

Report No. 39933-HN

The Inspection Panel



Investigation Report

**Honduras: Land Administration Project
(IDA Credit 3858-HO)**

June 12, 2007

About the Panel

The Inspection Panel was created in September 1993 by the Board of Executive Directors of the World Bank to serve as an independent mechanism to ensure accountability in Bank operations with respect to its policies and procedures. The Inspection Panel is an instrument for groups of two or more private citizens who believe that they or their interests have been or could be harmed by Bank-financed activities to present their concerns through a Request for Inspection. In short, the Panel provides a link between the Bank and the people who are likely to be affected by the projects it finances.

Members of the Panel are selected “*on the basis of their ability to deal thoroughly and fairly with the request brought to them, their integrity and their independence from the Bank’s Management, and their exposure to developmental issues and to living conditions in developing countries.*”¹ The three-member Panel is empowered, subject to Board approval, to investigate problems that are alleged to have arisen as a result of the Bank having ignored its own operating policies and procedures.

Processing Requests

After the Panel receives a Request for Inspection it is processed as follows:

- The Panel decides whether the Request is *prima facie* not barred from Panel consideration.
- The Panel registers the Request—a purely administrative procedure.
- The Panel sends the Request to Bank Management, which has 21 working days to respond to the allegations of the Requesters.
- The Panel then conducts a short 21 working-day assessment to determine the eligibility of the Requesters and the Request.
- If the Panel recommends an investigation, and the Board approves it, the Panel undertakes a full investigation, which is not time-bound.
- If the Panel does not recommend an investigation, the Board of Executive Directors may still instruct the Panel to conduct an investigation if warranted.
- Three days after the Board decides on whether or not an investigation should be carried out, the Panel’s Report (including the Request for Inspection and Management’s Response) is publicly available through the Panel’s website and Secretariat, the Bank’s Info Shop and the respective Bank Country Office.

¹ IBRD Resolution No. 93-10; IDA Resolution No. 93-6.

- When the Panel completes an investigation, it sends its findings and conclusions on the matters alleged in the Request for Inspection to the Board as well as to Bank Management.
- The Bank Management then has six weeks to submit its recommendations to the Board on what actions the Bank would take in response to the Panel's findings and conclusions.
- The Board then takes the final decision on what should be done based on the Panel's findings and the Bank Management's recommendations.
- Three days after the Board's decision, the Panel's Report and Management's Recommendation are publicly available through the Panel's website and Secretariat, the Bank's Project website, the Bank's Info Shop and the respective Bank Country Office.

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Table of Contents

| | |
|---|-------------|
| ABOUT THE PANEL..... | ii |
| ACKNOWLEDGMENTS..... | iv |
| TABLE OF CONTENTS..... | v |
| ABBREVIATIONS | viii |
| EXECUTIVE SUMMARY | ix |
| CHAPTER I: INTRODUCTION..... | 1 |
| A. EVENTS LEADING TO THE INVESTIGATION | 1 |
| 1. The Request | 1 |
| 2. Management Response | 4 |
| 3. Eligibility of the Request | 7 |
| 4. The Investigation..... | 8 |
| 5. Bank Operational Policies and Procedures Applicable to the Project | 9 |
| B. THE PROJECT..... | 9 |
| C. THE PROJECT IN RELATION TO THE GARÍFUNA PEOPLE | 13 |
| D. RECENT DEVELOPMENTS..... | 14 |
| CHAPTER II: THE GARIFUNA PEOPLE AND COLLECTIVE TITLES..... | 16 |
| A. BRIEF HISTORY OF THE GARÍFUNA PEOPLE..... | 16 |
| 1. Origins..... | 16 |
| 2. The Garífuna People Today | 18 |
| 3. Garífuna Land Use Patterns | 20 |
| B. ISSUES OF COLLECTIVE TITLES TO LAND | 27 |
| 1. General Situation regarding Land Issues | 27 |
| 2. Historical Land Claims of Garífuna, and Land Loss | 28 |
| 3. Land Titles Granted to Garífuna | 30 |
| C. GOVERNANCE AND REPRESENTATION | 33 |
| 1. Garífuna Organizations | 33 |
| 2. Garífuna Governance at Communal Level | 36 |
| CHAPTER III: CONSULTATION, REPRESENTATION AND PARTICIPATION OF THE GARIFUNA PEOPLE | 37 |
| A. RELEVANT POLICY PROVISIONS | 38 |
| B. CONSULTATION AND REPRESENTATION DURING PROJECT PREPARATION | 38 |
| 1. Consultation and Preparation of the IPDP | 38 |
| 2. Differing Characterizations of Meetings during Project Preparation..... | 41 |
| 3. Availability of Information | 42 |
| 4. Conclusions..... | 43 |
| C. CONSULTATION AND REPRESENTATION DURING PROJECT IMPLEMENTATION | 43 |
| 1. The Mesa Regional: Requesters Claims and Management Response..... | 44 |
| 2. The Creation of the Mesa Regional | 46 |
| 3. Membership and Role of the Mesa Regional..... | 47 |
| 4. Representation of the Garífuna People | 50 |
| 5. Conclusions..... | 51 |
| 6. Latest Development on the Mesa Regional | 54 |

| | |
|--|-----------|
| CHAPTER IV: THE PROJECT’S LEGAL FRAMEWORK..... | 56 |
| A. REQUEST’S CONCERNS AND MANAGEMENT RESPONSE..... | 56 |
| 1. Issues related to the Legal Framework..... | 58 |
| 2. Panel’s Request for a Legal Opinion and Response from the World Bank General Counsel | 64 |
| B. RELEVANT INTERNATIONAL AGREEMENTS: ILO CONVENTION NO. 169 | 69 |
| C. NATIONAL LEGISLATION RELEVANT TO LAND RIGHTS OF INDIGENOUS PEOPLES | 73 |
| CHAPTER V: COMPLIANCE WITH ENVIRONMENTAL POLICIES..... | 76 |
| A. REQUESTERS’ CLAIMS AND MANAGEMENT RESPONSE | 76 |
| 1. Demarcation of Protected Areas and Potential Overlap with Garífuna Lands..... | 77 |
| 2. Responsibility for Management or Co-Management of Protected Areas | 81 |
| B. NATURAL HABITAT: OP/BP 4.04 | 83 |
| CHAPTER VI: PROJECT IMPLEMENTATION: INSTITUTIONAL STRUCTURES.... | 85 |
| A. INTRODUCTION | 85 |
| B. CURRENT PROJECT IMPLEMENTATION ARRANGEMENTS | 86 |
| C. REQUIREMENTS OF THE IPDP | 87 |
| D. THE INTER-SECTORAL COMMISSION FOR PROTECTING LAND RIGHTS OF GARÍFUNA AND MISQUITO COMMUNITIES | 88 |
| E. THE REGULATORY FRAMEWORK FOR LEGALIZING AND REGISTERING LAND TITLES..... | 90 |
| 1. The IP Role in the Regularization of Land Titles | 90 |
| F. DISPUTES OVER TITLES TO LAND..... | 92 |
| 1. Conflicts Involving Indigenous Land..... | 92 |
| 2. Procedures for Settling Disputes over Land Titles | 96 |
| G. THE IMPLICATIONS OF THE PROJECT FOR THE TITLING OF COMMUNAL LANDS | 103 |

Annexes

| | |
|--|-----|
| Annex A Table of Findings | 106 |
| Annex B Inspection Panel Request for Legal Opinion..... | 115 |
| Annex C World Bank Senior Vice President and General Counsel Response..... | 123 |
| Annex D Biographies | 125 |

Boxes, Figures, Photos

| | |
|---|-----|
| Box 1.1 Loss of Lands, Battles and Deportation to Honduras | 17 |
| Box 2.2 Importance of Cassava for the Garífuna People | 20 |
| Box 2.3 Historical Background: Garífuna Dependency on the Sea | 22 |
| Box 6.1 OFRANEH's petition to the Inter-American Commission on Human Rights | 103 |
| Figure 2.1 Garífuna Communities Along the North Coast of Honduras..... | 19 |
| Figure 2.2 The Community of Triunfo de la Cruz: Land Uses, Title and Land Claimed | 24 |
| Figure 2.3 The Community of San Juan: Land Uses, Title and Land Claimed..... | 26 |
| Figure 2.4 The Community of San Antonio: Land Uses, Title and Land Claimed..... | 27 |
| Photo 1: The Garífuna community of Guadalupe | 21 |
| Photo 2 Meeting with Requesters in Sambo Creek | 24 |
| Photo 3: Non-Garífuna fences in Garífuna land near Trujillo..... | 29 |
| Photo 4: Title ejidal granted in 1901 to the community of Cristales..... | 31 |

| | |
|--|----|
| Photo 5: Panel team meeting with Project affected people | 35 |
| Photo 6: Panel meeting with Requesters at Sambo Creek..... | 39 |
| Photo 7: Meeting of the Mesa Regional and Mesas Locales in Guadalupe | 48 |
| Photo 8: Panel meeting with members of the Mesa Regional in Cristales..... | 49 |
| Photo 9: Panel meets with Requesters during visit to Project area..... | 51 |
| Photo 10: Panel experts meet with Garífuna people in Limón..... | 55 |
| Photo 11: Fencing in Punta Izopo Protected Area..... | 80 |
| Photo 12 Vacation houses in Garífuna lands belonging to non-Garífuna people in the area of Triunfo de la Cruz. | 93 |

Map

Honduras Land Administration Project: Garífuna Communities and Related Sites. Map attached to Management Response to Request for Inspection (IBRD 34485R)

Abbreviations

| | |
|--------------|--|
| APL | Adaptable Program Loan |
| AFE-COHDEFOR | Administración Forestal del Estado Corporación Hondureña de Desarrollo Forestal (Honduran Agency for Forest Development) |
| CACRC | Central American and Caribbean Council (currently named the Caribbean and Central American Research Council) |
| DCA | Development Credit Agreement |
| EA | Environmental Assessment |
| EMP | Environmental Management Plan |
| IACHR | Inter-American Commission on Human Rights |
| IDA | International Development Association |
| ILO | International Labor Organization |
| INA | <i>Instituto Nacional Agrario</i> (National Agrarian Institute) |
| IP | <i>Instituto de Propiedad</i> (Property Institute) |
| IPDP | Indigenous Peoples Development Plan |
| NGO | Non Governmental Organization |
| OD | Operational Directive |
| ODECO | Organización de Desarrollo Étnico Comunitario |
| OFRANEH | Organización Fraternal Negra de Honduras |
| OP | Operational Policy |
| PAAR | Rural Land Management Project (Proyecto de Administración de Áreas Rurales) |
| PAD | Project Appraisal Document |
| PATH | Honduras Land Administration Program (<i>Programa de Administración de Tierras de Honduras</i>) |
| PROBAP | Biodiversity in Priority Areas Project |
| SGJ | <i>Secretaría de Gobernación y Justicia</i> (Ministry of Justice) |
| SINAP | National Property Administration System (<i>Sistema Nacional de Administración de la Propiedad</i>) |
| PIU | Project Implementation Unit |

Executive Summary

Introduction

On January 3, 2006, the Inspection Panel received a Request for Inspection related to the Honduras: Land Administration Project (“the Project” – in Spanish *Programa de Administración de Tierras de Honduras*, PATH).² The Request alleges that the Bank has violated several Bank policies, and that as a result the Project will lead to significant harms to the Garífuna people in Honduras and their claims to their ancestral lands.³

The Project is financed by an IDA Credit of 16,900,000 Special Drawing Rights (SDR), about USD 25 million. The Credit was approved by the IDA Board of Executive Directors on February 24, 2004, and became effective on December 2, 2004. The closing date is April 30, 2008. The Project was developed to facilitate implementation of the Government reform strategy to address insecurity of land tenure throughout the country, through establishment and operation of an integrated decentralized land administration system as part of a broader reform program.

Of particular relevance to the Request, one of the Project components provides for systematic land regularization, titling and registration of lands, including municipal lands, urban and rural areas, forests, protected areas and Ethnic Lands. According to the PAD, Ethnic Lands are to be surveyed, regularized, titled and registered in the departments of Atlántida, Colon and Gracias a Dios. These areas have been given priority because of their high concentration of settlements of people of ethnic origin, and are home to many Garífuna communities.

The Requesters and the Substance of their Claims

The Organización Fraternal Negra Honduras (OFRANEH) submitted the Request on behalf of the indigenous Garífuna population of Honduras. OFRANEH states that it is a federation whose members are elected every three years by the Garífuna communities as their representatives.

The Requesters claim that in the design, appraisal and implementation of the Project the Bank did not take the rights and interests of the Garífuna people into consideration and, as a result, violated its own policies and procedures. More specifically, the Requesters claim that the Bank violated OD 4.20 on Indigenous People, OP/BP 4.01 on Environmental Assessment and OP/BP 4.04 on Natural Habitats.

² In this Report the Spanish acronym PATH will also be used to indicate the Project.

³ The Requesters do not contest application of the Project to areas in other parts of Honduras away from lands occupied or claimed by the Garífuna people.

Land Rights and Collective Title

The Requesters fear that as a result of these failures, the land titling and procedures under the Project will ultimately cause the loss of their rights over parts of their Ethnic Lands, and the demise of collective property held by Garífuna communities in favor of individual property.⁴ This is contrary to their preferred land tenure and would, they contend, cause them serious harms and endanger their culture and survival. According to the Requesters, the Project does not reflect the special legal situation of the Garífuna people.

Consultation, Representation and Disclosure

A major claim of the Request is that the Project has failed properly to consult with and identify the needs and interests of the affected communities, and has failed to consult adequately with people who are the legitimate representatives of the affected communities. The Requesters claim that this failure occurred both in the preparation and implementation of the Project and express concerns about the consequences of certain provisions of Honduras' new Property Law.

The Requesters particularly object to the establishment of the Mesa Regional, a "consultation board" created under the PATH. They state that the Mesa Regional is an institution not recognized by OFRANEH because it *"has been created in spite of the disagreement of the communities, was not elected by the communities, [and] is not an organization that represents them."* The Requesters believe that the Mesa is composed of people who cannot be considered Garífuna representatives and that it is alien to their own institutions

Indigenous Peoples Development Plan and Legal Framework

The Requesters allege that the Indigenous Peoples Development Plan (IPDP) for the Project fails to meet Bank policies. They claim that the conflict resolution method provided for in the IPDP, arbitration, not only is unconstitutional but is also different from the one called for in the new Property Law promulgated a few months after approval of the IDA Credit. They add that neither set of procedures responds to their social and political reality.

The Requesters claim that, in preparing the IPDP, the Bank failed to consider adequately the legal status of the indigenous populations as well as the procedures to issue legal titles to land. They also claim that the Project failed adequately to address the serious concerns of communities about the potential impact of the new Property Law, and its relationship to procedures and actions under the Project.

⁴ The Request presents an overview of the history of the Garífuna people, which the Requesters believe is important to understand the magnitude of the damage that the Project implementation may cause to them.

Environment and Natural Habitat

According to the Request, the Bank did not comply with OP 4.01 on Environmental Assessment (EA) because, although the environmental analysis addresses the problems affecting the Garífuna land, it does not provide that the Garífuna communities may manage or co-manage their land to restore their control over the “*functional habitat*” that they have preserved for centuries. The Requesters are concerned that land which they consider is the functional habitat of the Garífuna people could be given to people outside the Garífuna communities, and that Project did not take into account the importance of natural habitats for the livelihood of the Garífuna communities, as required by OP 4.04 on Natural Habitats.

Management Response

On February 9, 2006, Management submitted its Response to the Request. Management claims, as of the date of the Response, that no implementation activities involving surveying, demarcation, conflict resolution and titling have taken place in any Garífuna lands. Management adds that, in any event, when these activities occur, appropriate safeguards are built into the Project to protect indigenous people’s lands.

Land Rights and Collective Title

Management asserts that it has analyzed Honduras’ legal framework vis-à-vis the issue of collective versus individual titles. Management states that the Project does not favor individual titling in the Garífuna communities but establishes procedures that protect the rights of Garífuna communities. Management emphasizes that community participation in the Project is voluntary and thus land demarcation and titling will occur only in those communities willing to participate in the Project.

Consultation, Participation and Representation

Management claims that it has held meaningful consultations and open dialogue with all Garífuna stakeholders, that extensive consultations were held before field activities, and that a wide range of Garífuna stakeholders was consulted for the preparation of the Social Assessment and the IPDP. It also claims that proposals made by affected people during consultation meetings were taken into consideration in Project design.

Management states that the Mesa Regional is a consultation board that includes many Garífuna stakeholders. Management states that one representative of OFRANEH is part of the Mesa. It also claims that the leadership of OFRANEH has been under dispute, and the OFRANEH-Requesters refused to participate in the meeting that created the Mesa Regional.

Indigenous Peoples Development Plan and Legal Framework

With regard to the new Property Law, Management emphasizes that the Government enacted it after the Bank Board of Executive Directors had approved the Credit. According to Management this explains why the Law is not discussed in the Project documents. However, Management stresses that the Project design takes it into consideration and provides mechanisms for a continuous flexible adaptation of the Project to the new Law.

Management also states that it found the new Property Law acceptable and determined that the safeguards provisions were not in conflict with the Law. Management notes that these Project safeguards provide that the Bank must issue its no-objection to any updating of the IPDP, for example with respect to the land regularization and conflict resolution procedures, which have to be based on meaningful consultations. Management also states that the arbitration procedures included in the IPDP are consistent with national law in force at the time of Project preparation and are in compliance with OD 4.20.

Environment and Natural Habitat

The Management Response notes that the Project was assigned environmental Category B and the EA identified a possible overlap between existing communities and protected areas. For this reason a “Process Framework” and Environmental Management Plan were developed, and the demarcation of protected areas will occur only if and when local communities agree. According to the Process Framework, co-management of protected areas by agencies, NGOs and communities will be possible, and strict provisions for the recognition and demarcation of land areas in favor of indigenous communities are envisaged for the cases of overlap between land claims and protected areas.

Regarding natural habitats, Management states that the Project envisages that only legally established protected areas are eligible for demarcation; no Project field activities will take place in or near a proposed protected area; and procedures to protect the interests of the people must be in place before demarcation or titling occur on lands adjacent Ethnic Lands.

The Investigation Report and Applicable Policies and Procedures

This Report concludes the Panel’s investigation into the matters alleged in the Request for Inspection. Panel Chairperson Edith Brown Weiss and Panel Member Tongroj Onchan served as co-Lead Inspectors for the Panel’s investigation. To assist in the investigation, the Panel retained anthropologist Dr. Nancie Gonzalez, who is an internationally recognized expert on the history, life and culture of the Garífuna people, especially of Honduras. The Panel also retained Dr. Edmund Gordon, an anthropologist and expert on land use issues facing the Garífuna people today, and consulted with Joseph Berra, Esq., a lawyer with deep knowledge on these issues. The Panel also benefited from the assistance of a Garífuna consultant from Belize, Ms. Phyllis Cayetano, who, among other things, interpreted the Garífuna language for the Panel.

The Panel conducted a two-part investigation. The first part involved detailed research into Bank records related to the Project, interviews with Bank Staff, and a review of relevant documents and scholarly literature. The second part took the form of two in-country fact-finding visits.

During its visits, the Panel met with Requesters and other individuals and communities, local and national authorities, representatives of nongovernmental organizations, relevant experts and others. The Panel visited a number of Garífuna villages and communities along the Northern Coast of Honduras. The Panel gathered considerable information and data with which to evaluate the Requesters claims.

With respect to this Project, the Panel assessed whether the Bank complied with the following applicable operational policies and procedures:

| | |
|-------------|--------------------------|
| OP/BP 4.01 | Environmental Assessment |
| OP/BP 4.04 | Natural Habitats |
| OD 4.20 | Indigenous Peoples |
| OP/BP 13.05 | Project Supervision |

The Panel recognizes the importance of regularizing land titles for economic development in Honduras, and the importance of the objectives of the Project in this regard.

The Garífuna People and Collective Titles

Origins of the Garífuna People

The Garífuna are descendants of the original Carib and Arawak Indian populations of the Amazon and Eastern Caribbean who intermarried with enslaved Africans – both those who ran away from Europeans on neighboring islands, and those who had escaped from shipwrecks and were captured by the Indians themselves.

Succeeding generations retained their own language, culture and religion, and established a new identity for themselves, which aided in their survival. They became known as “Black Caribs”, and eventually became the most numerous and dominant population on the island of St. Vincent. Most Europeans did not interfere with them, owing to successive agreements beginning in 1660, which defined St. Vincent as a neutral island

This situation changed with the formal cession of St. Vincent to Britain in the Treaty of Paris in 1763. With the arrival of planters, settlers and speculators, and as a result of colonial battles, the “Black Caribs” were conquered and deported from the Leeward Island of St. Vincent and exiled to the island of Roatan in 1797 well before the emergence of the modern Honduran State. The Spanish colonial authority immediately

transferred most of the group to the mainland, specifically to the town of Trujillo. From there, they mainly dispersed along the northern coast of Honduras.

In more recent years, the designation of “Black Carib” or “Moreno” has been increasingly abandoned and replaced with the more historically correct name “Garífuna.” The Garífuna retained a distinctive, non-Western language. It remains as a variant of Arawak, with many words taken from French, English and Spanish, which they acquired from their several colonial experiences.

Garífuna People and Land Use Patterns

Garífuna people today live primarily on the Caribbean coast of Central America in Belize, Guatemala, Honduras, and Nicaragua. In Honduras, their 38 communities are mostly located along the northern coast, in the Departments of Atlántida, Colon, Cortes and Gracias a Dios.

The Garífuna maintain their ancestral language as well as specific religious beliefs and festivals which denote their strict connection with their land and territory. They also maintain traditional communal uses of the land and other patterns of work and activity that reflect their origins, home along the northern coast of Honduras, and unique culture.

Ancestral land use patterns, which the Garífuna brought with them from St. Vincent to Honduras in 1797, involved simple horticulture, primarily of cassava, as well as a few other roots, some annual vegetables, and plantains and the propagation and harvesting of tree fruits such as avocados and mangos. These were primarily for subsistence, although small surpluses were sold locally. The word “Garífuna” means “people who eat cassava.” Garífuna people have used the forest not only for planting, but as the source of protein and plant foods, of medicines, and of wood to build houses, canoes, and other objects.

Both on St. Vincent and in Central America, the Garífuna subsistence economy has also depended upon off-shore fishing, the collection of land crabs, and the hunting of small forest and sea game, such as deer, agouti, turtles, and manatee. **The beaches and the sea have always been important to the Garífunas for fishing.** In the past, the sea has also provided an avenue for them to reach the outside world in areas where land transportation was difficult or impossible. Beaches have been an important element in religious ceremonies. **The sea is part of the Garifuna ethnic and cultural identity. Garifuna houses lining the beaches are the very heart of this sea-faring culture.**

Garífuna ethnicity depends on their continued presence along the north coast of Honduras. This is important, not only for Garífuna living in Honduras today, but for those living in distant countries. Many of these long to relocate one day to their own original or ancestral village. Others look forward to visiting, both due to their own nostalgia, and because they wish their children to remain connected to their ancestry and to learn their history.

External Pressures on the Land

The Garífuna have been and are losing lands once occupied and used by their recent and remote ancestors, as well as by themselves today. Over time, there have been many important external forces that have significantly affected the land uses, work patterns and lands of the Garífuna people In particular, tourism and industrialized export-crop production (such as African palms, pineapples, rambutan, and bananas) are the two major actual and potential uses which attract land-buyers and “invaders” of Garífuna ancestral land. Lands once largely unrestricted for those who cared to use them have become economically valuable and highly sought by outsiders.

Non-Garífuna people have also come to develop vacation homes, cattle ranches and other land uses and activities, often excluding the Garífuna communities from access to the lands through fences, walls and gates. Other significant factors that affect Garífuna lands include: the evolving legal and institutional framework; actions by municipalities to issue private titles within Garífuna communal land; overlapping claims and unregistered transfers; and actions by outside entities to obtain land rights and title and subdivide this land and sell it to outsiders. Another significant concern relates to the designation of protected areas in lands claimed and traditionally used by the Garífuna people, and the related question of who has responsibility to manage use of and access to those lands.

In the face of these forces and pressures, traditional Garífuna communal systems continue to exist. They encompass a range of work, activities and uses of land that reflect the traditions and origins of the Garífuna people. Depending on the community, these include artisanal fishing, planting and subsistence agriculture, cattle, hunting, mining, medicinal plants, small-scale family initiatives of alternative tourism, and sale of items such as coco bread, cassava, fish, and artisanal products.

Land Titles

During the 1990s, the majority of Garífuna communities in Honduras received a communal title to part of the land they occupy and that they claim traditionally belongs to them. However, the titling programs carried out over the past two decades have not solved the situation of the Garífuna communities. In general, the titled areas do not include the entire ancestral claim of the Garífuna people, and most titles exclude important areas of use and resource management of the communities. In some cases, the titles received were extremely limited, and only covered the so-called “*casco urbano*” where their housing is located.

In addition, although many titles given to the Garífuna communities created enforceable rights, there remain land conflicts and issues of occupation of Garífuna land by outsiders to the communities. Moreover, some communities were not titled at all; or Garífuna families were issued individual titles over communal land.

In addition to titling of its lands, the Garífuna are also seeking to recover lands that they claim belong to them but that have been occupied (invaded, since Garífuna people regard

these occupations as invasions) over the last decades by non-Garífunas. **In many Garífuna communities, parts of the land over which the community have legal title have been illegally occupied, at times even with fraud or violence. The Garífuna people have been pursuing claims to collective title and rights over lands for many years, and struggling to address problems of illegal and/or unjustified occupation of lands that they consider belong to the community as a whole.**

The Inspection Panel does not pass judgment on these claims. However, the pursuit by the Garífuna people of their rights over ancestral lands is of central importance to this investigation, as the Requesters claim that the PATH Project may undercut and harm their ability to pursue and succeed in these claims.

Governance and Representation

The Garífuna people founded several entities in the 1950's to organize themselves politically, which can be considered the precursors of the main Garífuna organizations today, in particular OFRANEH and ODECO (Organización de Desarrollo Étnico Comunitario). In the 1970's and 1980's, the people became increasingly organized and mobilized around the issue of land rights (among other issues), first through communal organizations such as the "patronatos" and the Comites de Defensa de la Tierra (Committee for the Defense of the Land), and then through the broader organization of OFRANEH.

OFRANEH, the organization which submitted the Request, was founded in 1977. It began as an organization seeking brotherhood with all Afro Hondurans, but has since become exclusively concerned with the plight of the Garífunas. In general, OFRANEH seeks to promote the internal organization and political mobilization of the Garífuna communities. **OFRANEH has remained, over the years, the leading organization representing the Garífuna people. OFRANEH has been, in particular, at the forefront of efforts of the Garífuna people to secure their land rights, alongside ODECO which also has played a key role in this effort, especially during the titling process of the 1990's. The Panel observes that OFRANEH still plays a leading role in all Garífuna communities, especially at the grass roots level where it encounters great support.**

The Garífuna people are also organized at the community level. The majority of the communities have local associations called patronatos, whose members are chosen by communities' members. In some Garífuna communities there are councils of elders, which participate in resolution of disputes activities. Many communities have a Comité de Defensa de la Tierra.

Consultation, Representation and Participation of the Garífuna People

OD 4.20 provides that the Bank's strategy to address issues related to indigenous people *"must be based on the informed participation of the indigenous peoples themselves."* The policy mandates the identification of *"local preferences through direct consultation,*

incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists . . .”

On the issue of representation, OD 4.20 states that indigenous people’s representative organizations “*provide effective channels for communicating local preferences*” and “*traditional leaders ... should be brought into the planning process, with due concern for ensuring genuine representation of the indigenous population.*” It further notes that “. . . [m]any of the larger groups of indigenous people have their own representative organizations that provide effective channels for communicating local preferences.” OD 4.20 also calls for the preparation of an Indigenous Peoples Development Plan for projects that affect indigenous peoples.

OP 4.01 on Environmental Assessment also contains requirements for consultations with project affected communities. The policy calls for meaningful consultations which may occur only when people receive relevant information about the project in a timely manner before consultations take place and in a language and form understandable and accessible to those consulted.

Consultation and Preparation of an IPDP

The Panel notes that an IPDP was prepared for the PATH Project specifically in relation to issues faced by the Garífuna peoples. The record indicates that substantial efforts were put into the preparation of this IPDP. While important issues relating to the sufficiency of the IPDP are addressed in other sections of this Report, and issues relating to consultation during its preparation are reviewed below, **the Panel finds that preparing an IPDP complied with OD 4.20.**

Consultation during Project Preparation

The Panel has reviewed the Project records regarding consultations carried out during Project preparation. **The Panel finds that several meetings were conducted during Project preparation, and that the Requesters and other organizations representing Garífuna peoples participated and had the opportunity to provide comment and express their concerns about the Project. This is consistent with OD 4.20.**

When the Panel visited various Garífuna communities in June 2006, however, the team was repeatedly told by Garífuna people who are not part of any organization or group that little or no PATH information had been made generally available in the communities, that notice of informational meetings had not been made widely available, and that those Garífuna consulted were not chosen by the people themselves, but, many believed, by leaders and organizations selected by the PATH personnel. **The Panel saw no evidence of written materials such as brochures, announcements for posting having been sent directly to the communities so as to let the ordinary people know what to expect.**

The Panel also notes the significant concerns about the Project and its “consultation process” expressed in early meetings by organizations representing the Garífuna people,

in particular OFRANEH and ODECO. **The Panel considers that these provided an early indication of potential policy-based problems associated with the consultation mechanism that was eventually to be established for Project implementation.** These issues are considered below.

Consultation during Project Implementation

In line with Bank policies, proper consultations are critical to the implementation of the PATH's component related to indigenous peoples' land. In particular, the execution of a number of Project activities, such as demarcation and titling, depends in large part on the options preferred and the choices made by the indigenous communities.

Under the Project, the Mesa Regional was established as the institutional arrangement for consultations. The Management Response claims that *"under the auspices of the Project, Government invited representatives of a wide range of Garífuna communities and organizations, including Ofraneh, to participate in a meeting to establish an inter-institutional commission to organize the Mesa Regional."* In its Response, Management states that it *"endorses the Government's position to respect the decisions made by the Mesa Regional and individual communities regarding their preferred land tenure regime."*

The Panel reviewed carefully the formation and functioning of the Mesa Regional, in light of the critical role it is given in the land tenure process under the Project. According to records reviewed by the Panel, in early 2005 OFRANEH expressed positive interest in participating, but also stressed that all Garífuna people would have to be consulted about the formation of the Mesa in a transparent way. However, when the invitation to form the Mesa Regional was sent to community leaders and various organizations, including OFRANEH, in February 2005, OFRANEH had decided not to be part of this process because (according to them) the PIU did not accept that the selection of pilot communities to participate in the Project should be discussed by each community before holding a workshop. Subsequently, at a meeting in March 2005, eight communities were selected to be regularized under the PATH and an agreement was reached to establish the Mesa Regional of Regularization and Conflict Resolution of Atlantida and Colon.

The Mesa Regional's constitutive act is a complicated document, which is not easily understood by a non-legal expert. The document states that the Mesa came into existence on March 17, 2005 in the presence of *"leaders of Garífuna communities, Municipal Authorities, a political governor, representatives of AMHON, MAMUGAH, la commission diocesana de la Pastoral de La Ceiba, representatives of OFRANEH and ODECO"* and that its stated purpose is to promote the program of the PATH.

During its visits to the Project area, the Panel team met a number of times with members of the Mesa Regional, attended a Mesa Regional meeting in La Ceiba during its eligibility visit, and attended, as observers, a general meeting of the Mesa Regional and the Mesas Locales in Guadalupe on June 23, 2006. Members of the Mesa Regional in June told the Panel that the Mesa is composed of members of various organizations:

church, patronatos, sport clubs, dance clubs and others. They stressed that the Mesa is an open organization that does not discriminate and is not closed to any Garífuna.

The Panel considers that the initial concept of creating an organization like the Mesa Regional to unite the leaders and representatives of each Garífuna community was not inconsistent with OD 4.20 on Indigenous Peoples in the sense that it represented an effort to establish consultations with and engage the participation of affected people. However, the Panel considers that a consultation framework for Garífuna people in which their leading representative body or bodies are not part and do not give their support and guidance cannot ensure genuine representation of the Garífuna people, as required by OD 4.20.

In this regard, the Panel notes that Management, in its Response, gives the impression that there is little distinction between OFRANEH, ODECO and a range of other civil organizations in terms of representing the Garífuna people. In describing “The Garífuna People”, the Response states that “[a] variety of civil organizations represent the Garífuna” (emphasis in original). The Response then lists these organizations, including OFRANEH, ODECO and many others, in chronological order. The leading role of OFRANEH in representing the interests of the Garífuna people is not recognized; rather, OFRANEH essentially is grouped as one of a variety of civil organizations that represent the Garífuna.

The Panel considers this description to be inadequate. As noted above, OFRANEH is widely recognized as the leading entity representing the Garífuna people, and OFRANEH and ODECO together may properly be considered the two most important Garífuna organizations in representing the Garífuna people in protecting rights over their ancestral lands. In recent years, OFRANEH, in particular, has played a lead role in this effort. **The Panel finds that OFRANEH (and ODECO) are “representative organizations” within the meaning of OD 4.20 and are in a position to provide an effective channel for communicating local preferences.**

In this context, the Panel finds that the Bank’s endorsement of the Mesa Regional as the basic consultation framework for the PATH Project, without the participation of OFRANEH and ODECO, is inconsistent with the core provisions of OD 4.20 on consultation, representation and participation. The Panel is concerned that the Mesa Regional has put in place a parallel system that is at odds with the way the Garífuna people have established, over the years, to represent themselves on the critical issue of securing their rights over land.

The Panel appreciates the difficult situation faced by the Bank in this regard, and acknowledges the extensive efforts made by Management to seek the engagement of OFRANEH and ODECO in the consultation process. These efforts do not, however, alter the risks created by the present situation. The Panel finds that the Mesa system has divided the community and marginalized the existing representatives. It may potentially undercut the ability of its leading representatives to work on behalf of the community to achieve its objective for collective title to ancestral land. It may also make the process of

land demarcation and titling vulnerable to manipulation, contrary to the stated intent, which may result in the harm the Requesters have described and fear.

The Panel also notes that Bank staff interviewed by the Panel could not provide very detailed information about the Mesa Regional, especially with respect to its membership. Rather, they seemed to rely mostly on general information provided by the PIU. **Because of the key role given to the Mesa Regional in the process of land regularization, the Panel finds that closer supervision of the operation of the Mesa Regional by Bank staff, including social experts, is required under the Bank policy on Project supervision, OP/BP 13.05. The Panel finds that supervision of the activities related to the Mesa Regional does not comply with the applicable Bank policy.**

These concerns are illustrated by important developments relevant to the Mesa Regional. On September 28, 2006, there was a meeting among representatives of OFRANEH and senior Government officials, including the Director of INA, the Sub-secretary of State for the Ministry of Governance and Justice, the Secretaries of Environment and of External Affairs, and the Project Implementation Unit (PIU) coordinator. **The signed Aide Memoire of the agreement provided for, among other things, the immediate dissolution of the Mesa Regional.** Given that Management claims that the Government supported the establishment and operation of the Mesa Regional, the Panel asked Management for clarification. Management seemed to have been unaware of this development until it received the Panel's request for information.

On January 10, 2007, the Bank sent the Government a Notice of Threatened Suspension of Disbursement due, *inter alia*, to lack of due diligence in carrying out the Project. The Notice specified a number of conditions that had to be met to avoid suspension of disbursements. Among other things, the Bank requested the Government to:

“Publicly rescind its repudiation of the Mesa Regional Garífuna Wadabula as the Project's participatory consultative framework for Garífuna peoples; or, if the Borrower no longer recognizes the Mesa, submit to IDA the rationale for this drastic change of strategy and agree with IDA on an alternative transparent and non-exclusionary participatory consultative framework for Garífuna peoples in the Project areas, which is consistent with the Project's objectives and meets IDA safeguard policies.” (emphasis added)

The Panel notes that Bank Management, in calling upon the Government to “publicly rescind” its repudiation of the Mesa Regional, or to develop an alternative framework for this “drastic” change - - did not call for further consultations with the affected communities and their leaders to try to better understand the issues and concerns relating to the Mesa Regional. The Panel observes that the continued controversy regarding the Mesa Regional, and the recent document calling for its dissolution, provide another indication of the tensions that have surfaced about the role of the Mesa in representing the Garífuna people.

In light of the controversy and concerns already associated with the Mesa Regional, the Panel finds that the failure to seek input and participation by the affected communities and their leaders is not consistent with Bank policy provisions on consultation with indigenous peoples and on supervision. The Panel finds that Bank Management has not adequately adjusted to the many concerns raised with respect to the existing consultation mechanisms, as required by OD 4.20 and OP 13.05.

Legal Framework

One of the main concerns of the Requesters is that the Project will facilitate the application of certain provisions of the new Property Law which may be detrimental to their property rights and interests, because they fear it may ultimately lead to the loss of their ancestral land and their traditional communal land titles as defined in local legislation and in international conventions. The Request claims that the IPDP assessment of the legal framework was inadequate and not consistent with the provisions of OD 4.20 on Indigenous Peoples because it did not consider the Property Law, which was under discussion in Congress at the time the Project was being developed. In its Response, Management states that “*the Project incorporates appropriate safeguards to fill potential gaps in Honduran legislation to safeguard the rights of Indigenous Peoples.*” Management adds that the content of national laws and regulation is the responsibility of the Government of Honduras and that mechanisms are available for civil society to raise their concerns.

At the time of Project appraisal, some Bank staff members raised concerns about going ahead with the Project before the enactment of the Property Law, and about the implication of some provisions of the draft Law on the property rights of indigenous peoples. Regional Management decided, nevertheless, to continue processing the Project, with two conditions to be implemented: adoption of conflict resolution procedures reflecting the interests of indigenous peoples; and adoption of a legal/regulatory framework to regularize indigenous people lands as a trigger for the second phase of the Land Administration Program.

The Bank conducted an analysis of the legal framework regarding property rights of the indigenous peoples, including the Garífunas living in the Project area, in accordance with OD 4.20 during Project preparation. The Legal Analysis raises concerns about several amendments to the existing legal and institutional framework provided in the Bill of Law of the new Property Law. It states that these amendments must be taken into account in the design of training and outreach programs of the Project. The Legal Analysis also underlines the fact that the proposed Law may provide legitimate title in favor of people whose only claims to land are either uninterrupted possession or the fact that their request for title over the land that they possess has not been opposed by the legitimate owner.

The new Property Law was enacted in June 2004, a few months after the Board approved the Credit for the Project but before the Development Credit Agreement became effective. The Panel notes that the new Property Law contains a number of amendments

to the legal and institutional framework which are consistent with the objective of the Project and constitutes an essential part of the legal framework within which the Project is being implemented. However, the Law also contains some controversial provisions relating to the recognition of the land rights of the indigenous peoples.

OD 4.20 requires that the IPDP contain an assessment of the legal framework in the country, including legal status of affected groups, as reflected in the constitution, laws and regulations. *“Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.”* (para. 15).

OP 7.00 (Choice of Borrower and Contractual Agreements) provides in paragraph 14 that when local legislation is of relevance to the project/program financed by the Bank, the Bank *“tries to work within existing law to the extent possible.”* It adds, however, that *“[i]f the amendment of a particular law would impede the achievement of the project's objectives, the contractual agreements may provide that such amendment would constitute an event of suspension.”* (note 13) This is particularly relevant because a change in existing legislation, namely the passage of the new Property Law, was being discussed at the time the DCA was being negotiated and signed, and the Legal Analysis noted that the new law *“will entail a significant change to the existing legal and institutional framework.”*

In spite of many concerns about the Law raised by Requesters, Bank staff and Legal Analysis before and after the enactment of the Law, that is during Project preparation and after Credit approval, **the Panel did not find any record that these changed circumstances, which are potentially directly relevant for the land rights of indigenous people, were acted upon by Management, aside from an inconclusive exchange of communications between the Region and the Legal Department.**

The Panel further notes that, as required by OD 4.20, the Project provides for some measures to protect indigenous peoples' land rights. These include mechanisms for conflict resolution and the provision of legal advice and training for indigenous peoples, and a covenant in the DCA that requires that *“no titling and physical demarcation of lands adjacent to Ethnic Lands will take place unless procedures that adequately protect the rights of the indigenous and Afro-Honduran peoples, duly consulted with affected parties in a manner satisfactory to the Association and set forth in the Operational Manual, have been followed”* (emphasis added). **However, given the relative weakness of indigenous peoples, acknowledged in the Project documents, and the fact that the new Property Law gives specific rights to non-indigenous occupants of Ethnic Lands that cannot be amended or limited by regulations to the Law or by the provisions of the Project Operational Manual, the Panel finds that these measures are not sufficient to protect indigenous peoples' land rights that may be affected by Project implementation, as required by OD 4.20.**

The Panel notes that, in spite of the key importance of the Property Law to the execution of the Project and the rights of the indigenous peoples, and the concerns of staff and affected people noted above, Management did not include any references or remedies relating to possible negative effects of the Property Law in the DCA for this Project.

This Project is the first phase of an Adaptable Program Loan (APL). According to Bank policy the APL provides for funding of a long term development program, starting with the first set of activities, based on agreed milestones and benchmarks for realizing the program's objectives. The Project will have an immediate effect on indigenous peoples' land rights during this first phase. The adoption of a legal and regulatory framework for indigenous peoples' lands, however, is only a trigger to process the second phase of the APL. **The Panel finds that this is ineffective in protecting the rights of indigenous people during the first phase of the APL. If in the Bank's opinion there was not an appropriate legal/regulatory framework for indigenous peoples' lands, the Panel fails to understand why titling and regularization of indigenous peoples' lands was included in the first phase of the APL rather than the second one when such framework was required to be in place. The Panel notes that to be consistent with the principles and objectives of the Bank's operational policy on Indigenous Peoples, the first phase of the APL could have excluded titling on Ethnic Lands and areas adjacent to Ethnic Lands until the enactment of a suitable regulatory framework.**

Pursuant to the Resolution establishing the Panel, on December 20, 2006, the Panel requested a legal opinion of the Senior Vice-President and General Counsel as to whether the provisions of the Development Credit Agreement were sufficient to avoid harm to the rights of indigenous peoples as a result of Project implementation on Ethnic Lands. Specifically, the Panel requested a legal opinion on the rights and obligations of the Bank (and correlative obligations of the Borrower) to find out *"whether and to what extent the safeguards included in the Project and in the legal documents, including specific provisions of the Operational Manual, effectively protect the indigenous and Afro-Honduran peoples' rights on their Ethnic Lands from the harm that, in their opinion, will result from applying the provisions in Chapter III of the Property Law, with regard to regularization of Ethnic Lands under the Bank-financed Land Administration Project."*

According to the General Counsel, because of the separation of roles between the General Counsel and the Inspection Panel, the question of *"whether the Project provides adequate safeguards (under applicable Bank policies) must be addressed by the Panel through its review of whether the Project meets the applicable operational policy on indigenous peoples."* **The Panel notes and confirms its agreement with the General Counsel's view of the role of the Panel in this regard.**

The General Counsel's response also contains a discussion on the *"Relevance of Honduras Property Law."* It states that regulations to the Property Law have not been issued yet, and, as a result, the Law's chapter on Ethnic Lands has not been used to title and register land and *"has not been tested either domestically or against the provisions*

set forth in the Project's Development Credit Agreement." For this reason, the General Counsel believes that a legal opinion on the "*outcome of such a test ... would be purely speculative*" and not "*determinative*."

The Panel notes that the legal context in which a Project is designed and implemented is very important, as recognized by Bank policies. In this Project, the legal context is important also because the Requesters claim that the Project will facilitate the implementation of a Law that they believe is highly detrimental to their rights and interests. The fact that regulations have not yet been issued and that the alleged harm feared by the Requesters is, at this stage, potential, does not exempt the Bank from analyzing the potential implications of the Law as part of the analysis of "legal framework" as required by OD 4.20. **The Panel finds that Bank policy required Management to carry out this analysis in relation to this Project after the Law was enacted.**

Environmental Compliance

Environmental Assessment

The Panel reviewed the Environmental Assessment (EA) and related documents to assess their consideration of the issue of the possible overlap between protected areas and Garífuna lands, in light of the concerns stated by Requesters. The Panel notes that the environmental assessment for the Project identifies the possible overlap of protected areas and Garífuna lands as a potential impact of concern, [Matrix A], and the possibility that communities would be restricted from these areas. The EA also notes that the planning process for protected areas was created "*without considering the social, cultural and environmental conditions of the communities*" and states the "*imperative*" to formulate policies relating to protected areas in an integrated way with communities.

The Panel finds that the identification of the issue of overlap between protected areas and Ethnic Lands in the EA complies with OP 4.01. The Panel also finds that the provision of the Process Framework providing for the recognition and demarcation of land areas in favor of indigenous communities in case of the mentioned overlap is consistent with the objectives of the OD 4.20 on Indigenous Peoples.

However, the Panel notes that the implementation of the Process Framework may face challenging circumstances. An example of this is the particular situation of the Punta Izopo National Park, which overlaps with land claimed by the community of Triunfo de la Cruz in the Department of Atlántida. Punta Izopo is a national park of 18,820 ha at the far eastern end of the Triunfo de la Cruz communal land claim and was formerly an area utilized by the community for hunting and gathering activities. It is also adjacent to important community fishing grounds. Punta Izopo was declared protected area in 2000 and is now managed by the Fundación para la Protección de Lancetilla, Punta Sal y Texiguat (PROLANSATE).

The Panel was informed by the local communities, and has found confirmation of these allegations in the Central American and Caribbean Research Council (CACRC) study, financed by the Bank, that many parts of this protected area have been fenced off and access prohibited. The members of the community of Triunfo have no access to this area, except to the ocean areas, although they claim this is land that belongs to the community. Many Garífuna residents of Triunfo de la Cruz have not visited this section of their territory for years because they are afraid of security guards.

The Panel notes that the situation of Punta Izopo is an example of how, in reality, questions relating to the demarcation of protected areas have been and may be influenced by economically powerful vested interests. This could have a serious adverse effect on the ability of these local communities to protect their interests during this process, and diminish the practical effectiveness of the safeguards included in the Process Framework.

With respect to other areas claimed by the Garífuna communities, such as the Rio Tinto Forest Reserve, which has not yet been legally declared as protected area, the Panel notes that the EA states as follows:

“The Government of Honduras should regularize the property rights of the various ethnic groups in the country, principally through recognition of communal property in accordance with ILO Convention 169. Therefore, the Government should not designate more protected areas in zones where there are autonomous communities until their property rights are clearly defined, thereby safeguarding the interests of these communities.” (EA, subpart g)

The Panel finds that this statement provides a potentially important response to address the concerns of Requesters and complies with OD 4.20. The key issue, in this regard, will rest in its effective implementation.

Management or Co-Management of Protected Areas

The Panel considered the Requester’s claim that the EA does not address arrangements to enable the Garífuna communities to manage or co-manage protected areas so as to restore their control over the “*functional habitat*” that they have preserved for centuries, and does not contemplate the involvement of indigenous peoples in management of the protected areas. The Panel notes that the question of management of protected areas arises under OP 4.01, as management arrangements and the extent to which local communities are involved may strongly influence the achievement of environmental and other objectives within these areas

Management states that the Process Framework and Environmental Management Plan include provisions for co-management of protected areas by agencies, NGOs, and local communities. The Panel notes that the Process Framework contemplates situations where indigenous communities would be engaged in co-administration of protected areas, but

prefaced by the statement that this is contemplated “[i]n those limited cases there [sic] the presence of indigenous communities coincides with protected areas . . .”

In addition, the Environmental Assessment generally identifies organizations other than indigenous communities in relation to management responsibilities. This point is highlighted in the Request, with reference to the examples of Sierra Rio Tinto and Punta Izopo. The Panel notes the explanations provided by Management with regard to the management of these areas and, more generally, the EA table-listings. **In light of these considerations, the Panel finds that the commitments referred to in Project documents to have indigenous communities maintain or acquire management and co-management responsibilities over designated protected areas that may include their lands complies with OP/BP 4.01 on Environmental Assessment and OD 4.20 on Indigenous Peoples.**

The Panel is concerned, however, that local Garífuna communities having claims in listed areas are not mentioned in the EA as having a role or even a potential role in their management, even though other organizations (NGOs) are so identified. The Panel considers that the role of these communities in managing and/or co-managing of these lands is important under Bank policy because, among other things, it will likely affect the long-term health and well-being of the habitat in those lands and the people who depend on them. The Panel notes that OP 4.04 on Natural Habitats provides that the “*Bank expects the borrower to take into account the views, roles, and rights of groups, including local nongovernmental organizations and local communities, affected by Bank-financed projects involving natural habitats, and to involve such people in planning, designing, implementing, monitoring, and evaluating such projects.*” (Paragraph 10)

Project Implementation: Institutional Structures

The current institutional structure for the titling of lands in Honduras involves a number of different entities. The Requesters are concerned that the institutional structure, supported by the PATH Project, will not protect the interests of the Garífuna people on Ethnic Lands and in keeping collective titles. They claim, in particular, that Project implementation is not consistent with the requirements of OP 4.20 and its provisions regarding the preparation of an Indigenous Peoples Development Plan (IPDP).

The 2004 Property Law created a new regulatory framework for legalizing and registering land titles. Under the new framework, the municipalities, INA and the IP will play the main roles in regards to legalizing, titling, and registering land titles. The Property Institute was created under the 2004 Property Law and is housed within the office of the President. INA is the executor of the agrarian policies of the Government and is competent with respect to any aspect and issue related to lands destined to be part of the agrarian reform. It is the agency responsible for issuing titles in rural and ethnic areas.

The municipalities generally demarcate the boundaries of their territory, and regulate the urban development. Municipalities may also decide whether to enlarge urban boundaries. As noted, they may grant title over municipal land to third parties. This power has created conflicts with a number of Garífuna communities, who claim that the municipality has granted rights to lands that Garífuna claim have communal land rights.

According to the Property Law, the IP maintains, updates, and operates the property registry and cadastre, administering an integrated system of information on property rights in Honduras. The IP issues titles for lands that were not registered under the old Registry of Immovable Property, and registers the titles issued by INA and the municipalities. According to the Property Law, the IP must also regularize and issue titles on land parcels on which people have settled before 1999 and for which it is either not possible to determine who is the legitimate owner among the occupants because of overlapping titles, or the validity of these titles is under dispute by a third party not living on that land parcel.

In February 2007, the Project Implementing Unit (PIU) for the PATH was shifted from the SGJ (Ministry of Justice) to the Property Institute.

The Panel finds that the Requesters do not trust the new system for issuing titles. They oppose the new regularization process because they believe that, even if they maintain the full property communal title they were given during the titling policies of the 1990s, no extension of their titles would be possible (the so-called *ampliación* they seek). It may not be possible, in their view, to recover Garífuna land illegally occupied by third parties, because funds to compensate those now occupying the lands are not available (the process of “*saneamiento*”, or regularizing title).

The Panel notes that the Government officials with whom the Panel met stated that no resources have been earmarked and pledged to indemnify third parties who hold annullable titles in Ethnic lands. The Bank needs to address this issue fully to be consistent with OP 13.05.

Inter-Sectoral Commission

During its investigation, the Panel learned of the existence of the Inter-Sectoral Commission for Protecting Land Rights of Garífuna and Misquito (also “Miskito”) Communities. The Commission was created in 2001 by Executive Order No. 035-2001 signed by the then President of the Republic of Honduras. This commission is intended to help guarantee the property rights of the Garífuna and Misquito communities. The authority extends to the titling, extension, recovery and protection of the lands. This protection would extend not only to the lands occupied by these communities, but also to those “*that constitute their functional habitat and are regarded as ancestral [lands] under the ILO Convention No. 169.*”

The Members of this Commission include key officials of government institutions responsible for land titling and protection issues relating to the Garífuna and Misquito communities, and chosen representative entities for those communities. **In the case of**

the Garífuna, these are specified as OFRANEH (the Requesters) and ODECO. The Requesters called the Panel’s attention to the existence of the Inter-Sectoral Commission because, in their view, it is an important instrument for protecting their rights over the lands that they traditionally occupy and have been losing over the last decades.

The Panel notes that the Project’s IPDP, however, makes no mention of the Inter-Sectoral Commission. The Commission is mentioned only in the Project’s Social Assessment (SA), in a brief reference which states that the IPDP must define an institutional mechanism for participation of, and support by, the indigenous communities in Project implementation. Neither the Legal nor the Institutional Analysis mentions the creation of the Commission. **The failure of the IPDP to mention the Inter-Sectoral Commission for Protecting Land Rights of Garífuna and Misquito People is of particular concern given that the IPDP reviews the relevant legal framework and institutions and, on this foundation, proposes a “Model” approach for community involvement in the land titling process.**

The Panel observes that this omission may have had practical significance. The nature of consultations and decision-making in relation to Garífuna land rights has become a major controversy under the PATH. **The Inter-Sectoral Commission was designed specifically to defend the interests of indigenous peoples, contained provisions for their adequate representation, and engaged senior, decision-making levels of Government.** As a result, the Commission might have played a significant role in helping to address the concerns that have been raised, in support of the rights and interests of Requesters and the people they represent. **The Panel finds that the failure to identify the Commission in the IPDP and to assess its potential importance in the land titling process under the Project does not comply with OD 4.20**

Conflict Resolution

The Garífuna people have pursued varying means to resolve disputes over land titles, including through the court system in Honduras and petitions to the Inter-American Commission on Human Rights. The Project IPDP sets forth another set of procedures for resolving disputes, including through arbitration and the use of Mesas at the local and national levels. The new Property Law, adopted following the approval of financing for the Project, provides its own special abbreviated procedures for conflict resolution. In addition, the Project gives the Mesa Regional a role in conflict resolution during Project implementation.

The Panel notes important positive features in the IPDP, including budget allocations for capacity building and training of local community leaders on national laws, and for training of arbitrators and conciliators. This is consistent with the stated intent of the IPDP to protect indigenous peoples from the results of depredations and invasions of their territory.

The Panel notes, however, the potential impact of power and/or class divisions in the resolution of conflicts, both in the past and perhaps more recently. OD 4.20 (paragraph

15) requires that the IPDP contain an assessment of the ability of the indigenous peoples “to obtain access to and effectively use the legal system to defend their rights.” **The Panel is concerned that the IPDP does not adequately reflect or address the risks posed to the Garífuna people by its proposed means of resolving conflicts. These include, in particular, risks posed by disparities of power in the process.**

The use of Mesas (Boards) for conflict resolution is of particular concern in light of issues relating to representation of the Garífuna people, as described above. The identification of the *real representatives* of the indigenous communities is a matter of great importance for the correct, transparent and fair functioning of these conflict resolution systems. **Substantial and informed supervision by Bank staff, especially specialists in indigenous peoples matters, to ensure that the process is fair and that affected communities effectively participate in identifying their leaders and representatives, is of central importance to ensuring compliance with relevant Bank policy.**

The Panel notes the concerns of Requesters that the existence of multiple conflict resolution procedures, including those in the IPDP, in the new Property Law, and others (described in this Report) generates confusion in the communities. **Understandably, these many instances or options have created confusion and anxiety among the affected communities. The Panel finds that there is a need for clarification and consultation with the affected communities as to which procedures apply, and a need for better dissemination of this information**

Concluding Observations

The Project was intended to advance the titling of lands in Honduras, as an essential step to advance economic development in the country. The Panel recognizes the importance of these objectives. While the Project focuses on individual titling, the Project also includes a component on collective titling, with the proviso that communities can opt out of participating in the program. This was intended to protect the Garífuna and Misquito communities.

However, the Panel finds that the Project may have consequences far different than intended by the Indigenous Peoples Development Plan. The Panel finds merit in the concerns of Requesters that the Project may contribute to the demise of titles and claims to collective lands held by the Garífuna and indigenous peoples. In this sense, the Project may not protect the cultural integrity or economic base of some of the poorest communities along the Caribbean coast.

The Panel found that most members of the Mesas believe they were established to confirm and expand community titles and to get the *saneamiento*. In reality, the Mesas may not be effective in furthering collective titles, and may facilitate the opposite. The Panel notes concerns that municipalities may expand their urban limits over Ethnic Lands and grant individual titles to former communal lands and other lands that were formerly rural. The Panel was informed, for example, that all of the island of Roatán has been

declared to be municipal or urban land. Once designated as urban lands, the municipality, not INA, has authority to issue the titles. The Property Institute has responsibility for registering all titles.

The Panel also notes that the establishment of the Mesa Regional led to a situation where the already existing Inter-Sectoral Commission for Protecting Land Rights of the Garífuna and Misquito People was ignored. After the Panel inquired of the Bank about the status of the Commission late last fall, and after several government officials and others signed an “*Acta*” (Minutes) calling for the dissolution of the Mesa, the Bank responded by pressing strongly for the Mesa to be recognized as the appropriate body for dealing with Garífuna issues of title to lands. **The Bank’s position thus reinforced the power of an entity, (the Mesa), which has operated outside existing institutions and lacked the participation of the leading representatives of the Garífuna people in their struggle for land rights over many years.**

It is easy to understand why individuals would want to participate in the Mesas. For participants, it offers an official channel through which to present the interests of the Garífuna as they see them. Moreover, participants receive payment for travel expenses and *per diem* for all meetings, which in the context of the poverty of the Garífuna communities may constitute a significant benefit.

The Project entails legalizing the standing of the Mesas as community representatives. There is a danger that the Mesas, as developed during Project implementation, will become independent organizations that will supplant the traditional patronatos and other existing civil society groups and may create further divisions within the Garífuna communities. Moreover, powerful people who are not members of the Garífuna communities may be able to exert significant influence.

Among the Garífuna people interviewed by the Panel and its experts, there is broad consensus favoring communal title of Ethnic Lands. There is a possibility, however, that the Project as it stands will provide individual titles to families in Garífuna and indigenous communities, who will sell their land for prices which are attractive to them but inexpensive to the buyers. Individuals in poor communities may be most tempted. The Panel notes that it received comments from various quarters that the Project may have the effect of splitting the Garífuna communities, which could facilitate the eventual loss of collective titles and the rise of individual titles across the valuable land area fronting the Caribbean coast in Honduras.

As noted elsewhere in this Report, Management claims that communities are free to choose whether they want to participate in the Project and “*individual communities can avoid the potential harm alleged by the Requesters by choosing not to participate in the Project.*” The Panel doubts, however, whether there is a meaningful option for most communities not to participate in the demarcation and titling activities provided under the Project. The new Property Law, enacted after the Credit was approved by the Board, grants specific rights to non-indigenous peoples who occupy and hold a “valid title” within Ethnic Lands. As a result, these non-indigenous title holders may trigger title

regularization activities in Ethnic Lands. Communities may face a choice of participating in a Project which, as currently structured, they believe does not represent their interests, or attempt to opt out of the Project and face significant challenges from non-indigenous people occupying and claiming rights over their Ethnic Lands. **Given the relative economic and political vulnerability of the indigenous peoples, the Panel finds that the safeguards provided under the Project are not adequate to protect the Garífuna rights over their Ethnic Lands in the context of Project implementation.**

Chapter I: Introduction

A. Events Leading to the Investigation

1. On January 3, 2006, the Inspection Panel received a Request for Inspection⁵ (the “Request”) related to the Honduras: Land Administration Project (“the Project” – in Spanish *Programa de Administración de Tierras de Honduras*, PATH).⁶ The Request refers to alleged negative impacts of the Project on the Garífuna people and their land claims. The Request was received in Spanish and includes 13 attachments.
2. The Organización Fraternal Negra Honduras (OFRANEH) submitted the Request on behalf of the indigenous Garífuna population of Honduras. OFRANEH states that it is a federation whose members are elected every three years by the Garífuna communities as their representatives.
3. The Panel registered the Request on January 10, 2006 and notified the World Bank Board of Executive Directors (“Board”) and the President.
4. On February 9, 2006, Management submitted its Response to the Request for Inspection.⁷

1. The Request

5. The following paragraphs summarize the Request. The Requesters’ specific claims will be addressed in more detail later in the Report.
6. The Requesters claim that in the design, appraisal and implementation of the Project the Bank did not take the rights and interests of the Garífuna people into consideration and, as a result, violated its own policies and procedures.⁸ More specifically, the Requesters claim that the Bank violated OD 4.20 on Indigenous People, OP/BP 4.01 on Environmental Assessment and OP/BP 4.04 on Natural Habitats.

⁵Request for Inspection, received by the Inspection Panel on January 3, 2006.

⁶ In this report, the Spanish acronym “PATH” will also be used to indicate the Project.

⁷ Bank Management Response to request for Inspection Panel review of the Honduras Land Administration Project (Credit No. 3858-HO), [hereinafter “Management Response”].

⁸ The Request also presents an overview of the history of the Garífuna people, which the Requesters believe is useful to understand the magnitude of the damage that the Project implementation may cause to them. Request, p. 9. See also Chapter Two of this Report.

7. The Request also refers to the ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries. It states that the Convention, ratified by Honduras in 1994, recognizes the rights of the peoples with respect to the ownership and tenure of the lands they traditionally occupy, as well as the special protection of the natural resources of these lands. The Requesters state that Bank policies are designed, among other things, to ensure that rules and standards under such international agreements are respected.

Land Rights and Collective Title

8. The Requesters note that, under the Project, ancestral lands are to be regularized in favor of indigenous and Afro-Honduran populations by recognizing communal or individual land rights, based on the preference of each community, and by registering such rights in the land registry.
9. While the Requesters observe that properties and possessions supported by ancestral title or certification can be registered as private property and enjoy full ownership rights, they fear that the land titling and procedures provided under the Project will ultimately cause the demise of collective property in favor of individual property, which is contrary to their preferred land tenure system. According to the Requesters, the Project does not reflect the special legal situation of the Garífuna people.
10. The Requesters believe that implementing the Project will endanger the survival of the Garífuna people *“because they cannot agree to solutions unless they are based on a concrete will to resolve the conflicts and recognize the rights over the lands that ancestrally belong to them.”*

Consultation, Representation and Disclosure

11. A major claim of the Request is that the Project has failed properly to consult with and identify the needs and interests of the affected communities, and has failed to consult adequately with people that are the legitimate representatives of the affected communities.
12. The Requesters claim that few consultative meetings were held, and for these few meetings, Management failed to distribute background material in advance. The Requesters also assert that their criticisms and proposals made at these meetings were not taken into account.
13. The Requesters claim that there was a failure of consultation in the preparation of the IPDP. They allege that affected people were not consulted prior to preparing the plan, and that the text of the plan was disseminated only a short time before the single consultative meeting relating to the IPDP took place. In that meeting, the Requesters claim, the representatives of all the Garífuna

communities of Honduras signed a document that presented a firm rejection of the IPDP, and proposed several alternatives.

14. The Request also refers to a meeting held in 2005 in which pilot communities for the Project were selected. They claim that the interested communities did not receive information about the Project in advance of the meeting, and that no explanatory material was distributed. According to the Requesters, the representative of the *Patronatos*⁹ of one of the communities refused to sign the document related to the pilot activities.
15. One of the Requesters' main concerns relates to the issue of representation. They claim that consultations did not include people that are the legitimate representatives of the Garífuna communities, and they object to the establishment of the Mesa Regional, a "*consultation board*" created by the Government under the PATH. They state that the Mesa Regional is an institution not recognized by OFRANEH because it "*has been created in spite of the disagreement of the communities, was not elected by the communities, [and] is not an organization that represents them.*" The Requesters believe that the Mesa is composed of people who cannot be considered Garífuna representatives and that it is alien to their own institutions.

Indigenous Peoples Development Plan and Legal Framework

16. The Requesters allege that the IPDP for the Project fails to meet Bank policies. They claim that the conflict resolution method provided for in the IPDP, arbitration, not only is unconstitutional but is also different from the one called for in the Property Law.¹⁰ According to the Requesters, neither set of procedures responds to their social and political reality.
17. The Requesters claim that, in preparing the IPDP, the Bank failed to consider the legal status of the indigenous populations as well as the procedures to issue collective legal titles. The Requesters also complain that the IPDP, in its legal framework section, failed to reference and properly take into account the proposed new Property Law of Honduras, which was to be the center piece of the land titling program. They claim that the Project failed adequately to address the serious concerns of communities about the potential impact of the Property Law, and its relationship to procedures and actions under the Project.
18. The Requesters also state that the IPDP provides for the issuance of regulations to delimit and demarcate indigenous peoples' lands, but these were never issued. According to the Request, the IPDP provides for the creation of an "Indigenous Affairs Unit" (*Unidad de Asuntos Indígenas*) which would be in charge of carrying out and monitoring the titling procedures for indigenous

⁹ For more details about the patronatos see infra Chapter Two and Three.

¹⁰ The Property Law was under consideration in Honduras as a proposal at the time of Project appraisal. It was adopted by the Government in June 2004.

peoples' lands. It is unclear to the Requesters how this latter institution will coordinate its work with National Agrarian Institute (*Instituto Nacional Agrario* – INA) and which titling procedures will be applied.

19. The Requesters further claim that, even if these regulations were issued, this would only generate more confusion among the people regarding the applicable procedures to file territorial claims.

Environmental Assessment and Natural Habitat

20. According to the Request, the Bank did not comply with OP 4.01 on EA because, although the environmental analysis addresses the problems affecting the Garífuna land, it does not provide that the Garífuna communities may manage or co-manage their land to restore their control over the “*functional habitat*” that they have preserved for centuries. Similarly, the Requesters claim that the demarcation of the water limits is not being carried out and they are not aware of any measures that would support the permanent presence of the members of the communities in the protected areas.
21. Additionally, the Requesters, who consider their land as their functional habitat, are concerned that it could be given to people outside the Garífuna communities. They allege that the Project did not take into account the importance of natural habitats for the livelihood of the Garífuna communities, as required by OP 4.04 on Natural Habitats. According to the Request, the management of these areas is already given to institutions defined in the Project's manual, and in particular to NGOs with no participation of indigenous communities provided or required.

2. Management Response

22. On February 9, 2006, Management submitted its Response to the Request. Management claims, as of the date of the Response, that no implementation activities involving surveying, demarcation, conflict resolution and titling have taken place in any Garífuna lands. Management adds that, in any event, when these activities occur, appropriate safeguards are built into the Project to protect indigenous people's lands.

Land Rights and Collective Title

23. In its Response, Management states that the Garífuna communities face various and long-standing unresolved land conflicts among community members, with third parties, and with national and local authorities. The reason, according to Management, is that different types of ownership coexist in the region, and that past titling programs have not been satisfactory to the Garífuna people.

24. As to collective and individual titling, Management asserts that it has analyzed Honduras' legal framework vis-à-vis the issue of collective versus individual titles. Management states that the Project does not favor individual titling in the Garífuna communities but establishes procedures that protect the rights of Garífuna communities.
25. Management also states that, as of the date of the Response, no implementation activities involving surveying, demarcation, conflict resolution and titling have taken place in any Garífuna lands. Management emphasizes that community participation in the Project is voluntary and thus land demarcation and titling will occur only in those communities willing to participate in the Project.

Consultation, Representation and Disclosure

26. Management claims that it has held meaningful consultations and open dialogue with all Garífuna stakeholders and states that extensive consultations are held before field activities.
27. According to Management, OFRANEH has participated in several consultation events, including during Project preparation and implementation. Management specifies that a “*wide range of Garífuna stakeholders*” was consulted for the preparation of the Social Assessment and the IPDP. Management also claims that the Requesters did not participate in all the consultation meetings to which they were invited. It also claims that proposals made by affected people during consultation meetings were taken into consideration in Project design.
28. With respect to the IPDP, Management states that OFRANEH participated in two consultation events and the participants agreed to consult their communities to appoint representatives to form a *Mesa Nacional Indígena*, a consultation board that would facilitate the participation to the Project of the affected indigenous communities. The Response states that the Government decided, later on, to form two ethnic-based consultation boards – in Spanish, *Mesa Regional* – one for Garífuna and one for Misquito indigenous peoples. Management claims that at the two above-mentioned meetings no major objections to the Project were raised.
29. Management states that the Mesa Regional is a consultation board that includes many Garífuna stakeholders. Management states that in 2005, 112 Garífuna people, including representatives of 25 communities, members of *patronatos*, municipalities, the Garífuna church organization and organizations representing the Garífuna people, established the *Mesa Regional de Regularización y Resolución de Conflictos* (Regional Board of Regularization and Resolution of Conflicts), operating under the principle of non-exclusion.
30. Management notes that one representative of OFRANEH is part of the Mesa. It also claims that currently the leadership of OFRANEH is under dispute, and the

OFRANEH-Requesters refused to participate in the meeting that created the Mesa Regional.

Indigenous Peoples Development Plan and Legal Framework

31. Regarding the Property Law that the Request mentions, Management emphasizes that the Government passed it after the Bank Board of Directors had approved the Project. According to Management this explains why the Law is not discussed in the Project documents. However, Management stresses that the Project design takes it into consideration and provides mechanisms for a continuous flexible adaptation of the Project to the new Law.
32. Management also states that it found the new Property Law acceptable and determined that the safeguards provisions were not in conflict with the Law. Management notes that these Project safeguards provide that the Bank must issue its no-objection to any updating of the IPDP, for example with respect to the land regularization and conflict resolution procedures, which have to be based on meaningful consultations. As to the still un-issued regulations on land regularization mentioned by the Requesters, they have yet to be issued because a draft document is currently subject to consultations with indigenous communities.
33. Management states that the arbitration procedures included in the IPDP are consistent with national law in force at the time of Project preparation and are in compliance with OD 4.20. Management adds that the Project recognized that access to justice for Garífuna people is limited, and thus provided for budgetary allocations, within the IPDP, to create training programs for local community leaders on national law and regulations related to the Project and for conciliators and arbitrators. With respect to the territorial claims presented to the Inter-American Commission on Human Rights (IACHR), Management states that it takes no position with respect to these claims before the IACHR.

Environmental Assessment and Natural Habitat

34. The Response notes that the Project was assigned environmental Category B and the EA identified a possible overlap between existing communities and protected areas. For this reason a Process Framework and Environmental Management Plan was developed. Under the Project, the demarcation of protected areas will occur only if and when local communities agree. According to the Process Framework, co-management of protected areas by agencies, NGOs and communities will be possible, and strict provisions for the recognition and demarcation of land areas in favor of indigenous communities are envisaged for the cases of overlap between land claims and protected areas.

35. Regarding natural habitats, Management states that the Project establishes that only legally established protected areas are eligible for demarcation; no Project field activities will take place in or near a proposed protected area; and procedures to protect the interests of the people must be in place before demarcation or titling occur on lands adjacent Ethnic Lands. Management also asserts that no protected area was “*delivered*” to NGOs as claimed by the Requesters. Rather, Management notes, the Project EA includes a comprehensive inventory of existing and proposed protected areas as well as factual information regarding the organizations involved in the management of those areas.
36. Finally, Management asserts that the Project provides for mitigation activities, i.e. exclusion of proposed protected areas from demarcation, and inclusion of “*chance find procedures in the Process Framework*.”

3. Eligibility of the Request

37. To determine the eligibility of the Request and the Requesters, as set forth in the 1993 Resolution establishing the Panel and the 1999 Clarifications, the Panel reviewed the Request for Inspection and Management Response. The Panel Chairperson, Professor Edith Brown Weiss, together with Deputy Executive Secretary Peter Lallas and Operations Officer Tatiana Tassoni visited Honduras from February 12 to February 17, 2006. During their visit, the Panel Members met with the signatories of the Request for Inspection and members of Garifuna communities, Bank staff, national and local authorities, and members of the project’s Mesa Regional. The Panel visited the cities of Tegucigalpa, La Ceiba and Trujillo, and also met with Requesters and other affected people in the communities of Sambo Creek and Guadalupe.
38. The Panel determined that the Request fulfilled the eligibility requirements for inspection. The Panel recommended an investigation to the Board of Executive Directors because the Request and the Management Response contained conflicting assertions and interpretations of the issues, facts, compliance with Bank policies and procedures, and actual and potential harm.
39. On March 30, 2006, the Board approved the Panel’s recommendation to conduct an investigation into the matters alleged in the Request for Inspection. The Request, Management Response, and the Panel’s Report and Recommendation were made public shortly after the Board authorized the inspection sought by the Requesters.

4. The Investigation

40. The purpose of the investigation was to establish whether the Bank complied with its own policies and procedures in the design, appraisal and implementation of the Project, and whether, if instances of non-compliance were found, they caused, or were likely to cause, harm to the Requesters and the people they represent. Panel Chairperson Edith Brown Weiss and Panel Member Tongroj Onchan served as co-Lead Inspectors for the Panel's investigation.
41. The Panel conducted a two-part investigation. The first part involved detailed research into Bank records related to the Project, interviews with Bank Staff, and a review of relevant documents and scholarly literature. The second part took the form of two in-country fact-finding visits. To assist in the investigation, the Panel retained an anthropologist, Dr. Nancy Gonzalez, who is an internationally recognized expert on the history, life and culture of the Garífuna people, especially of Honduras. Dr. Edmund T. Gordon, Director of the Center for African and African American Studies, in the College of Liberal Arts at the University of Texas Austin and member of the Caribbean Central American Research Council also provided the Panel with important information regarding the history and the social organization of the Garífuna people. The Panel further benefited of the assistance of a Garífuna consultant from Belize, Ms. Phyllis Cayetano, who, among other things, interpreted the Garífuna language for the Panel.
42. Panel Member Tongroj Onchan, Executive Secretary Eduardo Abbott, Operations Officer Tatiana Tassoni, and the expert consultants Nancy Gonzalez and Phyllis Cayetano, visited Honduras from June 19-26, 2006. During the visit, the Panel met with the Requesters and other people in Project-affected communities, Government authorities, Project officials and Bank Staff in Tegucigalpa. The Panel visited a number of Garífuna villages, including the towns of Guadalupe, Santa Fe, San Antonio, Cristales, and Limón. Panel Chairperson Edith Brown Weiss, together with Executive Secretary Eduardo Abbott, and Operations Officer Tatiana Tassoni, returned to Tegucigalpa to complete the investigation, from October 2-9, 2006. In Tegucigalpa the Panel met again with Government authorities, Project officials, Bank staff and the Requesters.
43. The Panel also interviewed Bank Staff in Washington, D.C. before and after visiting the Project-affected area, and in the Bank office in Tegucigalpa. In its investigation, the Panel identified and carefully reviewed all documents relevant to the case that the Requesters, Bank Staff, and other sources provided to the Panel. The Panel also analyzed other evidence gathered during the field visits or otherwise in its research, including scholarly literature.

44. This Report presents the results of the Panel’s investigation regarding the social and environmental issues the Requesters raised in their submission to the Panel.

5. Bank Operational Policies and Procedures Applicable to the Project

45. With respect to this Project, the Panel assessed whether the Bank complied with the following applicable operational policies and procedures:

| | |
|-------------|--------------------------|
| OP/BP 4.01 | Environmental Assessment |
| OP/BP 4.04 | Natural Habitats |
| OD 4.20 | Indigenous Peoples |
| OP/BP 13.05 | Project Supervision |

B. The Project

46. According to the Project Appraisal Document (PAD), the Government of Honduras is implementing major legislative reforms on territorial planning, property rights, forestry and sizable public investment, overlapping titles, and related issues, to address problems of insecurity of land tenure.¹¹ Insecurity of land tenure is a source of social instability and a major constraint to investments. Land rights in Honduras are poorly enforced and this results in overlapping titles, illegal occupation of land and even violent disputes. The PAD also notes that the historical land claims of indigenous and Afro-Honduran communities complicate this situation even further. For these reasons, the Project was developed as an important instrument to facilitate the implementation of the Government reform strategy.¹²
47. **Project Objective:** According to the Development Credit Agreement the objective of the Project is “*to establish and operate (as part of the broader Program) an integrated and decentralized land administration system, composed of public and private entities, which provides users in the Project area with accurate information on urban and rural land parcels and effective land administration services (e.g. purchases, mortgages, cadastral and registry certifications) in a timely and cost-effective manner.*”¹³ The Project is designed to address land tenure issues throughout the country.
48. Moreover, the PAD refers to “*higher level objectives*” to which the Project contributes and states that “[i]t is hoped that a reliable and widely accessible

¹¹ At the time of Project design, in Honduras, only about 30 percent of the estimated 2.6 million land parcels were registered in the property registry. See PAD, pp 1, 16.

¹² Project Appraisal Document (PAD) Land Administration Project in support of the first phase of a Land Administration Program, January 22, 2004, p. 1.

¹³ Development Credit Agreement (Land Administration Project) between Republic of Honduras and International Development Association, August 18, 2004, [hereinafter “Credit Agreement”], Schedule 2.

*land administration system in Honduras, with the power to guarantee a national property rights system will ultimately increase economic growth as tenure security will stimulate private investment ...". According to the PAD "[s]ecure land rights will also feed in to the broad goal of sustainable development ..., and improved governance in the country"*¹⁴

49. **Project Components:** The Project is composed of three parts (A, B and C) respectively aimed at developing policy framework and institutional strengthening for the creation and operation of a National Property Administration System¹⁵ systematizing the regularization, titling and registration of lands in the Project area; and carrying out monitoring and evaluation activities. The first component aims at the policy framework and institutional strengthening; the second component involves areas-based systematic land regularization, titling, and registration; and the third component includes project management and monitoring as well as evaluation.¹⁶
50. The Request refers only to specific parts of the Project that involve alleged negative impacts on the Garífuna People and their land claims: it does not refer to other Project components.
51. Particularly relevant to the claims presented in the Request for Inspection is the Project's Part B, which provides for systematic land regularization, titling and registration of lands in the Project Area. Under this component, the Project will carry out field surveying of macro boundaries (e.g. municipal lands), urban and rural areas, forests, protected areas and Ethnic Lands.¹⁷ Part B further provides for parcel-level surveying and validation in the form of systematic cadastral field surveys of urban and rural areas to demarcate property boundaries and property rights in each parcel. Legalization, titling and registration of these lands will then be carried out. The PAD states that this Project component will be implemented in seven regional departments of Honduras: Cortes, Francisco Morazán, Comayagua, Atlántida, Colon, Gracias a Dios and Choluteca.¹⁸ According to the PAD, Ethnic Lands are to be surveyed, regularized, titled and registered in the departments of Atlántida, Colon and Gracias a Dios.
52. The Project is the first phase of a three-phase Land Administration Program, which provides for establishing a fully integrated and decentralized National Property Administration System (SINAP) to increase security and transparency

¹⁴ PAD, p. 2.

¹⁵ In Spanish Sistema Nacional de Administración de la Propiedad – SINAP.

¹⁶ PAD p.4.

¹⁷ PAD p. 2 According to the PAD, "[f]ollowing the ILO 169 Convention, of which Honduras is a signatory, for the purposes of this project, the term Ethnic Lands means "those lands that have ancestrally and historically been settled by Amerindian groups and/or Afro-Honduran communities for their use and that constitute their habitat on which they undertake their traditional productive and cultural practices." See also, Credit Agreement, Section 1.02 (e). In this Report Ethnic Lands will also be referred to as ancestral, indigenous or traditional lands.

¹⁸ PAD, p. 3.

in land issues, improve governance and “*stimulate the emergence of secondary financial markets such as insured bundled mortgages*”.¹⁹

53. The PAD states that Phase I of the program – the Project subject to the Request for Inspection – provides for, *inter alia*, incorporating in the national property administration system/SINAP real estate property located in the seven above-mentioned departments. More specifically, it integrates geographic data from the cadastre with alpha-numeric data from the registry under the so-called parcel-based (folio real) registration method, as opposed to the personal registry.
54. Phase II, to be started in 2008, aims at completing the parcel-based regularization and registration initiated under Phase I, expanding these activities to seven additional departments, and integrating into SINAP other property registries, such as movable assets, intellectual property etc.
55. Phase III, set to start in 2012, provides for, among other things, the completion of the regularization and registration of all urban and rural land parcels and the integration and consolidation of all property registries under SINAP.²⁰
56. The Project’s development indicators are, *inter alia*, that the system maintains a 96 % rate of tiled lands accurately registered in SINAP that at least 70% of the SINAP users give a satisfactory rating and that conflicts in 60% of national lands are resolved.²¹
57. **Project context:** The Project builds on a series of previous Bank-financed Projects. The first of these Projects is the Rural Land Management Project (PAAR)²², which was implemented between 1997 and 2003. One of the PAAR’s components supported the development of technological platforms, such as software designs, training and databases as well as land administration procedures with the aim to establish a parcel-based registration system (folio real) in the Department of Comayagua. Thirteen Tolupan communities (27,500 hectares of indigenous lands) were also demarcated and titled under the PAAR.²³
58. Additionally, the Bank has supported other projects that involved research on land issues of indigenous and Afro-Honduran peoples in Honduras. The Bank and Global Environment Facility (GEF)-supported Biodiversity in Priority Areas Project (PROBAP)²⁴, which was implemented between 1998 and 2005,

¹⁹ PAD, p. 5.

²⁰ PAD, p. 3.

²¹ PAD, p. 4.

²² IDA Credit No. 2900-HO.

²³ Management Response, ¶ 9.

²⁴ GEF Grant No. 28367.

supported a comprehensive land tenure study among Garífuna and Misquito populations in Honduras.²⁵ This land study/diagnostic, which was carried out by the Central American and Caribbean Research Council (CACRC), was based on a participatory methodology to map territorial claims of 25 Garífuna and Misquito communities along the northern coast.²⁶ Moreover, the Bank together with the Regional Unit for Technical Assistance (RUTA) sponsored a profile of indigenous and Afro-Honduran peoples in Honduras.²⁷ Other Bank financed activities include the institutional building of Afro-descendant groups in Latin America that included the Garífuna communities as well as the financing of an Institutional Development Fund (IDF) (together with the Central American Commission on Environment and Development – CCAD) to strengthen the capacities of central American black organizations, including Garífuna groups in Honduras.²⁸

59. **Financing:** The Project is financed by an IDA Credit of 16,900,000 Special Drawing Rights (SDR), about USD 25 million. The Credit was approved by the IDA Board of Executive Directors on February 24, 2004, and became effective on December 2, 2004. The closing date is April 30, 2008.
60. The Project is financed through an Adaptable Program Loan (APL), which provides phased support for long-term development programs by means of a series of loans, which build upon the lessons learned from the previous loans in the series. Moving to the next phase(s) of a program depends on satisfactory progress in meeting agreed milestones, benchmarks and triggers.²⁹ According to Management, agreed triggers to move to Phase II of the Land Administration Program include the creation of the SINAP, the achievement of at least 80 percent of the Project Development objective indicators and the “*adoption of legal/regulatory framework for Indigenous People’s lands*.”³⁰
61. **Implementation Arrangements:** According to the Credit Agreement, the overall implementer of the Project is the Ministry of Justice (SGJ) with the assistance of Executing Agencies and applicable municipalities.³¹ Pursuant to the Credit Agreement, the Borrower, through the SGJ, was to enter into a Participation Agreement with each Executing Agency and a Municipality Agreement with each participating municipality before carrying out any Project activities.³² The Agreement also set forth the Borrower’s obligation to establish a Project coordination unit, a high level Council of Governors composed of

²⁵ Management Response, ¶ 27.

²⁶ Diagnostic Study on Land Use and Tenancy in the Garífuna and Misquito Communities of Honduras, 2002-2003, [hereinafter “CACRC Study”]. The CACRC is now called the Caribbean Central American Research Council (CCARC).

²⁷ Perfil de los Pueblos Indígenas y Negros de Honduras (2002); see also Management Response, ¶ 27.

²⁸ Management Response, ¶ 27.

²⁹ Management Response, ¶ 9.

³⁰ Management Response, ¶ 9.

³¹ Credit Agreement, Article III, Section 3.01 (a).

³² Credit Agreement, Section 3.01 (b) and (c).

representatives of each Executing Agencies, and a Technical Steering Committee including representatives of the Agencies and “*selected independent advisors*” to ensure coordination of the Project activities.³³

C. The Project in Relation to the Garífuna People

62. As noted, the Government of Honduras is implementing major reforms to address problems related to land rights and security of titles. The PAD recognizes that these reforms cannot be carried out without dealing adequately with the historical land claims of indigenous and Afro-Honduran communities.³⁴
63. The Project’s Part B provides for systematic land regularization, titling and registration of lands. According to the PAD, under the first phase of the PATH, Ethnic Lands are to be surveyed, regularized, titled and registered in the departments of Atlántida, Colon and Gracias a Dios. These areas have been given priority because of their high concentration of settlements of people of ethnic origin. The Project is thus intended to recognize their ancestral rights and to regularize their land titles. Project documents in fact acknowledge a problem of invasions of Ethnic Lands by non-indigenous peoples because of, *inter alia*, a lack of clear recognition of the indigenous people’s communal rights.
64. Part B of the Project has four sub-components: 1) preparatory activities for field work aimed at reviewing existing paper and digital data in the official cadastral and land records of the various agencies; 2) delimitation of macro areas, which include Ethnic Lands; 3) parcel-level surveying and validation, and 4) legalization, titling and registration.
65. Under sub-component two, the territorial layout is to be defined according to the physical characteristic but also the particular uses given to the land. The delimitation of these areas is also to be carried out with the participation of the local stakeholders, including local communities and NGOs.³⁵ The fourth sub-component provides for the final stage of the land regularization process and it is important because, at this stage, conflicts over certain pieces of land are to be solved leading to parcels titling and then registering.
66. Under the Project, properties and possessions that are supported by ancestral certificates or titles are grouped within the category of private property. According to the IPDP, indigenous communities will enjoy all rights that are

³³ The Council of Governors and the Technical Steering Committee were only recently created in February 2007.

³⁴ PAD, p. 1.

³⁵ PAD, p. 36.

applicable to full ownership, once their rights are recognized and recorded in the real estate registry.³⁶

67. More specifically, the IPDP foresees “*the regularization of ancestral lands on behalf of the various indigenous and Afro-Honduran groups, which will fully guarantee the right of dominion over those lands, through the recognition of the communal and/ or individual ownership ..., through the registration of the domain in the corresponding registry, with direct participation of the communities in the legalization process so that in this way they enjoy the rights of full ownership.*”³⁷
68. According to the PAD, the Ethnic Lands to be titled are to be determined through “*ongoing consultation with indigenous peoples.*” In light of this, two consultation bodies for the Garífuna and Misquito indigenous peoples, the Mesas Regionales Garífuna and Misquito, were created under the Project.

D. Recent Developments

69. On January 10, 2007, the Bank sent the Government of Honduras a Notice of Threatened Suspension of Disbursements because of lack of due diligence in carrying out the Project. According to the Bank’s letter, this threat of suspension stemmed from the Borrower’s non-compliance with its obligations under the Development Credit Agreement (DCA) and the lack of notification to IDA of a number of events causing this non-compliance. Three particular instances of non-compliance are indicated in this letter: (1) failure to meet implementation performance targets, (2) “*failure to adapt the Project’s institutional arrangements to conform to the new legal regime for land administration established in Honduras by the enactment of the Property Law (Ley de Propiedad) after IDA Board approval of the DCA,*” and (3) “*support for the dissolution of the regional Garífuna consultative mechanism*” in violation of the DCA requiring this type of consultation body.
70. February 28, 2007, was the deadline the Bank posed to the Government for complying with the conditions described in the Notice and avoiding the suspension of further disbursements of the Credit. Such conditions or remedial measures included coming to an agreement on which entity was to be the Project implementing agency, whether the Ministry of Justice (SGJ) or the newly created Instituto de la Propiedad (IP – Property Institute), and act accordingly; recruiting a permanent Project Coordinator with qualifications acceptable to the Bank; revising the draft Participation Agreements with all Executing Agencies, consistent with the new institutional arrangements; submitting to the Bank revised drafts of the Municipality Agreements with all

³⁶ *Plan de Desarrollo Indígena (Administración de Tierras)* (Indigenous People Development Plan -Land Administration), November 22, 2003 (hereinafter IPDP), p.3.

³⁷ IPDP, p. 3.

participating Municipalities, consistent with the new institutional arrangements, and establishing the Council of Governors and Technical Steering Committee, as required by DCA Sections 3.05 (b) and 3.05 (c).

71. One of the measures the Bank expected the Government to complete by the deadline related specifically to the above mentioned Mesa Regional Garífuna. In this regard, Management requested the Government to:

“Publicly rescind its repudiation of the Mesa Regional Garífuna Wadabula as the Project's participatory consultative framework for Garífuna peoples; or, if the Borrower no longer recognizes the Mesa, submit to IDA the rationale for this drastic change of strategy and agree with IDA on an alternative transparent and non-exclusionary participatory consultative framework for Garífuna peoples in the Project areas, which is consistent with the Project's objectives and meets IDA safeguard policies.”

72. On March 7, 2007, in a letter addressed to the Ministry of Finance, the Bank noted the progress made by the Government in implementing the remedial actions required to avoid suspension of the Credit's disbursements. The letter indicated that six actions had been completed, noting in particular the Borrower's confirmation of its support to the Mesa Regional Garífuna, confirmation given in writing and through a public meeting held on February 23 in Trujillo with member of the Mesa. The Bank also noted the Government's decision to shift the Project Implementing Agency to the Property Institute (from the Ministry of Justice) and the establishment of the Council of Governors and the Technical Steering Committee provided under the Credit Agreement.
73. According to the Bank's letter, as of February 28, two actions still needed completion: recruiting a new Project coordinator and filling a number of vacant consultancies in the PIU. The Bank thus set two new deadlines for completion of these actions, respectively March 16 and March 28, 2007. On March 30, 2007, the Government of Honduras was informed that the Bank deemed that the two remaining actions had been completed. The Bank also noted that restructuring of the Project was undergoing especially in relation to the changing Project implementing agency and that, as a result, the Credit Agreement is also to be amended.

Chapter II: The Garífuna People and Collective Titles

A. Brief History of the Garífuna People

74. Estimates vary about total numbers of Garífuna today. While some estimate that the number of Garífuna exceeds half a million, the PAD states that the total Honduran Garífuna population is about 95,000³⁸. Different sources have assessed the number of Garífunas differently.³⁹ The CACRC study estimated the number of Garífuna to be 98,000 as of 1993. The 2001 national census reported more than 49,000 people who self-identified themselves as Garífunas. The Panel has not been able to obtain more current data on the Garífuna population in Honduras
75. The Requesters are members of OFRANEH (Organización Fraternal Negra Honduras), and are ethnically Garífuna. The Requesters state that OFRANEH is a federation whose members are elected by the Garífuna people of Honduras, on behalf of which they submitted their Request.
76. This chapter gives some background information on the origins and history of the Garífuna people, including their ancestral land use patterns and the origins and importance of collective title to land. This account of the origin and ethno-history of the Garífunas is important to understand the issues raised in the Request for Inspection. The chapter also provides information about the Garífuna people today, with a focus on issues and problems they face relating to claims over their ancestral lands.⁴⁰

1. Origins

77. The Garífuna are descendants of the original Carib and Arawak Indian populations of the Amazon and Eastern Caribbean who intermarried with enslaved Africans – both runaways from Europeans on neighboring islands, and those who had escaped from shipwrecks and were captured by the Indians themselves.

³⁸ PAD, p. 17.

³⁹ The CACRC Study provides a table according to which the Garífuna population was estimated in 1993 to be 98,000 people. According to the Project Appraisal Document of the Bank-financed Honduras: Judicial Branch Modernization Project (IDA Credit No. 4098-HO approved by the Board of Directors on July 7, 2005) the Garífuna population is estimated between 100,000 and 190,000 people. See PAD for Honduras Judicial Branch Modernization Project, Annex 10 (Indigenous Peoples and Access to Justice), June 6, 2005 (Honduras, Report. No. 32128 – HN), p. 74.

⁴⁰ The Panel has in its files a more extensive history of Garífuna and national politics in Honduras prepared by Dr. Nancie Gonzalez.

78. Succeeding generations retained the Amerindian language, culture and religion, and established a new identity for themselves, which certainly aided in their survival. They became known as “*Black Caribs*”, and eventually became the most numerous and dominant population on the island of St. Vincent. Most Europeans did not interfere with them, owing to successive agreements beginning in 1660, which defined St. Vincent as a neutral island, under the jurisdiction of neither the French nor the British. However, a small number of French Jesuit missionaries and white subsistence farmers settled clandestinely during the 18th century in St. Vincent. They treated the Caribs as neighbors and friends, introducing Christianity, the French language, and French names, many of which survive as surnames today.⁴¹
79. This situation changed with the formal cession of St. Vincent to Britain in the Peace of Paris in 1763. With the arrival of planters, settlers and speculators, and as a result of colonial battles, the “*Black Caribs*” were conquered and deported from the Leeward Island of St. Vincent and exiled to the island of Roatán in 1797 well before the emergence of the modern Honduran nation. The Spanish colonial authority immediately transferred most of the group to the mainland, specifically to the town of Trujillo. From there, they mainly dispersed along the northern coast of Honduras. These events are described in Box 2.1, below.

Box 2.1 Loss of Lands, Battles and Deportation to Honduras

Loss of Lands, Battles and Deportation to Honduras

Following the formal cession of St. Vincent to Britain in the Peace of Paris in 1763, planters and speculators who then quickly descended upon the island soon coveted the lands of the Black Caribs, which were some of the most fertile on the island and potentially suitable for sugar plantations. They sought to manipulate imperial policy to dispossess the Indigenous people by either relocating them or by providing them with what amounted to a reservation occupying a smaller area of the island. The Black Caribs’ unexpectedly fierce resistance, which included attacks on the lives and property of the British settlers, led the latter to seek military reprisals. Thus began the 1770 outbreak of what became known as the Carib War in which the Caribs, numbering between 7,000 and 10,000, were aided by their French neighbors.⁴²

A temporary truce was achieved in 1772, but it lasted only one generation because of continued invasions of indigenous lands. An even stronger Carib-French guerrilla resistance provoked the British to import African slave/mercenary militias in 1795. This time, aided by a virulent epidemic that decimated their enemy, the British were finally victorious. They burned over 1000 Carib houses and 200 of their canoes, destroyed their crops and confiscated their stores of food.⁴³

Nearly 4500 Caribs were captured in July of 1796 and sent to a nearby small, uninhabited island; there they suffered eight months of imprisonment and disease during which nearly half died. In March of

⁴¹ In 1950s a few Caribs in Central America still spoke some French, and some claimed that their villages had been founded by French-speaking ancestors

⁴² Gonzalez, Nancie L. 1988 *Sojourners of the Caribbean: Ethnohistory and Ethnogenesis of the Garífuna*. Urbana: U IL Press, p. 22.

⁴³ Gonzalez 1988:21.

1797, 2,248 were embarked, and 2,026 landed at Roatán on April 12, 1797. 1,465 were transported to the mainland at Trujillo in September of the same year.⁴⁴

Source: Professor Nancie Gonzalez, *Sojourners of the Caribbean: Ethnogenesis and Ethnohistory of the Garífuna*. U of Ill. Press: Urbana, 1988.

80. There is no evidence that those landed at Roatán had any notion of African tribal affiliations or antecedents. They had largely refrained from intimate or even friendly relations with British slaves on St. Vincent. However, the presence of other Africans and African descendants - mostly men - on the islands and along the Honduran coast,⁴⁵ suggests that there was great opportunity and advantage for some racial and cultural admixture to occur among the various African-derived and deprived population segments in the area. Yet, the Black Carib sense of peoplehood persisted, even among their increasingly mixed-blood descendants.⁴⁶
81. In more recent years, the designation of “*Black Carib*” or “*Moreno*” has been increasingly abandoned and replaced with the more historically correct name “Garífuna.” The Garífuna retained a distinctive, non-Western language. It remains until today as variant of Arawak, with many loan words from French, English and Spanish that they acquired from their several colonial experiences.

2. The Garífuna People Today

82. Garífunas today live primarily on the Caribbean coast of Central America in Belize, Guatemala, Honduras, and Nicaragua. In Honduras, their 38 communities are all located along the northern coast, in the Departments of Atlántida, Colon, Cortes and Gracias a Dios. Many Garífuna can also be found abroad, in particular in New York and many other cities in the United States.
83. The household surveys taken in 2002-2003 reported that the Department of Atlántida, Cortés and Colón hold 84 percent of the total Garífuna population of Honduras. The remainder are situated in the Departments of Gracias a Dios (3

⁴⁴ Presumably more than 200 died enroute. It is not clear what happened to the 561 who were not taken to Trujillo. Some 200 remained on Roatán; some may have gone to the mainland later, while others certainly died. The details of all this are in Gonzalez 1988:15-53.

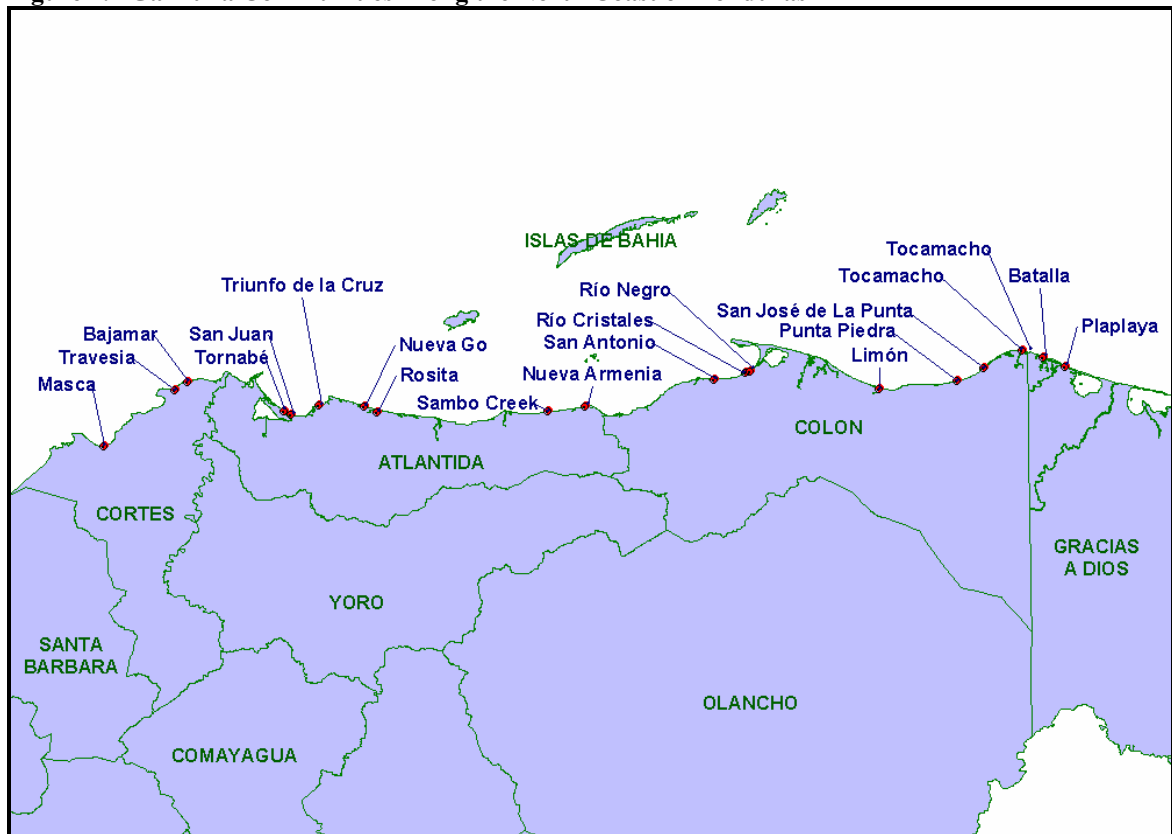
⁴⁵ Not only had the British established 17 settlements in the Mosquitia, Providence Island and the Bay Islands to which they brought many slaves, but rebels from Santo Domingo (now Haiti) and members of at least one British African army unit were freed and deposited near Trujillo and in British Honduras, where they were given lands to settle. It likely there were both sexual and marital unions with members of these populations, even though their descendants would have denied it (see Kerns, Virginia 1984 “Past and Present Evidence of Interethnic Mating.” Pp. 95-114 in *Current Developments in anthropological Genetics, Vol. 3: Black Caribs: A Case Study in Biocultural Adaptation*. Edited by Crawford, Michael H. New York: Plenum Press, as well as Gonzalez 1988:56).

⁴⁶ Early 19th century baptismal records of the Catholic Church in Trujillo variously identify babies and their mothers as Morenos, Caribes, Caribes Morenos, Morenos Franceses, Negros Caribes, Caribes Pardos (Gonzalez 1988:62.)

percent), Francisco Morazán (5 percent), and scattered across other departments (7 percent).⁴⁷

84. Fifty-two percent of the Garífuna live in urban areas, which are generally comprised of small villages and communities. Sixty-eight percent have attended primary school. Infant mortality is about 12 percent.⁴⁸ Garífuna households are considered to have higher than average living standards compared to the national averages in Honduras. In part this is based upon the increasing role that remittances play for household incomes, which reflects the intense migration process of Garífuna to the United States.⁴⁹

Figure 2.1 Garífuna Communities Along the North Coast of Honduras



Source: CACRC Study, p. 43.

85. **The Garífuna maintain their ancestral language as well as specific religious beliefs and festivals which denote their strict connection with their land and territory.** These festivals often mark the planting and harvesting season, including of fishing activities. The Garífuna people also maintain traditional communal uses of the land and other patterns of work and activity that reflect

⁴⁷ Management Response, ¶ 23.

⁴⁸ Management Response, ¶ 24.

⁴⁹ Management Response, ¶ 24.

their origins, home along the northern coast of Honduras, and unique culture. The land use patterns are discussed in more detail in section 3, below.

86. **Garífuna ethnicity depends on their continued presence along the north coast of Honduras.** This is important, not only for the Honduran Garífuna, but for those in other countries, including the United States. Many of the latter long to relocate one day to their own original or ancestral village. Others look forward to visiting, both due to their own nostalgia, and because they wish their children to maintain their ancestry and learn their history.

3. Garífuna Land Use Patterns

87. Ancestral Garífuna land use patterns, brought with them from St. Vincent to Honduras in 1797, involved simple horticulture, primarily of cassava, as well as a few other roots, some annual vegetables, plantains and the propagation and harvesting of tree fruits such as avocados and mangos. These were all primarily for subsistence, although small surpluses were sold locally. The word “Garífuna” means “people who eat cassava.”

Box 1.2 Importance of Cassava for the Garífuna People

Importance of Cassava for the Garífunas

Originating with their ancestors in the Amazon area, the Garífuna had until recently a sophisticated folk technology for cultivating, harvesting, and preparing cassava for their own consumption. Cassava grows easily in nearly every type of soil, ranging from acidic to alkaline, sandy to clay. Planting, weeding, harvesting and preparation as food was done mainly by women, men contributing to the original clearing and burning of virgin forests, and to the manufacture of basketry, sifters, and the ingenious “ruguma,” or “snake,” used to squeeze the poisonous juice from the grated roots. Like all rapidly growing plants yielding carbohydrates, cassava has high nutrient requirements and exhausts the soil very rapidly.⁵⁰ No fertilization is required when the land is freshly cleared or when there is enough land to enable the grower to substitute new land for old when yields fall. Formerly Garífunas had no problem finding new forest lands to till when their plots became less productive, and no doubt many of the smaller communities developed as families sought unused land. But as the coastal populations became larger, this became increasingly more difficult to find, and the concept of land ownership or territorial rights arose. Semi-systematic or casual fallowing then came into use, and is still carried out by those who continue to plant.

Although cassava is grown throughout the world as a major cash crop, the Garífuna have never developed it as such. In the 1970s there were experiments in Honduras fostered by foreign aid workers and some local NGOs, to improve the technology for processing cassava into the unleavened “bread” known as *areba*. Efforts were also made to help them market this in Central America, taking advantage of the free trade agreements among the different countries. No efforts were made to process the cassava into either tapioca or pure starch – both of which have been successfully produced and marketed in other countries, such as the Dominican Republic and some other Caribbean countries.

Source: Professor Nancie Gonzalez, *Sojourners of the Caribbean: Ethnogenesis and Ethnohistory of the Garífuna*. U of Ill. Press: Urbana, 1988.

⁵⁰ Moore, Lincoln M., USDA/NRCS Plant Guide, published by Plant Data Ctr., Washington, D.C.

88. Garífuna people have used the forest not only for planting, but as the source of protein and plant foods, medicines and of wood to build houses, canoes, and other objects. Both on St. Vincent and in Central America, the Garífuna subsistence economy also has depended upon off-shore fishing, the collection of land crabs, and hunting of small forest and sea game, such as deer, agouti, turtles, and manatee. Men and boys were largely responsible for all of this, although women might help along the shore. Communities have traditional fishing banks up to three miles into the sea, for which they claim use rights.
89. As noted above, Garífunas have settled along the northern coast of Honduras and along the beaches and the sea, which have always been an important value for the Garífunas for fishing. In the past, it also provided an avenue for them to reach the outside world in areas where land transportation was difficult or impossible.



Photo 1: The Garífuna community of Guadalupe

90. The men did all the weaving and care of fish nets, the construction of canoes, paddles, simple sails, and other paraphernalia; women might help out along the shore. Fishing was also done in the rivers using bows and arrows, spears, and poisonous plants to stun the fish. Sometimes it was done at night, using torches or lanterns to attract their prey. **Additionally, due to the Garífuna history, beaches are an important element in religious ceremonies. The sea is part of the Garífuna ethnic and cultural identity. Garífuna residential sites lining the beaches are the very heart of this sea-faring culture.**
91. **The beach is also the major attraction for tourists, and this has led to further occupation of Garífuna land, increasing the so called “land invasion” problem. For at least twenty years non-Garífuna have built seaside vacation houses in Garífuna territory, often putting up fences so as to impede access to public land.**⁵¹

⁵¹ It should be noted that the PATH’s Legal Analysis notes that, according to ILO Convention No. 169, beaches claimed by indigenous peoples as part of their ancestral lands ought to be considered their

Box 2.2 Historical Background: Garífuna Dependency on the Sea

Historical Background: Garífuna Dependency on the Sea

Folk memories of their inglorious arrival in Central America by sea have made the beaches important also in religious ceremonies in honor of their deceased ancestors.⁵² Funerals in Central America once included the building of a canoe with a mast and sail on the beach, which was set on fire to bid the spirit on its way – perhaps to return to St. Vincent. Some of the foods dedicated to the ancestral spirits during other ceremonies are cast upon the waters after having been blessed by the “buiye” and shared with the living. The arrival in Central America in 1797 is now commemorated by ceremonies in Roatán, Honduras on April 11, and Garífuna arrive there to celebrate from all over that country, as well as from other Central American countries and the U.S. In Belize and Guatemala “Settlement Day” occurs in November, when they believe the Garífuna first arrived on their shores, and in the former country it has been declared a national holiday. It involves a re-enactment of what they believe happened at the time, with people in “primitive” garb going out in canoes during the night, and returning early in the morning to be met by their fellows, celebrating the fact that regardless of the hardships they had endured, they were once again on *tierra firme* and free. In a sense, it is an affirmation of their unique ethnic identity, and of their ability to overcome disasters and hardships. Again, the sea is a necessary part of their history and cultural persistence. Garífuna in New York and elsewhere in the U.S. have taken to celebrating this Central American arrival as well, but without the seashore, it is not so moving.

Source: Professor Nancie Gonzalez, *Sojourners of the Caribbean: Ethnogenesis and Ethnohistory of the Garífuna*. U of Ill. Press: Urbana, 1988.

92. It is important to remember that the Garífuna indigenous ancestral communal property included lands once used for shifting agriculture, which now could be communally rented or planted with cash crops of various kinds, including, but not necessarily limited to cassava. With technical and financial assistance in agriculture and marketing, this could return considerable profit to the community as a whole, as well as to individual entrepreneurs.
93. **As a consequence, the delimitation of ancestral agricultural lands is a major issue that the Project needs to take into consideration, since what was once a large, unrestricted forest open for all who cared to use it, has now become a valuable and limited resource.** As has happened in every case where the nature of slash and burn agriculture is misunderstood by colonists, the amount of land necessary for indigenous needs is under-estimated. As populations grew, non-Garífuna peasants moved into the forests, competing with Garífuna for their own slash and burn agricultural needs. This was

property, and so titled. If the Indigenous people then choose to develop tourism facilities, they could be helped to do so communally.

⁵² In April, 1997 a monument in honor of a fallen hero in the Caribbean War in St. Vincent was dedicated in Punta Gorda, Roatán. Although this event may be seen by outsiders as mainly a political statement, it is significant that their traditional religion, still alive despite their Christianity, honors and reveres their ancestors.

followed or accompanied by both corporations and private individuals wanting large contiguous areas for export crops or for livestock, a form of agriculture less environmentally sustainable than that practiced by the Garífunas.

94. Migration abroad has increased in recent years, but became a double-edged sword as it stimulated Garífuna people to buy and then become dependent on more and more Western goods. At the same time, their absence from Honduras led to more land occupation by non-Garífunas, but also to the notion that they really didn't need the land, anyway. One of the "goods" that they began to value more than they had before was higher education. Some of the better educated went to Honduran cities, a few became professional doctors, nurses, professors; some found "white-collar" jobs, others became teachers or clerical workers. Most of these Garífunas, however, retained their ties with their coastal villages or towns, and found ways to increase their financial status and that of their entire community, often through tourism or its embedded attractions such as musical and dance presentations.⁵³
95. **Over time, there have been many important external forces that have significantly affected the land uses, work patterns and lands of the Garífuna people.**⁵⁴ In the late 19th century, foreign agro-industry began to arrive and developed inland of the Coastal lowland areas occupied by the Garífuna. The Garífuna developed a mixed economy, with many men engaged in migrant wage labor in agriculture while families remained in villages engaged in a traditional communal subsistence economy.
96. As agro-industry began to decline after the 1930's, pressure on the Garífuna lands increased. In particular, small-scale peasant agriculture by "Ladinos" began to impinge on Garífuna hunting and gathering activities in "forest hinterland areas of communities."
97. The emergence of upper and upper middle classes in Honduras after the 1940's led to pressures to acquire Garífuna beach lands for "Ladino" vacation homes and leisure activities. This pressure has escalated in the last 30 years.
98. At the same time, the further decline of agro-industry resulted in a new emphasis on alternative sources of revenue and financial base for municipalities, including through land sales and taxes. A market-based economy penetrated into the Garífuna villages, operating in parallel with the traditional communal economic systems, which continue to exist. In this

⁵³ Garífuna are renowned throughout Central America and the United States for their very professional and unusual music and dance. A combination of ancestral "*punta*" and other, more recent borrowings, has resulted in a new genre now called "*punta rock*," popular both in the U.S. and in Central America. Throughout their history, the Garífuna have been creative in these arts, and their reputation is well deserved.

⁵⁴ The text and figures which follow draw from the research and analysis of Professor Edmund T. Gordon, Director of the Center for African and African American Studies, in the College of Liberal Arts at the University of Texas Austin.

context, some Garífunas increasingly viewed land as a commodity that could be sold to others within or outside the community. Many other factors have significantly affected Garífuna lands and land claims, as described in more detail in other parts of this Report.

99. **In the face of these forces and pressures, traditional Garífuna communal systems continue to exist and encompass a range of work, activities and uses of land that reflect the traditions and origins of the Garífuna people.** Depending on the community, these include artisanal fishing, planting and subsistence agriculture, cattle, hunting, mining, medicinal plants, small-scale family initiatives of alternative tourism, and sale of items such as coco bread, cassava, fish, and artisan products.⁵⁵
100. The figures (maps with additional information) reproduced below illustrate these activities in three communities: Triunfo de la Cruz; San Juan; and San Antonio. The symbols for land uses are in the “key” box to the right of the figure. These figures also indicate areas of collective title of Garífuna people (yellow-border areas) and additional, larger land areas claimed by the Garífuna people (red-border areas). These topics of title and land claims are returned to in more detail in following sections of this Report.

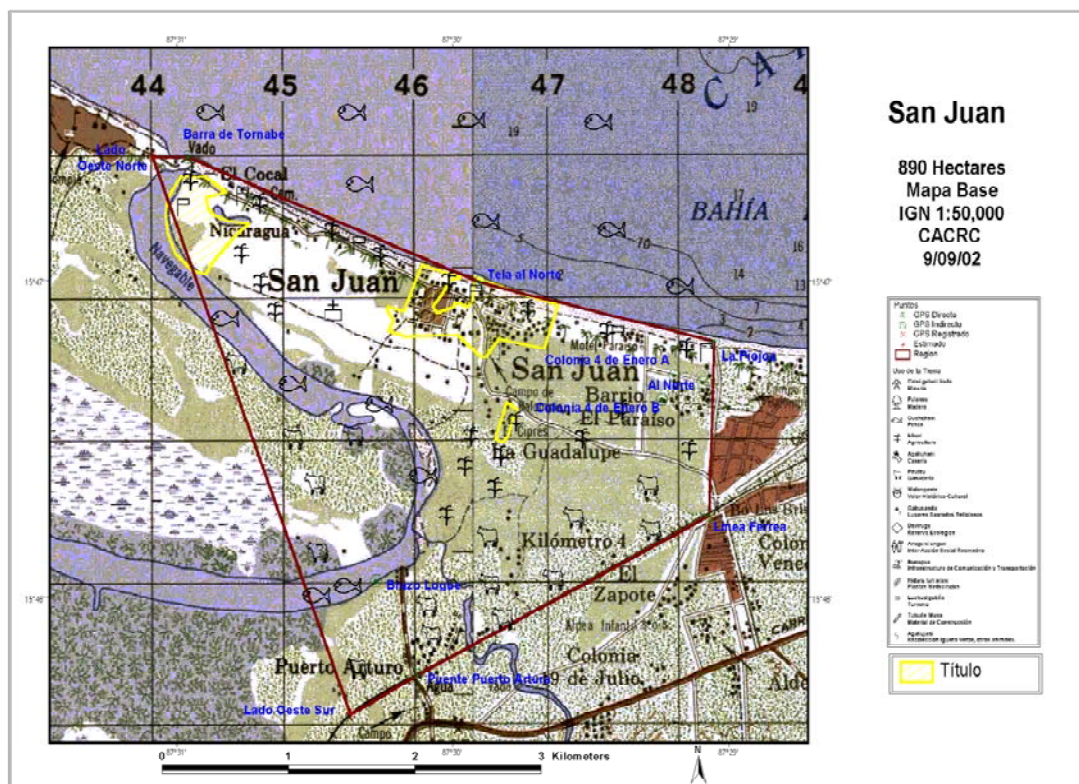


Photo 2 Meeting with Requesters in Sambo Creek

⁵⁵CACRC Study, Tomo 2, Section 2 (Las Comunidades Garífunas y la Costa Norte).

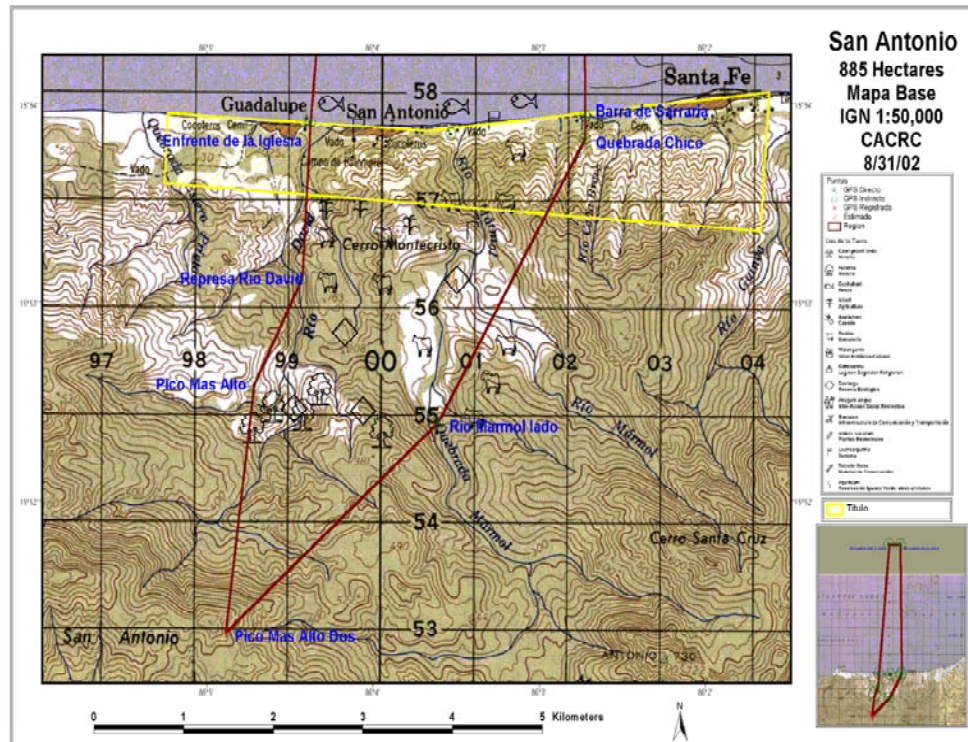
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Source: CACRC Study, Tomo 3 Etno- Mapas.

Figure 2.4 The Community of San Antonio: Land Uses, Title and Land Claimed



Source: CACRC Study, Tomo 3 Etno-Mapas

B. Issues of Collective Titles to Land

1. General Situation regarding Land Issues

101. As mentioned in Chapter One, the Government of Honduras and the PATH Project consider insecurity of land tenure in Honduras as one of the most critical constraints to increased investment and also a source of social

instability.⁵⁶ According to the PAD, insecurities are often a result of inadequately enforced land rights through weak land administration institutions. Garífuna communities face long-standing unresolved land conflicts.

102. The PAD mentions problems regarding untitled lands as well as titled lands. It notes that while about 84% of the land in rural areas in Honduras is legally classified as forest land, and most of this land is not subject to private ownership, only 54 percent of the territory is forested. About 35 percent of the forests are considered national forests, 35 percent is held by private owners, and 30 percent are considered municipal lands (ejidales). The PAD notes that, *inter alia*, farmers without titles illegally occupy forest lands and that in rural areas lands are occupied illegally because of lack of title.
103. **Problems that invalidate some property claims also exist with regard to titled land, such as overlapping private claims and norms restricting property use. Land issues are also complicated by unregistered transfers and implications of individual rights within communal lands.** Only about 30 percent of the estimated 2.6 million land parcels in Honduras (1.8. million urban, 0.8. million rural) are included in the property registry, which means that most of the legal titles that could be enforced against third parties are often not registered.⁵⁷

2. Historical Land Claims of Garífuna, and Land Loss

104. The PAD refers to historical land claims of Indigenous and Afro-Honduran communities and lists the limited recognition of their land rights as a major issue.⁵⁸ The Garífuna today are increasingly divided by social class and other interests, the “ancestral lands” in question are now more valuable and in demand by many non-Garífuna and even non-Hondurans.
105. **The Garífuna have been and are losing lands that were once occupied and used by their recent and remote ancestors, as well as by themselves today.** In particular tourism and industrialized export-crop production (such as African palms, pineapples, rambutan, and bananas) are the two major actual and potential uses which attract land-buyers and “invaders” of Garífuna ancestral land. As described previously, non-Garífuna people have also come to develop vacation homes, cattle ranches and other land uses and activities, often excluding the Garífuna communities from access to the lands through fences, walls and gates. Other significant factors that affect Garífuna lands contributing to land loss by Garífuna people include: the evolving legal and institutional framework in Honduras; actions by municipalities to issue private titles over

⁵⁶ PAD, p. 16.

⁵⁷ PAD, p. 16.

⁵⁸ PAD p. 17-18.

land within Garífuna communal land; issues of access to the legal system to confirm and protect land rights;⁵⁹ and actions by outside entities to obtain land rights and title and then subdivide this land and sell it to outsiders.⁶⁰



Photo 3: Non-Garífuna fences in Garífuna land near Trujillo

106. Another significant concern relates to the designation of protected areas in lands claimed and traditionally used by the Garífuna people, and the related question of who has responsibility to manage use of and access to those lands. For example, the Punta Izopo protected area near the community of Triunfo de la Cruz is on lands traditionally used and taken care of by Garífuna people. The Panel has been informed that the people now fear to enter this area, as access is restricted by security guards under the control of outsiders to the community.⁶¹
107. As another example, the problems associated with land loss in the town of San Juan has been noted and reported in local and international media outlets. There is evidence that a good portion of the ancestral lands of San Juan have been sold or otherwise granted to the local company dedicated to the development of a major tourist enterprise. The community of San Juan is practically enclosed,

⁵⁹ The Inter-American Commission of Human Rights, for example, recently noted that administrative and judicial actions pursued by the Garífuna community of Triunfo de la Cruz to protect its right over collective property “*have been fruitless and the conflict has endured over 10 years.*” Report No. 29/06, Petition 906-03, Admissibility, Garífuna Community of Triunfo de la Cruz and its Members, Honduras, March 14, 2006, ¶ 45.

⁶⁰ See *infra* Chapters Four and Five of this Report.

⁶¹ See *infra* Chapter Six of this Report.

surrounded by various private tourist developments all of which have restricted its territory.

3. Land Titles Granted to Garífuna

108. During the 1990s, the majority of Garífuna communities in Honduras have received a communal title to part of the land they occupy and claim that traditionally belongs to them.⁶² In 1992, the Honduran Congress passed the Agricultural Sector and Development Law (*Ley Para la Modernización y Desarrollo del Sector Agrícola*, Decree 31-92),⁶³ pursuant to which, between 1993 and 2004, 36 Garífuna communities and 6 Garífuna Associations of Farmers (*Empresas Asiociativas Campesinas Garífunas*) in the Departments of Atlántida, Colón, Cortes, Gracias a Dios and in the Bay Islands obtained full communal property title.⁶⁴ In 1999, the so-called enlargement/extension process (*proceso de ampliación*) began and a number of communities that had already received full title submitted extension requests and obtained to regularize larger amounts of land than their previous title awarded.⁶⁵
109. However, the titling programs carried out by the National Agrarian Institute (INA) under the *Ley Para la Modernización Agrícola* over the past two decades have not solved the situation of the Garífuna communities. In general, the titled areas do not include the entire ancestral claim of the Garífuna people, and most titles exclude important areas of use and resource management of the communities. In some cases, the titles received were extremely limited, and really only covered the so-called “*casco urbano*” where their housing is located.⁶⁶ In addition, although the titles given to the Garífuna communities created enforceable rights, there was no attempt to solve the land conflicts and issues of occupation of Garífuna land by outsiders to the communities. For example, some titles contained provisions according to which the land conflicts affecting that particular area, such as overlapping of titles with third parties, would be solved later on with the possibility that INA could carve out from the

⁶² Information regarding the history of titling of Garífuna land included in this section of the Report was provided to the Panel by members of the Central American and Caribbean Research Council (CACRC) now renamed as Caribbean Central American Research Council (CCARC). In this Report, the former acronym CACRC will be used. It was also provided by the Garífuna organization Organización de Desarrollo Étnico Comunitario (ODECO).

⁶³ See *infra* Chapter Four.

⁶⁴ Documents in Panel’s files. At the beginning of the 20th century, Garífuna people mobilized to solicit from the State so-called “*títulos ejidales*” for their communal lands under the Agrarian Law of 1898. The amount of land that could be designated as *ejido* was limited. However, these titles were very important for the communities and came to acquire a symbolic significance even though they did not confer fully enforceable rights nor did they cover the full extent of Garífuna ancestral lands. A 1975 Agrarian Law prompted another concerted effort by Garífuna communities to obtain from INA “*Garantía de Ocupación*” (Occupancy Guarantee) over lands beyond the limits of the *ejido* or for lands previously undesignated.

⁶⁵ According to ODECO’s documents, 9 communities received title expanding their communal property, while many other communities are still awaiting this type of land regularization.

⁶⁶ As already noted, information included in this and the following paragraphs of this section was provided to the Panel by members of the Caribbean Central American Research Council (CCARC).

titled area, and grant to the occupiers, land “invaded” by non-Garífunas. In other cases, INA granted the full property titles but did not appropriately register them; or a new title was registered in favor of a community, but the document did not refer to the title *ejidal* previously awarded to the same community creating a new situation of title overlapping. Moreover, some communities were not titled at all,⁶⁷ or Garífuna families were issued individual titles over communal land.⁶⁸

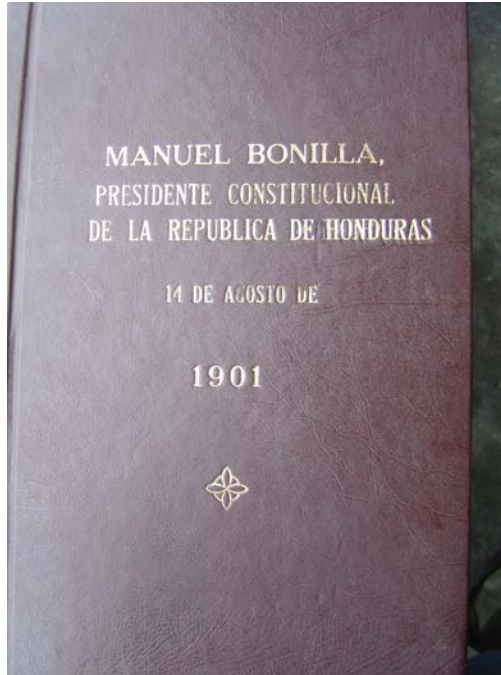


Photo 4: Title ejidal granted in 1901 to the community of Cristales

110. It is also important to note that, along with titling for all communities, and titles over larger amounts of land, the Garífuna are also seeking to recover land that belong to them but have been occupied (invaded, since Garífuna people regard these occupations as invasions) over the last decades by non-Garífunas (in Spanish, this process is called *saneamiento*). **As discussed more broadly in other parts of this Report, in many Garífuna communities, parts of the land over which the community have legal title have been illegally occupied, at times even with fraud or violence.** While in the late 1990s some Garífuna communities were able to obtain an extension of the titles (*ampliación*), thus far their demands for the above-mentioned *saneamiento* have never been met. For this reason, Garífuna organizations, including the Requesters, have pursued legal and political avenues to enforce their limited titles.⁶⁹ However, as it is discussed in other parts of this Report, the Panel was

⁶⁷ Management response, ¶ 26.

⁶⁸ Management response, ¶ 26.

⁶⁹ Pursuant to an amicable settlement with the Government of Honduras following a petition before the Inter-American Commission of Human Rights (see Box 6.1. in Chapter Six of this Report) regarding the Garífuna community of Punta Piedra, OFRANEH obtained from the Government promise of funds for the *saneamiento* of the title of the community of Punta Piedra. A further agreement with the a number of

informed during its visits to the Project area that no funds have been pledged or earmarked for the *saneamiento* neither under the Project nor independently of it.

111. Management Response notes that, according to the 2003 participatory Social Assessment that was carried out as part of Project preparation, the coexistence of different types of ownership and land use in the region have caused confusion and conflict among the community members, between communities and third parties as well as between communities and local and national authorities.⁷⁰
112. Figures 2.2, 2.3 and 2.4 above provide visual indications of these issues of title and land claims. The figures indicate, in various communities, both the areas of actual title (yellow borders) along with much larger areas of where the Garífuna people claim rights to collective title and related rights along the north coast of Honduras. The figures also show the corresponding land uses of the Garífuna people in these areas. The figure referring to San Juan illustrates, for instance, how land areas given in title to the Garífuna community do not include all areas that Garífunas have traditionally occupied. Instead, the titled area was configured to avoid areas settled upon by outsiders to the community.
113. **The Garífuna people have been pursuing these and other claims to collective title and rights over lands for many years, and struggling to address problems of illegal and/or unjustified occupation of lands that they consider belong to the community as a whole.** The figures reproduced in this Report have been presented to the Inter-American Commission for Human Rights as part of the evidence provided by the Garífuna people in support of their land claims. Some of these figures also are included in the CACRC Report, noted elsewhere in this Report.
114. It is not within the mandate of the Inspection Panel to pass judgment on these claims. The fact that the Garífuna people are pursuing their rights over ancestral lands, however, is of central importance to this investigation, as the Requesters claim that the PATH Project may undercut and harm their ability to pursue and succeed in these claims. This issue is addressed in subsequent chapters of this Report.

Government officials concluded by OFRANEH in September 2006 (Acta de Entendimiento entre la Organización Fraternal Negra de Honduras OFRANEH y Autoridades del Gobierno, September 28, 2006) reiterated the Government commitment to assign INA the budget, by the end of December 2006, to begin the indemnification payments to the occupiers of Garífuna communal land. The Requesters have informed the Panel that this commitment has yet to be implemented and no action has been carried out thus far.

⁷⁰ Management response, ¶ 26. For a more extensive discussion of conflicts involving indigenous land, see *infra* Chapter Six.

C. Governance and Representation

115. As already mentioned, the Request was submitted by OFRANEH on behalf of the Garífuna people in Honduras. Moreover, a key claim in the Request is that the Project is failing adequately to consult with OFRANEH as representative of the Garífuna people in regard to issues of land titling, in violation of relevant Bank policies, and that this failure is divisive and likely to result in serious harms to the collective title land claims and other interests of the Garífuna people. Thus, it is important to understand the organizational structures of the Garífuna, and how they represent themselves as a people.

1. Garífuna Organizations

116. In the 1950s the Garífuna founded several organizations (e.g. Sociedad Renovación and Sociedad Lincol) to organize themselves politically.⁷¹ These organizations can be considered the precursor of the main Garífuna organizations today, in particular OFRANEH and ODECO.
117. OFRANEH, founded in 1977⁷², began as an organization seeking brotherhood with all Afro Hondurans, but has since become exclusively concerned for the plight of the Garífunas. It refers to itself as a federation, and has developed structures to represent the Garífuna people over the years, including a General Assembly and an Executive Committee with various sub-committees addressed to issues of concern of the people.⁷³ It also has had formal chapters in many, if not all, Garífuna communities.
118. In general, OFRANEH seeks to promote the internal organization and political mobilization of the Garífuna communities. Its actions aim at obtaining recognition of the Garífunas' rights to land and natural resources, as well as at protecting and promoting Garífuna language and culture. **OFRANEH has remained, over the years, the leading organization representing the Garífuna people. It has been, in particular, at the forefront of efforts of the Garífuna people to secure their land rights, alongside ODECO which**

⁷¹ See generally CACRC Study, Tomo 2, p. 35. During the 1960s, Ballet Garífuna Nacional and Danzas Garífunas groups were born within a nationalistic movement of the Garífunas aimed at asserting the legitimacy of Garífuna culture and its distinction from the national Honduran culture by embracing the African origins of the Garífunas.

⁷² One of the founders of OFRANEH was Santos Centeno, who, as a child in the 1940s witnessed government-led murders in San Pedro Sula, a result of racism suffered by Afrohondurans and Garífunas since the 1920s. In 1954, a young Centeno, became a member of the communist party and a co-founder of the Sociedad Lincoln in La Ceiba, and participated in the major violent popular protest in Tegucigalpa known as the Huelga. In 1977 he was a co-founder of OFRANEH.

⁷³ Estatuto de la Organización Fraternal Negra Hondureña (Statute of OFRANEH). OFRANEH received juridical personality with Presidential Resolution No. 120-89 dated July 19, 1989, which also approved OFRANEH's statute.

also has played a key role in this effort, especially during the titling process of the 1990's.⁷⁴

119. The Organización de Desarrollo Étnico Comunitario (ODECO) is a prominent, well-organized and managed NGO whose primary concern is to reduce racism and to improve the economic and political status of Afro-hondurans in general. ODECO was founded by members of OFRANEH in 1992. The appearance of groups such as ODECO and OFRANEH reflects Garífuna leaders' increasing knowledge of national and international sociopolitical and ideological movements, and their interest in accessing the latter's funding and other assistance.
120. The leadership role of these two organizations has its contemporary origins in the early 1990's. Garífuna communities struggled for their rights to communal lands during the 1970's and 80's largely through the communal organizations such as patronatos and comites de defensa de la tierra of individual villages. However, during the 1990's Garífuna mobilization reached new heights. In 1992 ODECO was founded by OFRANEH members and both organizations took on many of the characteristics of the "new social movements" of indigenous and Afro-descendants peoples that appeared throughout the hemisphere in this epoch. The emergence of these two pan-Garífuna organizations at the forefront of the Garífuna movement greatly increased the effectiveness of Garífuna efforts to secure their rights to communal lands.
121. After a series of preliminary demonstrations for their rights to land in the early 1990's a coalition of Garífuna organizations, the Coordinadora Nacional de Organizaciones Negras de Honduras, of which ODECO and OFRANEH were the leading members, organized the Marcha de los Tambores. During this demonstration, which took place on October 11, 1996, thousands of Garífuna marched from La Ceiba on the North Coast of Honduras to Tegucigalpa, the nation's capital, to demand their rights to communal lands. They also demanded that the Honduran government adhere to the Covenant NO. 169 of the ILO.
122. As a result of the Marcha de los Tambores, led by ODECO and OFRANEH, the Honduran Government made a formal commitment to title Garífuna lands.⁷⁵ Subsequently, ODECO played a key role in securing the original limited titles to the urban centers of most Garífuna villages. In more recent years OFRANEH has taken the lead in pushing for the "*ampliación*" and "*saneamiento*" of these titles and is recognized by the Garífuna people for its leading role in this regard.

⁷⁴ It is also worth noting that at one time OFRANEH seems to have operated as an NGO, seeking and receiving funds for development and relief efforts.

⁷⁵ Edmund Gordon, Charles Hale, et.al., 2002, "Indigenous and Black Organizations in Central America: The Struggle for Resources and Recognition." Research Monograph for Ford Foundation (Mexico Office). The most successful indigenous and Black social movements in Central America combine organizations that are grass roots with organizations that are NGO's. It is the authors' opinion that even though their relations are not always good, ODECO (NGO) and OFRANEH (grass roots) play complementary roles.

As a result of this history OFRANEH and ODECO must be considered to be the primary institutions of Garífuna society concerned with the legalization of Garífuna land titles.

123. **The Panel observes that OFRANEH still plays a leading role in all Garífuna communities, especially at the grass roots level where it encounters great support.** The Panel heard direct testimony in support of this during its visits. The CACRC study recognizes OFRANEH and ODECO as the two major Garífuna organizations, as each Garífuna community has one or more representatives in the executive board (*Junta Directiva*) of the organizations. The role of OFRANEH and ODECO in these regards is also reflected in a 2001 Presidential Executive Order (035/2001). The Order established an Inter-sectoral Commission to protect the land rights of Garífuna and Misquito communities, and specified OFRANEH and ODECO as members of the Commission to represent the interests of the Garífuna people.⁷⁶



Photo 5: Panel team meeting with Project affected people

124. There are, as well, other organizations which work for the interests of the Garífuna people. The last two decades have seen the creation of other Garífuna organizations, aimed mainly at protecting and defending the rights and interests of the Garífuna communities. Among these organizations is CEDEC, which, like ODECO, is an NGO, but far smaller. Other organizations are CIDH, working in small scale projects, FUHDECGAR researching and documenting

⁷⁶ This Executive Order is described in more detail in Chapter Six.

the Garífuna culture, and *Enlace de Mujeres Negras (Association of Black Women)* specialized in education and domestic violence issues.

2. Garífuna Governance at Communal Level

125. The Garífuna people are also organized at community level. The majority of the communities have patronatos, whose members are chosen by communities' members. The patronatos are organized hierarchically and are normally in charge of regulating land rights of the communities.⁷⁷ According to the CARCR study, every patronatos should be registered with the Ministry of Justice. However, many patronatos lack a formal structure and substantive powers and this has generated situations where some communities have more than one patronatos; the existing one has been dissolved; or some patronatos have sold community land. It is important to note that both OFRANEH and ODECO work closely with these community-based patronatos.
126. In some Garífuna communities there are councils of elders, which participate in resolution of disputes activities. Many communities have committee for the defense of the land (*Comité de Defensa de la Tierra*).⁷⁸ In each town there are a few “traditional” voluntary associations, such as Sport, Musical or Dance Clubs, communal work parties for agriculture or building construction, and occasionally for political purposes such as supporting certain candidates or parties. Each community will likely have several small groups in each of these categories – each with exclusive membership and competitive with each other.

⁷⁷ CARCR Study, p. 37.

⁷⁸ CARCR Study, p. 37.

Chapter III: Consultation, Representation and Participation of the Garífuna People

127. A major element of the claim by Requesters is that Bank Management has failed to comply with provisions of Bank policies and procedures relating to consultation with, and participation by, Project-affected communities. Requesters contend that Project mechanisms for consultation and participation during Project implementation, especially for the legalization, titling and registration of Garífuna lands, will not reflect the preferences and interests of the Garífuna people, as required by OD 4.20 on Indigenous Peoples and other Bank policies.
128. The Requesters state that, especially with respect to the “Mesa Regional” established under the Project,⁷⁹ consultations are occurring only with people who cannot be considered representatives of the Garífuna communities because they were not chosen as such by the communities themselves. They consider, moreover, that the Project mechanisms have become divisive for their communities, and are likely to undercut their claims to ancestral lands and harm them as a people.
129. In its Response, Management states that the “*IPDP includes a broad and participatory consultation framework for indigenous communities*” including “*the establishment of a consultation framework through which indigenous communities participate in the process of defining land regularization procedures [the Mesa Regional].*”⁸⁰ Management states that a number of consultation events and meetings have taken place, and describes these in detail in their Response.
130. Management further asserts that OFRANEH, the Requester, participated in a number of consultation events during Project preparation. According to the Management Response, “*participatory mechanisms are an integral element of Project design*”⁸¹ and funds are designated for consultations, dissemination of information and legal advice on land issues to the indigenous communities, including the Garífunas.
131. This Chapter examines these issues in light of the relevant provisions of Bank policy.

⁷⁹ The “Mesa Regional” and “Mesas Locales” have been established as a consultation framework under the Project. They are discussed in detail below.

⁸⁰ Management Response, ¶ 34.

⁸¹ Management Response, ¶ 40.

A. Relevant Policy Provisions

132. The provision of full information to Project affected people, and meaningful consultation with them to enable their informed participation with respect to decisions that stand to affect them, are mainstays of the Bank safeguard policies. These core elements of Bank policy are of central importance to projects affecting indigenous peoples, as set forth in OD 4.20 on Indigenous Peoples.
133. Specifically, OD 4.20 provides that the Bank's strategy to address issues related to indigenous people *"must be based on the informed participation of the indigenous peoples themselves"* because *"[t]he key step in project design is the preparation of a culturally appropriate development plan based on full consideration of the options preferred by the indigenous people affected by the project."* The policy mandates the identification of *"local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists . . ."* A project should provide for mechanisms that allows *"participation by indigenous people in decision making throughout project planning, implementation, and evaluation."* (Paragraph 15 (d))
134. OD 4.20 contains provisions on the particularly important question of representation of indigenous peoples. It states that indigenous people's representative organizations *"provide effective channels for communicating local preferences"* and *"traditional leaders ... should be brought into the planning process, with due concern for ensuring genuine representation of the indigenous population."* (Paragraph 15 (d))
135. OP 4.01 on Environmental Assessment also contains requirements for consultations with project affected communities more generally, and specifies that affected people and local NGOs should be consulted during the EA process about the project's environmental impacts and their views should be taken into account. The policy calls for meaningful consultations which may occur only when people receive relevant material about the project in a timely manner before consultations take place and in a language and form understandable and accessible to those consulted.

B. Consultation and Representation during Project Preparation

1. Consultation and Preparation of the IPDP

136. The Requesters claim that the Project carried out no consultation program before drafting the Indigenous Peoples Development Plan (IPDP), which was allegedly distributed to OFRANEH, along with the Environmental Assessment, just a short time before *"the only consultation meeting regarding the PATH and*

the IPDP.” They also claim to have proposed alternatives to the Project design during preparation, especially through the Sambo Creek document dated December 2003, but that none of their suggestions were taken into account to address inconsistencies in the Project’s titling procedures and no options preferred by the indigenous peoples were considered.



Photo 6: Panel meeting with Requesters at Sambo Creek

137. The Requesters also claim that their serious concerns about the Property Law – still in draft form at the time of Project preparation – were not listened, although, they add, Bank staff knew that the proposed Law “*would be key to the future land titling programs.*” According to the Request, the Garífuna’s opposition to the draft Property Law was clearly expressed in a workshop held in San Juan de Tela in October 2003.
138. Management states that OFRANEH participated in seven consultation events during Project preparation, between January 2003 and February 2004 (when the Board of Executive Directors approved the Credit financing the Project.)⁸² These events related to the Project design, the IPDP and the draft Property Law. In addition, a “*wide range of Garífuna stakeholders was consulted as part of the participatory Social Assessment and preparation of the IPDP in July-August 2003,*” including Patronato leaders, community leaders, individuals, and

⁸² A footnote to paragraph 30 of Management Response clarifies that the preparation of the Project, including consultations events, was carried out by staff of the PAAR project during 2003 and 2004. See Management Response, at note 4.

*“civil society organizations representing the broad spectrum of Garífuna stakeholders.”*⁸³

139. Management asserts that OFRANEH participated in the two IPDP consultations meetings held on November 26 and December 2, 2003. According to the minutes of these meetings, in particular the December one, the participants were willing to discuss the Project and its documents and agreed *“to consult with their constituents to appoint representatives to a [national consultation board], the Mesa Nacional Indígena.”*⁸⁴ According to the Response, during the above-mentioned consultation meetings about the IPDP, those who participated did not raise major objections to the Project, while their recommendations were taken into account in Project design. Management states that *“[m]any of the proposals mentioned in the December 2003 Sambo Creek document were incorporated in Project design and are currently under implementation.”*⁸⁵
140. With respect to the concerns related to the Property Law, Management Response states that, under the earlier PAAR Project, an *ad hoc* working group that included OFRANEH was established in August 2003 to review the draft Law, and at an October meeting, to which seven representatives of OFRANEH participated, the working group’s recommendations were discussed. The Response also indicates that on October 25-26 2003 OFRANEH organized a workshop in San Juan de Tela sponsored by the PAAR, where 109 Garífuna representatives formed seven working groups that presented proposals related to various indigenous peoples’ issues and focused on the draft Property Law. According to Management, many of these proposals were incorporated in Project design. Among those, the Response indicates that safeguard measures were included to protect the rights of Indigenous Peoples in the resolution of land tenure conflicts; that participation in the Project is strictly voluntary; that *“prior informed consultation with Garífuna communities is a pre-requisite before land regularization methodologies are issued and before field activities begin”* and that *“the Project calls for the issuance of communal titles to Garífuna communities.”*⁸⁶
141. The Panel notes, first of all, that an IPDP was prepared for the PATH Project specifically in relation to issues faced by the Garífuna peoples. The record indicates that substantial efforts were put into the preparation of this IPDP. While important issues relating to the sufficiency of the IPDP are addressed in subsequent sections of this Report, and issues relating to consultation during its

⁸³ Management Response, ¶s 30, 31. The Response indicates that three focal groups, 15 structured interviews with key stakeholders, and 30 household questionnaires were conducted in three Garífuna communities in the Departments of Atlántida (Sambo Creek and Tornabé) and Gracias a Dios (Batalla).

⁸⁴ Management Response, ¶ 34.

⁸⁵ In this context the Response lists 12 land tenure issues that were addressed in Project design as a result of the Sambo Creek document, including lack of titling and lack of registration of titles in Garífuna lands, overlapping claims between Garífunas and others such as municipalities, private holders and protected areas.

⁸⁶ Management Response, ¶ 39.

preparation are reviewed below, **the Panel finds that preparing an IPDP complied with OD 4.20.**

2. Differing Characterizations of Meetings during Project Preparation

142. The Panel has reviewed the Project records regarding consultations carried out during Project preparation. It notes that a number of consultation meetings were conducted during Project preparation and that the Requesters and other organizations representing Garífuna peoples participated and had the opportunity to comment and expressed their concerns with respect to the Project and the draft Property Law.
143. The Panel has reviewed the minutes of the November and December 2003 meetings at which the Project in general, the IPDP and the EA were presented to the people. OFRANEH members as well as members of ODECO were present at these meetings. According to the minutes of the meeting held on December 2, OFRANEH expressed concerns about insufficient time to analyze in depth the documents brought to their attention, and about the Environmental Assessment lacking a plan to enhance natural resources.
144. Similarly, members of ODECO expressed concerns in relation to the IPDP, in particular with respect to people's opportunity to participate in activities aimed at regularizing land rights and the procedures for regularization. It is also worth noting that the actual text of the minutes does not reflect the summary of conclusions, according to which the plan was well received by the participants who then committed to consult with their constituents with respect to the creation of a *Mesa Nacional Indígena*.
145. In mid December 2003, representatives of the Garífunas met in the community of Sambo Creek to discuss issues related to the proposed PATH and IPDP. These issues are addressed in a document presented at the meeting, the Sambo Creek document mentioned in both the Request and Management Response. While the Requesters state that this document is a firm rejection of the Project⁸⁷, Management objects to this characterization claiming that the document rather "*praises the diagnosis of Garífuna land tenure issues presented in the IPDP.*"⁸⁸ In support of its interpretation of the Sambo Creek document, Management reports a quotation from page 18 concerning the IPDP:

"The excellent analysis of the issues that affect ethnic communities ... in general give hope to the indigenous and Garífuna communities of Honduras that these

⁸⁷ According to the Requesters, at this meeting, which took place on December 17-18, 2003 in the community of Sambo Creek, Garífuna representatives "*signed a document that presented a firm rejection of everything that was established in the IPDP, while proposing several alternatives.*"

⁸⁸ Management Response, ¶ 37.

will be translated into a concrete application of the design by Government and the World Bank, , with regards to the territorial planning issue ...”⁸⁹ (Emphasis added)

146. The Panel wishes to note that page 18 of the Sambo Creek document immediately continues as follows:

“However, said hope is frustrated by a detailed analysis of the plan in which the following is to be emphasized:

- 1. the relevant legal framework in which the PATH is moving embraces laws and norms (Land Use Law etc.) which created, more than once, prejudices to the ethnic populations ...*
- 2. In no part of the Plan there is a reference to the obligation of the State of Honduras to recognize at normative level the collective rights of the ethnic populations, in the absence of which the decent [Note: or, good] protection of the indigenous peoples and garifunas of Honduras can never be obtained.”* (Emphasis added)

The Panel further observes that subsequent pages of the 2003 Sambo Creek’s document raise the same issues presented in the 2006 Request for Inspection.

147. The Panel is concerned that the description by Management of the minutes of this important meeting omits reference to the major concerns being expressed by the participants, which are similar to those contained in the present Request for Inspection.

3. Availability of Information

148. When the Panel visited various Garífuna communities in June 2006, the team was repeatedly told by Garífuna people who are not part of any organization or group that little or no PATH information had been made generally available in the communities, that notice of informational meetings had not been made widely available, and that those Garífuna consulted were not chosen by the people themselves, but, many believed, by leaders and organizations selected by the PATH personnel. **The Panel saw no evidence of written materials such as brochures, announcements for posting having been sent directly to the communities so as to let the ordinary people know what to expect.**

⁸⁹ Management Response, ¶ 37 quoting from “Análisis Jurídico del Análisis Ambiental del PATH – Elaborado por Asesor Jurídico de la OFRANEH – Diciembre del 2003”, attached to the Request for Inspection as Annex II, p. 18.

4. Conclusions

149. **The Panel finds that several meetings were conducted during Project preparation, and that the Requesters and other organizations representing Garífuna peoples participated and had the opportunity to provide comment and express their concerns about the Project. This is consistent with OD 4.20.** It is also the Panel's view that it is likely the case that PATH personnel and Bank staff thought they had informed the legitimate Garífuna representative organizations and leaders. A review of the participants to these consultation meetings shows that these participants are knowledgeable, articulate people that can nowadays be considered leaders of the Garífunas.
150. The Panel however notes the significant concerns about the Project and its "consultation process" expressed in early meetings by organizations representing the Garífuna people, in particular OFRANEH and ODECO. **The Panel considers that these provided an early indication of potential policy-based problems associated with the consultation mechanism that was eventually to be established for Project implementation.** These issues are considered below.

C. Consultation and Representation during Project Implementation

151. Consultations are particularly important for the implementation of the PATH's component related to indigenous peoples' land, because the execution of a number of Project activities, such as demarcation and titling, depends in large part on the options preferred and the choices made by the indigenous communities.
152. As noted previously, OD 4.20 sets forth specific requirements regarding consultation and participation. Among other things, it requires the informed participation of indigenous peoples and the identification of local preferences. In terms of the "strategy for local participation", it states that: ". . . [m]any of the larger groups of indigenous people have their own representative organizations that provide effective channels for communicating local preferences." These provisions are critical to achieving the basic objectives of OD 4.20 for indigenous peoples, including to ensure that "*the development process fosters full respect for their dignity, human rights, and cultural uniqueness . . . and to ensure that indigenous peoples do not suffer adverse effects during the development process.*"
153. The Requesters complain about a lack of genuine participation of the Garífuna people in the Project decision-making processes. A focal point of this concern is that the Project has created and is relying on the Mesa Regional and Mesas Locales, which Requesters argue do not properly or legitimately represent the

Garífuna people. Rather, they contend, the Mesa system is having the effect of by-passing the peoples' legitimate representatives.

154. Management Response emphasizes that “*community participation in the Project is voluntary and individual communities are free to choose whether or not to participate in the Project*” and which land tenure regime they prefer, whether individual or communal. This is a choice that, according to Management, communities make “*in the context of a participatory and informed consultation framework.*” Should the communities opt for regularizing their land under the PATH, according to the IPDP, the Project provides for the involvement of these communities in the process of regularization and titling of their ancestral lands through a mechanism that would allow them to intervene in the delimitation of the lands and in the solution of conflicts over their property rights. In this context, a consultation board, the Mesa Regional Garífuna, composed of [alleged] representatives of the various communities was established, with the main objective to coordinate the process of demarcation and titling, and conflict resolution. Community-level consultation boards, the Mesas Locales, were also created under the Project to work closely with the Mesa Regional.
155. Management also claims that consultations are a pre-requisite to start field activities and issue land regularization methodologies, and maintains that it “*endorses the Government’s position to respect the **decisions made by the Mesa Regional and individual communities** regarding their land preferred tenure regime.*” (Emphasis added)
156. In light of the Mesa responsibility to make decisions on behalf of the communities and based on consultation with these communities, the Panel notes that the legitimacy of the Mesa and of its members as genuine representatives of the Garífuna communities is a key issue to address in order to assess Bank compliance with OD 4.20 in the preparation and implementation of the Project.

1. The Mesa Regional: Requesters Claims and Management Response

157. The Requesters have expressed strong objections to the process that established the Mesa Regional, its composition and the selection of the eight pilot communities where land regularization activities will be implemented. They believe that the Mesa Regional “*has been created in spite of the disagreement of the communities, was not elected by the communities, [and] is not an organization that represents them.*” The Requesters claim that the Mesa is composed of people who cannot be considered “*other Garífuna representatives*” as stated by the Bank because its members are self-declared representatives of the Garífunas and were never elected as such by the communities. As a result, in the Requesters’ view, the Mesa is an organization alien to the Garífuna own institutions and cannot be entrusted with fundamental decisions regarding the regularization of Garífuna land.

158. According to Management, the Mesa Regional is a consultation board that “includes a broad range of Garífuna stakeholders.”⁹⁰ This Mesa was formed in 2005 following invitations sent by the Government to “representatives of a wide range of Garífuna communities and organizations, including Ofrañeh, to participate in a meeting to establish an inter-institutional commission to organize the Mesa Regional”. Management states that at a meeting held in Trujillo, Colon, on March 15-17, 2005, 112 Garífuna people, which included representatives of 25 communities, members of *patronatos*⁹¹, municipalities, the Garífuna church organization and organizations representing the Garífuna people, established the *Mesa Regional de Regularización y Resolución de Conflictos* (Regional Board of Regularization and Resolution of Conflicts), operating under the principle of non-exclusion so that all interested parties can participate and express their views about the Project.
159. Management claims that one representative of OFRANEH was present at the March meeting and is now part of the Mesa. This person, however, is not one of the Requesters because, according to Management, the leadership of OFRANEH is under dispute, and the OFRANEH-Requesters refused to participate in the meeting that created the Mesa Regional.⁹² Management does not believe, as the Requesters do, that the members of the Mesa are “outsiders” to the communities or “Garífuna clowns”.⁹³ In addition, at the mentioned March meeting, the Response notes that “eight communities and twelve protected areas were selected by participants as candidates for participation and demarcation and titling activities under the Project.”⁹⁴ Management also states that *Mesas Locales* were created specifically for each community to work with communities’ assemblies so that all members can participate in the Project.⁹⁵
160. Management states that there is “broad support for the Project”, although it recognizes that there is also “diversity of opinions among various Garífuna stakeholders regarding the role of the Project in addressing their land claims.”⁹⁶
161. The following section of this Report will address the Requesters’ claims related to the Mesa Regional and, in this context, it reviews the patterns of Garífuna social and political organization. This section is based on information gathered

⁹⁰ Management Response, ¶ 42.

⁹¹ “Grassroot organizations” with legal personality located within the communities whose members are selected by community members directly. See Management Response, ¶ 40.

⁹² Management Response, ¶ 42-45.

⁹³ Management Response, ¶ 86.

⁹⁴ Management Response, ¶ 43.

⁹⁵ Management Response, ¶ 44. Mesa locales have so far been created in the communities of Santa Fe, San Antonio, Sagrelaya, Guadalupe, and Cocalito.

⁹⁶ Management Response, ¶ 46, 47.

during the Panel's field visits, Project records, the Land Diagnostic prepared by the Central American Caribbean Research Council under the Bank-financed HONDURAS: Biodiversity in Priority Areas, (PROBAP) (GEF TF028367), and Management Response.

2. The Creation of the Mesa Regional

162. The Panel has carefully reviewed Project records, especially Aide Memoires of meetings concerning the formation of the Mesa Regional and has met various times during its visits to the Project area with members of the Mesa.
163. Management Response indicates that *“under the auspices of the Project, Government invited representatives of a wide range of Garífuna communities and organizations, including Ofraneh, to participate in a meeting to establish an inter-institutional commission to organize the Mesa Regional.”*⁹⁷ According to the records reviewed by the Panel, at the onset of this process to form the Mesa (around the end of January and beginning of February 2005) OFRANEH had expressed positive interest in participating, but had also stressed that all Garífuna people would have to be consulted about the formation of the Mesa in a transparent way.
164. However, when the invitation to form the future Mesa Regional was sent to community leaders and various organizations (including OFRANEH) by the Ministry of Justice on February 22, 2005, OFRANEH had already decided not to be part of this process. This invitation also referred to a workshop aimed at establishing an inter-institutional commission for the regularization of titling of land in Afro-Honduran communities. According to the Requesters, they refused to be part of the Mesa Regional and to select the pilot communities that would participate in Project activities, because the members of the PIU did not accept that these matters be discussed by each community before holding the workshop and making any decision.
165. Despite OFRANEH's refusal, the workshop organization continued. The workshop was held on February 24, 2005. A provisional committee was formed to organize the first assembly, to be held on March 15-17, 2005, aimed at selecting PATH pilot communities. Present were leaders of Garífuna communities, municipal authorities, Governor, the Association of Municipalities of Honduras (AMHON), MAMUGA, the Garífuna Catholic Pastoral Diocese Commission, and the Community Development Organization of Honduras (ODECO).⁹⁸

⁹⁷ Management Response, ¶ 42.

⁹⁸ Management Response includes a letter (See Annex 2.15) dated June 9, 2005 signed by a significant number of members of OFRANEH with which OFRANEH agreed not to oppose the Project, to acknowledge the Mesa Regional and to become part of it. The Requesters told the Panel that all OFRANEH members but one (a member previously expelled from the organization) only signed an

166. At the March 2005 meeting eight communities were selected to be regularized under the PATH and an agreement was reached to establish the Mesa Regional of Regularization and Conflict Resolution of Atlantida and Colon. During this meeting the principles and function of the *Mesa Regional* were established. The principles included respect for ethnic and cultural diversity, autonomy, will of majority, non-exclusion, efficiency, participation, and correction of procedures.⁹⁹
167. On September 22, 2005, the Mesa Regional met with Bank staff. The Mesa members described the steps leading to the formation of the Mesa and to the selection of the eight pilot communities. According to the Aide Memoire of the meeting, they stated that “*the communities were selected following a consultation process and prior meetings with the communities.*” The Panel has found not record of these prior meetings with communities. However, members of the Mesa informed the Panel during its visits to the Project area that meetings were held with the eight communities after these were selected so that each community could ratify the selection and could express its willingness to participate in the PATH Project. One of the eight communities, Punta Piedra, refused the PATH. OFRANEH confirmed that this meeting took place. The pilot communities whose lands are to be regularized under the PATH are now seven.
168. Alongside the Mesa Regional, Mesas Locales were created under the Project to discuss territorial issues and thereby facilitate the role of the *Mesa Regional* in representing communities’ interests. Mesas Locales are also meant to discuss the operational aspects of PATH in general and decide whether the community even wants to participate at all.¹⁰⁰

3. Membership and Role of the Mesa Regional

169. The Panel notes that the Mesa Regional’s constitutive act as outlined in the document, “*Reglamento de La Mesa Regional*” or “*Wadabula, Mesa Regional Garífuna*” (Tegucigalpa, M.D.C. 2006) is a complex and wordy document, not easily understandable by a non legal expert. The document states that the Mesa came into existence on March 17, 2005 in the presence of “*leaders of Garífuna*

attendance document related to the June 9 meeting; they did not agree to the content of the Aide Memoire and did not sign it.

⁹⁹ Management Response, Annex 2.12. According to the regulations of the Mesa Regional (*Reglamento de la Mesa Regional. Wadabula: Mesa Regional Garífuna* -Tegucigalpa MDC: 2006), the *Mesa Regional* has four types of members: founding, contributing, active, and honorary members. Membership, however, is unlimited. Founding members are those that participated in the March 15-17 meeting when the Mesa was created. Active members are those that participate on a regular basis while contributing members are lawyers who provide services, members who contribute monetarily, or those who provide in-kind services and are approved by the General Assembly. There are a limited number of honorary members, who are chosen by the General Assembly. Founding and Active members help the General Assembly and have a full vote.

¹⁰⁰ Management Response, ¶s 44 and 74.

communities, Municipal Authorities, a political governor, representatives of AMHON, MAMUGAH, la commission diocesana de la Pastoral de La Ceiba, representatives of ORANEH and ODECO” and that its stated purpose is to promote the program of the PATH.

170. The Panel notes that, according to this constitutive act, the Mesa follows a distinctly Western organizational rhetoric, including safeguards against internal corruption. It also includes an “organigrama” of how the Mesa Regional would relate to other entities in conflict resolution. It was not understood at all by those individual Garífuna with whom the Panel spoke to in Honduras.
171. During its visits to the Project area, the Panel team met a number of times with members of the Mesa Regional and attended, as observers, a general meeting of the Mesa Regional and the Mesas Locales in Guadalupe on June 23, 2006. Although Management Response and the Mesa’s constitutive act give general information about the Mesa, the Panel gained practical understanding of its composition and how it functions through a number of discussions with members of the Mesa.



Photo 7: Meeting of the Mesa Regional and Mesas Locales in Guadalupe

172. Members of the Mesa Regional told the Panel that the Mesa is composed of members of various organizations: church, patronatos, sport clubs, dance clubs and others. According to the people interviewed by the Panel, the Mesa Regional was born in an assembly where all the Garífuna communities were represented. When the Panel met the Mesa Regional for the first time, in February 2006, some people present at the meeting introduced themselves as new members of the Mesa, having joined recently. They stressed with the Panel

that the Mesa Regional is an open organization that does not discriminate or is closed to any Garífuna.

173. For each pilot community, selected to participate in the PATH Project, a Mesa Local was also formed to be the linkage of each community - “*mouth and ears*” of the Mesa Regional, as their members characterize the Mesas Locales. According to the members of the Mesa Regional interviewed by the Panel, each Mesa Local is formed by ten or twelve people, four or five of which are also members of the Mesa Regional. The Panel was told that each member of the Mesa Local represents or speaks on behalf of thirty or forty people in each given community. They stated that the organized groups in each community select members within the groups to be part of the Mesas.
174. In June 2006, during the second Panel visit to the Project area, Mesa members informed the Panel team that they were holding community assemblies where leaders of each organization participate to ratify the decisions made with respect to the eight communities selected to be part of the PATH.
175. On June 22 the Panel met with a group of members of the Mesa Regional and the Mesa Local in Cristales who were preparing for the Mesa Regional Meeting to be held the following day in the community of Guadalupe. The Panel team noted that they were passionate about their work and sincerely believed that they could help in the development of their communities and not depend on the big organizations in La Ceiba and Tegucigalpa to come and do things for them. They seemed upset that someone had accused them of being paid agents and expressed disappointment towards OFRANEH for refusing to participate to the process.



Photo 8: Panel meeting with members of the Mesa Regional in Cristales

176. The day after, on June 23, the Panel team participated as observers to the general meeting of the Mesa Regional and Mesas Locales in Guadalupe. The meeting was held outside, under a palm leaves roof, open to anybody from the community who wished to attend. Some people present at the meeting to which the Panel talk said that they did not belong to any Garífuna organizations. Others defined themselves as “*concerned citizens*” who had known about this meeting through fliers distributed in their close-by community of Santa Fe. They stated that they attended the meeting because they wanted to be aware of the progress of the Project, and added that the flier they received also mentioned the visit of the Inspection Panel. They further stated that this was not the first Mesa Regional meeting they attended to; they had received other fliers before.

4. Representation of the Garífuna People

177. The systems of governance and representation that the Garífuna people have established for themselves, over many years, are described in Chapter Two. OFRANEH, founded in 1977, has developed structures to represent the Garífuna people over the years, and seeks to promote the internal organization and political mobilization of the Garífuna communities. As noted in Chapter 2, the Panel found that OFRANEH has remained, over the years, the leading organization representing the Garífuna people and has been, in particular, at the forefront of efforts to secure Garífuna land rights, alongside ODECO, which also has played a key role, especially during the titling process of the 1990s.¹⁰¹
178. The Panel notes that Management, in its Response, gives the impression that there is little distinction between OFRANEH, ODECO and a range of other civil organizations in terms of representing the Garífuna people. In its description of “The Garífuna People”, the Response states that “[a] **variety of civil organizations represent the Garífuna**” (emphasis in original). The Response then lists these organizations, including OFRANEH, ODECO, and many others, in chronological order. It notes that some of these are considered traditional grass-roots organizations (community or Patronato level), others are NGOs, while others are “second-tier national federations or confederations.” The leading role of OFRANEH in representing the interests of the Garífuna people is not recognized. Rather, OFRANEH essentially is grouped as one of a variety of civil organizations that represent the Garífuna.

¹⁰¹ It is also worth noting that at one time OFRANEH seems to have operated as an NGO, seeking and receiving funds for development and relief efforts.



Photo 9: Panel meets with Requesters during visit to Project area

179. The Panel considers this description to be inadequate. As noted above, the Panel finds that OFRANEH is widely recognized as the leading entity representing the Garífuna people, and that OFRANEH and ODECO together may properly be considered the two most important Garífuna organizations in representing the Garífuna people in gaining rights over their ancestral lands. In recent years, OFRANEH, in particular, has played a lead role in this effort. **The Panel finds that OFRANEH (and ODECO) are “representative organizations” within the meaning of OD 4.20 and are in the position to provide an effective channel for communicating local preferences.** The sources and basis for this finding are described in Chapter 2, and include information from field visits and testimony of local communities and experts, the CACRC study, and Executive Order 35/2001.
180. As noted, the Garífuna people are also organized at community level. With respect to land issues, in particular the patronatos and the comités de defensa de tierra play important roles and are active in dealing with land issues affecting each community.

5. Conclusions

181. **The Panel finds that the initial concept of creating an organization like the Mesa Regional to unite the leaders and representatives of each Garífuna community, was not inconsistent with OD 4.20 on Indigenous Peoples, in the sense that it represented an effort to establish consultations and participation with affected communities.** The Panel notes, in this regard, that

the invitation to a workshop aimed at creating the Mesa Regional was sent to a wide variety of Garífuna organizations and actors, including OFRANEH and ODECO, the two major Garífuna organizations.

182. The Panel observes that the membership of an entity established for the purpose of carrying out consultations with indigenous peoples is of primary importance to ensure that the objectives of OD 4.20, that indigenous people are not adversely affected by a Bank-financed project are met. Moreover, the significance of how such an entity might relate to existing organizations established by the indigenous peoples themselves as their representatives. The Panel notes that process like the Mesa that involves any members of a community may have the effect of marginalizing the existing representative bodies of the community as a whole and at the local level who have worked on the issues for many years.
183. The fact that OFRANEH and ODECO – leaders of the communities in land rights issues - have chosen not to be part of the Mesa Regional is a serious concern. Despite their different views on many issues, both organizations claim that the Mesa was formed without properly consulting the communities at large. **The Panel considers that a consultation framework for Garífuna people in which their leading representative body or bodies are not part and do not give their support and guidance cannot ensure genuine representation of the Garífuna people, as required by OD 4.20.**¹⁰²
184. The Panel would also like to draw attention to some issues related to the formation and the functioning of the Mesa Regional as it currently stands.
185. While the Panel has seen records of meetings that the Mesa Regional held in various communities after it was formed and had selected the pilot communities that would participate in the Project, it has found no record of communities assemblies held prior to the creation of the Mesa where members of the future Mesa Regional were allegedly selected, as claimed by the current Mesa members.
186. In addition, the Panel notes that it is not clear who could become member of the Mesa, whether for example it is open only to Garífunas. In view of the Mesa's responsibilities (described above) in activities of land demarcation and titling, its openness to different people in terms of membership could open it to manipulation that may result in the harm the Requesters have described and fear.

¹⁰² It should be noted that the CACRC study recommended the formation of a committee that reunite the different organizations and other components of the Garífuna society and added that such committee should secure not only OFRANEH and ODECO's consent, but also their guidance and support. See CACRC study, Executive Summary, Section 3.7.

187. The Panel observes that even if the present members of the Mesas are enthusiastic and ready to work, it is not clear that the Project plans in their entirety have as yet been presented to them. The Panel further notes that the Project could have pursued the involvement of OFRANEH and ODECO through, for example, the Inter-institutional Commission established by Decree in 2001 to protect the land rights of the Garífuna and Misquito people. The Decree establishing this Commission identifies OFRANEH and ODECO as the entities to speak on behalf of the Garífuna people. This Commission, however, has not been activated and is hardly even mentioned in Project preparation.¹⁰³
188. **In light of the above, the Panel finds that the Bank's endorsement of the Mesa Regional as the basic consultation framework for the PATH Project, without the participation of OFRANEH and ODECO, is inconsistent with the core provisions of OD 4.20 on consultation, representation and participation. The Panel is concerned that the Mesa Regional has put in place a parallel system that is at odds with the way the Garífuna people have established, over the years, to represent themselves on the critical issue of securing their rights over land.**
189. The Panel appreciates the difficult situation faced by Bank Management in this regard, and acknowledges the extensive efforts made by Management to seek the engagement of OFRANEH and ODECO in the consultation process. These efforts do not, however, alter the risks created by the present situation. **The Panel finds that the Mesa system has divided the community and could potentially undercut the ability of its leading representatives to work on behalf of the community to achieve its objectives for collective title to ancestral land.**
190. The Panel considers that this dual-system of representation, and the conflicts that it is engendering, has the potential to contribute to larger rifts and vulnerabilities for the people as a whole. The Panel notes that a process like the Mesa that involves any members of a community can have the effect of marginalizing the existing representative bodies of the community as a whole and at the local level who have worked on the issues for many years.
191. The Panel further notes that, when it met with the Mesa Regional the first time, a Government official, non-Garífuna, was chairing the meeting, while Bank staff interviewed by the Panel stated that this should not happen. Bank staff interviewed by the Panel also could not provide very detailed information about the Mesa Regional, especially with respect to its membership; they seemed to rely mostly on general information provided by the PIU. **Because of the key role given to the Mesa Regional in the process of land regularization, the Panel finds that closer supervision of the Mesa Regional and up-to-date knowledge by Bank staff is required under the Bank policy on Project**

¹⁰³ The Decree establishing this Commission, and its consideration under the Project, are examined in more detail in Chapter Six on Institutional Structures.

supervision, OP/BP 13.05. The Panel finds that supervision of the activities related to the Mesa Regional does not comply with the applicable Bank policy.

6. Latest Development on the Mesa Regional

192. During its October 2006 visit to Tegucigalpa, the Panel met with the Requesters, who called the Panel's attention to the Aide Memoire of a meeting held on September 28, 2006, between representatives of OFRANEH and several representatives of the Government, including Director of INA, the Sub-secretary of State for the Ministry of Governance and Justice and the Secretaries of Environment and External Affairs, and the Project PIU coordinator.
193. This Aide Memoire contains an agreement (*Acta De Entendimiento*) between the participants covering various issues, including the existence of the Mesa Regional created under the PATH. The agreement provides for the immediate dissolution of the Mesa Regional. The Panel asked Management for clarification about this agreement and its implications for the Project. Management seems to have been unaware of this development until it received the Panel's request for information.
194. According to the Aide Memoire of the latest supervision mission (December 2006) Bank staff were not informed of this *Acta* by the Head of the Project PIU who signed the document as well. He allegedly told the Bank that at the time the *Acta* were signed the Mesa did not have juridical personality. The legal existence of the Mesa will be determined only when the SGJ decide whether to give (or not give) juridical personality to the Mesa. In his view, the other representatives of the Government signed the document due to their lack of knowledge of the history of the Mesa. Therefore, the agreement to dissolve the Mesa had not formal effect and the Mesa continues to operate. The Aide Memoire concludes by stating the need for the Government to declare its support to the Mesa Regional as integral part of the Project.
195. In this regard it has to be noted that Management recently requested the Government to

“Publicly rescind its repudiation of the Mesa Regional Garifuna Wadabula as the Project's participatory consultative framework for Garifuna peoples; or, if the Borrower no longer recognizes the Mesa, submit to IDA the rationale for this drastic change of strategy and agree with IDA on an alternative transparent and non-exclusionary participatory consultative framework for Garifuna peoples in the Project areas, which is consistent with the Project's objectives and meets IDA safeguard policies.”

196. The Bank made this request in January 2007 to the Government of Honduras as one of the conditions that the Government must comply with, to avoid suspension of further disbursements of the Credit financing the PATH Project. The Bank sent the Government a Notice of Threatened Suspension of Disbursement on January 10, 2007, because of lack of due diligence in carrying out the Project. Three particular problems are signaled in this letter: (1) failure to meet implementation performance targets, (2) “failure to adapt the Project's institutional arrangements to conform to the new legal regime for land administration established in Honduras by the enactment of the Property Law (*Ley de Propiedad*) after IDA Board approval of the DCA, ” and (3) “support for the dissolution of the regional Garífuna consultative mechanism” which is required under the DCA and is part of the Project’s Operational Manual. February 28, 2007 is the deadline for complying with the conditions described in the Notice of threatened suspension.
197. The Panel observes that the continued controversy regarding the Mesa Regional, and the *Acta* calling for its dissolution, provide another indication of the tensions that have surfaced about the role of the Mesa in representing the Garífuna people.
198. The Panel further notes that Bank Management, in calling upon the Government to “publicly rescind” its repudiation of the Mesa Regional, or to develop an alternative framework for this “drastic” change - - did not call for [adequate] consultations with the affected communities and their leaders to try to better understand the issues and concerns relating to the Mesa Regional. **In light of the controversy and concerns already associated with the Mesa Regional, the Panel finds that the failure to seek input and participation by the affected communities and their leaders is not consistent with Bank policy. The Panel finds that Bank Management has not adequately adjusted to the many concerns raised with respect to the existing consultation mechanisms as required by OD 4.20 and OP/BP 13.05 on Project Supervision.**



Photo 10: Panel experts meet with Garífuna people in Limón

Chapter IV: The Project's Legal Framework

A. Request's Concerns and Management Response

199. One of the main concerns of the Requesters is that the Project will facilitate the application of certain provisions of the new Property Law¹⁰⁴ that they believe may ultimately lead to the loss of their ancestral land and their traditional communal land titles as defined in local legislation and international conventions. For this reason, the Request claims that the IPDP assessment of the legal framework was inadequate and not consistent with the provisions of OD 4.20 on Indigenous Peoples because it did not consider the Property Law, which was under preparation at the time the Project was being developed.
200. In their Request to the Panel and in other submissions to the Bank, the Requesters have raised various objections to the 2004 Property Law. They believe it will legitimize the ongoing violations of Garífunas' land rights by non-Garífuna people and will legalize the occupation and possession by non-Garífunas of land to which the Garífuna communities hold full communal property titles or have been occupying for decades. The Requesters also argue that the Property Law will push for a dynamic land market that favors elites in power, to the detriment of customary indigenous rights and in violation of laws that protect them. In the Requesters' view, since the Property Law is the essential normative component of the legal framework supporting the PATH, the Project will be the instrument through which territorial claims of the Garífuna communities will be denied and non-Garífunas will secure their rights over Garífuna land.¹⁰⁵
201. The Requesters believe that the provisions of Chapter III [Article 93-102] of the Property Law which provides for the regularization of property for indigenous and Afro-Honduran people may be applied under the Project in a way that is harmful to their land rights and claims. They state that while Article 93 recognizes the importance of ancestral land rights, the remaining articles in the Chapter are highly detrimental to the fulfillment of these same rights. Acknowledging the importance of ancestral land for the culture of indigenous peoples, Article 93 recognizes the rights of the indigenous peoples over the land that they traditionally possess and the importance of communal land tenure. Among the disputed provisions are Articles 97, 98 and 100. Article 97 provides that a third party who has valid title of ownership to the lands of indigenous peoples, and who has had and possessed the land referred to in such title, has the right to continue possessing and exploiting such land. According to Article 98, a third party who has received title to the communal property of indigenous

¹⁰⁴ Ley de Propiedad, Decreto No. 82/2004, in La Gaceta Diario Oficial de la República de Honduras, No. 30,428, June 29, 2004, [hereinafter "Property Law"].

¹⁰⁵ Request for Inspection Annex 2 (Denuncia Programa Administración Tierras de Honduras (PATH) por violación DO 4.20 y DO 4.01), p. 2, in Inspection Panel Report and Recommendation Honduras: Land Administration Project (IDA Credit No. 3858-HO), March 14, 2006 (INSP/R2006-0002), Annex I.

peoples, which may be nullified as a result of these characteristics, shall be indemnified for the improvements prior to the return of the lands to the affected communities.¹⁰⁶ Article 100 provides that indigenous communal land is inalienable, not attachable and imprescriptible, but allows the communities themselves to terminate such communal tenure system, authorizing the rental of lands to third parties or authorizing other contracts that allow the community to participate in investments that contribute to their development. The Requesters view the latter article as the beginning of the end of their traditional communal property rights.

202. In its Response, Management states that “*the Project incorporates appropriate safeguards to fill potential gaps in Honduran legislation to safeguard the rights of Indigenous Peoples.*” It adds that the content of national laws and regulation is the responsibility of the Government of Honduras and that mechanisms are available for civil society to raise their concerns.¹⁰⁷
203. Noting that the Credit financing the PATH was approved in February 2004 and became effective in December 2004, while the Property Law became effective in June 2004, Management argues that the Project design “*anticipated the possibility of a new law by providing mechanisms ... for the continuous flexible adaptation of the Project to the new law.*”¹⁰⁸ The Response lists such mechanisms as:
 - the issuance from the Supreme Court of a Regulatory Decree (Auto Acordado) authorizing a parcel-based property registry in Project areas as a condition of credit effectiveness;
 - adequate access to legal advice and training before decisions are made regarding lands which are in conflict;
 - transparent decision-making mechanisms for conflict resolution on these land which include genuine representation of indigenous and Afro-Honduras groups;
 - a covenant providing that “*no titling and physical demarcation of lands adjacent to Ethnic Lands will take place unless procedures that adequately protect the rights of the indigenous and Afro-Honduran peoples, duly consulted with affected parties in a manner satisfactory to the Association and set forth in the Operational Manual, have been followed;*”
 - adoption of a legal and regulatory framework for indigenous peoples lands as a trigger to phase II of the Land Administration Program.

¹⁰⁶ Article 98 reads: “El tercero que ha recibido titulo de propiedad en tierras comunales de esos rublos, que por sus características pudiera ser anulable, previo a la devolución de las tierras a las comunidades afectadas será indemnizado en sus mejoras.”

¹⁰⁷ Management Response, ¶ 21.

¹⁰⁸ Management Response, ¶ 52.

204. Management also notes that the regulations to the Property Law have yet to be issued and thus that the IPDP and Operational Manual for the Project “*have not been updated.*” According to the Response, the Project’s safeguards prevent the Government from launching field activities until the Bank has issued its non-objection to the land regularization and conflict resolution procedures.¹⁰⁹ Management states that if the land regularization procedures under preparation are approved as regulations to the Property Law and if they are consistent with the Credit Agreement and the Bank safeguard policies, “*Management will endorse the incorporation of said procedures into the IPDP and Project Operational Manual.*”¹¹⁰ The Response further states that, in light of the Project’s objectives and the above-mentioned safeguards, Management “*found the new law acceptable*” and “*concluded that the Project’s safeguard provisions were not in conflict with the new law and the two could be harmonized*”
205. A summary of national legislation relevant to indigenous people’s land rights appears at the end of this chapter.

1. Issues related to the Legal Framework

206. **The Bank conducted an analysis of the legal framework regarding property rights of the indigenous peoples, including the Garífunas living in the Project area, in accordance with OD 4.20 during Project preparation.**
207. Issues related to Garífuna lands were raised in the Project documents (including a Bank-sponsored Legal Analysis of the Land Administration Project and the Project Operational Manual¹¹¹), which confirm the existence of serious conflicts between indigenous communities and non-indigenous peoples, who have occupied and taken possession of ancestral lands, at times with fraud and/or violence. The Legal Analysis also addresses conflicts that have arisen because land considered to be the functional habitat of the indigenous peoples, e.g. the northern coast of Honduras, was declared tourist area or because it is subject to exploitation by farmers who disregard the ownership rights of the indigenous communities.¹¹² The Operational Manual further recognizes that the “*uncontrolled occupation of Ethnic Lands by people who are not members of the ethnic communities*” has generated harsh conflicts with these communities.¹¹³

¹⁰⁹ Management Response, ¶ 57.

¹¹⁰ Management Response, ¶ 63.

¹¹¹ Análisis Legal del Proyecto de Regularización y Administración de Tierras de Honduras (PATH), Informe Final, Tegucigalpa, October 2003 [hereinafter “Legal Analysis”]; Manual de Procedimiento de Regularización, August 28, 2004 [hereinafter “Operational Manual”].

¹¹² See Legal Analysis, Table 13, Land Conflicts in Indigenous Areas, p. 41.

¹¹³ Operational Manual, p. 58. The Panel notes that the adoption of the Operational Manual was a condition of effectiveness of the Credit Agreement and it was approved after the Property Law was enacted. See Credit Agreement, Section 6.01(b).

208. Because of insecurity of land tenure derived from overlapping of titles and often illegal occupation of indigenous lands, the analysis of the Project's legal framework was particularly relevant during Project preparation. As emphasized in the PAD, the Land Administration Program, of which the Project is the first phase, was designed to be the "*main instrument to implement*"¹¹⁴ legal, institutional and technological Government reforms aimed at, *inter alia*, formalizing property rights for all Hondurans and facilitating access to land by the poor. When the Project was being appraised, a new Property Law was being discussed by Congress. The Credit financing the Project was approved in February 2004, while the Law was enacted in June 2004.
209. The Panel notes that, according to Project records, at the Decision Meeting before appraisal approval, questions were raised on whether the Bank should proceed with the Project before the enactment of a new Property Law. The meeting agreed that to go ahead with the Project under the circumstances was still the "*best course of action*" because nothing prevented the Project from supporting land titling under the existing legal framework, which was considered quite adequate.¹¹⁵
210. With respect to Ethnic Lands, however, staff agreed that two conditions were to be required: a) "*insist on procedures for conflict resolution that adequately reflect the interests of indigenous peoples reflected in the Operational Manual...*" (the latter a condition of Credit Effectiveness) and b) to include as a trigger for the second phase of the Land Administration Program the "*adoption of a legal/regulatory framework for regularizing indigenous people lands.*" This latter framework would not "*necessarily mean passage of new legislation, but may require passage of decrees to make existing laws consistent with ILO Convention 169...*"¹¹⁶ The Panel notes that although titling and regularization of indigenous land will take place under this current first phase of the Project, this new legal/regulatory framework is required for the second phase of the Land Administration Program. The Panel also notes that staff argued, that "*a procedure in the Operational Manual, no matter how good and consulted it may be, is not the same as a national legal framework ...*" In addition, a member of the Bank's Legal department specialist in indigenous peoples matters was consulted about the specific legal framework covering indigenous peoples' rights to land under the proposed Project. The specialist observed that "*receiving legal advice and having conflict resolution provisions in the operational manual based on a dubious legal framework may not help too much in a titling process.*"¹¹⁷

¹¹⁴ PAD, p. 19.

¹¹⁵ Project Files, Communication dated December 16, 2003.

¹¹⁶ Project Files, communication dated December 16, 2003 and Minutes of Decision Package Review Meeting, dated December 16, 2003.

¹¹⁷ Project Files, communication dated December 17, 2003.

211. Contrary to Management's statement in its Response that the Honduran Legal Framework lacked "*legislation specifically addressing indigenous and Afro-Honduran land rights, including appropriate consultation frameworks,*"¹¹⁸ the Legal Analysis sponsored by the Bank stated that indigenous rights are recognized by Art. 346 of the Constitution of Honduras and by Honduras' approval of ILO Convention 169 on Indigenous and Tribal Peoples which became part of the "*ordenamiento juridico nacional*" (domestic law) on May 10, 1994.¹¹⁹ The Legal Analysis also raises concerns about several amendments to the existing legal and institutional framework provided in the Bill of Law of the new Property Law.¹²⁰ It states that these amendments must be taken into account in the design of training and outreach programs of the Project. The Legal Analysis also underlines the fact that the proposed Law may provide legitimate title in favor of people whose only claims to land are either uninterrupted possession or the fact that their request for title over the land that they possessed has not been opposed by the legitimate owner.
212. The Garífuna people claim that the enactment of the new Property Law substantially changed the legal situation of the indigenous peoples' rights over land because it granted specific rights to people occupying Ethnic Lands (See paragraph 3 above) The Panel notes that this claim is consistent with the observations of the Legal Analysis.
213. A few months before the Property Law was enacted, a staff member from the Latin American and Caribbean Region (LAC) specializing in social issues emphasized that although the wording of the draft Law seemed good, it might mean and imply different things, and thus an analysis by Bank's lawyers expert on ethnic rights was "*strongly*" suggested.¹²¹ However, the Panel's discussions with Bank staff during the investigation showed that the Requesters' concerns about the Property Law were largely considered by Bank staff only as a matter of national law rather than as a factor that could affect the Project and Bank compliance with its policy on Indigenous Peoples.
214. This is consistent with the following statements included in Management Response:

*"Management notes that, beyond matters related to the Project, the Request raises issues about the Honduran Property Law"*¹²² and "[t]o the extent they [the Requesters] disagree with the 2004 Property Law, and not with the Project per se, Management notes that the content of national laws and regulations is the responsibility of the Government of Honduras, and that the Government has put

¹¹⁸ Management Response, ¶ 53.

¹¹⁹ Legal Analysis, p. 17. See below for a description of the Convention.

¹²⁰ Legal Analysis, p. 31, Section 5.4 (Reflexiones Básicas del Proyecto de Ley) (Basic reflections about the bill of law).

¹²¹ Project Files, communication dated December 17, 2003 and communication dated May 19, 2004.

¹²² Management Response, ¶ 94.

in place mechanisms, such as the Project's consultation framework, for civil society to raise their concerns on such matters."¹²³

215. OD 4.20 requires however that the IPDP contain an assessment of the legal framework in the country, including legal status of affected groups, as reflected in the constitution, laws and regulations. *"Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction."* (para. 15)
216. Garifuna people interviewed by the Panel during the investigation also stated that they agree with the Project objectives but only to the extent that it does not provide technical and financial support to implement a Law that all Garífunas view as highly detrimental to their rights over their ancestral land and traditional forms of ownership. In fact, not only did strong opponents of the PATH like OFRANEH and ODECO propose to the Honduran Congress to amend Chapter III of the Law, but also the Mesa Regional established under the Project prepared its own proposal to amend the Property Law, raising the same substantive issues as the two other Garifuna organizations.
217. Notably, the Mesa members informed the Panel that they support the Project because they believe that the PATH and the World Bank involvement will help them to amend the Property Law and recover their ancestral land that others have taken. They believe that the PATH will help where everybody else has failed thus far. In their view, before the creation of the Mesa, existing organizations, including OFRANEH, who dealt with land issues did not obtain any result. They also hope that the PATH will help them in solving land conflicts with the invaders so as to obtain titling, extension of their lands and regularization of their titles (*saneamiento*). They added that during Project preparation, because PATH people did not mention "*saneamiento*," they doubted that this Project could help them. However, they explained to the Panel that the members of the PIU gave them more information about the Project and clarified what the PATH really was.
218. The Panel notes that the new Property Law contains a number of amendments to the legal and institutional framework which are consistent with the objective of the Project and constitutes an essential part of the legal framework within which the Project is being implemented. However, as already noted, the Law also contains some controversial provisions relating to the recognition of the land rights of the indigenous peoples.

¹²³ Management Response, ¶ 21.

219. OP 7.00 (Choice of Borrower and Contractual Agreements) provides in paragraph 14 that when local legislation is of relevance to the project/program financed by the Bank, the Bank “*tries to work within existing law to the extent possible.*” It adds, however, that “[i]f the amendment of a particular law would impede the achievement of the project's objectives, the contractual agreements may provide that such amendment would constitute an event of suspension.” (note 13) This is particularly relevant because a change in existing legislation, namely the passage of the new Property Law, was being discussed at the time the DCA was being negotiated and signed.
220. The Panel also observes that the Requesters as well as other Garífuna organizations, including the members of the Mesa Regional created under the PATH, told the Panel that they have been very concerned about the content and implementation of the Property Law since it was under discussion in Congress; the Project files show that Bank staff were also concerned about the Property Law as it was under discussion in Congress during Project preparation and approval; and that the Legal Analysis states that “*if the bill of law [of the Property Law] is approved, as it stands in the draft reviewed, it will entail a significant change to the existing legal and institutional framework since, in addition to creating new legal mechanisms (“figuras”), it eliminates or repeals existing legal institutions and norms...*”
221. In spite of these warnings to Management before and after the enactment of the Law, that is during Project preparation and after Credit approval, **the Panel did not find any record that these changed circumstances, which are potentially directly relevant for the land rights of indigenous people, were acted upon by Management, aside from a inconclusive exchange of communications between the Region and the Legal Department.**¹²⁴ To the contrary, Management states in its Response to the Request for Inspection that during Project design it “*anticipated the possibility of a new law by providing mechanisms ... for the continuous flexible adaptation of the Project to the new Law*” and that after the Law was enacted, it “*found the law acceptable.*” (emphasis added) For this reason, the Panel requested a legal opinion from the Bank’s Legal Department to find out to what extent the Development Credit Agreement entered into between Honduras and the Bank would avoid any eventual harm to the rights of indigenous peoples as a result of the implementation of the Project (including the application of the Property Law as feared by the Requesters). (See next section of this Chapter)
222. The Panel observes that the Operational Manual for the Project was approved by the Bank as a condition of effectiveness of the Development Credit Agreement after the Property Law had been enacted but no regulations on land regularization procedures had yet been issued. Management Response however

¹²⁴ Project Files, communications dated May 19, 2004.

states that “[i]f the proposed procedures are also consistent with the relevant Credit Agreement provisions and Bank safeguard policies, then Management will endorse the incorporation of said procedures into the IPDP and Project Operational Manual.” Management adds that “[t]hese measures can only occur before land regularization activities on the ground affecting Indigenous Peoples commence”

223. **The Panel finds that as required by OD 4.20, the Project provides for measures to protect indigenous peoples’ land rights. These measures include certain mechanisms of conflict resolution including conciliation and arbitration, the provision of legal advice and training for indigenous peoples and a covenant in the DCA that requires that “no titling and physical demarcation of lands adjacent to Ethnic Lands will take place unless procedures that adequately protect the rights of the indigenous and Afro-Honduran peoples, duly consulted with affected parties in a manner satisfactory to the Association and set forth in the Operational Manual, have been followed” (emphasis added). However, given the relative weakness of indigenous peoples, acknowledged in the Project documents, and the fact that the new Property Law gives specific rights to non-indigenous occupants of Ethnic Lands that cannot be amended or limited by regulations to the Law or by the provisions of the Project Operational Manual, the Panel finds that these measures are not sufficient to protect indigenous people land rights that may be affected by Project implementation, as required by OD 4.20.**
224. **The Panel notes that, in spite of the key importance of the Property Law in the design and execution of the Project and on the rights of the indigenous peoples, and the concerns of staff and affected people noted above, Management did not include any references or remedies relating to possible negative effects of the Property Law in the DCA for this Project.**
225. This Project is the first phase of an Adaptable Program Loan (APL). According to Bank policy¹²⁵ the APL provides for funding of a long term development program, starting with the first set of activities, based on agreed milestones and benchmarks for realizing the program’s objectives. The Project will have an immediate effect on indigenous peoples’ land rights during this first phase. The adoption of a legal and regulatory framework for indigenous peoples’ lands, however, is only a trigger to process the second phase of the APL. **The Panel finds that this is ineffective in protecting the rights of indigenous people during the first phase of the APL. If in the Bank’s opinion there was not an appropriate legal/regulatory framework for indigenous peoples’ lands, the Panel fails to understand why titling and regularization of indigenous peoples was included in the first phase of the APL rather than the second one when such framework was required to be in place. The Panel notes**

¹²⁵ Board Paper on Adaptable Lending – New Investment Operations (R97-203), dated August 1997.

that to be consistent with the principles and objectives of the Bank's operational policy on Indigenous Peoples, the first phase of the APL could have excluded titling on Ethnic Lands and areas adjacent to Ethnic Lands until the enactment of a suitable regulatory framework.

2. Panel's Request for a Legal Opinion and Response from the World Bank General Counsel

226. In light of the concerns about the Property Law noted above, expressed by the Requesters and the Garifuna people in general, on December 20, 2006, the Panel requested from the World Bank's Senior Vice President and General Counsel¹²⁶ a legal opinion on the rights and obligations of the Bank (and correlative obligations of the Borrower) regarding "*whether and to what extent the safeguards included in the Project and in the legal documents, including specific provisions of the Operational Manual, effectively protect the indigenous and Afro-Honduran peoples' rights on their Ethnic Lands from the harm that, in their opinion, will result from applying the provisions in Chapter III of the Property Law, with regard to regularization of Ethnic Lands under the Bank-financed Land Administration Project.*"¹²⁷
227. This opinion was requested pursuant to paragraph 15 of the Resolution that established the Inspection Panel, which provides that "*The Panel shall seek the advice of the Bank's Legal Department on matters related to the Bank's rights and obligations with respect to the request under consideration.*"¹²⁸ The General Counsel, however, declined to issue an opinion on the rights and obligations of the Bank¹²⁹ on the grounds that the request does not "*form the basis for a legal opinion of the General Counsel*" because "*responding to the Request Memo through a Legal Opinion would be to address a question that falls within the Panel's own jurisdiction.*"
228. The Panel emphasizes that, in order to ascertain Bank compliance with applicable Bank policies, it asked the General Counsel whether the safeguards mentioned in Management Response are properly set forth in the Project's DCA and are binding and enforceable obligations of the Borrower that would protect indigenous peoples from possible negative impacts that implementing the Project might bring about. In its Response to the Request for Inspection, Management states that the Project incorporates appropriate safeguards to fill

¹²⁶ Hereinafter General Counsel.

¹²⁷ See Annex C of this Report for the text of the Panel's Request for a Legal Opinion.

¹²⁸ "The World Bank Inspection Panel," Resolution No. IDA 93-6, September 22, 1993.

¹²⁹ See for example Ibrahim Shihata, Legal Opinion on Bangladesh – Jamuna Bridge Project (Credit 2569-BD), November 4, 1996; Andrés Rigo, Legal Opinion on Bangladesh – Jute Sector Adjustment Credit (Cr. 2567-BD), January 29, 1997; Ko-Yung Tung, Legal Opinion on China – Credit 3255-CHA, Loan No. 4501-CHA Western Poverty Reduction Project, April 19, 2000; Ko-Young Tung, Legal Opinion on Third and Fourth Power Projects and the Bujagali Hydropower Project in The Republic of Uganda, March 5, 2002.

the gaps in Honduran legislation to protect the rights of indigenous peoples. It goes on to assert that the Project design, anticipating the possibility of a new Property Law, provides for mechanisms to adapt the Project to the new Law in a flexible way and that the Project's safeguard provisions are not in conflict with the new Law.¹³⁰

229. According to the General Counsel, because of the separation of roles between the General Counsel and the Inspection Panel, the question of "*whether the Project provides adequate safeguards (under applicable Bank policies) must be addressed by the Panel through its review of whether the Project meets the applicable operational policy on indigenous peoples.*" The General Counsel indicated that to provide the legal opinion requested by the Panel, the General Counsel would be required "*to opine on what protection is effective in terms of Bank policy.*" The Panel notes and confirms its agreement with the General Counsel's view of the role of the Panel in this regard.
230. In a reversal of prior practice, however, the General Counsel claims that the Panel requested a review of correlative obligations of the Borrower, and goes on to state that "*even assuming, arguendo*" that such a review is authorized, it "*should be carried out – by the Panel – with references to applicable Bank policies and procedures.*" Although this contrasts with opinions issued by previous General Counsels, the Panel welcomes this clarification and will proceed accordingly.
231. Although the General Counsel does not provide the Panel with the legal opinion requested, she offered certain "*reflections*" on the issues raised. The paragraphs below address the General Counsel's note and the Panel's analysis.
232. According to the General Counsel, the provision included in the Resolution regarding advice from the Legal Department to the Panel "*cannot be understood to be aimed at altering the respective roles of the Board, the Panel and the Legal Vice Presidency that are the cornerstones of the Resolution.*" In support of this view, the General Counsel cites two legal opinions about the Panel's operations issued by a former World Bank General Counsel, Mr. Ibrahim Shihata, in 1996 and 1997, and her own legal views provided to the Board of Executive Directors on October 31, 2006, during the discussion of the Panel's Investigation Report and Management Action Plan related to the Pakistan: National Drainage Program Project. In the General Counsel's view, the October 2006 Board discussion "*highlighted the General Counsel's role of providing counsel and guidance on the rights and obligations of the Bank, separate from the Panel's discharge of its role in investigating the issues of Bank compliance with its policies.*"

¹³⁰ See Management Response at paragraphs 49-57 and Panel's Request at paragraphs 10-12.

233. The Panel respects its role as defined in the Resolution, and respects the role the Resolution assigned to the General Counsel in the context of a Request for Inspection submitted to the Panel. For this reason, and in the “*continuing spirit of collaboration between the Panel and the Legal Vice Presidency*”, the Panel has sought a legal opinion to address a legal issue pertaining to the rights and obligations of the Bank, namely whether the Borrower’s obligations are properly set forth in the Credit Agreement, and what are the rights and obligations of the Bank if the Borrower did not honor its obligations and the fears the Requesters express with respect to the Project materialize.
234. With regard to the legal opinions referred to by the General Counsel, the Panel notes that the 1996 legal opinion given in relation to the Request for Inspection about the Bangladesh: Jamuna Bridge Project explains what remedies would be available to the International Development Association if, *inter alia*, certain provisions of an Erosion Flood Plan designed to protect Project affected people were not applied in accordance with their terms by the Project implementing agency or the Borrower. This opinion does not specifically address the distinct responsibilities of the Panel, the General Counsel and the Board in the Panel process. Neither does the second 1997 legal opinion cited by the General Counsel, which deals with the competence of the Panel *ratione temporis* in determining the eligibility of a Request for Inspection. This latter issue has already been resolved with respect to the Request for Inspection currently under investigation, since the Board of Executive Directors approved the Panel’s eligibility determination and investigation recommendation on March 20, 2006.¹³¹
235. The Panel notes that when the Panel asked “*whether and to what extent the safeguards included in the Project and in the legal documents, including specific provisions of the Operational Manual, effectively protect the indigenous and Afro-Honduran peoples’ rights on their Ethnic Lands from the harm*”, the term “effectively” refers to whether the safeguards claimed by Management were properly set forth in the legal documents and are a binding and enforceable obligation of the Borrower. The Panel further notes that this Request for a Legal Opinion is consistent with previous requests made by the Panel to the Legal Department, for each of which it has received a legal opinion, as noted above.

¹³¹ The Panel notes that there is an additional legal opinion of 1999 (*Second Review of the Inspection Panel Experience - A commentary*) referenced in Ibrahim Shihata “The World Bank Legal Papers” (2000) Martinus Nijhoff, 601, which although not referenced above, deals with the distinction between the Bank’s failure to observe its policies and the failure of the Borrower to respect its obligations under a loan agreement. Shihata states that the Borrower’s failure to honor its obligations falls outside the Panel’s mandate, unless alleged harm is attributed to the borrower as well as the Bank’s actions and omissions, as for example when harm resulted from the borrower’s failure to honor its obligations and the Bank failed to follow up on the borrower’s obligations under a loan agreement. This latter failure is within the Panel’s mandate. (Resolution ¶ 12).

236. For example, in 2002 in the context of the Uganda: Bujagali Hydropower Project investigation, the Panel requested a legal opinion as to whether there was a valid, binding and enforceable obligation of the Government of Uganda to preserve the Kalagala Falls as an environmental and cultural offset in perpetuity, as Management had claimed in the Response to the Request for Inspection.¹³² The legal opinion (“*Legal Advice in Response to Request by Inspection Panel*”) provided by the then General Counsel, on March 5, 2002, disallowed Management’s claims and stated that Uganda had no valid, binding and enforceable obligation to conserve the Kalagala Falls in perpetuity. The Panel notes that the Panel’s request for a legal opinion posed to the General Counsel in the context of the Uganda Panel’s investigation raised a legal issue similar to the one presented in the instant Panel’s Request.¹³³
237. The Panel also notes that the Panel’s request does not ask the General Counsel to assess sovereign law and explicitly excludes this kind of judgment or assessment at paragraph 17 (i) where it states “*that the issues raised refer not to the content or intent of national legislation but rather whether the implementation of the Bank-financed project may result in instances of harm to the rights of indigenous peoples over their Ethnic Lands as they fear.*” In other words, the Panel specifically asked whether the obligation to avoid harm as a consequence of a Bank-financed project was applied in the PATH Project.
238. The Panel also notes the General Counsel’s statement that assessing foreign law is not relevant to determining the Bank’s compliance with its policies and procedures “*in the present circumstances*”. The Panel notes that OD 4.20 on Indigenous Peoples requires, *inter alia*, that:

“The project component for indigenous peoples development should include the following elements, as needed:

(a) Legal Framework. The plan should contain an assessment of (i) the legal status of the groups covered by this OD, as reflected in the country’s constitution, legislation, and subsidiary legislation (regulations, administrative orders, etc.); and (ii) the ability of such groups to obtain access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders,

¹³² Uganda Proposed Bujagali Hydropower Project Request for Inspection Legal Opinion on the Kalagala Offset Agreement, from Edward Ayensu, Acting Chairman, IPN, to Ko-Yung Tung, V.P. & Gen. Counsel, December 14, 2001, in Uganda: Third Power Project (Credit No. 2268-UG), Fourth Power Project (Credit No. 3545-UG), and Bujagali Hydropower Project (PRG No. B003-UG) Inspection Panel Investigation Report, May 23, 2002, Annex 1, ¶ 5 [hereinafter Uganda Request for Legal Opinion].

¹³³ The Panel observes that the reference to the “correlative obligations” of the Borrower is included in the above-mentioned Legal Advice in Response to Request by Inspection Panel, which reads: “*The Bank’s rights and obligations here must be analyzed in terms of the correlative rights and obligations of The Republic of Uganda.*”

and to have access to natural resources (such as forests, wildlife, and water) vital to their subsistence and reproduction.” (emphasis added)

239. This requirement, related to the content of an Indigenous Peoples Development Plan, is applicable whenever indigenous peoples are affected by a Bank-financed project. The Panel notes that the fact that regulations to the Property Law have yet to be issued does not shield the Bank from analyzing whether the application of this Law as part of Project implementation may result in harm to indigenous peoples’ rights over their Ethnic Lands.
240. The General Counsel also stated that OD 4.20 on Indigenous Peoples requires that harm to indigenous peoples resulting from a Bank-funded project be avoided or mitigated but that the policy “*is not prescriptive as to the exact substantive and procedural details that local law should contain*” to protect indigenous peoples. The General Counsel further indicated that OD 4.20 “*quite clearly indicates that the main mechanism for properly addressing indigenous peoples’ issues is ‘the informed participation of the indigenous peoples themselves’.*” (emphasis added) The Panel observes that this may not adequately reflect the political, social and economic weakness of the Garífuna and indigenous peoples in general, a fact that the Bank acknowledged during the preparation and implementation of this Project.¹³⁴ Indigenous peoples are by definition groups “*whose social and economic statuses restrict their capacity to assert their interests and rights in land and other productive resources.*”¹³⁵
241. The General Counsel’s document ends its reflections with a discussion on the “*Relevance of Honduras Property Law.*” The Response reiterates that regulations to the Property Law have not been issued yet, and, as a result, the Law’s chapter on Ethnic Lands has not been used to title and register land and “*has not been tested either domestically or against the provisions set forth in the Project’s Development Agreement.*” For this reason, the General Counsel believes that a legal opinion on the “*outcome of such a test ... would be purely speculative*” and not “*determinative.*”
242. The Panel notes that the legal context in which a Project is designed and implemented is very important and Bank policies recognize this. In this particular Project, the legal context is important also because the Requesters claim that the Project will facilitate the implementation of a Law that they believe is highly detrimental to their rights and interests. The fact that the regulations to the Law have not been issued yet and the alleged harm feared by the Requesters is, at this stage, potential, does not exempt the Bank from

¹³⁴ At the Project’s Decision Meeting noted above, it was agreed that Development Credit Agreement (DCA) would include specific provisions “*to ensure that Government takes positive steps to address the land rights of indigenous peoples and Afro-Honduran peoples, in particular to safeguard against the possibility of other land claimants taking advantage of the traditionally weak bargaining position of these groups.*” (emphasis added)

¹³⁵ See OD 4.20, ¶ 2. See also OP 4.10 (Indigenous Peoples) dated July 2005.

analyzing to what extent the implementation of the Project will be affected by the Law. **The Panel finds that Bank policy required Management to carry out this analysis after the Law was enacted.**

B. Relevant International Agreements: ILO Convention No. 169

243. The Requesters refer to a number of international conventions that they deem to be relevant for their claims. They state that the Bank policies “*have been designed and are frequently reviewed so that the Bank, in executing its projects, respects the international rules and standards designed to safeguard the rights of indigenous peoples ...*”.¹³⁶ More specifically, they mention, *inter alia*, the ILO Convention No. 169 concerning Indigenous and Tribal Peoples, which recognizes and protects the rights of ownership and possession of indigenous and tribal peoples over the lands they traditionally occupy.¹³⁷ According to the Requesters, Chapter III of the Honduras Property Law, which entered into force in 2004, violates their rights and interest over their ancestral land and as such is in violation of ILO Convention No. 169. The Requesters believe that the Project, by supporting the implementation of the above-mentioned Law, facilitates non-compliance with the ILO Convention.
244. In its Response, Management addresses the Requesters concerns regarding the ILO Convention No. 169 by stating that “[w]hile this issue may be appropriate to raise within the jurisdictional context of other fora, such as Inter-American Human Rights tribunals, the World Bank’s obligation in this project is to ensure compliance with the World Bank’s applicable policies, including the Operational Directive on Indigenous Peoples.”¹³⁸
245. The General Counsel’s Response states that the Panel “*suggests*” that the Property Law provisions dealing with indigenous land may be inconsistent with ILO Convention No. 169 and that “*the Project, by operating within the context of the Honduras Property Law, therefore contravenes Bank policy.*” The Panel emphasizes that, in its Request for a legal opinion, it did not state that the Project contravenes Bank policies, and indeed could not do so.
246. In 1957 the ILO adopted the Convention on Indigenous and Tribal Populations (No. 107), the first international convention for this subject. This Convention was revised, and ILO Convention No. 169 (“the Convention”) concerning Indigenous and Tribal Peoples was adopted in 1989. ILO Convention No. 169

¹³⁶ Request p. 2.

¹³⁷ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), adopted on June 27, 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entered into force September 5, 1991. Honduras ratified the Convention in 1995. The Honduran Congress passed in 1994 the law that approved the ILO Convention No. 169 (Decreto 26 de Mayo 25 de 1994 que aprueba el Convenio 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes).

¹³⁸ Management Response, p. 14, at note 11.

deals with Indigenous and Tribal Peoples in Independent Countries.¹³⁹ The Convention entered into force on September 5, 1991 and, as of March 2007, 18 countries have ratified it.¹⁴⁰ The Honduran Congress approved ILO Convention No. 169 in 1994.¹⁴¹ Honduras ratified the Convention on March 28, 1995.

247. The Convention affirms indigenous peoples' rights to identity, diversity, and differences within the structure of the national state. It is the only international legal agreement currently in force that exclusively addresses the rights of indigenous and tribal peoples.¹⁴² The Convention covers a number of issues, including access to natural resources, health, education, vocational training and, most importantly, land rights. It provides means by which these peoples can take control of their own lives and achieve greater recognition of their distinct cultures, traditions and customs and at the same time gain more control over their own economic, social and cultural development.
248. The Convention establishes the duties of Governments to protect and promote the rights of indigenous and tribal peoples in their countries. It recognizes peoples' rights to retain their customary laws and customs.¹⁴³ Most importantly, with regard to the Requesters' claims, the Convention includes comprehensive approaches to consultation and participation as well as to land rights.
249. The Convention devotes an entire section to land issues, recognizing the special relationship of many indigenous and tribal peoples to their land. It requires governments to *"respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories ... which they occupy or otherwise use."* Moreover, the Convention recognizes the importance of *"the collective aspects of this relationship"*.¹⁴⁴
250. Article 14, which is especially relevant to the Requesters' claims, states that indigenous and tribal peoples have rights to the land they traditionally occupy. It also provides that *"measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities."*¹⁴⁵
251. In order to protect these land rights, the Convention requires that *"[g]overnments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection*

¹³⁹ IPDP, p. 8.

¹⁴⁰ Spain has ratified the Convention in February 2007 and the Convention will enter into force for this country in February 2008. Available at <http://www.ilo.org/ilolex/english/newratframeE.htm>.

¹⁴¹ Decreto 26 de Mayo 25 de 1994 que aprueba el Convenio 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes.

¹⁴² ILO website, "The effect of Convention No. 169 so far".

¹⁴³ Article 8.

¹⁴⁴ Article 13, ¶ 1.

¹⁴⁵ Article 14, ¶ 1.

of their rights of ownership and possession.”¹⁴⁶ The Convention also mandates that governments make sure that procedures and mechanisms are in place to resolve land disputes.¹⁴⁷ Additionally, the Convention requires Governments to safeguard the rights of peoples concerned to the natural resources pertaining to their lands.¹⁴⁸

252. With regard to the transmission of land rights, the Convention states that procedures for the transmission of land rights have to be respected and that the peoples have to be consulted when consideration is given to their capacity to transmit their rights outside their own community.¹⁴⁹
253. Bank operational policies applicable to this Project indicate that the Bank must ensure that the Project Plan is consistent with the terms of international agreements related to a country’s environment and the health and well-being of its citizens and that the Project does not contravene international environmental agreements.¹⁵⁰
254. The General Counsel states that the Operational Manual Statement (OMS) 2.20 (Project Appraisal) about the Bank’s obligations not to finance projects not consistent with the Borrower’s international obligations, refers only to agreements that are “*essentially of an environmental nature*” adding that “*considering that the 1999 Operational Policy 4.01 on Environmental Assessment states in paragraph 3 that ‘The Bank does not finance project activities that would contravene [...] country obligations, as identified during the EIA’ under environmental treaties and agreements, paragraph 24 of OMS 2.20 has been superseded by OP 4.01 of 1999.*” (emphasis added)
255. The Panel wishes to record its serious concern about the above statement, because it seems to limit, and even amend, existing Bank policies to apply only to agreements of “essentially an environmental nature.” The Panel draws attention to the following considerations: a) the text of OMS 2.20 does not refer only to environmental agreements. Rather it requires more broadly that a “*project’s possible effects on the country’s environment and on the health and well-being of its people must be considered at an early stage... Should international agreements exist that are applicable to the project and area, such as those involving the use of international waters, the Bank should be satisfied that the project plan is consistent with the terms of the agreements.*” When it refers to international agreements, the policy mentions as an example agreements involving the use of international waters, which would normally not be characterized as “essentially of an environmental nature;” b) OMS 2.36

¹⁴⁶ Article 14 ,¶ 2.

¹⁴⁷ Article 14 ¶ 3.

¹⁴⁸ Article 15 ¶ 1.

¹⁴⁹ Article 17.

¹⁵⁰ OMS 2.20. on Project Appraisal and OP 4.01 on Environment Assessment.

(Environmental Aspects of Bank Work) ¹⁵¹ dated May 1984 and issued after OMS 2.20 contains a specific provision, according to which the Bank “*will not finance projects that contravene any international environmental agreements to which the member country concerned is a party.*” If OMS 2.20 had referred only to international environmental agreements there would have been no need for a new statement issued a couple of months later to restate the same directive; c) the preamble of OP 4.01 on environmental assessment lists specifically which operational policies are being replaced by the new OP/BP. This list includes OMS 2.36 because of its environmental nature, but does not refer to OMS 2.20, which is of a more general nature and refers to Project appraisal. The Panel observes that the current table of contents of the Operational Manual includes the complete OMS 2.20 as applicable to Bank-financed operations. ¹⁵²

256. The Panel recognizes that the Bank is responsible for compliance with its own policies and procedures. But it also notes that Honduras is a party to ILO Convention No. 169. The General Counsel’s Response indicates that OD 4.20 does not require compliance with ILO Convention No. 169. The Panel observes that OD 4.20 broadly reflects the spirit and provisions of ILO Convention No. 169. ¹⁵³
257. Some Bank staff raised issues during Project preparation regarding possible challenges to land regularization and titling procedures if they were carried out in violation of ILO Convention No. 169. Project documents, including the Operational Manual and the Environmental Assessment, address the land rights of indigenous peoples in the context of the rights and interests over their ancestral land as explicitly established in the Convention.
258. The Panel notes that it is a matter for Honduras to implement the obligations of an international agreement to which it is party and does not comment on this matter. However, the Panel is concerned that the Bank, consistently with OMS 2.20, did not adequately consider whether the proposed Project plan and its implementation would be consistent with ILO Convention No. 169.

¹⁵¹ OMS 2.36 (Environmental Aspects of Bank Work) ¶ 9 (g), which reads: “The Bank ...will not finance projects which would significantly modify natural areas designated by international conventions as World Heritage sites or Biosphere Reserves, by national legislation as national parks, wildlife refuges, or other protected areas...”. OMS 2.36 (Environmental Aspects of Bank Work) has been replaced by OP/BP 4.01 (Environmental Assessment) issued in January 1999.

¹⁵² The Panel notes that both ILO and the World Bank are specialized agencies of the United Nations and this seems to be an additional reason for the World Bank to refrain from financing activities that will not be consistent with the provisions of ILO Convention No. 169.

¹⁵³ The Panel was informed that ILO Convention No. 169 was not mentioned in OD 4.20 because at the time the policy was drafted, the Convention had been ratified only by two countries. As noted in the Section C of this Chapter, as of March 2007, ILO Convention No. 169 has been ratified by 18 countries, including Honduras.

C. National Legislation Relevant to Land Rights of Indigenous Peoples

259. The 1982 Constitution of Honduras recognizes the special status of indigenous peoples in Article 346, which provides that the State must develop measures to protect the rights and interests of the indigenous communities, especially with respect to the land and forests they occupy.¹⁵⁴ Further, Article 107, which prohibits foreigners from owning national, municipal or private lands within 40km of international borders and the coastline, is also relevant for the land rights of the Garífuna people, whose communities, including those selected to participate in Project activities, are mostly located in the northern coastal areas of Honduras. However, Art 107 further provides that a special law may create exceptions to the constitutional prohibition, for urban lands or areas destined for tourist development. Honduras Congress passed a special law allowing non-Hondurans to own urban land affected by Art. 107 in 1990 (Decree 90/1990). The constitutionality of this decree was challenged, but the Supreme Court of Honduras decided in 2005 that the law is in fact constitutional.
260. Honduras has adopted international conventions protecting the rights of indigenous peoples over their Ethnic Lands, in particular ILO Convention No. 169. Honduras has ratified ILO Convention No. 169 in 1994 through Decree 26-94.¹⁵⁵
261. Management claims that Honduras does not have, to date, a specific law for indigenous peoples and that a trigger for the second phase of the Bank-financed Land Administration Program, of which the Project under investigation is the first phase, is precisely the “*adoption of a legal/regulatory framework for Indigenous Peoples lands.*”
262. In 2004, Congress passed a new Property Law, which in Chapter III provides for the regularization of property for indigenous and Afro-Honduran people. The Panel notes that during its first visit to Honduras, the Panel met with a former Government official who stated that Chapter III of the Property Law was meant to implement ILO Convention No. 169.
263. Other laws relevant to land rights of indigenous people are described below. The Agricultural Sector and Development Law, entered into force in 1993, served as the legal framework for the massive titling of Garífuna lands that took place in the 1990s. (See also *supra*, Chapter Two). Art. 65, amending Art. 92 of the Agrarian Law (Decreto Ley N° 170 de 1974), establishes that indigenous communities that have occupied rural land for a period of at least 3 years

¹⁵⁴ Honduras, Political Constitution, Decreto Numero N° 131, January 11, 1982, Article 346 reads, “Es deber del Estado dictar medidas de protección de los derechos e intereses de las comunidades indígenas existentes en el país, especialmente de las tierras y bosques donde estuvieren asentadas.”

¹⁵⁵ See Section C of this Chapter for a discussion of ILO convention No. 169

receive full property title, issued by the INA, free of charge.¹⁵⁶ This law is regulated by Regulation 1093-93 which, at Art. 41, also establishes that the tenure of communities who pacifically occupy national forest areas before the law entered into force is to be regularized through contracts of usufruct or forest management of medium and long term. Contracts of usufruct are contracts between the State Forest Administration (AFE-COHDEFOR) and any natural or juridical person (beneficiary) to establish conditions, norms and technical procedures for the use or usufruct by the beneficiary of national forests for a specified period of time.

264. Additional laws which have provisions affecting indigenous people's lands include the following: the law creating the Honduran Corporation for Forest Development (COHDEFOR / Law 103-1974); the Environment Law (Ley General de Ambiente 104 – 1993) which establishes the participation of ethnic communities in the process of protection and use of natural resources; and the Forest Law (Ley Forestal) which classifies as forests areas, *inter alia*, lands granted in trust to indigenous communities under State supervision.¹⁵⁷
265. Particularly worthy of mention is also the Law of Municipalities, which regulates, *inter alia*, the administration of *ejidos*. *Ejidos* are lands owned by a municipality for the use and enjoyment of people who live in the municipality. *Ejidos* may be urban or rural. Municipalities administer the *ejidos* and may title urban *ejido* lands, while INA is responsible for titling rural *ejido* lands. Article 70 of the law of municipalities regulates this case. It provides that municipalities can title land they own (and which are not destined for forest use) in favor of third parties. They may title *urban ejido* land in full property to communities who occupy and possess it, if they request it and for a charge not inferior to 10% of the latest cadastral value of the land. However, Article 70 also establishes that if municipalities request it, INA can title *ejido* lands in favor of the municipality itself, free of charge. This system is particularly important for land rights of indigenous peoples, because some communities do

¹⁵⁶ The Agrarian Law of 1898 legalized the *ejido* system, through which lands that belonged to the State were transferred to communities and municipalities for their use and enjoyment, while the State maintained the property right. The first Garífuna community that asked for a “*titolo ejidal*” (title for the use of the *ejido*) was the community of Iriona; the title was granted in 1915. This *ejido* system remained substantively the same with the new Agrarian Law passed in 1924. However, occupations of Garífuna lands had already started and neither the Agrarian Laws nor the *ejido* titles were able to restrain this phenomenon. The first Agrarian Reform was implemented in Honduras in 1962 pursuant to a new Agrarian Law, which recognized the property rights of the indigenous peoples over land, forests, water bodies and *ejidos* that the people were already using, or had title over it or simply had been occupying for unmemorable time.¹⁵⁶ Nevertheless, illegal occupation of Garífuna lands continued. A second Agrarian Reform was implemented several years later, in 1975. The new Agrarian Law however marked a step backwards for indigenous people and the recognition of the land rights. The customary land rights typical of the Garífuna people did not find protection in the new law and the rate of invasion of Garífuna land increased dramatically.

¹⁵⁷ Ley Forestal, Decreto 85 del 1971, Art. 10 reads: “Por su régimen de propiedad, las áreas forestales se clasifican así: [...] 2) Areas Forestales Privadas: [...] b) Areas Forestales en fideicomiso poseídas por las comunidades tribales bajo la tutela del Estado.”

not have a full property title, but hold certificate of occupation over lands belonging to the municipalities.¹⁵⁸

266. In addition, Article 125 of the Law of Municipality, as amended by Decree 127-2000,¹⁵⁹ provides that each municipality must demarcate, through a resolution, the urban boundaries of all the human settlements or communities within its jurisdiction. The fourth paragraph of Art. 125, as amended, also establishes that this resolution, to be notified, *inter alia*, to INA and the Ministry of Justice, must respect the provision of the ILO Convention No. 169, approved by Decree 26-94 of May 10, 1994.
267. As noted above, Executive Agreement No. 035-2001 provides for establishing a “*Comision Intersectorial de titulación, ampliación, saneamiento y protección de las tierras de las comunidades Garífunas y miskitas de Honduras*” (Intersectoral Commission for titling, extension, recovery and protection of the lands of the Garífuna and Mosquito communities of Honduras.)¹⁶⁰ The Requesters called this Agreement and the Commission to the Panel’s attention because the main objective of this Commission would be to contribute in an effective manner to guarantee the property rights of the Garífuna and Misquito communities. According to the Agreement, this protection would extend not only to the lands occupied by these communities, but also to those “*that constitute their functional habitat and are regarded as ancestral [lands] under the ILO Convention No. 169.*”¹⁶¹

¹⁵⁸ According to the Law of Municipalities, Article 70, urban lands are those located within the urban centre of a municipalities, where people are settled. All others areas are considered rural.

¹⁵⁹ Decreto 127-2000, Diario Oficial de la Republica de Honduras, September 21, 2000, Num. 29,281. Art. 1 provides that Decree 127-2000 amends, *inter alia*, Art. 70 and Art. 125 of the Law of Municipality approved by Decree 134-1990 (October 29, 1990)

¹⁶⁰ Acuerdo Ejecutivo No. 016-96 Reglamento de Regularización de Derechos de Población en Tierras Nacionales de Vocación Forestal. Art. 2 defines the “Contrato de Usufructo” as “el contrato o convenio que se realiza entre la Administración Forestal de Estado y cualquier persona natural o jurídica particular (beneficiarios), donde se establecen las condiciones, normas o procedimientos técnicos, a través de los cuales se hará el uso o usufructo del bosque nacional y10 los subproductos, por un tiempo determinado.”

¹⁶¹ Acuerdo Ejecutivo Numero 035-2001, published in the Offical Gazette on December 11, 2001.

Chapter V: Compliance with Environmental Policies

A. Requesters' claims and Management Response

268. According to the Request, the Bank did not comply with OP 4.01 on Environmental Assessment because the environmental assessment for the Project, while recognizing the issue of overlap of protected areas and territories claimed by Garífuna people, does not provide that the Garífuna communities may manage or co-manage their land to restore their control over their “*functional habitat*” that they have preserved for centuries. The claim that they are not aware of any measures “*designed to eliminate or at least mitigate the presence of government institutions in the management of the protected areas in favor of the permanent presence of the members of the communities.*”¹⁶²
269. The Request claims that the management of these areas is already given to institutions defined in the Project's EA, in particular to NGOs with no participation of indigenous communities provided or required. The Request notes that almost all of the NGOs and institutions indicated by the PATH' Environmental Assessment (EA) as responsible for the management of the protected areas do not contemplate the presence of indigenous elements. For example, the Request claims that the Project EA provides that the Serra Río Tinto Forest Reserve, which is not yet established as protected area, will be managed by the NGO known as MOPAWI, a non-Garífuna NGO that does not represent the interests of the Garífuna people.¹⁶³ The Request also states that Project documents indicate that part of the Punta Izopo reserve, claimed by the community of Triunfo de la Cruz, already has been handed over to an NGO that is alien to the community. Similarly, the Request claims that the demarcation of the water limits is not being carried out.
270. In its Response, Management states that the Project was assigned environmental Category B and the Environmental Assessment identified among the potential impacts “*the possible overlap between existing communities (both indigenous and non-indigenous) and protected areas.*”¹⁶⁴ Since demarcation may result in restriction of access to resources for local communities, Management observes that a Process Framework and Environmental Management Plan were developed. The Response adds that, according to the Process Framework, “*protected areas demarcation will proceed only if and when local communities agree.*”¹⁶⁵

¹⁶² Request, p. 8.

¹⁶³ Request, p. 10.

¹⁶⁴ Management Response, ¶ 77.

¹⁶⁵ Management Response, ¶ 77.

271. The Response indicates that co-management of protected areas by agencies, NGOs and communities is provided for in the Process Framework. It also claims that the listings in EA tables 6 through 11 “*in no way constitutes an act of ‘establishing in advance the delivery of territory to outsiders’*”, as claimed in the Request, and “*should not be interpreted as a Project proposal or endorsement of those organizations.*” Rather, the list reflects a relationship between Government and those organizations.¹⁶⁶ Management adds that water limits of protected areas will be demarcated on a case by case basis, based on specific circumstances.
272. The Response also claims that “*strict provisions for the recognition and demarcation of land areas in favor of indigenous communities*” are envisaged in the Process Framework for cases of overlap between land claims and protected areas.¹⁶⁷ Management further states that no activities will take place within or near Sierra Río Tinto Forest Reserve, as it is a proposed protected area and therefore excluded from the Project per Section 3.10 of the Credit Agreement. With regard to Punta Izopo, Management reiterates that the Credit Agreement contains safeguards for affected communities regarding the demarcation and titling of lands “*adjacent to Ethnic lands.*”

1. Demarcation of Protected Areas and Potential Overlap with Garífuna Lands

273. OP 4.01 states that an EA, among other things, “*evaluates a project’s potential environmental risks and impacts in its area of influence*” and “*identifies ways of improving project . . . design and implementation by preventing, minimizing, mitigating or compensating for adverse environmental impacts and enhancing positive impacts . . .*”
274. The Panel reviewed the Environmental Assessment and related documents to assess their consideration of the issue of the possible overlap between protected areas and Garífuna lands, in light of the concerns stated by Requesters. The Panel notes that the environmental assessment for the Project identifies the possible overlap of protected areas and Garífuna lands as a potential impact of concern, [Matrix A], and the possibility that communities would be restricted from these areas. The EA also, constructively, notes that the planning process for protected areas was created “*without considering the social, cultural and environmental conditions of the communities*” and states the “*imperative*” to formulate policies relating to protected areas in an integrated way with communities.¹⁶⁸

¹⁶⁶ Management Response, ¶ 79.

¹⁶⁷ Management Response, ¶ 77, 78.

¹⁶⁸ Analisis Ambiental, November 2003, Executive Summary, p 1.

275. As noted above, Management Response claims that “*protected area demarcation will proceed only if and when local communities agree*” and refers to “page 6, first paragraph of Process Framework”, which reads as follows:

“For communities settled within the limits of a protected area [occupied by other recognized communities] or that frequently use natural resources [within the area], the PATH together with the competent government authorities (AFE-COHDEFOR and INA) will establish lines of actions that will provide for pacific and sustainable coexistence between the communities, while the situation of the community which is not recognized is solved...the delineation and demarcation will occur only if both communities agree. Mechanism of conciliation and arbitration in accordance with the related law, as well as Mesas Interétnicas and other instances of conciliation, will be provided.”

The Process Framework goes on to say that:

“For rural communities, composed of ladinos, indigenous peoples or Afro-Hondurans who live or frequently use the natural resources within legally declared protected areas, the following procedures will be applied:

- The PATH, after the delineation and demarcation has been completed, will conduct the land survey identifying parcels of land and occupants*
- Simultaneously...will present the Management Plan for Protected Areas to communities and other relevant parties by means of a participatory process;*
- This process seeks to confirm the commitment for the execution of the activities included in the management plan and the annual operational plans. This confirmation is done after delivering Occupation Certificates that support the rights of the occupier and establishes his consent to participate in the plan execution.”*

276. Management Response’s claim that the demarcation of a protected area will occur only if and when local communities agree does not seem to find confirmation in the Process Framework, which provides for communities to be able to consent or not to demarcation only in the specific case involving two communities both either living or using resources in the same protected area. In this latter case, the delimitation/demarcation will occur only if both communities agree and means of conciliation or arbitration can be resorted to for this purpose.
277. On the other hand, when one community, indigenous or non-indigenous, lives or uses resources in a protected area (and no conflict exists with another community), the demarcation will occur anyway, and the community will receive a certificate of occupation of the area. In the section of the Process Framework headed “*Protected Areas and Indigenous Communities*” there is no statement preventing the demarcation of the protected area should the community disagree.

278. However, the Panel notes that the Process Framework also provides that “*areas where indigenous communities are present will be recognized and delineated, even in cases where all or part of a community is within the limits of a protected area.*”¹⁶⁹
279. The Credit Agreement indicates further that only legally established protected areas (with a Decree) would be eligible for demarcation under the Project; that no private land titles will be issued “*in areas within or adjacent (a) Protected Areas unless the boundaries of said Protected Areas, have been delineated in a manner satisfactory to the Association; and/or (b) other critical natural habitats (areas of known high conservation value), unless the Borrower has issued a decree establishing new Protected Areas*” (Section 3.10 of the Credit Agreement); and no titling or physical demarcation on lands adjacent to Ethnic Lands would take place unless procedures that adequately protect the interests of Indigenous Peoples have been followed (Section 3.11 of the Credit Agreement).
280. In light of the foregoing, although according to the Process Framework the demarcation of protected areas that overlap with Ethnic Lands may take place regardless of the consent of the communities, the Panel notes that the Process Framework establishes a preference for demarcating the land in favor of indigenous communities even when the land is within a protected area. The Panel also notes the provisions of the Credit Agreement that mean to protect the rights of the land indigenous communities (See Chapter 4 for a detailed discussion of these provisions.) **The Panel finds that the identification of the issue of overlap between protected areas and Ethnic Lands in the EA is consistent with OP 4.01. The Panel also finds that the provision of the Process Framework providing for the recognition and demarcation of land areas in favor of indigenous communities in case of the mentioned overlap is consistent with the objectives of the OD 4.20 on Indigenous Peoples.**
281. However, the Panel notes that the implementation of the Process Framework may face challenging circumstances. An example of this is the particular situation of the Punta Izopo National Park, which overlaps with land claimed by the community of Triunfo de la Cruz in the Department of Atlantida. Punta Izopo is a national park of 18,820 ha at the far eastern end of the Triunfo de la Cruz communal land claim and was formerly an area utilized by the community for hunting and gathering activities. It is also adjacent to important community fishing grounds. Punta Izopo was declared protected area with Decree 261-2000 and is now managed by the Fundación para la *Protección de Lancetilla, Punta Sal y Texiguat* (PROLANSATE).¹⁷⁰ The Panel was informed by the local communities and has found confirmation of these allegations in the CACRC

¹⁶⁹ Analisis Legal, Política de Reasentamiento, Marco de Proceso Sobre Posible Impactos Adversos a Las Comunidades Asentadas en Las Areas del Proyecto (Process Framework), November 2003, p. 8.

¹⁷⁰ Analisis Ambiental, p. 24, Table 6.

study¹⁷¹ that many parts of this protected area have been fenced off and access prohibited. The members of the community of Triunfo have no access to this area, except to the ocean areas, although they claim this is land that belongs to the community. Many Garífuna residents of Triunfo de la Cruz have not visited this section of their territory for years because they are afraid of security guards.



Photo 11: Fencing in Punta Izopo Protected Area
(Courtesy Dr. Edmund T. Gordon)

282. **The Panel notes that the situation of Punta Izopo is an example of how, in reality, questions relating to the demarcation of protected areas have been and may be influenced by economically powerful vested interests. This could have a serious adverse effect on the ability of these local communities to protect their interests during this process, and diminish the practical effectiveness of the safeguards included in the Process Framework.**
283. With respect to other areas claimed by the Garífuna communities, such as the Rio Tinto Forest Reserve, which has not yet been legally declared as protected area, the Panel notes that the EA addressed the concern raised by Requesters stating that:

“The Government of Honduras should regularize the property rights of the various ethnic groups in the country, principally through recognition of communal property in accordance with ILO Convention 169. Therefore, the government should not designate more protected areas in zones where there are

¹⁷¹ See CACRC study, “*Etnografía Comunidad Triunfo de la Cruz*”, Tomo 3 Etno-Mapas, p. 63.

autonomous communities until their property rights are clearly defined, thereby safeguarding the interests of these communities.” (EA, subpart g)

284. **The Panel finds that this statement provides a potentially important response to address the concerns of Requesters and is in compliance with OD 4.20. The key issue will rest in its effective implementation.**

2. Responsibility for Management or Co-Management of Protected Areas

285. The Panel considered the claim that the EA does not set forth an “hypothesis” on the development of management arrangements so that the Garífuna communities may manage or co-manage protected areas to restore their control over the “*functional habitat*” that they have preserved for centuries, and does not contemplate the involvement of indigenous peoples in management of the protected areas.¹⁷² The Panel notes that the question of management of protected areas arises under OP 4.01, as management arrangements and the extent to which local communities are involved may strongly influence the achievement of environmental and other objectives within these areas. This question also arises under the provisions of OP 4.04 (Natural Habitats).
286. In Honduras there are 107 protected areas, 57 of which have been declared as such by special law. The remainders have been declared protected areas mainly through a presidential order (Order 1118-92). These protected areas are grouped into nine management categories based on their characteristics: national park, biological reserve, marine reserve, wildlife refuge, natural monument, cultural monument, anthropological reserve, multi-use area and biosphere reserve. The level of protection of these areas depends on their legal status, which can be modified only by law.
287. Protected areas are divided in three zones: buffer zone, cultural zone and core zone. Only in the first two zones (buffer and cultural, is economic activity allowed, albeit based on an environmental management plan. The Panel was informed during its visit to the Project area that buffer zones have been suffering an increasing amount of human penetration: in some of the them coffee plantations are growing. While, as noted, economic activity is allowed in buffer zone under a specific management plan, the Panel was told that in practice no supervision has effectively been carried out to avoid damage to these areas. In an effort to solve this problem, the Government has entered into co-management agreements with NGOs, which are granted the responsibility of overseeing the implementation of the environmental management plan, while the Government, through AFE-COHDEFOR, maintains the main management responsibility.

¹⁷² Co-management of natural resources refers to “...arrangements whereby local people and their organizations are given responsibility for decision making about access to and use of natural resources, in exchange for assured benefits, through agreements with government authorities.” See Stephen r. Tyler, *Comanagement of Natural Resources*, IDRC, 2006, p. 3.

288. The Panel was informed that one of the main issues in protected areas is the pollution of water sources, especially in areas adjacent to urban or rural areas where agricultural activities are conducted with chemical products. Shifting part of the managing responsibility to NGOs and to communities living in or around protected areas to enforce mechanisms to protect these areas is one solution the Government has been trying to implement.
289. Management states that the Process Framework and Environmental Management Plan include provisions for co-management of protected areas by agencies, NGOs, and local communities (referring to p. 7 sp. version, last para. of Process Framework).
290. The text of the Process Framework includes the following text:
- “In those limited cases there [sic] the presence of indigenous communities coincides with protected areas, the PATH will promote, in conjunction with the INA and AFE-COHEDEFOR the signing of co-administration agreements with NGOs and with the indigenous communities.”*
291. The Process Framework states that *“every protected area ...has management plans developed through combined effort of DAVS [Departamento de Áreas Protegidas y de Vida Silvestre] and the NGOs that co-manage the protected areas.”* For each legally established protected area there are identified co-managing NGOs. The PF also states that: *“signing of co-management agreements between NGOs, indigenous communities and AFE-COHEDEFOR will be supported, to ensure that they are consistent with conservation objectives, that they define the rules for managing the protected areas and clearly specify the commitments of the parties.”*
292. Co-management of natural resources refers to *“...arrangements whereby local people and their organizations are given responsibility for decision making about access to and use of natural resources, in exchange for assured benefits, through agreements with government authorities.”*¹⁷³ Co-management is therefore about sharing responsibility between local users and governments. To be successfully implemented building local capacity so that local people and their organizations can effectively carry out their task is required. This is a rather new approach for natural resource management, which based on recent case studies in some countries has demonstrated how local people can help conserve natural resources and at the same time improve their livelihood as well.
293. The Panel considers that above-mentioned provision included in the Process Framework contemplates situations where indigenous communities would be engaged in co-administration of protected areas with NGOs and the competent government authorities.

¹⁷³ See Stephen R. Tyler, *Comanagement of Natural Resources*, IDRC, 2006, p. 3.

294. As to the listing of specific protected area sites or proposed sites, the Environmental Assessment generally identifies organizations other than indigenous communities in relation to management responsibilities. This point is highlighted in the Request, with reference to the examples of Sierra Rio Tinto and Punta Izopo.
295. The Panel notes the explanations provided by Management with regard to the management of these areas and, more generally, the EA table-listings. **The Panel is concerned, however, that local Garífuna communities having claims in listed areas are not mentioned as having a role or even a potential role in their management, even though other (NGO) organizations are.** The Panel considers that the role of these communities in management and/or co-management of these lands is important under OP 4.01 because, among other things, it will likely affect the long-term health and well-being of the habitat in those lands and the people who depend on them.
296. In light of these considerations, **the Panel finds that the commitments referred to in Project documents to have indigenous communities maintain or acquire management and co-management responsibilities over designated protected areas that may include their lands complies with OP/BP 4.01 on Environmental Assessment and OD 4.20 on Indigenous Peoples.**

B. Natural Habitat: OP/BP 4.04

297. The Request claims that the Project did not take into account the importance of natural habitats for the livelihood of the Garífuna communities, as required by OP 4.04 on Natural Habitats.¹⁷⁴ In Response, Management notes that the Project did, in fact, trigger OP 4.04 and that additional compliance measures were needed to mitigate the identified potential impacts.
298. In this regard, OP 4.04 provides, inter alia, as follows:

“The Bank expects the borrower to take into account the views, roles, and rights of groups, including local nongovernmental organizations and local communities [footnote to OP/BP 4.10, Indigenous Peoples, when local communities include indigenous peoples], affected by Bank-financed projects involving natural habitats, and to involve such people in planning, designing, implementing, monitoring, and evaluating such projects. Involvement may include identifying appropriate conservation measures, managing protected areas and other natural habitats, and monitoring and evaluating specific

¹⁷⁴ Request, p. 8.

projects. The Bank encourages governments to provide such people with appropriate information and incentives to protect natural habitats.

299. As noted above, the Panel observed that Management has identified specific steps and safeguards to address issues that local communities might face in relation to project activities involving protected areas and natural habitat. These include: restrictions that only legally established protected areas, with a decree, would be eligible for demarcation under the Project; that no field activities would take place in or near proposed protected areas; and that no titling or physical demarcation on lands adjacent to Ethnic Lands would take place unless procedures that adequately protect the interests of Indigenous Peoples have been followed.¹⁷⁵ The Process Framework developed under the Project also provides that “*areas where indigenous peoples are present will be recognized and delineated...*”
300. The Panel observes that OP 4.04 states that the Bank expects the Borrower to take into account the “*role*” of local communities affected by Bank-financed projects involving natural habitats. This implies gaining an understanding of the role of these communities and the entities that represent them, as a foundation for efforts to integrate local communities into the planning and decision making process, as required by the Policy.
301. The steps and safeguards in the Project design, noted above, suggest that the Project has considered this question. The Panel found little analysis, however, of the relationship between the local Garifuna communities and areas of natural habitat, and the importance of the natural habitat for the livelihood of the Garifuna communities.
302. As described in Chapter 2, the Garifuna have had an extensive and close relationship to their lands and surrounding areas of natural habitat for more than two hundred years. The forests, for example, were used not only for planting but as the source of protein and plate foods, and of wood to build houses, canoes and other objects, including coffins for the dead. The Garifuna subsistence economy also depended upon off-shore fishing, the collection of land crabs, and hunting of small forest and sea game, such as deer, turtles, and manatee.
303. The Panel considers that the development of this type of information would assist in meeting the provisions of OP 4.04, by providing a more informed basis to take into account the role, rights and interests of the local Garifuna communities in relation to important areas of natural habitat. This could be especially important in light of uncertainties and conflicts on the ground relating to natural habitat areas, including issues of access and management (e.g., Punta Izopo), as well as in relation to demarcation and titling.

¹⁷⁵ Management Response, ¶ 81.

Chapter VI: Project Implementation: Institutional Structures

A. Introduction

304. To understand the current institutional context of the Bank-funded PATH Project for land regularization and titling, it is helpful to highlight legal and institutional developments in the previous decade.
305. In the 1990s, there was concern about agrarian reform, land titling, and foreign ownership of land within a specified distance from the coast. At the national level, INA, which is responsible for issuing titles to rural lands and Ethnic Lands¹⁷⁶, granted collective titles to land to some Garífuna communities. As noted elsewhere in this Report, the Panel understands that the collective titles issued in the 1990's do not include the entire ancestral claim of the Garífuna people, and that most titles exclude important areas of use and resource management of the communities. In some cases, the titles received were extremely limited, and really only covered the so-called “*casco urbano*” where their houses were located.
306. In 2001, the Government of Honduras established by Executive Order 035/2001 the *Comision Intersectorial de titulación, ampliación, saneamiento y protección de las tierras de las comunidades Garífunas y misquitas de Honduras* (Inter-Sectoral Commission for titling, extension and regularization and protection of the lands of the Garífuna and Misquito communities of Honduras) to guarantee the property rights of the Garífuna and Misquito communities. As detailed below in Section D, the two most important groups representing the Garífuna people were members of this Commission.
307. Shortly thereafter a new Government took office. The Commission was put aside and a new institutional framework of Mesas initiated as part of the institutional arrangement for the Project. When the current Government came into power, it proceeded with the Mesas for the Garífuna and Misquito, pursuant to the World Bank financed Project.
308. The current institutional structure for the titling of lands involves a number of different entities: a new Property Institute (Instituto de la Propiedad – IP), which has responsibility for confirming title to urban lands and registers titles for all lands; the INA, which has responsibility for titling rural and Ethnic Lands; municipalities, which issue various kinds of titles to land and can expand their urban borders to include additional lands to title; regional and local mesas for the Garífuna (and for the Misquito), which claim to represent the interests of the Garífuna in titling issues and to have authority to resolve

¹⁷⁶ See PAD, Annex 6 (Implementation Arrangements), p. 45. See also Operational Manual, p. 63.

disputes over claims; and the dormant Inter-Sectoral Commission for Protecting Land Rights of Garífuna and Misquito Communities.

309. The Requesters are concerned that the institutional structure supported by the Project will not protect the interests of the Garífuna people in collective titles. They claim that Project implementation is not consistent with the requirements of the IPDP. The materials below focus on the IPDP and the current arrangements for implementing the Project, on the Inter-Sectoral Commission, on the variety of disputes over collective land titles, and on the procedures for settling these disputes.

B. Current Project Implementation Arrangements

310. As detailed below, the institutional arrangements for implementing the Project have evolved since the Project's inception.
311. **The Project Implementing Unit.** The Credit Agreement provides that the overall implementing agency of the Project is the *Secretaría de Gobernación y Justicia* (SGJ) (the Ministry of Justice), which is to have a designated Project Implementing Unit (PIU). This contrasts with the trend towards avoiding the establishment of PIUs and instead mainstreaming project implementation within the structure of the implementing agency. The PIU coordinates the implementation of the PATH as well as two additional Bank-financed projects. The PIU is to work with other Government agencies, including the Instituto Nacional Agrario (National Agrarian Institute -INA), the Honduran Association of Municipalities (AHMON) and AFE-COHDEFOR, the Honduran Agency for Forest Development. These bodies entered into participation agreements with the SGJ, which in turn concluded participation agreements with each municipality where the Project is being implemented.
312. After the Board of Executive Directors approved the Credit, the implementing structure changed. The new Property Law enacted in 2004 created a new agency, the Instituto de la Propiedad (Property Institute - IP), which includes the functions and responsibilities of other agencies originally envisaged as the Project's co-executing entities, such as the Directorate of the National Cadastre (DEC), the National Geographic Institute (IGN), and the Property and Mercantile Registry (RPIM).
313. In May 2006, the Government of Honduras requested the Bank's no-objection to changing the implementing agency and shifting the PIU from the SGJ to the recently created IP. While preparatory work for the shift was underway, in December 2006 the Government apparently decided that the PIU was to remain within the SGJ.¹⁷⁷ However, on January 10, 2007, as noted in Chapter One, the

¹⁷⁷ Aide Memoire, December 14-20, 2006.

Bank indicated to the Government that, to avoid suspension of the Bank Credit disbursements, one of the conditions that it had to satisfy was to come to a final decision on which agency would be in charge of Project implementation. The Government decided to change the implementing agency and, as of February 2007, the PIU moved from the SGJ to the IP.

C. Requirements of the IPDP

314. A core element of OD 4.20 concerning the IPDP relates to institutional capacity. Para. 15 (f) notes that “government institutions assigned responsibility for indigenous peoples are often weak” and “[a]ssessing the track record, capabilities, and needs of those institutions is a fundamental requirement.”
315. The IPDP contains a section on Policy and Regulatory Framework, which includes a sub-part on “Institutional Strengthening”. This section reads, in its entirety, as follows:
- a. “Institutional strengthening – responsible for improving the institutions concerned with SINAP¹⁷⁸ through civil engineering work, consulting, re-engineering processes, training of SINAP users, and equipping those institutions. Creation of registries and document presentation windows for the regularization, titling, registration, and cadastre process; as well as the training and certification of individuals in conciliation and conflict resolution mechanisms in the indigenous and Afro-Honduran communities.
 - b. Establish processes and systems to strengthen inter-institutional coordination and community management (communal regularization boards and departmental committees of territorial planning.)”¹⁷⁹
316. Building on these foundations, the IPDP sets forth a “Community Participation Model” for the participation of Garífuna communities “in the process for regularizing and titling their ancestral lands, implementing mechanisms that allow them to intervene in the demarcation of those lands and in the resolution of conflicts arising from their ownership and possession . . .”¹⁸⁰

¹⁷⁸ As noted in Chapter One, the Project is the first phase of a three-phase Land Administration Program, which provides for establishing a fully integrated and decentralized National Property Administration System (SINAP).

¹⁷⁹ IPDP, p. 4.

¹⁸⁰ IPDP, p. 11.

D. The Inter-Sectoral Commission for Protecting Land Rights of Garífuna and Misquito Communities

317. During its investigation, the Panel learned of the existence of the so-called Inter-Sectoral Commission. The Commission was created in 2001 by Executive Order No. 035-2001 signed by the then President of the Republic of Honduras. This commission, the original full name of which is *Comision Intersectorial de titulación, ampliación, saneamiento y protección de las tierras de las comunidades Garífunas y misquitas de Honduras* is intended to help guarantee the property rights of the Garífuna and Misquito communities. The authority extends to the titling, extension, regularization and protection of the lands. This protection extends not only to the lands occupied by these communities, but also to those “*that constitute their functional habitat and are regarded as ancestral [lands] under the ILO Convention No. 169.*”¹⁸¹
318. The Members of this Commission include key government institutions responsible for land titling and protection issues relating to the Garífuna and Misquito communities. The Members also include chosen representative entities for those communities. In the case of the Garífuna, these are ODECO and OFRANEH (the Requesters). The full list of members is as follows:
- National Agrarian Institute
 - Secretariat of Government and Justice
 - Secretariat of Natural Resources and Environment
 - Secretariat of Tourism
 - State’s Forest Administration (AFE-COHDEFOR)
 - Organization of Ethnic-Community Development (*Organización de Desarrollo Étnico Comunitaria*, ODECO)
 - Black Honduran Brotherhood Organization (*Organización Fraternal Negra Hondureña*, OFRANEH)
 - Mosquitia Asla Takanka* (MASTA)

According to the Executive Order, the representatives of government entities will be “*at the decision making levels*” to ensure the seniority and authority of their representatives in the Commission.

319. The Panel notes that the Project’s IPDP, however, makes no mention of an Inter-Sectoral Commission, though it had been established in 2001 by Presidential Decree. The Commission is mentioned only in the Project’s Social Assessment (SA) (box at page 50), which states that the IPDP must define an institutional mechanism for participation of, and support by, the indigenous communities in Project implementation.¹⁸² The reference to the Inter-sectoral Commission is placed next to the description of the recommended features of

¹⁸¹ Acuerdo Ejecutivo Numero 035-2001, published in the Official Gazette on December 11, 2001.

¹⁸² Evaluación Social y Económica Participativa (Social Assessment), Honduras, August 2003, p. 49.

the institutional mechanism, and it seems that the SA's authors considered the Commission as the possible mechanism.¹⁸³ Neither the Bank's Legal nor Institutional Analysis mentions the creation of the Commission.

320. **The failure of the IPDP to mention the Inter-Sectoral Commission is of particular concern given that the IPDP reviews the relevant legal framework and institutions and, on this foundation, proposes a "Model" approach for community involvement in the land titling process.**
321. During its investigation, the Requesters brought to the Panel's attention the existence of this Commission, its importance to them and to their interests in protecting their lands, and the fact that it is not being utilized in the land titling process. The significance of the Commission to the interests of the Requesters is apparent on the face of the instrument creating the document, which highlights that its purpose is to protect and guarantee the property rights of the Garífuna people in line with ILO Convention No. 169.
322. As noted above, the Commission includes OFRANEH - - the Requesters - - as one of the two selected entities to represent the Garífuna people. This further underscores the sense of grievance on the part of the Requesters that the potential use and importance of this Commission is not considered in the IPDP and in the creation of a Model for involving the local communities.¹⁸⁴
323. Staff informed the Panel (in January 2007) that the Secretariat of Governance and Justice, the Project's implementing agency, had sent a note to all the participants in the technical team working on the draft land regularization procedures for Ethnic Lands notifying them of their decision to transfer the chair of that team to the INA. The SGJ's move was reportedly due at least in part to the recent recognition of the existence of Decree 035-2001 creating the Inter-sectoral Commission.
324. **The Panel observes that the Bank's failure to consider the Inter-Sectoral Commission adequately in Project preparation may have had practical significance. The nature of consultations and decision-making in relation to Garífuna land rights has become a major controversy under the PATH. The Inter-Sectoral Commission was designed specifically to defend the interests of indigenous peoples, contained provisions for their representation, and engaged senior, decision-making levels of government. As a result, the Commission might have played a significant role in helping to address the concerns that have been raised, and protecting the rights and**

¹⁸³ Social Assessment, p. 50: "*El 17 de Diciembre de 2001, el Presidente de la República emitió un decreto mediante el cual establecía una instancia de negociación entre las comunidades indígenas y el Gobierno para asuntos de tierras y titulación. Esta podría ser una posibilidad, teniendo en cuenta que aún se encuentra vigente.*"

¹⁸⁴ Bank staff recently indicated to the Panel that, during Project preparation, staff had considered this Commission, but the former Government administration, under which the Project was prepared, did not seem interested in making it operational.

interests of Requesters and the people they represent. **The Panel finds that the failure of the IPDP to identify the Commission and to assess its importance in the land titling process under the PATH is not consistent with the objectives and spirit of OD 4.20.**

E. The Regulatory Framework for Legalizing and Registering Land Titles

325. As noted in Chapter Four, the 2004 Property Law created a new regulatory framework for legalizing and registering land titles. Component Two of the Bank-financed Project involves the legalization, titling and regularization of, *inter alia*, Ethnic Lands. Under the new framework, the municipalities, the INA and the IP will play the main roles in regards to legalizing, titling, and registering land titles.
326. The INA is the executor of the agrarian policies of the Government and is competent with respect to any aspect and issue related to lands destined to be part of the agrarian reform. It is the agency responsible for issuing titles in rural and ethnic areas.
327. The municipalities generally demarcate the boundaries of their territory and control and regulate the urban development. Municipalities may also decide whether to enlarge municipal boundaries. As noted, they may grant title over municipal land to third parties. This has created conflicts with a number of Garífuna communities, who claim that the municipality has granted rights to lands that Garífuna claim have communal land rights.
328. According to the Property Law, the IP maintains, updates, and operates the property registry and cadastre, administering an integrated system of information on property rights in Honduras. According to the Property Law, IP issues titles for lands that were not registered under the old Registry of Immovable Property, and registers the titles issued by the INA and the municipalities.

1. The IP Role in the Regularization of Land Titles

329. When the Panel visited Tegucigalpa in October 2006, the Panel met with IP officials. The IP officials described to the Panel, in general terms, how the regularization process for titling of lands takes place and the IP's role in it.
330. Art. 69 of the Property Law declares as a national priority the land regularization and resolution of all conflicts about tenancy, possession and ownership of land, their incorporation into a national cadastre, and titling and registration in the land registry of all real estate property in Honduras.¹⁸⁵

¹⁸⁵ The IP officials stated that this process should take place pursuant to the Property Law. However, since no regulations to the Law had been issued when the Panel spoke with the IP officials, they stated that the

331. In general, the IP begins the regularization process *ex officio* or upon a request from a party seeking title.¹⁸⁶ According to the Project PAD, this process includes the creation of *Mesas de Regularización* (Regularization Boards), “with the participation of DEC, INA, municipalities, RPIM, the National Personal Identification Registry (RNP), civil society representatives and local committees for specific land uses.” These Boards would provide “legal advice, identify overlapping claims, facilitate resolution of conflicts and handle title requests.”¹⁸⁷ As envisaged in the PAD, the functions and responsibility of DEC and RPIM in these Regularization Boards were transferred to the IP.
332. If ownership of a parcel of land is disputed, various means for resolving disputes would be available: conciliation for which the IP is the competent authority (see Art. 66 of the Property Law); the judicial procedure established in Title VI of the Property Law, or arbitration if the parties agree.
333. The IP officials stated to the Panel that the Law guarantees communal property rights to indigenous peoples, but at the same time non-Garífunas have a right to continue owning the land they possess and have been using (if they hold valid title over the parcel of land), even if this land is within Garífuna communal land.
334. The officials stated to the Panel that, in a land dispute involving Ethnic Lands – for example when non-Garífuna third parties occupy Garífuna land – if the title claimed by the third parties is annulled pursuant to Art. 98 of the Property Law¹⁸⁸, the third parties are to be compensated for the improvements they made to the land over the years. However, the IP officials also indicated that the IP does not have the budget to make these payments. **The Panel notes that the Government officials with whom the Panel met stated that no resources have been earmarked or pledged to indemnify third parties who hold annullable titles in Ethnic Lands. The Bank needs to address this issue fully to be consistent with OP/BP 13.05.**
335. The Requesters object to the regularization process provided in the Property Law because they believe that they may lose portions of their land currently occupied by others. They also believe that, even if they maintain the full property communal title they were given in the 1990s, it will be very difficult for them to obtain an extension of that title to adjacent lands that they have

regularization activities were carried out in accordance with the provisions of the Ley de Procedimiento Administrativo (Administrative Procedure Law).

¹⁸⁶ Art. 73 of the Property Law.

¹⁸⁷ PAD, p. 45.

¹⁸⁸ Art. 98 provides that a third party who has received a title of ownership to the communal property of indigenous peoples, which may be nullified as a result of the characteristics thereof, shall be indemnified for the improvements prior to the return of the lands to the affected communities. In Spanish: “*El tercero que ha recibido título de propiedad en tierras comunales de esos rublos, que por sus características pudiera ser anulable, previo a la devolución de las tierras a las comunidades afectadas será indemnizado en sus mejoras.*”

traditionally occupied and/or relied upon for their subsistence (the so-called *ampliación* they seek). Not will it be possible to recover Garífuna land occupied by third parties without valid title, because funds are not available to compensate them.

336. The Requesters further complain about the envisaged dispute resolution procedures because they believe they are unfair and do not take into consideration the real ability of the indigenous peoples to access justice. These complaints are addressed below.

F. Disputes over Titles to Land

337. As already noted in this Report and also indicated in Management Response, “*long-standing unresolved land conflicts*”¹⁸⁹ are currently affecting Garífuna communities and their rights over their ancestral land. Different types of conflict resolution procedures, judicial and extra-judicial, are available to solve them. However, the Requesters raise serious concerns about the procedures proposed under the Project because, in their opinion, these procedures will not allow them to obtain justice and to recover the lands that they claim ancestrally belong to the Garífuna people. In their view, the measures proposed to resolve conflicts over land claims that are proposed in the IPDP and other Project documents such as the Operational Manual do not correspond to the needs arising from the social and political reality within the communities, with power elites on the one hand and indigenous peoples on the other.
338. In order to address these issues and assess whether the Project complies with OD 4.20, it is important to understand the nature and types of conflicts involving lands claimed by Garífuna people, whether such claims are based on a full property title granted by INA, a certificate of occupancy, or traditional occupation for decades, albeit without title. These land conflicts are briefly described below. An analysis of the conflict resolution procedures and Bank compliance with its own operational policies follows.

1. Conflicts Involving Indigenous Land

339. Land conflicts involving Garífuna lands may be grouped in distinct categories:¹⁹⁰ conflicts with non-Garífuna third parties; conflicts with municipalities; conflicts with Government agencies; and conflicts between Garífuna areas and protected areas.
340. **Conflicts with third parties** are varied. According to the Project Operational Manual, in many communities non-indigenous people have occupied Ethnic Lands and now claim possession of it. In many Garífuna communities it is land over which the community received full property title (*titulo pleno*). A number

¹⁸⁹ Management Response, ¶ 26.

¹⁹⁰ CACRC Study.

of non-Garifuna people who have settled on ancestral lands are small farmers or coffee growers. They live on Garífuna land pacifically and do not threaten either the use by Garífunas of their land or their cultural life. In other cases, however, occupations of Garífuna land have occurred with violence, intimidations and/or fraud. Not only are Garífunas kept from using and enjoying their land, but also from accessing it, as plots of land have been fenced off.

341. Some of these “invasions”, as the Garífunas regard them, have been regularized with titles granted by INA, although INA itself issued a title to the same land to Garífuna communities, thus creating a situation where there is more than one title over the same parcel of land. In some cases titles overlap because individual members of the communities sold part of the communal land to non-Garífunas or lost it because of debts they incurred.



Photo 12 Vacation houses in Garífuna lands belonging to non-Garífuna people in the area of Triunfo de la Cruz.

(Courtesy of Dr. Edmund Gordon)

342. The Panel notes that during its visits to the Project area, all those it met with emphasized the gravity of the Garífuna land “invasions” problem. Mesa Regional members talked at length about “invasions” of their land by non-Garífunas. Like all Garífunas, including the Requesters, they view these invasions as their biggest problem, because not only do invasions mean loss of their ancestral land but also their source of income as the “invaders” do not allow them to work the land.

343. In the community of *Cristales* for example, members of the Mesa Local (who are also members of the Mesa Regional) showed the Panel a map of their communal land and explained that, although at the beginning of the 1900s they received a *titulo ejidal* for 600 hectares (ha) that they had been occupying for almost a century, they now have actual access only to 100ha, because the remaining 500ha have been “usurped” by invaders, who are non-Garífuna. They also stated that while some of these invaders live on the land they occupy, others sell it; a few are dangerous and have threatened the people; some were also able to obtain title over the land they occupied. The legal advisor of the Mesa Regional informed the Panel that he is reviewing all titles given to the Garífuna communities so as to make claims for lands that belong to them.
344. **Conflicts with municipalities** may occur in several situations. Garífuna communities may lose lands that traditionally belonged to them and are essential for their economic and cultural survival because the area where they live, or part of it, is declared urban. The municipality may claim ownership rights as explained below:
- c. As a result of titling programs carried out during the 1990s Garífuna communities were able to obtain communal titles. However, according to all Garífunas the Panel met with, the boundaries of the titled areas do not correspond to the actual area where the community lives and which it uses for their subsistence. Some of the titles granted cover only the so-called “casco urbano” (urban perimeter) and most titles exclude areas of use and resource management and areas of agricultural activities. As a consequence, the community also lives and uses areas over which it does not have full property title and the municipality may claim such land as *ejidal*.
 - d. Similarly, the entire Garífuna community lives in an area over which it does not have full title (*dominio pleno*) but which it has possessed and used for decades. If this area is or becomes part of a municipality’s urban zone, the municipality may claim it as *ejidal*.
 - e. In both cases, Art. 70 of the law of municipalities allows the municipality to acknowledge the ties of the Garífunas to the land and may provide them with full title after paying a sum no less than 10% of the cadastral value of the land in question. The municipality, however, may exclude some areas from this benefit and even provide full title to other people who claim or prove possession over these areas.
345. It should be noted that, according to the Legal Analysis carried out during Project preparation, while some municipalities seriously implemented the responsibilities they have by law, others have exceeded their mandate and have

titled lands beyond their jurisdiction.¹⁹¹ This situation has had serious implications for Garífuna communities and their land rights, as a number of Garífuna communities are in conflict with municipalities, which claim rights to communal land. A prominent example of this conflict involves the community of Triunfo de la Cruz, the situation of which is currently under review by the Inter-American Commission of Human Rights.

346. **Conflicts** may also occur when ancestral land is **in forest areas that qualify as protected areas**. Part of the land over which the Garífunas claim ancestral property rights has been declared protected area. Ethnic groups including Garífunas claim that their rights were disregarded and consultations did not occur before declaring certain areas as protected. The status as a protected area implies many restrictions on the use and enjoyment of the land, or even prohibition on using the land, depending on the type of protected area. In some cases Garífuna communities signed usufruct agreements that would allow them to use the area declared as protected. However, communities believe that they are entitled to full title of some of the areas declared as protected, because they believe it is ancestral land belonging to them. They refuse the usufruct agreement, which gives them limited rights to use and enjoy the land but falls short of giving ownership rights.
347. Land **conflicts** may also arise **with Government agencies**, such as the Secretary of Tourism, which has declared ‘tourist’ areas that are within the functional habitat of Garífunas communities. This declaration may constitute the preamble to a process resulting in non-indigenous people possessing and eventually owning land in these areas.
348. **Conflicts** over ancestral land and especially the type of title to be granted, whether individual or communal, have also arisen **within communities**. While community leaders and representatives generally support communal titles, believing that this type of tenure will help to preserve not only their traditional land but also the culture and way of life of the Garífuna people. However, some members of the communities would prefer to obtain individual titles. This has important implications for the structuring of a program to title lands.
349. The Project provides that communities can opt out of the Project and thus, conceptually, cannot be forced to try to register either collective or individual titles. In practice, this may mean that individuals within the community can seek individual titles, even if the community itself does not participate in the program.
350. As noted above, there can be conflicts within communities between persons seeking individual titles and the more general community desire for collective titles. Dissension and division with communities makes it more difficult for

¹⁹¹ Legal Analysis, p. 27.

community titling. There are reports that Garifuna want land back that was originally sold by individual members of their communities.

2. Procedures for Settling Disputes over Land Titles

351. **Claims of Requesters.** The Requesters argue that conflict resolution options provided in the IPDP differ from the dispute settlement procedures described in the Property Law. According to them, this has created confusion because people are not clear as to which mechanism they need to resort to in case of conflicts involving Ethnic Lands. The Requesters state that the Project did not study and did not take into consideration the real ability of indigenous peoples to access the legal system and use it effectively to protect their rights and interests.
352. The Requesters are also concerned about the arbitration procedure proposed in the IPDP, which they believe to be an unconstitutional means of resolving conflicts related to land rights. In discussions with the Panel, the Requesters have emphasized that they believe that arbitration would not be a fair process. In their view, an arbitral proceeding, in which one or a few persons, albeit certified arbiters, decide the controversy with no possibility of appealing the decision, opens the process to abuses and corruption of which the indigenous groups would be the predictable victims.
353. The Requesters also express their concerns, and did so during Project preparation as well, about other conflict resolution systems proposed in the IPDP, such as the *Mesas Interétnicas*, and conciliation and mediation procedures. They consider these to be unfair procedures where indigenous peoples would be confronting powerful elites and thus would be at a disadvantage.
354. Although the Requesters do not seem to have strong faith in the national judicial system, they stated to the Panel that they would rather resort to the courts under the traditional procedures rather than arbitration or other extrajudicial procedures, because they believe that the appeal system and the public exposure of a court process may ensure a more just treatment than a procedure where powerful people may face poor indigenous groups on opposite sides of the table and only one person is to make a final and binding decision.
355. **Management Response.** Management argues that “*the arbitration procedures in the IPDP were consistent with national law at the time of Project preparation*”¹⁹² because the IPDP was prepared when the Property Law was not yet in effect. As already noted, Management however states that there is a need to harmonize the Project and the Property Law and to update the IPDP and the Operational Manual with respect to land regularization methodologies and

¹⁹² Management Response, ¶ 65.

conflict resolution procedures.¹⁹³ Management indicates that “*inputs into the development of land regularization procedures and conflict resolution mechanisms under the Project*” may be provided through the Mesa Regional.¹⁹⁴ It adds that “[s]ince changes to the IPDP and the Project Operational Manual are subject to the Bank’s no-objection, Management expects that these participatory consultations would result in proposals to harmonize some of the Project’s features with the new Property Law.”¹⁹⁵

356. Management also believes that the arbitration procedures as a means for conflict resolution are consistent with OD 4.20, because they provide people with an effective, reliable and efficient system for affected groups to defend their rights.
357. With respect to access to justice for indigenous groups, Management claims that it recognized the difficulties for Garífuna people to access the Honduran legal system and for this reason it required that the IPDP include specific safeguards and budgetary allocations to ensure “*capacity building and training for local community leaders on national laws and regulations pertinent to the Project*” and “*a program of training and certification for conciliators and arbitrators.*”¹⁹⁶
358. **Court System.** Within Honduras, the court system provides a traditional means to resolve disputes over land titles. The courts are part of the Judicial Branch of the country, and consist of the Supreme Court of Justice, the Court of Appeals, and national courts. The basic framework and operation of the courts and tribunals is set forth in Chapter XII of the Constitution and in the Law of Organization and Attribution of the Tribunals.¹⁹⁷
359. The trial courts and tribunals are the first instance of jurisdiction. Their rulings may be reviewed by Courts of Appeals. The highest court with jurisdiction over the entire country is the Supreme Court. It has 15 Justices, elected by the National Congress. Around major cities there are specialized first instance courts, which include civil, criminal, family, labor courts and others. In less populated rural areas, courts of mixed jurisdiction tend to be more prevalent, and are responsible for hearing all categories of cases. Other institutions of the Justice system include the Ministry of Governance and Justice, the National Human Rights Commission, and others.¹⁹⁸

¹⁹³ Management Response, ¶ 67.

¹⁹⁴ Management Response, ¶ 67.

¹⁹⁵ Management Response, ¶ 67.

¹⁹⁶ Management Response, ¶ 69.

¹⁹⁷ See Project Appraisal Document (PAD) for a Honduras: Judicial Branch Modernization Project (IDA Credit No. 4098-HO), June 6, 2005 (Honduras, Report. No. 32128 – HN), “Sector Profile: The Justice System and the Judicial Branch of Honduras,” Annex 1, p. 27- 27.

¹⁹⁸ PAD (Judicial Branch Modernization Project), Annex 1, p. 27-29.

360. The 2005 Sector Reform analysis of the World Bank identified challenges facing the Judiciary in three strategic areas: weak institutional capabilities (resulting, for example, in significant backlogs); transparency and accountability in administering justice; and limited access to justice for the population.¹⁹⁹ It notes that the justice sector “*has suffered a strong crisis of public confidence.*” The Report addresses the Justice system and indigenous populations, and cites to a survey in which “*75 percent of ethnic minorities express distrust in the justice sector,*” and states that “[l]ocal communities prefer to resolve civil disputes where possible by ‘informal’ justice.”²⁰⁰ The Report also identifies a number of legal and judicial reform initiatives in recent years, introducing important changes.²⁰¹
361. **Conflict resolution options provided in the IPDP.** The IPDP for the Project identifies alternative, non-judicial means of conflict resolution for the land regularization process, and states that these are to be applied in accordance with the national Law of Conciliation and Arbitration. It specifically mentions three levels of conflict resolution: local; departmental; and national.
362. The local-level indicated in the IPDP is the Mesa Local Interethnica (interethnic board), which presents the first instance of conflict resolution. The IPDP states that

*“[i]n the case of conflicts in the process, Local Inter-Ethnic Committees (mesas locales interétnicas) shall be set up. These committees shall handle conflicts between ethnic communities or communities that may be adjacent to ethnic communities; between ethnic communities of different origins; between an ethnic community and peasant settlements; or between ethnic communities and the municipality and/or state.”*²⁰²

When the above-mentioned conflicts occur, according to the IPDP, the PATH will convene the parties, will establish the Interethnic Board, and will present a list of certified conciliators from which the parties select the conciliator.²⁰³

363. The departmental level may constitute a second instance of conflict resolution in specific cases.²⁰⁴ The IPDP refers to the already existing Departmental Councils of Development (Interethnic Section) chaired by the Governor of the Department on behalf of the SGJ. When recourse is presented to the Council, the parties are presented with a list of conciliators or arbiters among whom they

¹⁹⁹ PAD (Judicial Branch Modernization Project), Annex 1, p. 27-29.

²⁰⁰ PAD (Judicial Branch Modernization Project), p. 8-9.

²⁰¹ PAD (Judicial Branch Modernization Project), Annex 1, p. 31.

²⁰² IPDP, p. 12.

²⁰³ IPDP, p. 17. See also Operational Manual, p. 62-63

²⁰⁴ Recourse to the Department Council is available when (a) the lands claimed cover more than one municipality; (b) the conflict is with a municipality; (c) there is overlapping with protected or cultural areas; (d) conflicts are with Government agencies. IPDP, p. 17.

select the individual or individuals they prefer. The decisions or agreements reached at this level are final and binding. No authority may intervene in the decisions of the conciliators and arbiters.²⁰⁵

364. The third instance is the *Mesa Nacional de Resolución de Conflictos* (National Board for the Resolution of Conflicts). The IPDP specifies that its members are to be the representatives of the National Indigenous Council, farmers, the *patronatos* and others that represent local communities in the Project areas where conflicts occur. Complaints to this Board are available with respect to conflicts that were not resolved in previous instances of dispute settlement. The directors of the Board will convene the parties and will present a list of certified conciliators or arbiters among whom the suitable individuals or individuals will be selected. The IPDP notes that, in accordance with national law on conciliation or arbitration, the agreements reached may not be appealed to the courts.
365. The IPDP indicates that the certification for the conciliators and arbiters will be provided by the SGJ (Ministry of Justice) and the Chamber of Commerce of Tegucigalpa after completion of a specialized course to be financed with PATH funds. It also notes that only individuals certified by the above-mentioned entities may conduct conciliation and arbitration.²⁰⁶ The Requesters note that the certification process for arbiters and conciliators does not include other representatives of civil society or indigenous peoples and for that reason their impartiality may be questionable.
366. **Conflict resolution procedures provided in the new Property Law.** The new Property Law, in Title VI, provides for a special abbreviated judicial procedure for settlement of disputes over land.²⁰⁷ According to this procedure, only an annulment recourse to the Supreme Court (*recurso en Casación per saltum*) is available to question the first instance judge's decision.

²⁰⁵ IPDP, p. 17.

²⁰⁶ IPDP, p. 17. The Panel notes that a new Manual for the Regularization of Ethnic Lands have been drafted but it has yet to receive the Bank's no objection. This Manual differs from the IPDP and the current Manual in that it includes only two instances of extrajudicial dispute settlement procedures: the conciliation and arbitration board and the National Indigenous Board. The former would constitute the first degree of instance of dispute settlement and will work in coordination with the Mesa Regional. According to the Manual, this conflict resolution method will try to settle the issue through conciliation. If this does not work, the second instance, the National Board, is to be invoked for arbitration. This Board is composed of representatives of indigenous and Afro-Honduran communities chosen through "*their federations*". The National Board would convene the parties and present a list of arbiters among which the communities will choose one arbiter.

²⁰⁷ According to Title VI of the Law, once the plaintiff submits the complaint, its admissibility is decided within two days or the complaint is corrected within three working days. Once the complaint is considered admissible, the defendant has three days to answer and the first hearing is to take place within five days of such answer. Hearings cannot go beyond thirty working days, while the judge must decide on the merits within five days from the end of the hearings.

367. In addition, the Law provides that the Property Institute has authority to initiate conciliation procedures in certain situations.²⁰⁸ According to the law, mediation and arbitration procedures are also available.²⁰⁹
368. **Dispute Settlement in Project Implementation thus far** As noted above, at the beginning of Project implementation (early 2005) two indigenous boards/mesas were created: the Mesa Regional Garífuna and the Mesa Regional Misquito. According to the Aide Memoire of the meeting establishing the Mesa Regional Garífuna, the Mesa was created with the “*objective of coordinating the process of regularization and conflict resolution*” in the communities selected to participate in the Project.²¹⁰ The Mesa Regional Garífuna’s official name is *Mesa Regional de Regularización y Resolución de Conflictos “Wadabula”*²¹¹
369. According to Management Response, the Government decided to create two ethnic-based regional boards instead of one Mesa Nacional Indígena (National Indigenous Board).²¹² The Panel notes that the IPDP refers to a Mesa Nacional as one of the instances of conflict resolution. It also notes that Annex 4 to the IPDP entitled *Acuerdo con la Secretaría de Gobernación y Justicia para los Procedimientos Alternativos de Resolución de Conflictos de Tierras en Areas Indígenas y Afrohondureñas* (Agreement with the Ministry of Justice for alternative procedures of resolution of conflicts for lands in indigenous and Afro-Honduran areas) includes a letter dated November 7, 2003, from the Director of the Citizens Organization and Participation within the PIU of the Bank-financed Rural Land Management Project (Proyecto de Administración de Áreas Rurales –PAAR) the experience of which, Management states, the PATH Project builds on. According to this letter, a Mesa Nacional Indígena already existed. It was used in the context of the PAAR and could now be used for the PATH.
370. **Discussion and Conclusions.** OD 4.20 states that the IPDP should assess the ability of indigenous groups to “*obtain access to and effectively use the legal system to defend their rights. Particular attention should be given to the rights of indigenous peoples to use and develop the lands that they occupy, to be protected against illegal intruders, and to have access to natural resources (such as forests, wildfire, and water) vital to their subsistence and reproduction.*” (paragraph 15(a)).

²⁰⁸ Art. 66 of the Property Law. The Law of Conciliation and Arbitration (Decreto No. 161-2000) provides two types of conciliation: judicial and extrajudicial. Extrajudicial conciliation can be institutional, when it takes place in conciliation centers defined in the law; notary, when it takes place before a public notary; and administrative, when it is performed by administrative officials duly entitled by law to do so.

²⁰⁹ Art. 66 and Art. 90 of Property Law.

²¹⁰ Management Response, Annex 2.12.

²¹¹ Management Response, ¶ 40.

²¹² Management Response, ¶ 34.

371. **The Panel notes important positive features in the IPDP, including budget allocations for capacity building and training of local community leaders on national laws, and for training of conciliators and arbitrators. This is consistent with the stated intent of the IPDP to protect indigenous peoples from the results of depredations and invasions of their territory.**
372. The Panel notes, however, the potential impact of power and/or class divisions in the resolution of conflicts both in the past and perhaps more recently. OD 4.20 (paragraph 15) requires that the IPDP contain an assessment of the ability of the indigenous peoples “*to obtain access to and effectively use the legal system to defend their rights.*” **The Panel is concerned that the IPDP does not adequately reflect or address the risks posed to the Garifuna people by its proposed means of resolving conflicts. These include, in particular, risks posed by disparities of power in the process.**
373. The use of the Mesa for conflict resolution, in particular, is of concern to the Panel in this regard, given the findings about representation of the communities noted elsewhere in this Report. The identification of the *real representatives* of the indigenous communities is a matter of great importance for the correct, transparent and fair functioning of these conflict resolution systems. **Substantial and informed supervision by Bank staff, especially specialists in indigenous peoples matters, to ensure that the process is fair and affected communities effectively participate in identifying their leaders and representatives, is of central importance to ensure compliance with relevant Bank policy.**
374. OD 4.20 states that an IPDP should contain an assessment of the ability of groups to use the legal system to defend their rights. The Panel notes, for example, that the IPDP does not adequately assess the potential implications for indigenous peoples of the special expedited judicial procedure that is contained in the draft Property Law.
375. The Panel also notes the complexity of the conflict resolution procedures, and the concerns of Requesters that the existence of multiple conflict resolution procedures including those in the IPDP, in the new Property Law and others generates confusion in the communities. As described above, the IPDP envisions arbitration, conciliation and “*mesas*” for conflict resolution. The new Property Law, on the other hand, sets forth its own judicial abbreviated procedure, and, alternatively, provides for conciliation (for which the Property Institute would be the competent authority to initiate or support), arbitration or mediation. It should also be noted that the Project’s Operational Manual describes the instances of extrajudicial conflict resolution as included in the Project IPDP, but also states that every conflict between indigenous peoples and third parties with respect to communal land will be subject to the special

procedure created in the Property Law.²¹³ In addition, during Project implementation, the Mesa Regional was created with a role in conflict resolution. **Understandably, these many instances and options have created confusion and anxiety among the affected communities. The Panel finds that there is a need for clarification and consultation with the affected communities as to which procedures apply, and a need for better dissemination of this information.**

376. The Panel observes that demarcation and titling activities have yet to take place in the Garífuna communities selected for participating in the Project. The Panel does not express a judgment on the merits of the various means for resolving disputes, but notes and understands the Requesters' concerns.

²¹³ See Operational Manual, p. 65, from section headed "Derechos reales de propiedad existentes en las tierras indígenas y ejercidos por particulares" p. 64: "Todo conflicto que se suscite entre estos pueblos y terceros respecto a tierras comunales se someterá al procedimiento especial creado en la Ley de la Propiedad."

Box 6.1 OFRANEH's petition to the Inter-American Commission on Human Rights (IACHR)

Box 6.1. OFRANEH's petition to Inter-American Commission of Human Rights (IACHR)

On October 9, 2003, OFRANEH submitted a petition to the IACHR, which reflects the claims raised in the Request for Inspection to the Panel. The Panel notes that the petition before the Commission is not directly relevant to the Panel's investigation of the Bank Management compliance with its own policies and procedures. However, it informs the context in which the Project is being implemented and illustrates the kinds of land issues the Garífuna people face.

OFRANEH's petition to the IACHR alleges that the State of Honduras violated Arts. 8, 21 and 25 of the American Convention of Human Rights, in relation to ILO Convention No. 169 as well, to the detriment of the Garífuna communities of Triunfo de la Cruz, Cayos Cochinos and Punta Piedra. The Commission decided, a few months after the submission, to separate the petition according to each community. This box includes a summary of the case concerning the community of Triunfo de la Cruz.

OFRANEH argues that despite the community's property title (for 380 ha) and the deed guaranteeing occupancy (for 126.40ha), the State has violated the rights of the community because it did not protect them against invasions of their land by non Garífuna people and by the Municipality of Tela. OFRANEH alleges that the Municipality unlawfully obtained from INA an extension of its urban limits affecting Garífuna communal land in Triunfo de la Cruz and proceeded to award part of this land to its Labor Union.

The State of Honduras contends that the petition is inadmissible because the community of Triunfo de la Cruz has not exhausted all available domestic remedies, especially with respect to the land allegedly taken by the Municipality of Tela.

The IACHR concluded, on March 14, 2006, that the petition regarding the community of Triunfo de la Cruz is admissible, *inter alia*, because the community repeatedly complained to INA about actions of third parties and also brought court actions. However, ten years went by and, while the situation of the community is getting worse by the day, the State took no measure to try to solve the issue.

The Commission is currently hearing the merits of the case. In the meantime, precautionary measures were requested by OFRANEH to the Inter-American Court of Human Rights and granted in June 2005. Following inaction by the State, on September 21, 2005, the Court reiterated its original request for precautionary measures and requested that additional measures be adopted. OFRANEH has informed the Panel that, as of May 1, 2007, the precautionary measures ordered by the Court have not been implemented.

G. The Implications of the Project for the Titling of Communal Lands

377. The Project was intended to advance the titling of lands in Honduras, as an essential step to advance economic development in the country. The Panel recognizes the importance of these objectives. While the Project focuses on individual titling, the Project also includes a component on collective titling,

with the proviso that communities can opt out of participating in the program. This was intended to protect the Garífuna and Misquito communities.

378. **However, the Panel finds that the Project may have consequences far different than intended by the Indigenous Peoples Plan.** The Panel finds merit in the concerns of Requesters that the Project may contribute to the demise of titles and claims to collective lands held by the Garífuna and indigenous peoples. In this sense, the Project may not protect the cultural integrity or economic base of some of the poorest communities along the Caribbean coast.
379. The Panel found that most members of the Mesas believe they were established to confirm and expand community titles and to get the *saneamiento*. In reality, the Mesas may not be effective in furthering collective titles, and may facilitate the opposite. The Panel notes concerns that municipalities may expand their urban limits over Ethnic Lands and grant individual titles to former communal lands and other lands that were formerly rural. The Panel was informed, for example, that all of the island of Roatán has been declared to be municipal or urban land. Once designated as urban lands, the municipality, not INA, has authority to issue the titles. The Property Institute has responsibility for registering all titles.
380. The Panel also notes that the establishment of the Mesa Regional led to a situation where the already existing Inter-Sectoral Commission for Protecting Land Rights of the Garífuna and Misquito People was ignored. Even after the Panel inquired to the Bank about the status of the Commission late last fall, and after several government officials and others signed an “Act” calling for the dissolution of the Mesa, the Bank responded by pressing strongly for the Mesa to be recognized as the appropriate body for dealing with Garífuna issues of title to lands.²¹⁴ The Bank’s position thus reinforced the power of an entity, (the Mesa), which has operated outside existing institutions and lacked the participation of the leading representatives of the Garífuna people in their struggle for land rights over many years.
381. It is easy to understand why individuals would want to participate in the Mesas. For participants, it offers an official channel through which to present the interests of the Garífuna as they see them. Moreover, participants receive payment for travel expenses and *per diem* for all meetings, which in the context of the poverty of the Garífuna communities may constitute a significant benefit.
382. The Project entails legalizing the standing of the Mesas as community representatives. There is a danger that the Mesas, as developed during Project

²¹⁴ As noted previously, the Bank’s letter to the Government in January 2007 requested the Government to publicly rescind its repudiation of the Mesa Regional or submit to IDA the rationale for this “*drastic change of strategy and agree with IDA on an alternative transparent and non-exclusionary participatory consultative framework . . .*”

implementation, will become independent organizations that will supplant the traditional patronatos and other existing civil society groups and may create further divisions within the Garífuna communities. Moreover, people who are not members of the Garífuna communities may be able to exert significant influence. In a Panel visit to the Regional Mesa, the Governor sat at the head table for the meeting, and delivered closing remarks.

383. Among the Garífuna people interviewed by the Panel and its experts, there is broad consensus favoring communal title of Ethnic Lands. There is a possibility, however, that the Project as it stands will provide individual titles to families in Garífuna and indigenous communities, who will sell their land for prices which are attractive to them but inexpensive to the buyers. Individuals in poor communities may be most tempted. The Panel notes that it received comments from various quarters that the Project may have the effect of splitting the Garífuna communities, which could facilitate the eventual loss of collective titles and the rise of individual titles across the valuable land area fronting the Caribbean coast in Honduras.
384. As noted elsewhere in this Report, Management claims that communities are free to choose whether they want to participate in the Project and "*individual communities can avoid the potential harm alleged by the Requesters by choosing not to participate in the Project.*" However, the Panel has significant concerns about the representation of Garífuna peoples under the Project, including the Mesa Regional's selection of the communities participating in the Project. This selection was followed by a questionable *ex post facto* consultation process in which one community, Punta Piedra, managed to disengage from the Project. This community had special circumstances regarding collective titles.²¹⁵
385. Importantly, the Panel doubts whether there is a meaningful option for most communities not to participate in the demarcation and titling activities provided under the Project. The new Property Law, enacted after the Credit was approved by the Board, grants specific rights to non-indigenous peoples who occupy and hold a "valid title" within Ethnic Lands. As a result, these non indigenous title holders may trigger title regularization activities in Ethnic Lands. Communities may face a choice of participating in a Project which they believe, as currently structured, does not represent their interests, or attempt to opt out of the Project and face significant challenges from non-indigenous people occupying and claiming rights over their Ethnic Lands. **Given the relative economic and political vulnerability of the indigenous peoples, the Panel finds that the safeguards provided under the Project are not adequate to protect the Garífuna rights over their Ethnic Lands in the context of Project implementation.**

²¹⁵ See *supra*, Chapter Two, at note 66.

Annexes

Annex A Table of Findings

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
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| <i>CONSULTATION, REPRESENTATION AND PARTICIPATION OF THE GARIFUNA PEOPLE</i> | | |
| Consultation During Project Preparation | Broad participatory mechanisms are an integral element of Project design. OFRANEH has participated in ten consultation events to date, including during Project preparation and implementation. Between January 2003 and February 27, 2004 representatives of OFRANEH participated in seven events sponsored by Government related to Property Law, preparation of Project, and IPDP. A wide range of Garifuna stakeholders was consulted as part of participatory Social Assessment and preparation of IPDP in July-August 2003. Participants at the two IPDP consultation events did not raise major objections to the Project or its design. Project design took into account recommendations made at consultation events carried out during Project preparation. | <p>Panel finds that preparing an IPDP complied with OD 4.20.</p> <p>Panel finds that several meetings were conducted during Project preparation, and that Requesters and other organizations representing Garifuna peoples participated and had the opportunity to provide comment and express their concerns about the Project. This is consistent with OD 4.20.</p> <p>The Panel also notes significant concerns about Project and its “consultation process” expressed in early meetings by organizations representing the Garifuna people, in particular OFRANEH and ODECO. These provided an early indication of potential policy-based problems associated with consultation mechanism that was eventually to be established for Project implementation.</p> <p>Panel saw no evidence of written materials such as brochures, announcements for posting having been sent directly to the communities so as to let the ordinary people know what to expect.</p> |
| Consultation During Project Implementation | Community participation in the Project is voluntary and individual communities are free to choose whether or not to participate in the Project and which land tenure regime | Panel considers that initial concept of creating an organization like Mesa Regional to unite the leaders and representatives of each Garifuna community was not |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
|-------|---|--|
| | <p>they prefer, individual or communal. IPDP includes establishment of consultation framework through which indigenous communities participate in the process of defining land regularization procedures.</p> <p>On March 15-17, 2005, 112 Garífuna persons, including representatives from 25 Garífuna communities, and municipal and <i>Patronato</i> authorities, including representatives from the Association of Municipalities of Honduras (AMHON), the principal Garífuna Catholic Church Organization (<i>Pastoral Garífuna</i>), OFRANEH (the person representing OFRANEH at the March 2005 <i>Mesa Regional</i> meeting is not one of the Requesters) and ODECO, gathered in Trujillo, Colón to create the <i>Mesa Regional de Regularización y Resolución de Conflictos</i>.</p> <p>Requesters declined the invitation to participate in the establishment of the Garífuna <i>Mesa Regional</i>.</p> <p><i>Mesa Regional</i> includes a broad range of Garífuna stakeholders. Under the auspices of Project, Government invited representatives of a wide range of Garífuna communities and organizations, including OFRANEH, to participate in meeting to establish an inter-institutional commission to organize <i>Mesa Regional</i>.</p> <p>Diversity of opinions among various Garífuna stakeholders regarding role of the Project in addressing their land claims. Government and <i>Mesa Regional</i> have extended open invitations to all Garífuna communities and organizations to participate in consultation framework sponsored by the Project. Some Garífuna groups are actively participating in the Project, others</p> | <p>inconsistent with OD 4.20 on Indigenous Peoples in the sense that it represented an effort to establish consultations with and engage participation of affected people. However, Panel considers that a consultation framework for Garífuna people in which their leading representative body or bodies are not part and do not give their support and guidance cannot ensure genuine representation of the Garífuna people, as required by OD 4.20.</p> <p>OFRANEH has remained, over the years, the leading organization representing the Garífuna people. OFRANEH has been, in particular, at the forefront of efforts of the Garífuna people to secure their land rights, alongside ODECO which also has played a key role in this effort, especially during the titling process of the 1990's. The Panel observes that OFRANEH still plays a leading role in all Garífuna communities, especially at the grass roots level where it encounters great support. Panel finds that OFRANEH (and ODECO) are "representative organizations" within the meaning of OD 4.20 in the position to provide an effective channel for communicating local preferences.</p> <p>Panel finds that the Bank's endorsement of <i>Mesa Regional</i> as the basic consultation framework for the PATH Project, without the participation of OFRANEH and ODECO, is inconsistent with the core provisions of OD 4.20 on consultation, representation and participation. Panel is very concerned that the <i>Mesa Regional</i> has put in place a parallel system that is at odds with the way the</p> |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
|-------|---|--|
| | <p>have participated sporadically, while still others have chosen not to be involved.</p> | <p>Garifuna people have established, over the years, to represent themselves on the critical issue of securing their rights over land.</p> <p>Panel finds that the Mesa system has divided and marginalized the community and could potentially undercut the ability of its leading representatives to work on behalf of the community to achieve its objectives for collective title to ancestral land.</p> <p>Because of the key role given to the Mesa Regional in the process of land regularization, Panel finds that closer supervision of the Mesa Regional and up-to-date knowledge by Bank staff is required under the Bank policy on Project supervision, OP/BP 13.05. Panel finds that supervision of the activities related to the Mesa Regional does not comply with the applicable Bank policy.</p> <p>The Panel notes that Bank Management, in calling upon the Government to “publicly rescind” its repudiation of the Mesa Regional, or to develop an alternative framework for this “drastic” change - - did not call for further consultations with the affected communities and their leaders to try to better understand the issues and concerns relating to the Mesa Regional. In light of controversy and concerns already associated with the Mesa Regional, Panel finds that failure to seek input and participation by the affected communities and their leaders is not consistent with Bank policy provisions on consultation with indigenous peoples and on supervision. Panel finds that Bank Management is not adequately</p> |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
|----------------------------------|---|--|
| | | adjusted to the many concerns raised with respect to the existing consultation mechanisms, as required by OP 13.05. |
| PROJECT'S LEGAL FRAMEWORK | | |
| Legal Framework | <p>Project design anticipated the possibility of a new law by providing mechanisms for the continuous flexible adaptation of Project to new law. Property Law is not explicitly discussed in Project documents because its approval and contents were uncertain at the time of Project Appraisal and Board Approval; draft Law had been under discussion for more than two years and it was not certain to be approved. Project preparation identified potential gaps in the Honduran legal framework.</p> <p>Throughout Project preparation, Management carefully considered and evaluated options for addressing identified potential gaps in the Honduran legal framework. Following careful consideration of options, Management decided that it was most appropriate to continue Project preparation of first phase of the three-phase APL under existing legal and institutional framework, while building into the design specific safeguards addressing the above-mentioned gaps.</p> <p>Considering Project Development Objective, Management found new Property Law acceptable, taking into account safeguards included in the design of the Project.</p> | <p>Bank conducted analysis of the legal framework regarding property rights of indigenous peoples, including Garifunas living in Project area, in accordance with OD 4.20 during Project preparation.</p> <p>In spite of concerns about Law raised by Requesters, Bank staff and Legal Analysis, before and after the enactment of Law, that is during Project preparation and after Credit approval, Panel did not find any record that these changed circumstances, which are potentially directly relevant for the land rights of indigenous people, were acted upon by Management, aside from an inconclusive exchange of communications between Region and Legal Department.</p> <p>Panel notes that, as required by OD 4.20, Project provides for measures to protect indigenous peoples' land rights. However, given relative weakness of indigenous peoples, acknowledged in the Project documents, and fact that new Property Law gives specific rights to non-indigenous occupants of Ethnic Lands that cannot be amended or limited by regulations to Law or by provisions of Project Operational Manual, Panel finds that these measures are not sufficient to protect indigenous people land rights that may be affected by Project implementation, as required by OD 4.20.</p> |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
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| | | <p>Panel notes that in spite of the key importance of the Property Law in the design and execution of the Project and on the rights of the indigenous peoples, and the concerns of staff and affected people noted above, Management did not include any references or remedies relating to possible negative effects of the Property Law in the DCA for this Project.</p> <p>Project will have an immediate effect on indigenous peoples' land rights during this first phase. Adoption of legal and regulatory framework for indigenous peoples' lands is only trigger to process <u>second phase</u> of the APL. Panel finds that this is ineffective in protecting rights of indigenous people during first phase of APL. If in Bank's opinion there was not appropriate legal/regulatory framework for indigenous peoples' lands, Panel fails to understand why titling and regularization of indigenous peoples was included in first phase of the APL rather than second one when such framework was required to be in place. Panel notes that to be consistent with principles and objectives of Bank's operational policy on Indigenous Peoples, first phase of APL could have excluded titling on Ethnic Lands and areas adjacent to Ethnic Lands until enactment of a suitable regulatory framework.</p> <p>Panel notes that legal context in which a Project is designed and implemented is very important, as recognized by Bank policies. In this Project, legal context is important also because the Requesters claim that Project will facilitate implementation of a Law that they believe is highly</p> |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
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| | | <p>detrimental to their rights and interests. The fact that regulations have not yet been issued and that the alleged harm feared by the Requesters is, at this stage, potential, does not exempt the Bank from analyzing potential implications of Law as part of analysis of "legal framework" as required by OD 4.20. Panel finds that Bank policy required Management to carry out this analysis in relation to this Project after the Law was enacted.</p> |
| COMPLIANCE WITH ENVIRONMENTAL POLICIES | | |
| <p>Environmental Assessment</p> | <p>Project's Process Framework ensures that protected area demarcation will proceed only if and when local communities agree. Among the potential impacts identified in the EA was the possible overlap between existing communities (both indigenous and non-indigenous) and protected areas. As Project demarcation of protected areas could lead to the restriction of access to resources within those areas for neighboring communities, Government prepared and disclosed a Process Framework in accordance with OP 4.12 (Involuntary Resettlement).</p> <p>Regarding the overlap between Triunfo de la Cruz community land claims and the Punta Izopo National Park, DCA contains safeguards for affected communities regarding the demarcation and titling of lands "<i>adjacent to Ethnic Lands.</i>"</p> | <p>Panel finds that identification of issue of overlap between protected areas and Ethnic Lands in the EA is consistent with OP 4.01. Provision of Process Framework providing for recognition and demarcation of land areas in favor of indigenous communities in case of the mentioned overlap is consistent with the objectives of OD 4.20 on Indigenous Peoples.</p> <p>Panel notes the implementation of Process Framework may face challenging circumstances. Panel notes particular situation of Punta Izopo National Park, which overlaps with land claimed by community of Triunfo de la Cruz in Department of Atlantida. Panel notes that situation of Punta Izopo is an example of how, in reality, questions relating to demarcation of protected areas have been and may be influenced by economically powerful vested interests. This could have a serious adverse effect on the ability of these local communities to protect their interests during this process, and diminish practical effectiveness of safeguards included in the Process</p> |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
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| Management or Co-Management of Protected Areas | <p>Process Framework and Environmental Management Plan (EMP) include provisions for co-management of protected areas by agencies, NGOs, and local communities. Project has not “delivered” protected areas to NGOs. To clarify, tables 6 through 11 of the EA include a comprehensive inventory of existing and proposed protected areas in six departments of Honduras, in compliance with OP 4.04, as well as factual information regarding the organizations involved in the management of those areas. This in no way constitutes an act of “establishing in advance the delivery of territory to outsiders.</p> | <p>Framework.</p> <p>Panel finds that commitments made in Project documents to have indigenous communities maintain or acquire management and co-management responsibilities over designated protected areas that may include their lands complies with OP/BP 4.01 and OD 4.20 on Indigenous Peoples.</p> <p>Panel is concerned that local Garifuna communities having claims in listed areas are not mentioned as having a role or even a potential role in their management, even though other (NGO) organizations are so identified.</p> |
| PROJECT IMPLEMENTATION: INSTITUTIONAL STRUCTURES | | |
| Institutional Structures | <p>Considering the Project Development Objective, Management found the new Property Law acceptable, taking into account specific safeguards included in the Project.</p> <p>Regulations to the Property Law related to Indigenous People's lands have not been issued yet. A draft document on the procedures for regularization of indigenous communities' lands has been circulated to indigenous communities for consultation.</p> | <p>Panel finds that the Requesters do not trust the new system for issuing titles. Requesters believe that to recover Garifuna land illegally occupied by third parties will not be possible, because funds to compensate those now occupying the lands are not available.</p> <p>Panel notes that the Government officials with whom the Panel met with stated that no resources have been earmarked and pledged to indemnify third parties who hold annullable titles in Ethnic lands. Bank needs to address this issue fully to be consistent with OP 13.05.</p> |
| Inter-Sectoral Commission | <p>Management has kept open channels of communication to any Garifuna individual or organization with an interest or concern in connection with the PATH.</p> | <p>Failure of the IPDP to mention Inter-Sectoral Commission for Protecting Land Rights of Garifuna and Misquito People is of particular concern given that IPDP reviews relevant legal framework and institutions and, on this foundation, proposes a “Model” approach for community involvement in land titling process.</p> |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
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| | | <p>Inter-Sectoral Commission was designed specifically to defend the interests of indigenous peoples, contained provisions for their adequate representation, and engaged senior, decision-making levels of government.</p> <p>Panel finds that the failure to identify the Commission in the IPDP and to assess its potential importance in the land titling process under the Project does not comply with OD 4.20.</p> |
| <p>Conflict Resolution</p> | <p>Arbitration procedures in IPDP are consistent with national law at the time of Project preparation. Under the 2004 Property Law, disputes may be resolved through a judicial process with the right to appeal to the Supreme Court (Article 111). Conciliation and arbitration methods of conflict resolution included in the IPDP are consistent with OD 4.20. These methods provide affected groups with effective use of the legal system to defend their rights, following a global trend of incorporating new methods of conflict resolution that are considered efficient, effective and reliable (Section 1 of the Conciliation and Arbitration Law) into national legal systems.</p> <p>Finding Garífuna access to the Honduran legal system to be limited, Project design incorporated appropriate safeguard measures. In compliance with OD 4.20, Management required that the Project's IPDP include specific provisions – including budgetary allocations within the Project – for: (i) capacity building and training for local community leaders on national laws and regulations pertinent to the Project; and (ii) a program of training and certification of conciliators and</p> | <p>Panel notes important positive features in the IPDP, including budget allocations for capacity building and training of local community leaders on national laws, and for training of arbitrators and conciliators. This is consistent with the stated intent of the IPDP to protect indigenous peoples from the results of depredations and invasions of their territory.</p> <p>Panel is concerned that the IPDP does not adequately reflect or address the risks posed to the Garifuna people by its proposed means of resolving conflicts. These include, in particular, risks posed by disparities of power in the process.</p> <p>Panel notes concerns of Requesters that existence of multiple conflict resolution procedures, including those in IPDP, in Property Law and others, generates confusion in communities. Understandably, these many instances or options have created confusion and anxiety among affected communities. The Panel finds that there is a need for clarification and consultation with the affected communities as to which procedures apply, and a need for better dissemination of</p> |

| ISSUE | MANAGEMENT RESPONSE | PANEL'S FINDINGS |
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| | arbitrators. | this information. |
| Concluding Observations | <p>Management considered carefully issue of individual versus collective titling. Social Assessment addressed this issue and Management analyzed the legal framework: neither the Property Law nor the Project favors or encourages individual titling in Garífuna communities. Given importance of this issue and fact that Garífuna communities may be subject to influences from outsiders encouraging individual titling – a special safeguard provision was necessary for the Project. Specifically, Sections 3.08(b) and 3.11 of the Credit Agreement provide for the establishment of procedures that adequately protect rights of Garífuna communities, including right to choose a tenure regime. Management endorses Government's position to respect the decisions made by <i>Mesa Regional</i> and individual communities regarding their preferred land tenure regime. Community participation in the Project is voluntary, and individual communities are free to choose whether or not to participate in the Project.</p> | <p>Panel finds that the Project may have consequences far different than intended by IPDP. Panel finds merit in the concerns of Requesters that the Project may contribute to demise of titles and claims to collective lands held by the Garífuna and indigenous peoples. Project may not protect the cultural integrity or economic base of some of poorest communities along the Caribbean coast.</p> <p>Panel doubts that there is a meaningful option for most communities not to participate in demarcation and titling activities provided under the Project. Communities may face a choice of participating in a Project which, as currently structured, they believe does not represent their interests, or attempt to opt out of Project and face challenges from non-indigenous people occupying and claiming rights over their Ethnic Lands. Given relative economic and political vulnerability of indigenous peoples, Panel finds that the safeguards provided under the Project are not adequate to protect the Garífuna rights over their Ethnic Lands in context of Project implementation.</p> |

Annex B Inspection Panel Request for Legal Opinion

THE INSPECTION PANEL

OFFICE MEMORANDUM

DATE: December 20, 2006

TO: Ms. Ana Palacio, Senior Vice President and Corporate General Counsel

FROM: Ms. Edith Brown Weiss, Chairperson, IPN

EXTENSION: 82742

SUBJECT: **Request for Inspection HONDURAS: Land Administration Project
Request for Legal Opinion**

1. The purpose of this memorandum is to request a legal opinion on certain matters related to the rights and obligations of the International Development Association (IDA) with respect to the above referred Request for Inspection. This request is made pursuant to paragraph 15 of the Resolution that established the Inspection Panel, which provides that *“The Panel shall seek the advice of the Bank’s Legal Department on matters related to the Bank’s rights and obligations with respect to the request under consideration.”*²¹⁶ In this instance, the *“‘Bank’s rights and obligations’ here must be analyzed in terms of the correlative obligations”*²¹⁷ of the Borrower.

Background

2. On January 3, 2006, the Inspection Panel received a Request for Inspection raising issues related to the Honduras: Land Administration Project (IDA Credit No. 3858 HO) (the Project²¹⁸). The Request – submitted by OFRANEH, an organization representing Garífuna communities living on the northern coast of Honduras – argues that the Project will harm the rights and interests of the Garífuna people and communities because it will ultimately lead to the loss of their ancestral land²¹⁹ and their traditional communal land titles. The Requesters

²¹⁶ “The World Bank Inspection Panel,” Resolution No. IDA 93-6, September 22, 1993.

²¹⁷ Inspection Panel Investigation Report, UGANDA: Third Power Project (Credit No. 2268-UG), Fourth Power Project (Credit No. 3545-UG), and Bujagali Hydropower Project (PRG No. B 003-UG), May 23, 2002, Report No. 23998, Annex 1 (Legal Advice in Response to Request by Inspection Panel, March 5, 2002), ¶ 2.

²¹⁸ Also referred to as PATH.

²¹⁹ As stated in the Project Appraisal Document (PAD), *“for purposes of the project the term ethnic lands means ‘those lands that have ancestrally and historically been settled by Amerindian groups and/or Afro-Honduran communities for their use and that constitute their habitat on which they undertake their traditional productive and cultural practices.’ ”* PAD, p. 5, Table 2. See also Development Credit

- state that by supporting the implementation of the new Property Law (enacted after the Credit was approved), the PATH will deny them full rights over the lands they have traditionally occupied and possessed and will give title to some of these lands to non-Garífuna people.
3. The Project - the objective of which is to establish a decentralized land administration system to provide users in the Project area with accurate information on land parcels and effective land administration services – is part of a proposed three-phase Bank-financed Land Administration Program.²²⁰ This Program was designed to be the “*main instrument to implement*” legal, institutional, and technological Government reforms aimed at, *inter alia*, formalizing property rights for the majority of Hondurans and facilitating access to land by the poor. (PAD, p.1)
 4. At the time of Project appraisal, a new Property Law was being discussed by the Honduran Congress. The new Law (*Ley de Propiedad, Decreto No. 82/2004*) was enacted in June 2004, a few months after the Board of Executive Directors of IDA approved the IDA Credit financing the Project (February 2004). The Property Law became, therefore, an essential part of the legal framework within which the Project is being implemented.²²¹
 5. The Requesters state that the Property Law, as it deals with the regularization of property for indigenous and Afro-Honduran people, is highly detrimental to their rights and interests in their Ethnic Lands. In this sense, they fear that the Project, by providing the technical, logistical and financial means to apply the new Property Law, may cause the demise of their communal property and may deprive them of lands that they traditionally own but are currently occupied by non-Garífuna people. This sentiment is widely shared by other Garífuna organizations and people interviewed by the Panel.

Issues

6. In their Request to the Panel and in other submissions to the Bank, the Requesters have raised various objections to the 2004 Property Law, which they believe will legitimize the ongoing violations of Garífunas’ land rights by non-Garífuna

Agreement (Land Administration Project) between the Republic of Honduras and the International Development Association, August 18, 2004, Section 1.02(e).

²²⁰ The Project is composed of three parts (A, B and C) respectively aimed at developing the policy framework and institutional strengthening for the creation and operation of a National Property Administration System (in Spanish *Sistema Nacional de Administración de la Propiedad* - SINAP); systematizing the regularization, titling and registration of lands in the Project area; and carrying out monitoring and evaluation activities. Part B provides for systematic land regularization, titling and registration of lands in the Project Area. Under this component, the Project will carry out field surveying of macro boundaries (e.g. municipal lands), urban and rural areas, forests, protected areas and ethnic lands. Part B further provides for parcel-level surveying and validation in the form of systematic cadastral field surveys of urban and rural areas to demarcate property boundaries and property rights in each parcel. Legalization, titling and registration of these lands will then be carried out.

²²¹ PAD, p. 1.

people and will legalize the occupation and possession by non-Garifunas of land which the Garifuna communities were already given or to which full communal property titles have been recognized. The Requesters also argue that this law will push for a dynamic land market that favors elites in power, to the detriment of customary indigenous rights and in violation of laws that protect them. In the Requesters' view, since the Property Law is the essential normative component of the legal framework supporting the PATH, the Project will be the instrument through which territorial claims of the Garifuna communities will be denied and non-Garifunas will secure their rights over Garifuna land.²²²

7. Issues of occupation of Garifuna lands by people outside the Garifuna communities were also raised in the Project documents (including a Bank-sponsored Legal Analysis of the Land Administration Project and the revised Project Operational Manual²²³), which confirm the existence of serious conflicts between indigenous communities and non-indigenous peoples, who have occupied and taken possession of ancestral lands, at times with fraud and/or violence. (See Legal Analysis, Table 13, Land Conflicts in Indigenous Areas, p. 41) The Legal Analysis also addresses conflicts that have arisen because land considered to be the functional habitat of the indigenous peoples, e.g. the Northern Coast of Honduras, was declared a tourist area or because it is subject to exploitation by farmers who disregard the ownership rights of the indigenous communities. (See Legal Analysis, Table 13, Land Conflicts in Indigenous Areas, p. 41). The updated Operational Manual further recognizes that the uncontrolled occupation of Ethnic Lands by people who are not members of the ethnic communities has generated harsh conflicts with these communities. According to the Manual, these conflicts will be subject to the special judicial procedures established in the Property Law. (See Operational Manual, p. 64 and 65)
8. The Requesters object to the implementation of the provisions of Chapter III [Article 93-102] of the Property Law, which provides for the regularization of property for indigenous and Afro-Honduran people. They state that while Article 93 recognizes the importance of ancestral land rights, the remaining articles in the Chapter are highly detrimental to the fulfillment of these same rights. The Requesters, as well as other Garifuna organizations present in Honduras such as ODECO, and the Mesa Regional established under the Project, strongly object to Article 97, according to which a third party who has title of ownership to the lands of indigenous peoples, and who has had and possessed the land referred to in such title, has the right to continue possessing and exploiting such land;²²⁴

²²² Request for Inspection Annex 2 (Denuncia Programa Administración Tierras de Honduras (PATH) por violación DO 4.20 y DO 4.01), p. 2, in Inspection Panel Report and Recommendation Honduras: Land Administration Project (IDA Credit No. 3858-HO), March 14, 2006 (INSP/R2006-0002), Annex I.

²²³ Legal Analysis of the Land Administration Project, Mario Vallejo Larios, October 2003 and Land Administration Project, Operational Manual for Regularization, August 28, 2004

²²⁴ "Unofficial translation" of Chapter III provided by Management to the Panel and attached to Management Response as Annex 7. In Spanish, Article 97 reads: "El tercero que tenga título de propiedad

Article 98 which provides that a third party who has received a title of ownership to the communal property of indigenous peoples, which may be nullified as a result of the characteristics thereof, shall be indemnified for the improvements prior to the return of the lands to the affected communities;²²⁵ and Article 100, which provides that indigenous communal land is inalienable, not attachable and imprescriptible, but allows the communities themselves to terminate such communal tenure system, authorizing the rental of lands to third parties or authorizing other contracts that allow the community to participate in investments that contribute to their development.²²⁶

9. According to the Requesters, the mentioned articles are in violation of ILO Convention No. 169, which recognizes and protects the rights of ownership and possession of indigenous and tribal peoples over the lands they traditionally occupy.²²⁷ The Requesters believe that, as a result, by supporting the application and implementation of the Property Law, the Bank facilitates non-compliance with the ILO Convention.
10. In its Response, Management states that “*the Project incorporates appropriate safeguards to fill potential gaps in Honduran legislation to safeguard the rights of Indigenous Peoples.*” It adds that the content of national laws and regulation is the responsibility of the Government of Honduras and that mechanisms are available for civil society to raise their concerns. (See Management Response, at paragraph 21). It further states that the issue of non-compliance with ILO Convention No. 169 “*may be appropriate to raise within the jurisdictional context of other fora ... [while] the World Bank obligation in this project is to ensure compliance with the World Bank’s applicable policies, including the Operational Directive on Indigenous Peoples.*” (See Management Response, at note 11).
11. Noting that the Credit financing the PATH was approved in February 2004 and became effective in December 2004, while the Property Law became effective in June 2004, Management argues that the Project design “*anticipated the possibility of a new law by providing mechanisms ... for the continuous flexible adaptation*

en tierras de estos pueblos [indígenas y afrohondureños] y que ha tenido y poseído la tierra amparada por ese título, tiene derecho de continuar poseyéndola y explotándola.”

²²⁵ Art 98 reads: “El tercero que ha recibido título de propiedad en tierras comunales de esos rublos, que por sus características pudiera ser anulable, previo a la devolución de las tierras a las comunidades afectadas será indemnizado en sus mejoras.”

²²⁶ Art. 100 reads: “Se declara y reconoce que el régimen de las tierras que tradicionalmente poseen esos pueblos conlleva la inalienabilidad, inembargabilidad e imprescriptibilidad de la misma. No obstante, las mismas comunidades podrán poner fin a este régimen comunal, autorizar arrendamientos a favor de terceros o autorizar contratos de otra naturaleza que permitan la participación de la comunidad en inversiones que contribuyan a su desarrollo.”

²²⁷ Convention concerning Indigenous and Tribal Peoples in Independent Countries (ILO No. 169), adopted on June 27, 1989 by the General Conference of the International Labour Organisation at its seventy-sixth session, entered into force September 5, 1991. Honduras ratified the Convention in 1995. The Honduran Congress passed in 1994 the law that approved the ILO Convention No. 169 (Decreto 26 de Mayo 25 de 1994 que aprueba el Convenio 169 de la OIT sobre Pueblos Indígenas y Tribales en Países Independientes).

of the Project to the new law.” (Response, at paragraph 52). The Response lists such mechanisms as:

- the issuance by the Supreme Court of a Regulatory Decree (Auto Acordado) authorizing a parcel-based property registry in Project areas as a condition of credit effectiveness;
- adequate access to legal advice and training before decisions are made regarding lands which are in conflict;
- transparent decision-making mechanisms for conflict resolution on these lands which include genuine representation of indigenous and Afro-Honduras groups;
- a covenant providing that “*no titling and physical demarcation of lands adjacent to Ethnic Lands will take place unless procedures that adequately protect the rights of the indigenous and Afro-Honduran peoples, duly consulted with affected parties in a manner satisfactory to the Association and set forth in the Operational Manual, have been followed;*”
- adoption of a legal and regulatory framework for indigenous peoples lands as a trigger to phase II of the Land Administration Program.

12. The Response further states that, in light of the Project’s objectives and the above-mentioned safeguards, Management “*found the new law acceptable*” and “*concluded that the Project’s safeguard provisions were not in conflict with the new law and the two could be harmonized.*” (Response, paragraph 56). Management also notes that the land regulations to the Law have yet to be issued and thus that the IPDP and Operational Manual for the Project “*have not been updated.*” According to the Response, the Project’s safeguards prevent the Government from launching field activities until the Bank has issued its non-objection to the land regularization and conflict resolution procedures. (Response, paragraph 57). Management states that if the land regularization procedures under preparation are approved as regulations to the Property Law and if they are consistent with the Credit Agreement and the Bank safeguard policies, “*Management will endorse the incorporation of said procedures into the IPDP and Project Operational Manual.*” (Response, paragraph 63)

13. However, the records show that issues related to possible adverse effects of the Project and of the Property Law on indigenous people’s ancestral land rights were of concern to Bank staff working on the PATH. With respect to the safeguards to be included in the Credit Agreement, staff argued that “*a procedure in the Operational Manual, no matter how good and consulted it may be, is not the same as a national legal framework ...*” A few months before the Property Law was enacted, Bank staff emphasized that although the wording of the draft Law seemed good, it might mean and imply different things, and thus an analysis by Bank lawyers expert on ethnic rights was “*strongly*” suggested. (Project files, documents dated December 17, 2003 and May 19, 2004)

14. The Panel notes that, according to Project records, at the Decision Meeting before the Credit's approval, questions were raised on whether the Bank should proceed with the Project before the enactment of the new Property Law. The meeting agreed that to go ahead with the Project under the circumstances was still the "*best course of action*" because, in Management's view, no justification prevented the Project from titling under the existing legal framework, which was considered quite adequate. The meeting also agreed that the Project Operational Manual would contain procedures on conflict resolution satisfactory to the Association, as noted above, and that the Development Credit Agreement (DCA) would include specific provisions "*to ensure that Government takes positive steps to address the land rights of indigenous peoples and Afro-Honduran peoples, in particular to safeguard against the possibility of other land claimants taking advantage of the traditionally weak bargaining position of these groups.*"

15. The DCA between the Republic of Honduras and the Bank contains a covenant that reads:

*the Borrower shall ensure that no titling or physical demarcation of **lands adjacent to Ethnic Lands** will take place unless procedures that adequately protect the rights of indigenous and Afro-Honduran peoples, duly consulted with affected parties in a manner satisfactory to the Association, and set forth in the Operational Manual have been followed.*" (Emphasis added)

Request

16. Noting that:

- a. the Project is, *inter alia*, providing the technical, logistical and financial support to implement the Property Law;
- b. the Property Law provides that a third party who has title of ownership to the lands of indigenous peoples, and who has had and possessed the land referred to in such title, has the right to continue possessing and exploiting such land; and that a third party who has received a title of ownership to the communal property of indigenous peoples, which may be nullified as a result of the characteristics thereof, shall be indemnified for the improvements prior to the return of the lands to the affected communities (see *supra* paragraph 8)
- c. Government officials have informed the Panel that no resources have yet been earmarked and pledged to indemnify third parties who hold titles in Ethnic Lands, which may be nullified;
- d. OD 4.20 (Indigenous Peoples) aims at ensuring that (a) indigenous peoples benefit from development projects (paragraph 2), (b) potentially adverse effects on indigenous peoples caused by Bank-financed activities are avoided or mitigated (paragraph 2); (c) the development process

fosters full respect for their dignity, human rights and cultural uniqueness (paragraph 6); (d) indigenous peoples do not suffer adverse effects during the development process from Bank-financed projects (paragraph 6); and they receive cultural and compatible social and economic benefits (paragraph 6);

- e. Bank operational policies (OMS 2.20 on Project Appraisal and OP 4.01 on Environmental Assessment) prevent the Bank from financing activities that would contravene the Borrower's international obligations;²²⁸
- f. ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries, to which the Government of Honduras became a party in 1995, establishes that *"The rights of ownership and possession of the peoples concerned over the lands which they traditionally occupy shall be recognized. In addition, measures shall be taken in appropriate cases to safeguard the right of the peoples concerned to use lands not exclusively occupied by them, but to which they have traditionally had access for their subsistence and traditional activities..."* (Article 14.1) and that *"Governments shall take steps as necessary to identify the lands which the peoples concerned traditionally occupy, and to guarantee effective protection of their rights of ownership and possession."* (Article 14.2)
- g. the original terms of the above-mentioned covenant provided in Section 3.10 of the Credit Agreement were amended during the negotiations;
- h. other than Section 3.10 and references to the Operational Manual, the Credit Agreement does not seem to include a specific provision, such as an event of default, dealing with the possibility that the provisions and implementation of the new Property Law would not be consistent with the objectives of the Project and above-referred Bank operational policies and procedures; and
- i. that the issues raised refer not to the content or intent of national legislation but rather whether the implementation of the Bank-financed project may result in instances of harm to the rights of indigenous people over their Ethnic Lands, as they fear;

the Panel would appreciate a legal opinion on whether and to what extent the safeguards included in the Project and in the legal documents, including specific provisions of the Operational Manual, effectively protect the indigenous and

²²⁸ OMS 2.02 (Project Appraisal) provides that *"Should international agreements exist that are applicable to the project and area, such as those involving the use of international waters, the Bank should be satisfied that the project plan is consistent with the terms of the agreement."* OP 4.01 (Environmental Assessment) states that the EA takes into account the *"obligations of the country, pertaining to project activities, under relevant international environmental treaties and agreements. The Bank does not finance project activities that would contravene such country obligations"*,

Afro-Honduran peoples' rights on their Ethnic Lands from the harm that, in their opinion, will result from applying the provisions in Chapter III of the Property Law, with regard to the regularization of Ethnic Lands under the Bank-financed Land Administration Project.

17. The Inspection Panel would expect to incorporate or refer to your Legal Opinion in the Investigation Report.

cc. David Freestone
Eduardo Abbott
Peter Lallas

Annex C World Bank Senior Vice President and General Counsel Response

THE WORLD BANK/IFC/M.I.G.A.
OFFICE MEMORANDUM

DATE: March 15, 2007

TO: Ms. Edith Brown Weiss, Chairperson, IPN

FROM: Ana Palacio, Senior Vice President and Group General Counsel



EXTENSION: 33105

SUBJECT: **Honduras: Land Administration Project (Credit No. 3858-HO)**
Request for Legal Opinion

The Request

1. This memorandum is in response to your Request for a Legal Opinion, dated December 20, 2006 (Request Memo). The Request Memo states that its purpose is:

*"to request a legal opinion on certain matters related to the rights and obligations of the International Development Association (IDA)"...and that "the 'Bank's 'rights and obligations' here must be analyzed in terms of the correlative obligations' of the Borrower."*¹

However, in its penultimate paragraph, after presenting a number of observations which appear to inappropriately confine the analysis requested, the Panel specifies the question to be addressed by the General Counsel as:

*"whether and to what extent the safeguards included in the [above-referenced] Project and in the [Project] legal documents, including specific provisions of the [Project] Operational Manual, effectively protect the indigenous and Afro-Honduran peoples' rights on their Ethnic Lands from the harm that, in their opinion, will result from applying the provisions in Chapter III of the [Honduras Property Law (Ley de Propiedad, Decree no. 82/2004) (the Property Law)], with regard to the regularization of Ethnic Lands under the Bank-financed Land Administration Project."*²

Analysis

2. In view of the Request Memo and related documents, responding to the Request Memo through a Legal Opinion would be to address a question that falls within the Panel's own jurisdiction. In coming to this view, I note that the Bank's Board Resolution No. IBRD 93-10 creating the Panel (the Resolution), while granting the Panel the responsibility to determine in response to a request for investigation whether Bank policies and procedures have been met, authorizes requests to the Legal Vice Presidency for a legal opinion regarding the "rights and obligations" of the World Bank³ This provision, however, cannot be understood to be aimed at altering the respective roles of the Board, the Panel and the Legal Vice Presidency that are the

¹ Memorandum from Ms. Edith Brown Weiss, Chairperson, IPN, to Ms. Ana Palacio, Senior Vice President and [Corporate] General Counsel, Request for Inspection HONDURAS: Land Administration Project, Request for Legal Opinion, December 20, 2006 [Request Memo], paragraph 1.

² Id., paragraph 17.

³ IBRD Resolution No. 93-10/IDA Resolution No. 93-6, The World Bank Inspection Panel, September 23,

Ms. Edith Brown Weiss, IPN

-2-

March 15, 2007

cornerstones of the Resolution.⁴ A recent example of the importance of preserving these different

was approved by the IDA Board.¹² As a critical fact, the law's Ethnic Lands chapter awaits adoption of implementing regulations and, consequently, has not been used to title or register any Ethnic Lands under the Project. As such, that chapter has not been tested either domestically or against the provisions set forth in the Project's Development Credit Agreement. Therefore, at this time, an opinion on the outcome of such a test by the General Counsel would be purely speculative. Furthermore, in my view, under Bank policy, such a test would not be determinative because, as indicated in paragraph 6 above, OD 4.20 is not prescriptive as to the exact content of local law when it comes to specific land administration details.

Conclusion

11. The Resolution grants the Panel the responsibility to determine in response to a request for investigation whether Bank policies and procedures have been met – a responsibility that is crucially important for the World Bank in both real and reputational terms. The Request Memo is read by the General Counsel as seeking an opinion as to whether the design of the Project provides adequate safeguards. In this light, for the General Counsel to opine as requested would mean accepting a shift of the Panel's responsibility to the General Counsel. Nevertheless, this memorandum sets out some reflections on points raised in the Request Memo.

¹² The Project's Development Credit Agreement (DCA) maintains for mechanisms aimed at complying with the principles of OD 4.20 regarding land regularization (see DCA, Sections 3.04 (a) (ii), 3.08 (b) and 3.11) and no additional remedies were required.

Annex D Biographies

Ms. Edith Brown Weiss was appointed to the Panel in September 2002 and is an outstanding legal scholar who has taught and published widely on issues of international law and global policies, including environmental and compliance issues. She is the Francis Cabell Brown Professor of International Law at Georgetown University Law Center, where she has been on the faculty since 1978 and has directed international multi-disciplinary research projects. Before Georgetown, she was a professor at Princeton University. Ms. Brown Weiss has won many prizes for her work, including the Elizabeth Haub prize from the Free University of Brussels and, the International Union for the Conservation of Nature (IUCN) for international environmental law, and the 2003 American Bar Association Award in recognition for distinguished achievements in Environmental Law and Policy. She has also received many awards for her books and articles. She served as President of the American Society of International Law and as Associate General Counsel for the U.S. Environmental Protection Agency, where she established the Division of International Law. Ms. Brown Weiss is a member of many editorial boards, including those of the American Journal of International Law and the Journal of International Economic Law. She has been a board member, trustee, or advisor for the Japanese Institute for Global Environmental Strategies, the Cousteau Society, the Center for International Environmental Law, and the National Center for Atmospheric Research, among others. Ms. Brown Weiss has been a Special Legal Advisor to the North American Commission on Environmental Cooperation. She has been a member of the U.S. National Academy of Sciences' Commission on Geosciences, Environment, and Resources; the Water Science and Technology Board; and the Committee on Sustainable Water Supplies in the Middle East. She is an elected member of the American Law Institute, the Council on Foreign Relations, and the IUCN Commission on Environmental Law. Ms. Brown Weiss received a bachelor's of arts degree from Stanford University with Great Distinction, an LL.B. (J.D.) from Harvard Law School, a Ph.D. in political science from the University of California at Berkeley, and an Honorary Doctor of Laws from Chicago-Kent College of Law.

Mr. Tongroj Onchan was appointed to the Panel in September 2003. He has a Ph.D. in agricultural economics from the University of Illinois. Professor Onchan taught on the Faculty of Economics at Kasetsart University in Thailand for 26 years, including a term as Dean. He later served as vice president of Huachiew Chalermprakiat University; then joined the Thailand Environment Institute (TEI) as vice president. In 1998, Mr. Onchan was appointed president of TEI. He helped establish and was appointed president of the Mekong Environment and Resource Institute (MERI) in 2000. He has served as advisor to the Prime Minister and to the Minister of Science, Technology and Environment, as member of the National Environmental Board, chairman of the National EIA Committee, chairman of the Committee on the Preparation of State of the Environment Report for Thailand, and member of the National Audit Committee. Mr. Onchan is on many editorial boards, among them the Asian Journal of Agricultural Economics and the International Review for Environmental Strategies. He has consulted for a number of

international organizations, including the Asian Productivity Organization, ESCAP, the World Bank, the Asian Development Bank, the Food and Agriculture Organization, the International Labor Organization, USAID and the Ford Foundation. He has been project director of over thirty research projects and author or co-author of numerous technical and research papers on rural development, natural resources and environmental management. Currently, he serves in several capacities: chairman of the Board of Directors of the MERI, member of National Research Council for economics, and a director of the International Global Environment Strategy (IGES) based in Japan. Mr. Onchan was appointed as eminent person to serve as a member of the Asia and Pacific Forum for Environment and Development (APFED).

Mr. Werner Kiene was appointed to the Panel in November 2004. He holds a Masters of Science degree and a Ph.D. in Agricultural Economics from Michigan State University. He has held leadership positions with the Ford Foundation and German Development Assistance. In 1994, Mr. Kiene became the founding Director of the Office of Evaluation of the United Nations World Food Programme (UN WFP). He was the World Food Programme Country Director for Bangladesh from 1998 through 2000 and also served as UN Resident Coordinator during this period. From 2000 to 2004 he was a Representative of the UN WFP in Washington, D.C. Mr. Kiene's focus has been on the design, implementation and assessment of sustainable development initiatives. His professional writings have dealt with issues of rural poverty and social services delivery; food security, agricultural and regional development; emergency support and humanitarian assistance; international trade and international relations. Mr. Kiene is involved in professional organizations such as the American Evaluation Association; the Society for International Development; the American Association for the Advancement of Science; and the International Agriculture Economics Association.

Consultants

Dr. Nancie L. Gonzalez is Professor Emerita of Anthropology, University of Maryland, College Park, where she also served as Vice Chancellor for Academic Affairs 1977-1981. As a graduate student at the University of Michigan, she began working with the Garífuna in 1955, and since then has written three books, as well as more than 50 scientific articles dealing with their ethno-history and other aspects of their culture. Her Garífuna research over the years has led her to repeated field studies throughout Central America, and among diaspora groups in New York City. These have been augmented by extensive archival research in England, France, St. Vincent, Belize, Guatemala, Honduras, and to documentary resources referring to Garífuna in the United States. Her interest in the processes by which ethnicity is formed and changed has led her to other peoples, as well. She has published a book about Palestinians in the West Bank and Central America, and written extensively about Dominican migration to New York. Her lengthy academic career has been interrupted at times when she has taken leave to work for the Institute of Nutrition of Central America and Panama, the National Science Foundation, and as a Peace Fellow at the United States Institute of Peace. She has

consulted for a wide variety of governmental and non-governmental organizations. Her independent research has been funded by grants from numerous sources over the years. She has served on the Executive Boards of the American Anthropological Association, the American Association for the Advancement of Science, the Society for Economic Anthropology, and the Society for Applied Anthropology, which she also served as President. She now lives in the Capitol area, where she continues her research and writing, and occasionally accepts consultancies on topics of her interest and expertise.

Dr. Edmund T. Gordon is presently the Director of the Center for African and African American Studies, Associate Professor of Anthropology and an affiliate of the Lozano Long Institute of Latin American Studies at the University of Texas at Austin. His research interests include: Culture and power in the African Diaspora, gender studies (particularly Black males), critical race theory, and racial political economy in Central America and the U.S. His research in these areas has resulted in a number of publications including: "Cultural Politics of Black Masculinity." Transforming Anthropology 1997, "The African Diaspora: Towards and Ethnography of Diasporic Identification." Journal of American Folklore 1999, and Disparate Diasporas: Identity and Politics in an African-Nicaraguan Community. 1998 U.T. Press. His current work focuses on race and the struggle for resources, particularly communal lands, among indigenous and African descended communities in Central America. Dr. Gordon holds a PhD in Social Anthropology from Stanford University, Stanford, California; a Master of Arts in Anthropology from Stanford University; a Master of Arts in Marine Sciences from the Rosenstiel School of Marine and Atmospheric Sciences (RSMAS), University of Miami, Miami, Florida, and a Bachelor of Arts in Sociology-Anthropology from Swarthmore College, Swarthmore, Pennsylvania.

Mrs. **Phyllis Cayetano** is a Garífuna from Dangriga, Belize. Most of her adult life has been spent advocating for the rights of the Garífuna People in Belize and in the Diaspora. She is the founding president of the National Garífuna Council and presently is the president of the Dangriga Branch of the Council. Throughout her life, Mrs. Cayetano has maintained a deep interest in the music, language and culture of the Garífuna People. She is one of the organizers of the Annual Garífuna Settlement Day Celebrations held in November each year. Through her advocacy, Garífuna Settlement Day, November 19th became recognized as a Public and Bank Holiday in Belize in 1977. Mrs. Cayetano taught high school for over 30 years in Belize and retired as Dean of Ecumenical Junior College in 1995. She was appointed to the National Women's Commission of Belize in 1982 and in 1991 she was also appointed as a Commissioner of the Supreme Court of Belize. She served as Belize Representative in the Foro de Mujeres de Centro America and twice on the Town Council of Dangriga and was Deputy Mayor of the town from 1998-1999. Mrs. Cayetano is a graduate of St. Louis University (Missouri).