

Panama

The Problem of Overlap: The Panamanian Government Stalls on Indigenous Land Titling on Protected Areas

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This case study was published in June 2018 and compiled by Janis Alcorn and Augusta Molnar. For more information on this study as well as four companion studies on Congo, India, Indonesia, and Peru, visit CorneredbyPAs.com.

Introduction

Panama is home to five indigenous semi-autonomous indigenous territories (*comarcas*) and several protected areas, including the well-known Darién National Park. However, the government has yet to recognize a number of the customary lands of the Bri Bri, Embera, Guna, Naso, and Wounaan peoples, because of their location in, or proximity to, protected areas. The Ministry of Environment has held up titling for over two years, with more than two-thirds of current indigenous land claims pending due to overlaps. The situation has become a major bottleneck in the recognition of indigenous land rights in Panama. This case study focuses on the overlap between indigenous lands and protected areas in the Darién, particularly the Darién National Park.

Background

Indigenous lands comprise about 60 percent of the remaining forest cover in Panama, mainly in the Darién, which has a forest cover of more than 70 percent—demonstrating, as elsewhere, the effectiveness of Indigenous Peoples in protecting forests. Nationally, 56 percent of all lands in parks and reserves overlap with indigenous territories, both titled and untitled.¹ For the comarcas, this has resulted in restrictions and even conflict, despite a lack of park staff, resources, and agreed management plans, particularly related to community forestry.² For lands awaiting title, the situation has led to increases in land invasions, deforestation, and violence.

Panama's 1998 law on the environment, which created the National System of Protected Areas,³ was revised in March 2015 to establish the Ministry of Environment.⁴ The revised law re-establishes certain articles that had been excised in 2003, including some that would allow the co-management of protected areas.⁵ The revision did not, however, re-establish provisions to guarantee the consent of Indigenous Peoples in the creation and management of protected areas. Law No. 80/2009 regulates titling on coastal lands.⁶

Executive Decree No. 59, passed in 2016, allows for and regulates co-management in the protected-area system.⁷ The decree was made without adequate consultation with the indigenous movement, however, and focuses more on co-management with outside entities such as non-governmental organizations and businesses than on co-management with indigenous communities.

The Alto Darién Protection Forest was established in 1972 as a strict conservation area.⁸ It was augmented and reclassified as the Darién National Park in 1980⁹ and recognized as a United Nations Educational, Scientific and Cultural Organization (UNESCO) Biosphere Reserve in 1981. At approximately 575,000 ha, the park is the largest protected area in the Darién. The National Institute for Renewable Natural Resources was the original manager, and today the park is managed by the Ministry of Environment. From its beginning, the park has received financial and technical support from national and international organizations such as The Nature Conservancy, the World Wildlife Fund (WWF), Fundación Natura, and Asociación Nacional para la Conservación de la Naturaleza (ANCON).

According to UNESCO:

"The property is also culturally and ethnically diverse, as evidenced by major archaeological findings, as well as Afro-descendants and Indigenous Peoples of the Embera, Wounaan, Kuna and others living within the property to this day. Darien National Park was groundbreaking by explicitly including a cultural dimension in the management and conservation of a protected area."¹⁰

Moreover, "Darien National Park is state-owned with customary tenure of the indigenous inhabitants accepted in a part of the property."¹¹

Indigenous lands

Panama's national constitution guarantees indigenous collective land tenure. Article 127 states that: "The state will guarantee reserving the lands necessary to indigenous communities and their collective property in order to achieve their social and economic well-being. The Law will regulate the procedures that must be taken to achieve this goal, and corresponding delimitation [of lands], in which private appropriation of lands is prohibited."¹²

Panama has a long history of recognizing indigenous lands and territories, going back to the Guna Revolution and the creation of the first indigenous comarca in 1938. Four more comarcas were established in 1983 (Embera Wounaan), 1996 (Madugandi), 1997 (Ngabe Bugle), and 2000 (Wargandi). Outside these five comarcas, however, indigenous lands in Panama remained without any form of legal protection until 2008, when, thanks to pressure from the indigenous movement, Law No. 72 was passed.¹³ This law allows for the recognition of collective lands ("tierras colectivas") outside the comarca system. Enabling legislation (Executive Decree No. 223/2010) was passed in 2010,¹⁴ laying out the steps needed for titling these lands under the National Authority for Land Administration in Panama (ANATI). Despite the new law and

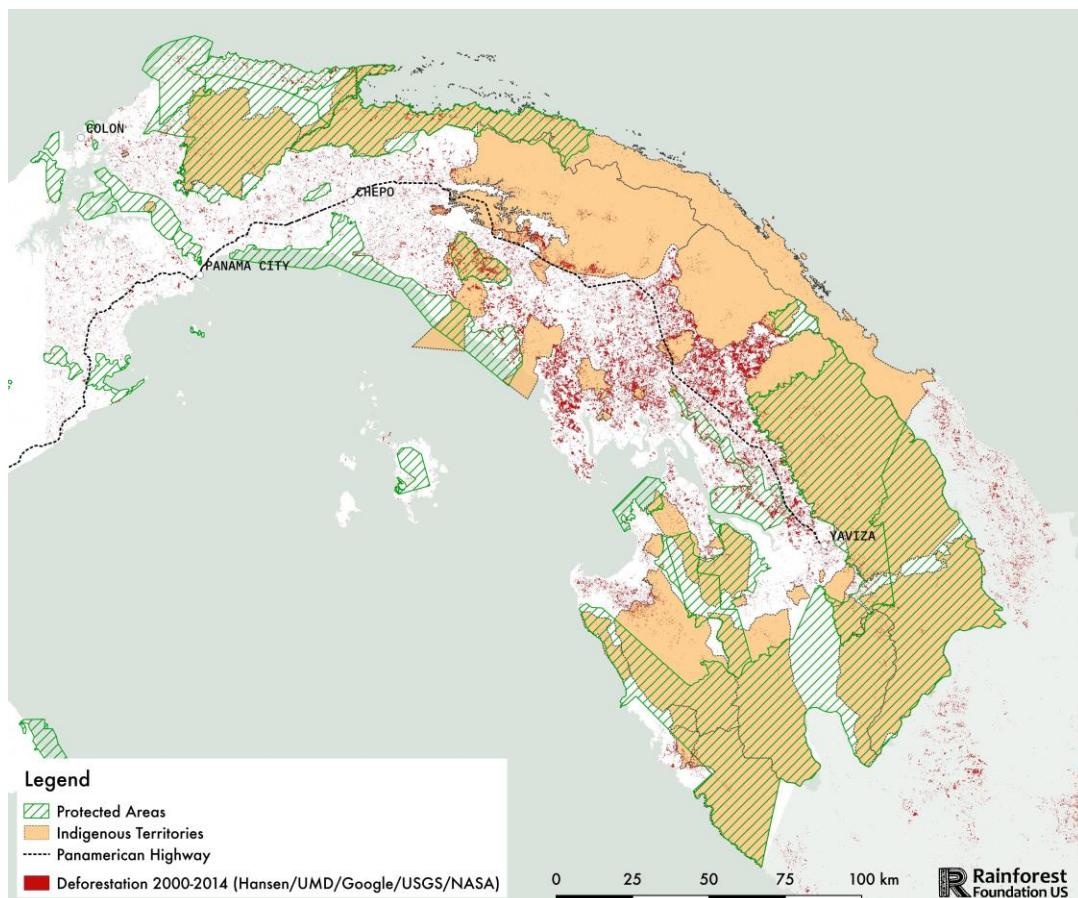
procedures, however, the government has been slow to act, with only five *tierras colectivas* titled since 2010: Puerto Lara and Caña Blanca (2012); Piriati (2014); Ipeti (2015), thanks to an Inter-American Court case;¹⁵ and Arimae (2015). Another 24 *tierras colectivas* remain without title, most of which are in the Darién and have some kind of overlap with protected areas.

Under Article 13 of Law No. 72/2008, the role of the Ministry of Environment in the titling process is to: "coordinate strategies and actions to execute sustainable-use plans for the use of natural resources and community development with the traditional authorities of each community, should the lands requested be part of the National Protected Area System."¹⁶

Article 5 of Executive Decree 223/2010 describes the titling process in more detail. Regarding protected areas, it states that: "In cases where the map [of a *tierra colectiva*] includes areas corresponding to protected areas, before it is approved, it will be sent to the National Environmental Authority for its no objection (*visto bueno*)."¹⁷

In 2016, Panama passed a consultation law, Law No. 37/2016, which provides for free, prior, and informed consent for any legislative or administrative measures that affect the collective rights of Indigenous Peoples, including lands, territories, resources, ways of life, and culture.¹⁸ The law took effect on June 30, 2017.

Existing situation



The map shows that deforestation in eastern Panama occurred predominantly outside customary indigenous lands in 2000–2014. The deforestation rate on titled and untitled customary indigenous lands combined was 1.82 percent. The rate was 1.38 percent on titled customary lands, slightly outperforming protected areas, where it was 1.42 percent. It is worth noting that the deforestation rate outside indigenous territories was higher (6.6 percent) than it was outside protected areas (4.2 percent). The Ministry of Environment, however, has blocked the titling of indigenous lands that overlap with protected areas.

Since the passage of Law No. 72/2008, most Embera, Guna, and Wounaan communities in the Darién have requested titles to their lands. The lands lying in—and near—the Darién National Park have so far been denied title due to overlaps (with either the park itself or its buffer zone), with the Ministry of Environment holding back titling requests since late 2015. Land title requests are pending for the communities of Aruza, Bajo Lepe, Majé Drua, Mercadeo, Pijibasal, and Rio Hondo/Platanares, which all have some overlap with a protected area. In March 2018, thanks to pressure from indigenous organizations, the Ministry of Environment gave its provisional approval to titling these communities—conditional on additional inspections and sustainable-use plans. Time will tell if this moves the titling process forward, and whether the conditions are acceptable and sustainable-use plans are based on customary use and community vision.

Financial information related to the case

Financial support for the establishment and management of the Darién National Park has come from a variety of sources, both national and international. In 2004, the governments of Panama and the United States of America signed a debt-for-nature swap, creating a fund to support the management of the park. The swap included contributions of US\$1.3 million from The Nature Conservancy and US\$6.5 million from the United States government, in exchange for US\$10.9 million of Panama's external debt. The resulting Darién Fund ("Fondo Darién") is overseen by the Ecological Trust of Panama (*Fideicomiso Ecológico de Panamá*), administered by Fundación Natura,¹⁹ and executed on the ground by the Group for Sustainable Environmental Education and Management (*Grupo para la Educacion y el Manejo Ambiental Sostenible*), a Panamanian non-governmental organization (NGO).²⁰ Another Panamanian NGO, ANCON, has also provided significant support.²¹

The table shows Darién National Park management expenditure for 2007–2015; it likely excludes certain funds contributed by NGOs or from ministerial budgets. The table includes the amounts spent on strengthening community organizations and a small grants fund on the assumption that these amounts are related to working with communities in the park. Other expenses cover park administration and management, as well as financial administration.

Table 1: Management expenditure, Darién National Park, 2007–2015

Year	Total management expenditure (USD)	Total community organization-strengthening program (USD)	Small-grants fund (USD)
2007	451,199	100,852	25,315
2008	294,023	12,217	9,762
2009	328,054	31,554	6,908
2010	547,950	158,678	4,000
2011	384,112	12,201	14,989
2012	409,720		27,493
2013*	401,099		102,364
2014	927,156		17,643
2015	728,765		24,552
Total	4,472,078	315,502	233,026

Note: Data on management expenditure are available on Fundación Natura's website.²² Additional expenditure by NGOs and from ministerial budgets may not be included.

* Audited data for 2013 are unavailable on the Fundación Natura website; the data presented here for 2013 are extrapolated from 2012 and 2014 reports.

Instruments used to correct the situation

Both Law No. 72/2008 and its enabling legislation allow for the titling of tierras colectivas in protected areas. Moreover, a number of indigenous lands—comarcas and at least one tierra colectiva—overlap with protected areas; the Embera Wounaan Comarca, for example, has a significant overlap with the Darién National Park. The Guna Comarca established its own protected area, Nargana, within its boundaries to provide additional protection from outside encroachment. Despite these precedents, the titling process for tierras colectivas has stalled in Panama.

The Ministry of Environment has sent mixed messages and has put forward neither a clear policy statement nor a clear legal justification for not giving its “no objection.” In some cases (e.g. Playa Muerto), the Ministry has denied outright giving its no objection for titles; in others, it has stated that it will not stand in the way of titling. The Ministry has cited the coastal protection law (Law No. 80/2009) as the justification for not titling indigenous territories that overlap with protected areas. That law, however, provides an exception for lands on which occupation began before the establishment of the protected area—which is certainly the case

for all the lands in question, as documented in numerous studies of Indigenous Peoples in Panama.

A recent decision by the Attorney General's Office, which the Ministry of Environment consulted on the issue, does not provide clear guidance. It recognizes indigenous rights to land under international and national law, and cites the Alto Bayano case mentioned above, but it suggests deferring to the Inter-American system for further guidance.

Indigenous organizations have pushed actively for land titling and for a resolution of the impasse with the Ministry of Environment. They have argued that the environmental laws (both Law No. 80/2009 and Law No. 8/2015) only prohibit the titling of private property—not collective lands—in protected areas. This argument mirrors recent international jurisprudence, including that of the Inter-American Court on Human Rights in *Kaliña and Lokono Peoples v. Suriname*.²³ In 2013, the Panamanian government proposed "modest" changes to the size of the Darién National Park, seeking to add 31,628 hectares (an increase of about 5.4 percent). In 2014, the World Heritage Committee responded by requesting a clearer map and an approved management plan. It also asked the proponent to "confirm, and provide supporting information, on the necessary consultation with indigenous and local peoples in support of the proposed addition of the new areas to the property."²⁴ In 2015, the International Union for Conservation of Nature, as an advisory body to UNESCO, recommended that:

"[t]he supplementary information from the State Party makes clear that the consultations have not been concluded, and no written agreement has been reached. Further consultation meetings should occur and a written agreement should be developed to document that local communities and Indigenous Peoples are in agreement with the expansion as well as the governance and management arrangements."

*Since the site and the expansion include land which is used by Indigenous Peoples and local communities, it will be important to confirm appropriate governance arrangements for the proposed additions to the area, including options for co-management arrangements. It will be important that the State Party ensure this step is completed with the requisite documentary evidence of consultation and consent."*²⁵

Despite this, the Ministry of Environment has blocked titling in areas apparently covered by the park extension. In meetings, the Ministry has alleged that titling in the park or in the proposed extensions would compromise the park's status as a UNESCO biosphere reserve. Clarification on this from UNESCO has been requested but has not yet been forthcoming.

According to Fondo Darién, there is a 5-kilometer buffer zone around the park.²⁶ This is not shown on maps, however, and the exact meaning of “buffer zone,” and what regulations apply, is unclear in this case. The map of the Darién National Park on the UNESCO website states that, “[t]he property had no buffer zone at the time of its inscription on the World Heritage List.”²⁷ Nevertheless, in meetings with indigenous organizations, the Ministry has also cited the park’s buffer zone as an impediment to titling collective lands.

Alternative approaches

Legal precedent

Precedents exist for titling indigenous lands that overlap with protected areas in Panama. They include Puerto Lara, which overlaps with the Filo del Tallo Hydrologic Reserve, titled in 2012, and the Comarca Embera Wounaan, titled in 1983, which overlaps with the Darién National Park. Panama should move quickly to title all collective lands that still need title in both the Darién and western Panama.

Sustainable-use plans

The laws for titling collective lands allow for titles for lands that overlap with protected areas to be granted if the Ministry of Environment gives its no objection and sustainable-use plans are put in place. The formal requirements for sustainable-use plans, as outlined by the Ministry of Environment, seem to be covered in some communities by land-use planning already taking place. Title applications could be accompanied or followed by sustainable-use plans that are indigenous-led and reflect authentic community visions of land use and development. ANATI and the Ministry of Environment should support the land management planning processes taking place on *tierras colectivas* by providing technical assistance and facilitating approvals.

Community-led management

The Darién National Park was the first national park in Central America to recognize and include cultural diversity and the role of Indigenous Peoples in its management. Park management plans should therefore reflect the cosmovision and traditional practices of Indigenous Peoples and include investment in community planning, natural resource management, and sustainable livelihoods. Support for community-led environmental monitoring would improve the management of these lands and complement traditional park management strategies.

A rights-based approach

International jurisprudence recognizes the importance of ensuring that rights are protected, along with environmental protection. The free, prior, and informed consent of Indigenous Peoples on

park creation, expansion, buffer zones, and management must be ensured, as per international standards and Panama's own consultation law.

The Special Rapporteur on Indigenous Peoples, Victoria Tauli-Corpuz, made the following recommendations in her 2016 report, which are relevant to Panama:

- Undertake all necessary measures for the effective implementation of the United Nations Declaration on the Rights of Indigenous Peoples and ratify the International Labour Organization's Indigenous and Tribal Peoples Convention No. 169.
- Adopt all necessary policy, legal, and administrative measures for the full recognition of the rights of Indigenous Peoples over their lands, territories, and resources, as enshrined in international human rights law.
- Review and harmonize the environmental, legal, and institutional framework regarding the rights of Indigenous Peoples and ensure that a rights-based approach is applied to the creation or expansion of existing protected areas.

¹ PRISMA Foundation. 2016. Conservation and Community Rights: Lessons from Central America. San Salvador: Programa Regional de Investigación sobre Desarrollo y Medio Ambiente.

² PRISMA Foundation 2016.

³ Ley General de Ambiente de la República de Panamá, Ley 41 de 1998. Título VI, Capítulo II, Artículo 66 "Crea el Sistema Nacional de Áreas Protegidas."

⁴ Ley No. 8 de 25 de Marzo de 2015 Que Crea El Ministerio de Ambiente-Panamá. Scribd. Available at: www.scribd.com/doc/261532195/Ley-N%C2%BA-8-de-25-de-Marzo-de-2015-Que-Crea-El-Ministerio-de-Ambiente-Panama.

⁵ Article 96: The Ministry of Environment will coordinate, with traditional authorities of the comarcas and Indigenous Peoples, everything relevant to the environment and natural resources on their lands. Note that all English translations of laws in this case study are unofficial.

Article 48: Re-establishes Article 98 of Law Ley 41 of 1998, as follows: Article 98. Recognizes the right of comarcas and Indigenous Peoples with regard to the use, management and traditional use of renewable natural resources on their lands. These resources should be used with the goal of protecting and conserving the environment established in the Constitution, this law, and other national laws. Note that all English translations of laws in this case study are unofficial.

⁶ Ley 80/2009. Que Reconoce Derechos Posesorios y Regula la Titulacion en las Zonas Costeras y el Territorio Insular con el Fin de Garantizar su Aprovechamiento Optimo y Dicta Otras Disposiciones. Available at: www.anati.gob.pa/Normativa/Ley_80_de_2009_Titulacion_de_Tierras.pdf

⁷ Decreto Ejecutivo No. 59 de 9 de Marzo 2016. Available at: www.gacetaoficial.gob.pa/pdfTemp/27986_B/54970.pdf

⁸ Decreto Ejecutivo No. 84, May 1972. Gaceta Oficial 17111, June 1, 1972.

⁹ Decreto Ejecutivo No. 21, August 7, 1980; Gaceta Oficial 19142, August 27, 1980. “Logging, destruction, burning, possession and adjudication of lands and any other activity in the National Park created by this decree are prohibited, without previous authorization of the National Direction for Renewable Natural Resources of the Ministry of Agricultural Development.” Note that all English translations of laws in this case study are unofficial.

¹⁰ UNESCO. Undated. Darien National Park. <http://whc.unesco.org/en/list/159>

¹¹ UNESCO (undated). This is a reference to the Comarca Embera Wounaan, created in 1983. “Part of what is today the property has been under formal protection since 1972, when the Alto Darien Protection Forest was declared. The latter was reclassified as a national park by Presidential Decree in 1980. World Heritage status since 1981 and international designation as a biosphere reserve by UNESCO and parts of the area by the Ramsar Convention add a layer of recognition and protection. Darien National Park is state-owned with customary tenure of the indigenous inhabitants accepted in a part of the property.” Note the mention of the Alto Darién Protection Forest, which was reclassified – but which the Ministry of Environment has used as justification for not giving its *visto bueno* to titling *tierras colectivas* in the area.

¹² Note that all English translations of laws in this case study are unofficial.

¹³ Ley No. 72 de 23 de diciembre de 2008.

www.anati.gob.pa/Normativa/Ley_72_de_2008_Propiedad_Colectiva_de_Tierras_Indigenas.pdf

¹⁴ Decreto Ejecutivo No. 223 de 29 de junio de 2010. http://ctf.ac.pa/documentos/decreto_ejecutivo_511.pdf

¹⁵ Inter-American Court of Human Rights. 2014. Caso de los Pueblos Indígenas Kuna de Madungandí y Emberá de Bayano y sus Miembros vs. Panamá. Sentencia de 14 de Octubre de 2014.

www.corteidh.or.cr/docs/casos/articulos/seriec_284_esp.pdf

¹⁶ Ley No. 72/2008. Que Establece el Procedimiento Especial para la Adjudicación de la Propiedad Colectiva de Tierra de los Pueblos Indígenas que no están Dentro de las Comarcas.

www.anati.gob.pa/Normativa/Ley_72_de_2008_Propiedad_Colectiva_de_Tierras_Indigenas.pdf

¹⁷ Gaceta Oficial Digital. 2010. Miércoles 07 de julio. No 26571. Available at:

http://ctf.ac.pa/documentos/decreto_ejecutivo_511.pdf

¹⁸ International Labour Organization. Undated. Panama. NATLEX: Database of national labour, social security and related human rights legislation. Available at: www.ilo.org/dyn/natlex/natlex4.detail?p_lang=en&p_isn=102800

¹⁹ Fundación Natura. 2016. Fondo FIDECO. 11 Marzo. Available at: <http://naturapanama.org/fondo-fideco>

²⁰ Grupo para la Educación y el Manejo Ambiental Sostenible. Undated. Proyecto: Implementación 2013-2016 del Plan Estratégico del Fondo Darién. Available at: <http://gemasdarien.blogspot.com/p/gemas.html#.Wg8s6TBrwb5>

²¹ UNESCO (undated).

²² Fundación Natura. Undated. Formularios y reportes. Available at: <http://naturapanama.org/publicaciones/>

²³ *Kaliña and Lokono Peoples*. Concluding statement of the IACHR. Audio transcript.

²⁴ UNESCO. 2014. Decision: 38 COM 8B.46. Examination of minor boundary modifications: Darien National Park (Panama). Available at: <http://whc.unesco.org/en/decisions/6133>

²⁵ UNESCO. 2015. Decision: 39 COM 8B.41. Darien National Park, Panama. Available at:
<http://whc.unesco.org/en/decisions/6391>

²⁶ Fundación Natura. 2016. Fondo Darién. 9 Marzo. Available at: <http://naturapanama.org/fondo-darien/>

²⁷ National Environment Authority. 2012. Boundary World Heritage Property Darien National Park (159), According to Executive Decree No. 21 of 7 August 1980. Available at: <http://whc.unesco.org/document/123579>