating their concerns over construction of the canal*, 21 April 2016 (Index: AMR 43/3887/2016).

[140] Amnesty International, *Nicaragua: Human rights defender harassed: Francisca Ramírez*, 6 December 2016 (Index: AMR 43/5277/2016) and *Nicaragua: Human rights defender stigmatized and publicly discredited by government authorities*, 10 March 2017 (Index: AMR 43/5860/2017).

"When I go to the demonstrations my husband comes too, and when I leave my house, it really hurts me because maybe I'll get to come home or maybe I won't because of government oppression. And when I say goodbye to my children when I leave, I tell them: I don't know if I will come back. But they say, yes, Mummy, we know that you are doing it because you love us, for our future...Sometimes they are crying".

Peasant farmer interviewed by Amnesty International.

There is no doubt that the Nicaraguan state has had several concrete opportunities to engage in dialogue with the communities that have used legal mechanisms, formal requests for information and peaceful demonstrations to express their concerns about the possible impacts that the Project could have on their human rights and livelihoods.

“The government sold our land practically without asking us: Do you agree?”

Peasant farmer interviewed by Amnesty International

“For us the government is deaf, dumb and blind. It doesn’t want a dialogue”.

Peasant farmer interviewed by Amnesty International

Punta Gorda river. Photo taken in June 2016.
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6. CONCLUSIONS AND RECOMMENDATIONS

"We love the land. Because the canal project endangers the natural resources and heritage of Nicaraguans, we demand respect for all the human rights that are put at risk by the construction of the canal".

Francisca Ramírez, member of the Council for the Defence of Our Land, Lake and Sovereignty.

The Nicaraguan state has moved ahead, without consultation and using a process that is shrouded in secrecy, with the approval and design of a gigantic project that will divide the country in two and jeopardize the human rights of hundreds of thousands of people. The state's actions constitute an unacceptable lack of respect for its international human rights obligations.

The Nicaraguan authorities must, as a matter of urgency, implement measures to ensure that the human rights of those who will be affected by the Interoceanic Grand Canal and other associated infrastructure projects (the Project) are safeguarded and respected. These measures should include the repeal of the Project's legal framework.

Amnesty International is aware of the existence of stability clauses under which the state has an obligation to indemnify or compensate contracting parties for the negative consequences of events such as changes in the law and that this may act as a disincentive to implement the recommendations below. For this reason, the organization also includes recommendations to the concessionary company of the Project and other contractors urging them not to invoke and/or make use of these clauses, since it is also their responsibility and in their interests to ensure that the projects are developed in full compliance with respect for human rights.

Amnesty International makes the following recommendations:

TO THE NICARAGUAN GOVERNMENT (INCLUDING THE NICARAGUA CANAL AND DEVELOPMENT PROJECT COMMISSION)

- Impose a moratorium on the implementation of all aspects of the work on the Project until legal and procedural safeguards are in place that comply with human rights standards, including effective consultation of those who will be affected and prevent forced evictions.
- Implement, immediately, a process to disseminate information and engage in genuine consultation on the Project, including:

- Ensuring that all those affected by the Project, regardless of whether they hold title to the property, have timely, complete and accessible information about: The Project, its impacts, measures to mitigate and avoid negative impacts, timeframes, routes, information about the sub-projects, the number of people affected in each community, resettlement and compensation programmes, forms and modalities of public participation, a procedure for filing and processing complaints and legal remedies.

- Provide immediate, easy and public access to all documents, studies and reports of meetings of state entities that contain information of public interest on the Project, its possible impacts and sources of financing.

- Ensure that all those who are potentially affected, without exception, as well as other interested groups (human rights organizations, academics, etc) are invited to participate effectively in consultations on the Project. The design and methodology of the consultations must be consistent with international human rights standards.

- Begin a serious and effective dialogue with the National Council for the Defence of Our Land, Lake and Sovereignty, in which questions are answered and concerns are heard, analysed and taken into account in the decisions regarding the Project.

- Ensure that the consultation process is based from the outset on the premise that the outcome could lead to a change in government plans that result in significant modifications to or suspension or cancellation of the Project. In order for there to be effective participation, the consultation process should not begin with a preconceived outcome or without accepting that there is a possibility of changes to the original plans.

- Ensure that the consultation process is implemented in a fully transparent manner and with public accountability for the discussions held and the agreements and decisions made.

- Based on the results of a process of genuine consultation of all the people who could be affected and their representatives, initiate a renegotiation with the concession holder and other relevant parties of the Master Concession and Implementation Agreement in respect of the Nicaragua Canal and Development Project (MCA) and other agreements relating to the Project, with the aim of setting up a legal framework that ensures respect for human rights and environmental integrity, and protection from forced evictions.

- Support the repeal of national legislation on the Project – including the MCA and other agreements related to the Project – and ensure the establishment of a regulatory framework for the Project based on effective and genuine prior consultation that ensures respect for human rights and environmental integrity, and protection from forced evictions.

- Develop legal guidelines that establish judicial and procedural safeguards against forced evictions. The guidelines should be drawn up in consultation with civil society and incorporate international human rights norms and principles.

- Publicly recognize and protect the legitimate and important work of defenders of human rights and of the environment who have been expressing their concerns about the potential impacts of the Project and take the necessary measures to ensure that they can carry out their work in a safe and enabling environment and without fear of reprisals.

TO THE NATIONAL ASSEMBLY

- Repeal national legislation on the Project, including the MCA and other agreements relating to the Project, and ensure the establishment of a regulatory framework for the Project, based on effective and genuine prior consultation, that ensures respect for human rights, environmental integrity, and protection from forced evictions.

- Avoid the future approval of legislation that contravenes Nicaragua's international obligations and violates or jeopardizes the human rights of its people.

TO THE SECURITY FORCES

- Guarantee and respect the right to freedom of expression and peaceful public protest of those who want to express their position to and concerns about the future impacts of the Project.
- Refrain from acts that constitute intimidation, harassment and reprisals against human rights defenders and community leaders who have expressed their concerns about the future impacts of the Project.
- Undertake an internal investigation into instances of violent repression of public demonstrations in which the unnecessary or excessive use of force by police officers and military elements has been reported and initiate administrative or criminal proceedings, as appropriate.

TO THE CONCESSION-HOLDING COMPANY AND OTHER CONTRACTORS

- Cease all work on or related to the Project until the necessary measures have been taken to ensure full respect of the human rights of those who will be affected, including prior consultation.
- Refrain from invoking or making use of indemnity or stability clauses in relation to any legal changes or measures introduced by the state that are aimed at ensuring respect for and protection of human rights in the context of the Project.
- Based on the results of a process of genuine consultation of all those who could be affected and their representatives, initiate a renegotiation, with the state, of the MCA and other agreements regarding the Project in order to establish a legal framework that ensures respect for human rights and protection from forced evictions.

TO THIRD-PARTY STATES WHO ARE POTENTIAL INVESTORS OR SERVICE PROVIDERS

- Countries interested in investing in or providing services to the Project should assess the commitment of the Nicaraguan state to comply with international human rights standards and proactively initiate a dialogue with the Nicaraguan authorities to ensure that the Project complies with, and does not lead to violations of, Nicaragua's international human rights obligations.
- Carry out a thorough analysis of the Project that includes a study of incidences of possible evictions, in line with human rights standards, to avoid contributing to or exacerbating human rights violations. In line with their own human rights obligations, the countries concerned must ensure that the Project is implemented in such a way as to respect and promote human rights.

AMNESTY INTERNATIONAL IS A GLOBAL MOVEMENT FOR HUMAN RIGHTS. WHEN INJUSTICE HAPPENS TO ONE PERSON, IT MATTERS TO US ALL.

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DANGER: RIGHTS FOR SALE

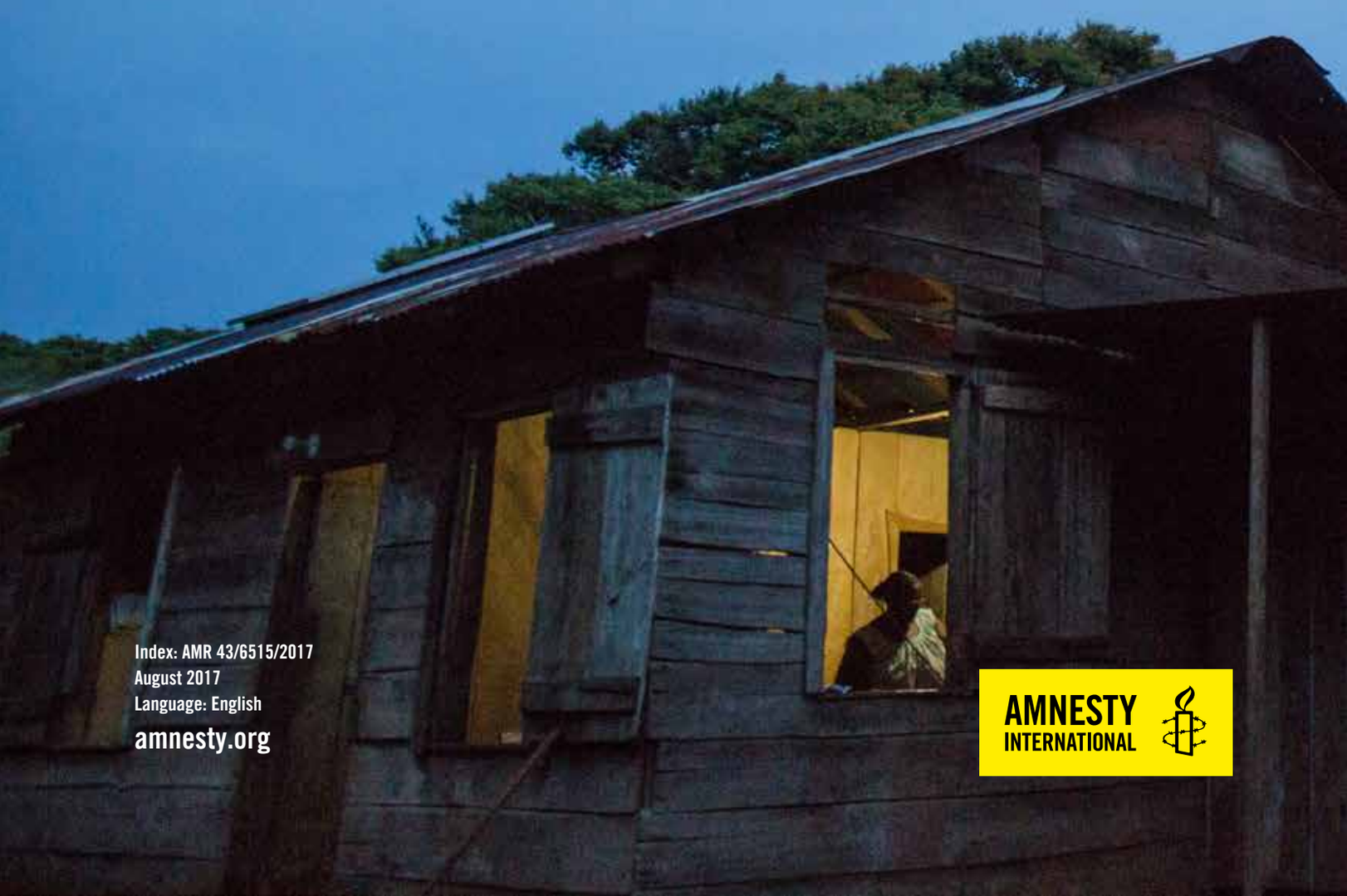
THE GRAND INTEROCEANIC CANAL PROJECT IN NICARAGUA AND THE EROSION OF HUMAN RIGHTS

According to the plans proposed by its sponsors, the Nicaraguan Interoceanic Grand Canal (GIC) will cross the country from east to west, dividing it in two. It is estimated that it will require an investment of approximately US$50 billion.

The Project involves more than just a waterway across Nicaragua and its impact will not be limited to the canal route as the project also includes a series of additional Sub-Projects.

The Nicaraguan state has gone ahead with the approval and design of a megaproject that puts at risk the human rights of hundreds of thousands of people without a genuine consultation and in a process shrouded in silence. The state´s actions constitute an unacceptable failure to respect its international human rights obligations.

It is imperative that the Nicaraguan State implement without delay a process of effective participation, providing information in an appropriate and effective manner, ensuring genuine consultation mechanisms involving all those who may be affected.



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