

Report No. 56565-PA



Investigation Report

Panama: Land Administration Project (Loan No. 7045-PAN)

September 16, 2010

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 failed to comply with 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.
- 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.

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

Acknowledgements

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The Panel expresses its appreciation to the many national and local government officials in Panama with whom the Panel met. They provided valuable insights and information. The Panel is also grateful to the Panama country team for their assistance.

The Panel also wishes to thank the World Bank Staff in Washington D.C. and in the Panama office for assisting with logistical arrangements. The Panel wishes to thank Bank Management and Staff for their assistance in obtaining documents, providing the Panel with information, and responding promptly to written requests.

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Finally, the Panel wishes to convey its gratitude and appreciation to the members of its Secretariat for their resourceful handling of this investigation. The Panel also wishes to thank Ms. Janine Lux and Ms. Jennifer Bliss Hatch for their valuable service and assistance.

Abbreviations, Acronyms, and Terms

ACD	Alianza para la Conservacion y el Desarrollo (Alliance for Conservation and Development), a Panamanian environmental organization
AES	Applied Energy Services Corporation
ANAM	Autoridad Nacional del Ambiente (National Environmental Agency)
BP	Bank Policy
BPPS	Bosque Protector Palo Seco (Palo Seco Protective Forest)
BTO	Back to Office Report
Carta Orgánica	Organic Charter
CBMAP II	Consolidación del Corredor Biológico Mesoamericano del Atlántico Panameño (Consolidation of the Panamanian Atlantic Mesoamerican Biological Corridor)
COONAPIP	Coordinadora Nacional de Pueblos Indígenas de Panamá (National Coordinating Body of Indigenous Peoples of Panama)
EA	Environmental Assessment
EPM	Empresas Públicas de Medellín (Utilities service provider with headquarters in Medellin)
GEF	Global Environment Facility
IACHR	Inter-American Commission on Human Rights
IBRD	International Bank for Reconstruction and Development
IDB	Inter-American Development Bank
ILO	International Labor Organization
IPDP	Indigenous Peoples Development Plan
IPS	Indigenous Peoples Strategy
NGO	Nongovernmental Organization
OAS	Organization of American States
OD	Operational Directive
OP	Operational Policy
PAD	Project Appraisal Document
PID	Project Information Document
PILA	Parque Internacional La Amistad (La Amistad International Park)
PPI	Plan de Participación Indígena (Indigenous Peoples Participation Plan)
PRONAT	Programa Nacional de Administración de Tierras (Panama Land Administration Program)
SA	Social Assessment
SIICAR	Sistema Integrado de Catastro y Registro (Integrated Cadastre and Registry System)
SINAP	Sistema Nacional de Áreas Protegidas (National System of Protected Areas)
US \$	United States Dollar

Overview

The Inspection Panel has prepared this Investigation Report in response to two Requests for Inspection related to the Panama: Land Administration Project (PRONAT, also referred to as the “Project”). The first Request was submitted on February 25, 2009, by several members of the Naso indigenous people and representatives of community organizations. The second Request was submitted on March 17, 2009, by representatives of the “Annex Area Congress” of Bocas del Toro on behalf of Ngäbe indigenous communities that live in “*áreas anexas*” (hereafter Annex Areas) to the Ngäbe-Buglé Comarca in Bocas del Toro province, Panama.

Key Claims Presented to the Panel. The claims in the Requests for Inspection, like the Project itself, involve fundamental questions of land rights and tenure security of the affected indigenous peoples. The Project, approved in 2001, restructured in 2006, and closed in June 2010, contained a component to support and advance private land titling and administration in the country, and a parallel component that aims to establish and consolidate indigenous territories for the Naso and the Ngäbe in Panama.

The Requests allege, however, that activities under the Project have contributed to a weakening of the Requesters’ rights to lands traditionally occupied by the Naso and the Ngäbe. The Naso Requesters contend that the Project, especially since 2005, has failed to support their aspirations to establish a comarca (a territory over which indigenous groups have collective land rights and considerable administrative authority, as established by specific law), has taken actions contrary to this aim, and has failed to properly recognize and consult with the legitimate leader of the Naso people. The Ngäbe Requesters contend that the Project failed to take policy-required actions to protect and consolidate Ngäbe territories in the Annex Areas (Ngäbe territories outside the core area of their comarca), and instead has proposed improperly restrictive land delimitations (establishment of physical boundaries) based on a flawed consultation process.

This Report presents the Panel’s findings in response to these claims. The Report focuses on whether Bank Management has complied with relevant Bank operational policies and procedures in relation to this Project, and if not, whether such noncompliance has contributed to the harm or potential harm alleged in the Requests.

Panel Findings on Compliance and Harm. Recognizing the legitimate and serious concerns expressed by the Requesters and affected communities, the Panel found that Bank Management has, in many respects, substantively complied with key policies and procedures applicable to the Project, namely on Indigenous Peoples (OD 4.20) and Project Supervision (OP/BP 13.05).

The Panel found this to be the case especially for the actions taken by Management in respect to the concerns of the Naso people. While it is clear to the Panel that the Naso’s rights and interests over their land are at risk and progressively weakening as the result of various factors, including the lack of a comarca, the Panel found that these problems generally are not attributable to noncompliance by the Bank with relevant Bank policies.

The Panel notes that in the early years of Project implementation, Management actively supported efforts to create a Naso Comarca. In addition, Management recently scaled up its supervision efforts to try to address the issues raised by the Naso before the Project closed.

The Panel also found, however, certain important instances of noncompliance, some of which have already been acknowledged by Bank Management. With respect to the Naso, there was a crucial period of time beginning around 2005 when Bank supervision did not comply with relevant policy requirements, and Management should have been more engaged to analyze and address fundamental changes in the Project context caused by a convergence of several events of great concern to the Naso. During this period, proposed legislation to create a Naso Comarca, supported by the Project, twice failed in the National Assembly; a major schism in Naso leadership, linked to construction of the Bonyik dam on lands envisioned within the Naso Comarca, left the Naso community divided and vulnerable to land tenure threats; and a new law of great concern to the Requesters, Law No. 72 on Collective Lands, was passed. The development of this law was supported by the Project because it was regarded by Management as a viable if less ideal measure to improve the momentum for improved security of tenure.

With respect to the Ngäbe, the Panel found that during Project preparation and the early years of implementation, the Project did not adequately identify and address core issues of land verification and delimitation of the Annex Areas, which were home to many Ngäbe communities. Related to this, the consultation process and methodology under the Project to determine the extent of these lands and territories was not adequately participatory and did not comply with Bank policy. In the judgment of the Panel, these shortcomings left Ngäbe lands exposed to development pressures over many years, hampering the Ngäbe's efforts to gain recognition of their lands as indigenous communities. The Panel also found that supervision in the early years of Project implementation did not follow up on certain concerns expressed by Government officials on the situation of the Annex Areas in the islands of Bocas del Toro.

Additional Observations. The Panel also wishes to note to the Board the following observations. First, the claims and concerns in the two sets of Requests are fundamental and serious, and relate to core issues of rights and security to land of the affected indigenous peoples. The Panel's investigation confirms that it is of the utmost importance that Bank policies relevant to these concerns be fully and properly applied in support of the interests and rights of these peoples, who face very significant threats.

Second, the Project aimed to both regularize individual tenure rights as well as consolidate indigenous territories. The context and setting within which these dual objectives were pursued is complex and challenging. Project activities related to indigenous lands are taking place in the midst of historically rooted struggles to secure indigenous land rights, and during a time in which private investment interests and disputes over land in the country continue to grow rapidly. It is an environment within which the two objectives—the left hand and the right hand of the Project—may represent different sides of this struggle. The Panel's report considers, as a systemic issue, the

question of whether these different elements of the Project were working in harmony or in opposition to each other, and the related question of Bank Management supervision responsibilities with respect to activities not financed by the Bank that posed risks for the realization of core Project objectives.

Third, and without diminishing the significant issues raised by several of its findings, the Panel observes that Bank Management has played a leadership role in engaging on the issues of seeking to support the land rights of indigenous peoples through this Project. The Project itself, as designed, included core objectives and actions to meet fundamental aspirations of the indigenous communities, including the establishment of a Naso Comarca. And while these objectives may not yet have been met, and some aspects of Project design and supervision fell short of that required by Bank policy, the Bank has acted ahead of others in its willingness to risk the potential impasses and failures that can occur with this kind of work, and this should be noted.

Finally, the Panel wishes to note that following receipt of the Requests, Bank staff have engaged intensively and constructively with the complainants and affected communities to seek to better understand and help to resolve the problems they have raised. The Requesters and affected people have indicated to the Panel that while they still have continuing fears about whether their rights will be supported by PRONAT, they greatly appreciate these recent actions and efforts by Bank Management, and hope that the Bank will remain engaged on these issues in the country.

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EXECUTIVE SUMMARY

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The Panel’s report is presented in five chapters, summarized below.

Chapter 1: The Requests for Inspection

The two Requests for Inspection contain several claims relating to noncompliance and harm based on the particular issues facing each of the affected indigenous communities. Key elements of these claims, the Management Response, and the Panel investigation process are noted below.

The First Request: The Naso Indigenous People

A core issue raised by the First Requesters, members of the Naso people,² is that the Project, especially since 2005, undermined their aspirations for a comarca.³ The First Requesters acknowledge that in the initial years of the Project, Bank financing helped to enable agreement on a proposed bill of law, supported by the Naso, to create a Naso Comarca. This bill and a subsequent bill were submitted to the National Assembly of Panama in 2004 and 2005, but were rejected.

The First Requesters believe that the rejection of the Naso Comarca bill happened, at least in part, because the Project was supporting a new bill of law approved by the National Assembly on December 3, 2008, known as Law No. 72 on Collective Lands. The First Requesters believe, moreover, that Bank Management’s support for this law was detrimental to their rights and to their long-standing desire to establish a Naso Comarca. They further contend that the Naso indigenous people were not properly consulted on the law.

² The Naso are among the smallest of Panama’s eight indigenous groups, and are also referred to as the Naso Tjërdi or Naso Teribe. This report uses the term Naso.

³ A comarca is a territory over which indigenous peoples possess collective land rights and administrative authority, as established by specific law. In Panama, each Comarca has independent political representation as an administrative entity.

A second key issue relates to consultation between the Project and the Naso. According to the First Request, PRONAT was expected to demarcate the territory of the “*original people*” of Bocas del Toro province, and a key requirement in doing so was full and proper consultation with the affected peoples in accordance with Bank policy on Indigenous Peoples. According to the First Requesters, the Naso people removed King Tito Santana during Project implementation and designated a new king, Valentín Santana. They contend that PRONAT officials who continued to consult with Tito Santana on Project matters were no longer consulting with the legitimate representatives of the Naso People, and that this undermined their efforts to gain recognition of the Naso Comarca.

The Second Request: The Ngäbe Indigenous People

A core issue raised by the Second Requesters, members of the Ngäbe people,⁴ is that the urgent need for demarcation of the Annex Areas (Ngäbe territories outside the core area of the Ngäbe-Buglé Comarca, created in 1997) was not adequately addressed by the Project. Furthermore, according to the Second Requesters, the demarcation methodology followed under the Project in the Annex Areas not only violates their human and land occupation rights, but also contravenes “*the World Bank’s strategies and operational policies on indigenous peoples approved by the Bank’s Board on February 22, 2006.*”

The Second Requesters claim that the Project is restricting the recognized Ngäbe areas to lands used for housing, and excluding their *trabajaderos*, which are areas that the communities use “*for materials, medicines, craft items, workshops and other production activities.*” They state that the Government rejected their proposals on how to demarcate the Annex Areas and, as a result, these areas or territories “*were left out*” of the Ngäbe-Buglé Comarca. They claim that in meetings with Bank staff the Bank promised to address their concerns, but did not act to do so.

The Second Request also claims that the Bank-financed Project supported a new bill of law, eventually Law No. 72 of Collective Lands, which established collective land property in indigenous territories and specifically prohibited the creation of new Annex Areas. In the Requesters’ opinion, this law is contrary to the creation of a juridical framework for the Ngäbe people.

The Management Response

Management’s Response indicates that land tenure security and efficient land administration services were identified as important aspects of the Government Poverty Reduction Strategy since the mid-1990s, but that long-standing conflicts and wars in Latin America have been rooted primarily in land tenure issues, and poor peasants as well as indigenous peoples have increasingly lost land in this process. In its Response, Management notes that it has always been aware that this context would pose challenges

⁴. The Ngäbe (sometimes spelled Ngöbe) and the Buglé are two different ethnic groups with their own languages. This report uses the term Ngäbe when referring to the indigenous group, and Ngäbe-Buglé when referring to the comarca.

for Project implementation but considered “*that supporting Indigenous Peoples in the consolidation of their territories is a worthwhile development endeavor.*”

Response to the First Request. In response to the First Requesters, Management states that it supports the creation of a comarca for the Naso people. However, Project-supported bills of law for a Naso Comarca were submitted twice to the National Assembly and twice rejected. Management thus decided to lend its support to a subsequent bill before the National Assembly, the Bill of Law on Collective Property on Indigenous Lands, which eventually became Law No. 72.

When passed, Law No. 72 included a provision, Article 17, that was not provided for in the bill of law submitted to the National Assembly. This provision referred to a special territorial regime for the Naso (as a *corregimiento comarcal*, a comarca more akin to a municipality than to a province), and to a *Carta Orgánica* (organic charter) to be issued and applied, under Law No. 72, in the Naso territory. Management claims that it only “*became aware*” of Article 17 five days after the approval of the law and that it did not have any information about it before it was included in the law. However, Management also states that as soon as it learned about Article 17 it promptly took up the issue with the Government to express concerns about the implications of the Law for the Naso people, in particular the provisions relating to the *Carta Orgánica*.

With respect to the Naso people’s “*internal conflict*”, Management states that upon learning of the concerns of the Requesters by letter of December 2007, it stressed to the Government that the Project should consult with both groups to meet the requirements of OD 4.20 on Indigenous Peoples on meaningful consultations. Management has also encouraged mediation between the two “factions”.

Management states its belief that it has been responsive to the First Requesters’ concerns. Management “*asked the Government not to use Loan proceeds to finance any activities related to the Naso, except those related to the mediation process between the two competing factions; and it recommended to the Government not to approve the draft Charter until Management had an opportunity to review the requested documentation and exchange views with Government on the matter.*”

Response to the Second Request. Management states that it agrees with the Second Requesters that the Annex Areas were not delimited (measured and mapped) and shares their concerns about this problem. Management also agrees that the Project “*has not fully demonstrated the principle*” of informed participation and consultation with respect to the delimitation of these Annex Areas. In March 2008, a Bank mission visited 9 of the 15 Annex Areas to evaluate the work being carried out under the Project. The mission made recommendations to Project staff to correct these problems and asked them to prepare a Consultation Plan.

The Response states that in February 2007 an agreement was reached with Ngäbe leaders to start the delimitation of the 15 Annex Areas. Management also indicates that Ngäbe

communities could choose whether they wanted to be delimited as Annex Areas. According to the Response, 7 of the 15 communities have chosen to be Annex Areas.

Special Issues and Action Plan. Management states that a Social Assessment (SA) was carried out during Project preparation, but not disclosed. This SA, Management argues, contains “*key elements*” of an Indigenous Peoples Development Plan (IPDP) but “*no free-standing IPDP in accordance with OD 4.20 was prepared.*” During preparation for Additional Financing for the Project, an SA and an IPDP were prepared and disclosed in December 2008. However, this 2008 SA and IPDP, in Management’s view, “*do not meet the full requirements of OD 4.20.*”

The Management Response presents an action plan and timeline to follow up on issues raised by the Requesters. The action plan includes finalizing the IPDP and disseminating it through consultations; requesting that the Government clarify the implications of Law No. 72 of 2008 for the Naso territory and follow up on the possibility of reintroducing the Naso Comarca bill to the National Assembly; verifying that the delimitation of the Ngäbe Annex Areas includes the *trabajaderos*, not just the housing areas; verifying the consultation work carried out so far and continuing to support mediation efforts to solve internal conflicts among the Naso people; and meeting and discussing with Requesters the issues raised and actions proposed by Management.

Eligibility of the Requests and Board Decision

In its Eligibility Report, the Panel determined that both Requests for Inspection met the eligibility requirements for an investigation and noted there were important questions of compliance and harm raised by the Requests. The Panel recommended that an investigation be carried out, with a delayed start of four months due to a transition in government and to foster additional opportunities for early problem solving.

Relevant Policies and Key Issues of Compliance. In its investigation, the Panel assessed whether the Bank had complied with OD 4.20 on Indigenous Peoples and OP/BP 13.05 on Project Supervision. Key compliance issues examined by the Panel included the following:

- Did the decision not to produce a *stand-alone* IPDP during Project design violate provisions of OD 4.20 on Indigenous Peoples? Did this, in turn, weaken the quality and scope of the analytical work required under OD 4.20 underpinning project design? Did this have adverse impacts on the Naso and Ngäbe peoples?
- Was the approach to *consultation* during Project preparation and implementation in accordance with of OD 4.20? Did weaknesses, if any, in the consultation process contribute to intensifying the internal strife among the Naso or have adverse impacts on Ngäbe land rights in the Annex Areas? Did the Bank fail to comply with relevant policies in supporting Law No. 72 on Collective Lands, and in respect to the consultation process with project-affected people?

- Was progress in formalizing indigenous territories slow as a result of failures of the Bank to comply with OP 13.05 on *supervision*? Did this, in turn, contribute to increased conflicts over land in these territories, taking into consideration private entities' rapid pace of land investment and development in the country? Did Project activities in support of private titling hamper or undercut the ability of the Naso and the Ngäbe to advance and consolidate their land tenure rights as indigenous peoples?

Chapter 2: The Project, Its Context, and Relevant Bank Policies

The Project. The Bank financing for the Project was approved in early 2001 with two interrelated operational objectives: to improve land security through titling activities and a modernized land administration system, and to consolidate protected areas and indigenous territories. The Project is partially financed by a loan from the International Bank for Reconstruction and Development (the “Bank”) in an amount equal to US\$47,900,000, and was approved by the Board of Executive Directors on January 16, 2001. The Loan closed on June 30, 2010.

The Project component on titling and land administration includes the recognition of legal rights, land titling, conflict resolution, legal cadastre, and registry. The component on protected areas and indigenous peoples pursues “*legal recognition and demarcation of indigenous lands*” and aims to establish indigenous territories and consolidate established and unestablished indigenous territories. The Project objectives include completing the establishment of the Ngäbe-Buglé Comarca and creating a comarca for the Naso.

Indigenous Peoples in Panama: The Quest for Land Tenure Security. Panama is home to eight indigenous ethno-linguistic groups, including the Naso and the Ngäbe. The Ngäbe are the largest indigenous group, with more than 270,000 people; the Naso are among the smallest with just over 4,000 people. Both groups currently inhabit lands in Bocas del Toro province in western Panama. The Naso inhabit lands that are inland along the Teribe River, in the Changuinola River basin. The Ngäbe lands in the Annex Areas are on islands and on the mainland.

The Comarca: Autonomous Territory for Indigenous Peoples in Panama. The history of the comarca in Panama dates back to 1925, when the state created a comarca, a new legal entity, for the Kuna indigenous people. While the state does not release its overall jurisdiction, authority within the comarca on internal cultural and political affairs is indigenous. Each comarca is created by law and its regulations and an organic charter dealing with governance of the comarca are adopted by Executive Decree. There are now three provincial-level comarcas, including the Ngäbe-Buglé Comarca, and two corregimiento-level comarcas (a corregimiento is a political division of the territory of Panama). The Naso still do not have their own comarca.

The Ngäbe-Buglé Comarca was created by Law No. 10 of 1997. This law also referred to annexes to this comarca (the Annex Areas), including 15 Ngäbe communities in Bocas del Toro province, physically outside the comarca, to be included within the comarca

regime. According to Law No. 10, these Annex Areas were to be delimited, demarcated, and regularized to become part of the comarca within two years of passage of the law, that is, in 1999. This schedule was not met; when the Project began in 2001, the work had still not been done.

Indigenous Lands and the Development Context of the Requests. At the time the Ngäbe-Buglé Comarca was created in 1997, the islands of Bocas del Toro contained mostly communities of Ngäbe people and only a few concessions for tourism activities. As the Management Response notes, the ancestral lands of the Naso, Ngäbe, and other indigenous peoples of Panama hold important economic potential that has attracted national and international interest.

Since the 1980s, the Government has transferred large sections of these regions to its system of protected areas. In these protected areas, the government has granted concessions for commercial development of natural resources, including for mining and hydropower. In addition, a 2002 Special Tourism Zone law sparked a flurry of tourism-related investments in Bocas del Toro. As described in Chapter 2 of this Report, rapid expansions in private investment have been coming into direct conflict with the land claims, rights and aspirations of indigenous communities.

Chapter 3: Panel Findings on the Claims of the Naso People

Chapter 3 presents the Panel's analysis of compliance and harm in the core claims of the Naso Requesters.

Claim That the Project Undercut the Naso Aspiration for a Comarca

The first claim of the Naso Requesters is that the Project failed in supporting the true aspiration of the Naso people for a comarca and, especially since 2005, has taken actions that undermine this aim, contrary to Bank policy. This is an issue of fundamental importance to the Naso, for whom their ancestral lands are tantamount to their survival as a group and who have been struggling to obtain a comarca of their own since 1973.

Project Design and Appraisal. The Project at appraisal included a sub-component that specifically supported the demarcation of the Naso territory and the drafting of a bill of law for a Naso Comarca. The Project's Social Assessment noted the critical need to demarcate and consolidate a Naso territory, and warned "*about the negative consequences that a postponement of this activity will imply for the protection and development of one of the most vulnerable indigenous peoples in Panama.*" The PAD (which includes an Indigenous Peoples Strategy [IPS]) reflects this analysis and the extraordinarily high stakes involved, stating that it is "*imperative to give high priority to this territory because it is not yet recognized and the survival of the Teribe-Naso people is at stake.*"

As acknowledged in the Management Response, however, the Project did not prepare a stand-alone Indigenous Peoples Development Plan (IPDP) at the time of Project

appraisal, and the SA was not publicly disclosed. During its investigation, Bank staff also noted to the Panel that an IPDP can become a document to empower indigenous peoples in their fights for their rights and interests.

The Panel determined that the participatory development and proper dissemination of a stand-alone Indigenous Peoples Development Plan (IPDP) would likely have placed the Bank in a better position to support the Naso to deal with the challenges that subsequently unfolded. **The Panel concurs with the view of Management that the absence of a stand-alone IPDP, and failure to disclose publicly the Social Assessment prior to appraisal, was not in accordance with OD 4.20.**

At the same time, **the Panel finds that the absence of a stand-alone IPDP at appraisal did not prevent the Bank from taking important actions in support of the aspiration of the Naso to have their own comarca. The Panel further finds that the Social Assessment and PAD prepared for the Project properly highlighted the core need to give high priority to the work to develop a Naso Comarca, in light of risks faced by the Naso people. The Panel finds that this is consistent with the objectives of OD 4.20.**

Project Implementation and Supervision - - Early Years. The Panel's investigation revealed that in the early years of Project implementation, 2001–05, significant actions were being taken to seek passage of a new bill of law to create a Naso Comarca. The evidence also indicates that the Naso were adequately informed and participated in the early process of determining comarca boundaries and identifying potential conflicts with the boundaries, and in the elaboration of the comarca bill. The bill, however, was rejected by the National Assembly in 2004. Although a new bill was introduced in 2005, discussion was suspended by the National Assembly in December. While not an outright rejection, the action may have signaled a prevailing mood in Panama that further comarcas were not politically viable at that time.

The Panel finds that the Project's support for the preparation of a comarca bill in the early years of Project implementation was directly supportive of the territorial and administrative aspirations of the Naso, and consistent with OD 4.20 on Indigenous Peoples and OP 13.05 on Project Supervision. The failure of a comarca bill to pass the National Assembly in 2004 and 2005 does not alter this assessment.

Project Implementation and Supervision - - Later Years. The period beginning in 2005, when the Naso comarca Bill failed again to pass Congress, constitutes a distinct second period of Project implementation. Requesters claim that the Project, beginning around this time, did not consult with the legitimate leaders of the Naso people, but instead consulted with a king who was no longer its valid leader. According to the First Requesters, this contributed to strong divisions in the community and led the Bank and the Project to support Law No. 72, which they believe was detrimental to their interests and aspirations for a Naso comarca, and to pursue a flawed approach for demarcation of Naso lands. The Panel's findings in respect to these claims are summarized below.

Claim That the Project Did Not Consult Properly with Legitimate Leaders

During its fact-finding process, the Panel learned that in 2003–04, the Naso internal body politic ripped apart, apparently over support by the then Naso King, Tito Santana, for the Bonyik dam hydroelectric project. The opposing “faction” recognized Tito Santana’s uncle, Valentín Santana, as the new king. During its investigation, the Panel observed the effects of the schism between people supporting Tito Santana and those supporting Valentín Santana. The Management Response indicates that once it learned of concerns relating to this schism in the December 2007 letter from the Requesters, it *“tried to impress upon Government authorities and Project staff the need to consider the views and concerns of both groups.”*

The Panel determined that Management, upon learning of these concerns in late 2007, tried to deal with both factions of the Naso people and repeatedly interacted with the Project directly to attempt to resolve the conflict. Management made these efforts as required by Bank policy even though the Government officially recognized Tito Santana as king of the Naso. **The Panel finds that these recent efforts denote a good faith attempt on the part of Management to ensure that the consultation process was meaningful, and that the genuine representatives of the Naso indigenous peoples participated in the process, consistent with the provisions of OD 4.20.**

As a matter of supervision, however, the Panel notes with concern the significant lapse in time before Management seems to have reported, and recommended action in response to, the risks posed for Project objectives resulting from the Naso schism. This issue of supervision is addressed in the summary of chapter 5: Supervision and Systemic Issues.

Claim of Inadequate Consultations in Relation to Project Support for Law No. 72

The Requesters are particularly concerned about the consultation process relating to the development of Law No. 72, claiming that the process was inadequate and the law was then “imposed” on the Naso. The Naso Requesters believe that the Project moved away from support of a Naso Comarca because Management decided to support the bill of law on collective lands (eventually Law No. 72 of 2008).

Management states that to maintain momentum in the protection of indigenous lands, it decided to support the consultation process related to the new bill of law (eventually Law No. 72 of 2008) being proposed to regulate the acquisition of collective property rights over indigenous lands outside established comarcas. **Management acknowledges, however, that there were inadequate consultations with the Naso on the inclusion of Article 17 of Law No. 72 and the preparation of the draft organic charter. The Panel concurs in this assessment.**

During its investigation, the Panel observed disagreement and misunderstanding about the actual meaning for the Naso people of Law No. 72. Whether this was due to inadequate consultations is not easy to determine, but the many unanswered questions about the effect of the law on the Naso aspiration for a comarca, and about the meaning of Article 17, generated anxiety and tensions within the community.

It is important to observe, again, that the internal conflict among the Naso created a complex and difficult dynamic for Project officials and Bank Management to deal with, which may have contributed to misunderstandings and poor information, or even disinformation, on the objectives and implications of Law No. 72. The Panel also notes that once Management learned at the end of 2008 about the draft organic charter and shortcomings in consultation, Management reacted promptly to seek further information and then to ask the Government not to use loan proceeds for activities related to the Naso other than for mediation efforts.

The Panel notes the importance of ensuring broad dissemination of information among the Naso on matters having direct implications for their land rights and claims, such as Law No. 72 and the organic charter referred to in Article 17 of Law 72, and appropriate and meaningful consultations on these matters.

Claim That Project Support for Law No. 72 Caused “An Uncertain Regime of Regional Rezoning”

The Panel also considered the substance of the claims of the First Requesters that Law No. 72 and its Article 17 would result in a smaller area of land and less administrative authority for the Naso than had been envisioned in the Naso Comarca bills in 2004 and 2005.

Following the Request for Inspection, Management commissioned a private legal opinion from a well-recognized Panamanian law office on issues relating to the effect of Law 72. This opinion, obtained by Management in May 2009, and the opinions of several experts contacted by the Panel, coincide in the view that Law No. 72 is not a legal obstacle per se for the Naso people to obtain the approval of a “comarca” type law, if they can gather enough support at Panama’s National Assembly. The legal opinion notes, however, that the reference to a corregimiento indigena comarcal Teribe, for which an organic charter has to be approved by the executive branch, created a confusing legal situation and great anxiety to the Naso, partly because such corregimiento was never established by a specific law as required by Panama’s Constitution.

There are, however, important differences in the procedures and nature of the property rights established by Law No. 72 and an eventual comarca law. One is that while Law No. 72 allows indigenous peoples to obtain collective property title over the lands that they have traditionally occupied, a typical comarca law, in addition to granting property rights, would also establish a new political-administrative division of the country that is under the indigenous peoples’ administrative control. There has also been concern about

the extent of the territory envisioned by the new language of article 17 of the law, referring to a “*corregimiento comarcal*.”

Although Management cannot be held responsible for the legislative actions of a sovereign country, OD 4.20 and OP/BP 13.05 provide guidance on how to follow up on this kind of situation. The Management Response lists a number of actions taken by the Bank to comply with these policies in the face of the rejection of the comarca law for the Naso. However, few actual results have emerged.

Management did not follow up on several inconclusive and, at times contradictory, legal opinions and reports on legal and regulatory developments directly affecting the Requesters’ rights and aspirations, especially the situation created the provision of Article 17 of Law 72. Management decided to informally suspend disbursements for certain project activities that affect the Naso. **The Panel finds this suspension is consistent with the requirements of OP/BP 13.05 but also finds that such a contradictory situation warrants seeking further explanations from the borrower to achieve full compliance with OP/BP 13.05 and the objective of OD 4.20, to address the concerns of intended Project beneficiaries.** Unfortunately, many of the unresolved issues remain after the closing of the Loan on June 30, 2010.

The Panel is of the view that Management’s decision to support the process of establishing Law No. 72 was a good faith measure that seemed reasonable under the prevailing political situation. The Panel has determined that the decision cannot be viewed as deliberately backing off from the commitment in the PAD to support the aspirations of the Naso people, particularly given the signals at the time that the climate may have become less favorable to the adoption of a comarca. **The Panel finds, however, that this decision, consistent with the policy on Project Supervision, should have been followed by stronger efforts to seek clarity on the legal ambiguities of Law No. 72 with respect to the territorial aspirations of the Naso.**

Claim That the Project Improperly Failed to Address Invasions of Naso Lands

During meetings with the Panel, the Naso Requesters also claimed that there have been other actions and omissions under the Project that have either supported or enabled private development activities contrary to the territorial rights of the Naso people. This claim raises important questions about the adequacy of Bank supervision.

Bonyik Dam. The Bonyik dam is a hydroelectric facility under development within land envisioned for the Naso Comarca. During Project preparation, the overlap of Naso territory with the Bonyik facility was noted as an issue of concern, particularly as this was a factor in previous faltered efforts to secure Naso territory. The PAD highlights the need to resolve the overlap in jurisdictions, and for close monitoring of efforts to regularize Naso land, in light of past failures and the urgency of the Naso situation.

During its visit, the Panel met with members of Naso communities living near the site who expressed serious concerns not only about the potential impacts of this dam, but also

that it had been approved improperly on Naso lands. The Panel learned that this project was supported by Tito Santana, who in 2004 signed an agreement with the company sponsoring the dam. This agreement was a key factor in the schism within the Naso leadership. Some people have expressed the view that the dam, and the lack of support for it by some Naso people, may also have been a factor in the failure of the Naso Comarca bill to be passed by the National Assembly.

Management has informed the Panel that the Bank has not provided any financing for the Bonyik dam, and the Panel observes that Management's efforts in the early years of Project implementation to support the Naso Comarca bill were a significant, if unrealized, effort to address the territorial needs of the Naso.

With regard to Project supervision, however, Bank policy requires Management to “*identify problems promptly*” as they arise during implementation, and “*recommend to the borrower ways to resolve them,*” as well as actions to address changing circumstances. **Although Management cannot be held responsible for actions not financed by the Bank, it has a responsibility to identify promptly, and recommend ways to address, significant actions or events in the Project environment that may undermine key Project objectives.**

The Panel notes, however, that Bank supervision records from the period 2004–07 are silent on the Bonyik dam issue and its political consequences for the Naso, both internally (the schism) and externally (allegations that the Bonyik issue influenced the Naso Comarca bill in the National Assembly). (See Panel findings on issues of Supervision, below)

Land Demarcation and the Conflict Involving Ganadera Bocas. In the early years of the Project a study identified 57 specific conflicts with the proposed boundaries of the Naso Comarca. In 2006, most of the 57 conflicts had been resolved with the exception of the conflict with a cattle ranching company, Ganadera Bocas.

In August 2006, a locally organized commission attempted to resolve the conflict with Ganadera Bocas through dialogue in the field. The commission made findings on a number of issues. While all the actors present were willing to discuss solutions, a PRONAT report on these activities states that it was acknowledged that only Tito Santana had the authority to negotiate any concrete solution. It was therefore decided to submit the process to higher levels in government to continue.

In a second field visit on October 23, 2006, only Tito Santana and his advisors participated. In a subsequent visit on November 13 and 14, Valentín Santana's supporters stated that they would not support the work of verifying the boundaries of the comarca unless the government recognized Valentín Santana as King.

The land conflict with Ganadera Bocas deteriorated in 2009, when, after repeated warnings, members of the Naso communities of San San Druy and San San were violently evicted from their houses by court order at the petition of Ganadera Bocas. **It is**

the Panel's view that the lack of resolution of the proposed comarca boundaries may have contributed to the progressive deterioration of this land conflict, which eventually led to evictions in 2009 of some Naso families found to be encroaching on Ganadera's land.

However, the Panel also notes that the Naso internal dispute seems to have played a role in preventing a resolution of these issues. The Panel finds that while the verification of the proposed boundaries of the Naso territory between 2004 and 2006 might have prevented the progressive worsening of events, the Bank cannot be held responsible for the eviction of members of the Naso in 2009.

Recent Actions As noted above, Management states in its Response to the Request for Inspection that it decided to have an IPDP prepared for the Project. During interviews, staff also indicated the hope that the IPDP, prepared at this stage, would provide an important basis for future dialogue. The Panel now has a copy of the IPDP, but has determined that it does not contain the elements of an IPDP as required by OD 4.20. The Panel appreciates the intent behind Management's action and good faith effort to bring the Project into compliance. **It is the Panel's view, however, that the new document could only serve as a positive model for later IPDPs in Panama if it contained the elements of an IPDP required by Bank policy.**

The Panel also notes that supervision greatly intensified shortly before and after the submission of the Request for Inspection and that Management has worked actively to address the issues raised in the Request, including issues related to Law 72 and the resolution of ongoing boundary conflicts. **The Panel notes and commends Bank Management for these more recent expanded supervision actions, which the Panel finds are in compliance with OP/BP 13.05 and OD 4.20. The Requesters also have indicated to the Panel their appreciation for these efforts of Bank Management.**

The Panel has been informed by the Requesters and Management of some important recent developments in this regard, including indications that there may be a re-instatement of the Naso Comarca bill at the National Assembly.

Chapter 4: Panel Findings on the Claims of the Ngäbe People

Chapter 4 addresses the issues raised by the Ngäbe Requesters (the Second Requesters) in their Request for Inspection to the Panel, organized according to the main claims of the Requesters.

Claim That Annex Area Issues Were Not Adequately Addressed

A central concern of the Requesters is that the Project, from its beginning stages of design and appraisal, failed to give appropriate attention to the rights and interests of the Ngäbe communities in the Annex Areas in Bocas del Toro, as identified in Law No. 10 of 1997.

The history of events in the years just prior to Project approval is notable in this regard. The Panel was informed that in 1998-1999, just after the adoption of Law No. 10, there was an unsuccessful attempt to delimit the Annex Areas. The communities were offered legalization of the land containing their houses but excluding their trabajaderos (work areas). Considering this to be inadequate, all 15 communities refused the offers at the time to be annexed to the Ngäbe-Buglé Comarca.

Through its investigation, the Panel determined that there was a lack of attention to the issues and needs of Ngäbe people living in the Annex Areas, both in Project design and in the early years of implementation. The Panel found no records to indicate Bank concern with the Annex Area issues in Bocas del Toro province until 2007. Despite the field research that was claimed to have gone into the preparation of the Social Assessment and the Indigenous Peoples Strategy, the Panel found that there was no mention of the early controversy related to the Annex Areas in relevant Project preparation documents and studies.

No field study of sufficient depth to detect possible problems in the Annex Areas seems to have been conducted. **The Panel finds that this is a flaw in the studies underpinning the Project, as they relate to the Ngäbe people. This does not comply with OD 4.20.** This is of particular concern as these were areas where significant problems could arise, given the history of failed attempts to delimit them.

Perhaps as a consequence of the above flaw, Management did not ensure that the consultation activities related to the consolidation of the Ngäbe-Buglé Comarca included residents and local leaders of the Annex Areas. The Management Response acknowledges that an adequate consultation process was not carried out in any of the Annex Areas.

The Panel recognizes the difficulty of identifying and addressing an issue that traditional and official leaders representing an indigenous group may not have brought to the attention of Project officials. **It is the Panel's judgment, however, that more-inclusive consultations should have been carried out, and would likely have brought the Annex Area issue to light.** Given the controversial history, the early warnings by government, and the Bank's experiences in the region with land administration projects involving indigenous peoples in areas of rapidly developing tourism and other industries, the Panel notes that earlier attention to the Annex Areas in Bocas del Toro would have highlighted the critical need for action to address issues subsequently raised in the Request for Inspection.

In addition, the Project did not prepare a stand-alone IPDP to help address and plan for issues facing the affected indigenous peoples. **The Panel finds that the lack of a stand-alone IPDP generated adverse consequences for the Ngäbe people of the Annex Areas.** In particular, **it is the Panel's view that an IPDP with adequate consultations and studies that inform an IPDP could have identified the Annex Areas in Bocas del Toro as a critical issue requiring timely attention,** and would have analyzed in depth the conflicts and other risks, including hydroelectric and tourist developments, to the land

rights of the Ngäbe and other indigenous groups. This analytical work could have helped to mitigate these risks in a timely manner.

Work in the Annex Areas began in mid-2007. By then, there were serious conflicts as a consequence of the lack of land tenure security. However, while the issue of serious land conflicts in the Bocas del Toro islands is noted for the first time in a 2003 Aide Memoire, the Panel found no record to indicate that Management emphasized with Project officials the need to address it. **It is the Panel’s view that this is not in compliance with OP 13.05, which provides that, if circumstances surrounding a project change, it may be necessary to make corresponding changes in the project or its implementation arrangements.**

Claim That Consultations in Delimiting the Annex Areas Were Inadequate

The Ngäbe Requesters further claim that the delimitation of the Annex Areas proposed by Project officials during Project implementation does not reflect the aspirations of the Ngäbe people. They claim that the proposed boundaries (termed “polygons”) include only areas where the houses are located and exclude the *trabajaderos*. The Requesters believe that inadequate consultations with the affected communities in the Annex Areas led to a situation, in which, at the time they submitted their Request, after more than eight years of Project implementation, no Annex Area had yet been legalized and recognized as part of the Ngäbe-Buglé Comarca.

Work in the Annex Areas of Bocas del Toro began in mid-2007. **The Panel observes that the polygons offered to Ngäbe communities in the Annex Areas did not meet the expectations of the communities.** According to people with whom the Panel spoke, there have been no concrete offers from PRONAT and the National Boundaries Commission that take into account *trabajaderos* and daughter communities – that is, settlements related to the Annex Areas (“mother communities”) named specifically in Law 10 of 1997 (see Report). Local people seem not to have been advised of their rights in relation to the Annex Areas during Project preparation and early years of implementation.

The Panel finds that the methodology used for determining the boundaries of the Annex Areas included consultation with only the main leaders—who may not have been “local”—but did not involve the interested communities. The Panel finds that this methodology was not adequately participatory as required by OD 4.20.

The Panel also considered information contained in the Management Response that 8 of the 15 communities “*do not desire*” to be Annex Areas to the comarca. **Interviews in the field suggest that, if adequate polygons had been offered, many of the Annex Areas now listed as having rejected Comarca membership would have preferred to be in the Comarca because it would provide stronger land tenure security than they presently enjoy.**

Claim That a Comarca Boundary Had Been Improperly Restricted: The Case of Norteño

During its investigation, the Panel met with members of the Norteño community, who told the Panel that they were originally within the boundaries of the comarca as laid out in Law No. 10. However, when PRONAT officials came to demarcate, they were left outside the comarca.

No clear sequence of events could be ascertained. **It seems possible that the boundary was changed during the demarcation process and that the community was not consulted. If so, this change may have harmed their land tenure security by leaving them unprotected.** However, without clarification from PRONAT as to the exact sequence of field events and decisions, it is impossible to render a judgment at this point. The Panel notes the great importance of this issue to the indigenous community of Norteño. **The Panel notes and appreciates recent efforts by Bank Management to gather further information on this question, and stresses the importance of both clarification and follow-up in line with Bank policy and the relevant Project objectives.**

Claim That the Project Failed to Address Encroachments in the Annex Areas

It is undisputed that loss of Ngäbe lands has occurred in Annex Areas, particularly as a result of tourism and other development activities. One important aspect of the issue of encroachment relates to Government concessions in indigenous lands for hydroelectric projects, including the Chan 75 dam, which Requesters contend is affecting two Annex Areas. Management has indicated that the World Bank is not involved in the financing of the Chan 75 project, and the Panel found no evidence that validates the Requesters' allegation about officials of PRONAT participating in Chan 75 activities.

The underlying issue raised by the Request is what might have happened in the negotiations for the Chan 75 project had the two Annex Areas been consulted earlier in the PRONAT Project in accordance with OD 4.20 and, as a result, given tenure security in a timely manner. **It seems clear that if issues of co-management had been properly addressed and the delimitation of the Annex Areas had occurred in a timely way, the Ngäbe would have been in a better position to negotiate the terms and conditions of a concession within their land.**

The Panel has reviewed Management supervision reports and notes that, when the second Requesters sent letters to the Bank in early 2008 raising issues of human rights abuses in the context of the resettlement being carried out under the Chan 75 project, Management reacted by proposing urgent actions to determine whether there was any link between the PRONAT Project and Chan 75, and whether Bank safeguard policies applied. **The Panel finds that Management's actions following the concerns raised by the Requesters are consistent with the requirements of the policy on supervision.**

However, as a matter of supervision, the Panel notes the absence of any earlier reference in supervision reports to the potential risks for Project objectives by the Chan 75 concession. This lapse in supervision is similar to that identified by the Panel with respect to emerging developments and problems affecting the Naso during Project implementation. (see discussion of Supervision, below)

Chapter 5: Supervision and Systemic Issues

The PRONAT Project, which lasted for almost a decade and dealt with complex issues of indigenous peoples and land administration in a very challenging environment, revealed weaknesses in the Bank's supervision of the Project as well as other challenges of a more systemic character related to the broader objective of securing the territorial land rights of indigenous peoples. This chapter discusses both of these sets of issues.

Findings on Adequacy of Project Supervision

As noted in chapter 2, OP 13.05 on Project Supervision requires Management to “*identify problems promptly as they arise during implementation and recommend to the borrower ways to resolve them . . .*” and to “*recommend changes in project concept or design, as appropriate, as the project evolves or circumstances change.*” OD 4.20 on Indigenous Peoples highlights the need to include “*the appropriate anthropological, legal, and technical skills in Bank supervision missions during project implementation.*”

The Panel commends the Bank for financing a Project aimed at securing territorial rights for the Naso and the Ngäbe, and acknowledges the challenging environment in which the Bank was pursuing this objective. **The Panel finds, however, that Management, in critical stages of the Project, did not supervise in a way that was commensurate with these challenges.** The Panel's specific findings in this respect are presented below.

Inadequate Attention to Emerging Problems on the Ground. The Panel notes that between 2002 and 2007, supervision visits identified Project subcomponent 3.2 (on Indigenous Lands) as progressing satisfactorily. Satisfaction was based on PRONAT reports of progress in delimitation of the Naso Comarca and demarcation of the Ngäbe-Buglé Comarca, as well as work on other indigenous lands.

During the middle years of Project implementation, however, a number of events took place that posed significant risks for the achievement of Project objectives relating to indigenous peoples, thus requiring close supervision under Bank policy. As described in this Report, these included the 2004 schism in Naso leadership, the failure of the Naso Comarca bills in 2004 and 2005, the risks to Project objectives posed by the unfolding and controversial events relating to the Bonyik dam and the Chan 75 hydroelectric project, and the Project's approach to demarcation of Ngäbe and Naso lands.

As discussed in more detail in chapters 3 and 4, **the Panel found that these critical events and risk factors affecting the local population were not reported accurately in the middle years of Project supervision.** A Bank mission conducted in December 2007

detected no serious problems in the indigenous component of the project. The Back to Office Report (BTO; an internal Bank memorandum) from that visit casts the Naso and Ngäbe problems in a common framework of disputes between older traditional leaders and younger leaders. The BTO indicates that the Bank is not at fault, but rather “*caught in the middle of the internal conflicts.*”

The Panel also noted, in this regard, an important **failure to analyze changing circumstances.** With respect to the Naso, the Panel observes that it may be understandable not to have anticipated that the Naso Comarca would fail in the Panamanian National Assembly. When it did fail, the Project reacted with a fall-back position of support for an alternative law (Law No. 72) that Management believed would help to continue to advance the cause of indigenous collective land tenure security.

The Panel could not find, however, a formal analysis of the implications arising from the rejection of the Naso Comarca bill of law and of the potential need for concrete mitigation measures to protect the Naso territory during the legislative vacuum. Indeed, the analysis of the implications of Law No. 72 for the Naso found by the Panel was prepared well after the Request for Inspection, when Management requested a legal analysis.

In view of the seriousness of the threat to the Naso as a people from encroachments on their still unprotected lands, the Panel finds that to be consistent with applicable policies supervision should have met a higher standard. The Panel has determined that the key emerging problems should have been detected much earlier, and been accompanied by actions and recommendations appropriate to addressing the changing circumstances.

With respect to the Ngäbe, the Panel finds, similarly, that supervision did not promptly react to early warnings and emerging issues related to the Annex Areas until 2007, when the future Second Requesters began raising their concerns to Bank Management. As described in the Report, the Panel found that Ngäbe land rights were compromised by the delay in the start of the effort in Bocas del Toro, and that the resulting consultations that led to action in 2007 were inadequate.

The Panel notes that once the Project began work on the Annex Areas in Bocas del Toro in 2007, Management, at the time, accepted the account of PRONAT with regard to whether the Annex Areas favored incorporation into the comarca. During the July 2008 supervision mission, PRONAT informed the Bank that 14 of the 15 Annex Area polygons had been delimited, presumably successfully. Bank officials did not follow up with an empirical check on these data and admits to a “*missed opportunity.*” **It is the Panel’s view that Management, as a matter of supervision, should have been more active and engaged to guide and verify Project actions, according to Bank policy, with regard to consultations and land demarcation with the Ngäbe Annex Area communities.**

The Panel finds that supervision of the Project did not promptly and adequately react to warnings and emerging issues during certain key phases of the Project. This is not consistent with OP 13.05 on Project Supervision and related provisions of OD 4.20.

Engagement of Social (Anthropology) Specialists. Despite the sensitive nature of the indigenous land issues, the broad experience gained by the World Bank in Nicaragua and Honduras, the warnings placed in the Social Assessment, and the explicit provisions in the Bank's Indigenous Peoples policy on engaging social (anthropology) specialists, the Panel's review of Management supervision reports indicates that **supervision visits did not include a social specialist until March 2007. This does not comply with OD 4.20 on Indigenous Peoples.**

In line with Bank policy, a social specialist would have played a key role in assisting the Project to properly assess the evolving situation and could have recommended appropriate responsive actions, particularly in light of the issues emerging during Project implementation. The Panel has determined that the lack of adequate engagement of social specialists on supervision teams may have been a significant factor in the shortcomings in supervision described above.

Recent Strengthening of Supervision. The Panel notes that supervision intensified greatly more recently, particularly following Management's receipt of a letter in 2007 indicating concerns from the Naso Requesters. A December 2007 supervision mission recommended a review of the formulation process for Law No. 72 of 2008, a legal interpretation of Law No. 72 with regard to its effect on the "Naso-Teribe" Comarca, and a review of the adequacy of conflict resolution mechanisms. Management requested a full report on the Annex Areas consultation process. These initiatives signaled new momentum in the Bank's supervision.

A review of supervision reports since 2008 shows that Management reaction was initially prompt and thorough. A February 2008 supervision mission recommended intensifying supervision of the social and environmental aspects of the Project, especially in relation to the indigenous lands component. As described in this Report, **Management has taken many important actions since that time to review and address the concerns raised in these Requests. The Panel notes that the intensity of supervision has increased since 2008. The Panel finds that this meets the standards set forth in OP/BP 13.05 and OD 4.20.**

Observations on Systemic Issues

This investigation has revealed systemic issues relevant to the Bank's compliance with its operational policies and procedures in the context of this Project. Some of these issues are noted and discussed briefly below in the hope that they may provide some lessons that could help strengthen future policy compliance and overall development effectiveness.

Application of the Bank’s Policy on Indigenous Peoples (IP). The planning and implementation of the PRONAT Project have revealed at least three key issues with respect to the application of the Bank’s IP policy.

The first issue relates to the requirement to prepare an Indigenous Peoples Development Plan (IPDP) and carry out the corresponding participatory consultation process with affected communities. As discussed in chapters 3 and 4, no stand-alone IPDP was developed during Project preparation, on the grounds that the subcomponent of the Project dealing with indigenous territories would serve as the IPDP. While the Panel understands why Bank staff may have adopted this approach, our investigation has shown that this lack of a stand-alone IPDP prepared through a participatory process led to adverse consequences, especially for the Ngäbe people of the Annex Areas. As this case suggests, safeguard policies, particularly in land projects involving indigenous people, play a crucial role in anticipating and preventing harm and thereby avoiding possible future grievances. This reinforces the need to ensure that not only the *content*, but the *purpose* of safeguard policies and the *potential consequences* of policy noncompliance, are properly understood by staff.

A second issue is that the proper implementation of the Bank’s IP policy hinges on not only strong and clear foundations during Project preparation, but also appropriate allocation of resources for supervision, in particular to engage the services of staff and consultants with specialized training in indigenous peoples’ issues and participatory development. The Panel’s experience in this investigation and others suggests that while the Bank is making progress in ensuring that more projects apply the IP policy, especially in Africa, it still faces serious challenges in implementation of these policies, as the result, in part, of insufficient attention to supervision and to the deployment of appropriately trained social specialists.

A third issue that arose in the context of this investigation and others that relate to indigenous peoples concerns the role of the Bank in the context of what may often be a conflict between indigenous peoples and their governments. In the present Project, for example, there was a dispute over the question of leadership of the Naso people. While the Bank sees the Government as its primary client and partner, the Bank’s IP policy also requires the Bank to take a proactive role to ensure that its provisions are applied, including provisions on the informed participation of and representation of indigenous communities. The proper application of these policies is intended to provide crucial safeguards for the affected indigenous peoples, and is of special significance in light of the risks and vulnerabilities they may face. This has important implications for other Bank-supported projects, including those related to financing for the sustainable use of forest resources and biodiversity conservation under Reducing Emissions from Deforestation and Forest Degradation (REDD) activities.

The Challenges of Land Management and Administration Projects. A recent analysis by Management has highlighted the risks associated with land management and administration projects, as well as the “*high reward nature of land projects and the growing demand across all regions.*” The Panel’s investigation of this Project, as well as

its ongoing investigation of the Cambodia: Land Management and Administration Project, clearly illustrates these risks and shows that land projects are generally extremely complex and difficult to implement effectively. The Panel notes that Management has highlighted that staffing may be a potential barrier to effective Bank engagement in land administration and management projects, and is reviewing measures to “*strengthen ... technical support in this area, including targeted supplemental training of existing staff.*”

Although they may constitute an important contribution to social and economic development, land projects in developing countries not only pose significant operational risks but are often politically controversial. It is important for the Bank to systematically assess, both during design and during project implementation, operational risks and risks of a political economy nature, and devote adequate trained staff and resources to the project. **This investigation suggests that the Bank should be given credit for engaging in this extremely important Project in Panama, though it may not have invested sufficient resources to address the risks involved, especially with regard to supervision.**

Discontinuity and Turnover of Project Personnel. The Panel’s investigation has shown that the PRONAT Project experienced discontinuity and turnover in Bank personnel, including Task Team Leaders, during its almost decade-long life. This discontinuity, while not unusual in Projects of this duration, is of relevance in the case of the PRONAT Project because core Project activities related to indigenous lands took place during a period in which private investment and disputes over land grew swiftly. This affected Project supervision and the effective implementation of safeguard policies.

Potentially Conflicting Project Components. Another challenge is the potential conflict between different Project components. As discussed in chapter 4, the design of this Project appears to have led to the potential for conflict between the “left-hand” of the Project (titling activities) and the “right-hand” of the Project (protection of indigenous land areas), which were exacerbated by the scale and pace of titling activities under the Project. **The Panel notes and appreciates that once Bank Management discovered this problem during implementation, it promptly took responsive action.** Based on its experience with this investigation and others, and in line with suggestions made during staff interviews, the Panel observes that the inclusion of relevant covenants in Project documents can help safeguard against the possibility that activities under one project component could come into conflict with project objectives and related policy requirements under other components. This is particularly important for projects in which one component deals with the protection of the rights of indigenous people.

A related concern that arose in the Panama case is that the co-financing arrangements for the Project provided additional financing for the Project components that related to titling, but not to the component that related to protection of indigenous territories. While co-financing arrangements undoubtedly played an important role in increasing the overall impact of the Project, particularly in relation to its important land titling objectives, this characteristic of the Project may have heightened the possibility that titling activities could take place within indigenous land areas intended for protection under Component 3

of the Project. Interviews with staff responsible for the Project in its early days also suggest that considerable time and effort was involved in securing Project co-financing, which may have contributed to delays in implementation of crucial aspects of Project Component 3.

The Importance of the World Bank's Role in Indigenous Peoples' Issues. As noted elsewhere in this report, **Bank Management has played a leadership role in seeking to support the land rights of indigenous peoples in Panama through this Project.** The Project included a core component responding to fundamental aspirations of the indigenous communities, and (unlike other donors) the Bank was willing to take on the risks inherent in this kind of work. Furthermore, once the Requests for Inspection were filed, Bank staff constructively engaged with the affected communities to help resolve the issues. **For all these reasons, the Requesters and affected people have expressed their hope that the Bank will remain engaged in these issues in Panama in the future, following relevant policy safeguards. The Panel is likewise of the view that continued Bank engagement on indigenous issues in Panama, in line with policy, is critical.**

The importance of indigenous peoples' issues in the Bank's work is likely to intensify given the increased interest by Panama and other Governments for financing for the sustainable use of forest resources and biodiversity conservation under REDD. Future Bank financing for virtually any infrastructure project in Panama, and many other countries, will also require proactive engagement in these issues. The Panel hopes that its investigation will yield useful lessons for the work ahead.

Chapter 1: The Requests for Inspection

1. The Inspection Panel has prepared this Investigation Report in response to two Requests for Inspection related to the Panama: Land Administration Project (the “Project”)⁵ partly financed by the World Bank. The first Request (the “First Request”) was submitted on February 25, 2009, by several individual members of the Naso⁶ indigenous people and representatives of community organizations (the “First Requesters”). The second Request (the “Second Request”) was submitted on March 17, 2009, by leaders of the Congreso de Area Anexa de la Provincia de Bocas del Toro⁷ on behalf of Ngäbe indigenous communities that live in the so-called *áreas anexas*⁸ to the Ngäbe-Buglé⁹ Comarca¹⁰ in Bocas del Toro province, Panama (the “Second Requesters”).
2. The Panel registered the Requests on March 11 and March 20, 2009. Management submitted its Response to both Requests on April 20, 2009. The Panel submitted its Eligibility Report on June 19, 2009, recommending an investigation into the matters raised in the Requests. The Panel also recommended that the start of the investigation be delayed for approximately four months to foster additional opportunities for early problem solving, and in light of the fact that a new government was coming into place in Panama. The Board approved the Panel’s recommendation on a non-objection basis on July 7, 2009.
3. The claims in the Requests, like the Project itself, involve fundamental questions of land rights and tenure security of the affected indigenous peoples. The Project contains objectives and a component aimed to support, advance, and consolidate indigenous land rights in selected comarcas in Panama, as well as a component designed to support and advance private titling and land regularization activities in various areas of the country.
4. The Requests allege, however, that activities under the Project have contributed to a weakening of rights to lands traditionally occupied by two indigenous peoples—the Naso and the Ngäbe—in the province of Bocas del Toro on the eastern Atlantic coast. Each Request contains several claims of harm that the Requesters believe have occurred.

5. In Spanish, Programa Nacional de Administración de Tierras (PRONAT).

6. The Naso is among the smallest of Panama’s eight indigenous groups, also referred to as Naso Tjërdi or Teribe. This report uses the term Naso.

7. In English, Congress of the Annex Area of Bocas del Toro Province.

8. In English, annex areas.

9. The Ngäbe (sometimes spelled Ngöbe) and the Buglé are two different ethnic groups with their own languages. They live in the same area, although the Ngäbe is by far the larger group. They share the same comarca and are often referred to as one group. The Requesters are from the Ngäbe and this report uses the term Ngäbe when referring to the indigenous group, and Ngäbe-Buglé when referring to the comarca.

10. A comarca is a territory where indigenous groups possess exclusive land rights and considerable administrative authority.

5. This Report presents the findings of the Inspection Panel in response to these claims. The Report focuses on whether Bank Management has complied with relevant Bank operational policies and procedures in relation to this Project, and if not, whether such noncompliance has contributed to the harm or potential harm alleged in the Requests. The policies relevant for this investigation pertain to project appraisal, indigenous peoples, and project supervision. Among the issues presented to the Panel is whether actions required under Bank policy were properly taken to support the rights of, and avoid harm to, the affected indigenous peoples.
6. **Organization of the Report.** The Panel's report is presented in five chapters. The present chapter reviews the procedural background leading to the investigation, summarizes both the claims of the Requesters and the Response of Bank Management to these claims, and summarizes the Panel's investigation process and key questions considered. Chapter 2 provides a more in-depth discussion of the Project and the surrounding context of land rights and issues faced by indigenous peoples in Panama that form the basis for both the Bank's engagement in this Project and the claims of the affected people, and presents relevant Bank policies. On these foundations, chapter 3 presents the Panel's analysis and findings on the claims of the Naso Requesters, and chapter 4 presents the Panel's analysis and findings on the claims of the Ngäbe Requesters. Chapter 5 concludes with some systemic and final observations relevant to the issues of compliance and harm examined in the present Report.

A. The Two Requests for Inspection

7. The two Requests for Inspection concerning the PRONAT Project from the Naso and the Ngäbe indigenous peoples, respectively, are briefly summarized below.

1. The First Request

8. The First Requesters assert that, during implementation of the Project, the Bank did not take into account the rights and interests of the Naso people. They specifically refer to the following two principal issues:
9. The first issue relates to the failure to establish a comarca for the Naso people. The First Requesters acknowledge that in the initial years of the Project, Bank financing helped to enable agreement on a proposed bill of law, supported by the Naso people, to create a *Comarca Naso Tjërdi*. This bill of law was submitted to the National Assembly of Panama for its consideration.
10. The bill was, however, rejected by the National Assembly on two occasions. The Requesters believe that this happened because the Bank-financed Project was supporting a new bill of law establishing collective land property rights in indigenous territories, which was approved by the National Assembly on December 3, 2008, as Law No. 72. According to the First Requesters, Law No. 72 created “*an uncertain regime of regional rezoning*” and

constitutes a flagrant and very serious violation of the sole and true aspiration of the Naso People—the creation of a juridical framework that would respect the cultural and all forms of politico-traditional life of our Naso people, as well as the natural, archeological and genetic resources in general that we now have and that we have inherited from our ancestors and that we are entitled to: that is the region of Naso Tjërdi.

The First Requesters note that this law makes reference to the creation of a *Carta Orgánica*¹¹ in their territory. They believe that this organic charter is detrimental to their rights, was not formed in consultation with the indigenous people, and lacks legal basis.

11. The second issue concerns consultation and how the Project related to different factions among the Naso leadership. According to the First Request, PRONAT was expected to demarcate the territory of the “*original people*” of Bocas del Toro province and that, since its initial implementation, “*the Project has been carrying out activities in their Naso Tjërdi territory with the support of the Dobbo Yala Foundation and the then King [of the Naso people] Tito Santana and his team.*” The First Requesters claim, however, that the situation later in Project implementation changed because the Naso people decided to remove Tito Santana and designate a new King, Valentín Santana. Therefore, according to the Requesters, PRONAT officials who still consulted with Tito Santana on matters related to the Project were, in fact, no longer consulting with the legitimate representatives of the Naso people.
12. The First Requesters state they are “*disappointed with the World Bank, who has not enforced its operational policies on indigenous peoples,*” adding that for this reason they are “*requesting the Inspection Panel to carry out an in-depth and detailed investigation of all that has happened since the arrival of PRONAT in our territory.*”

2. The Second Request

13. The Second Requesters object in particular to the demarcation methodology followed under the Project in the Ngäbe territories in Bocas del Toro province, the La Amistad International Park (which is a World Heritage Site and encompassed within the La Amistad Biosphere Reserve), the Palo Seco Protection Forest (tropical upland forest), and the Bastimentos National Marine Park. According to the Second Requesters, the Project’s actions not only violate their human and land occupation rights, but also contravene conventions and international treaties on indigenous peoples as well as “*the World Bank’s strategies and operational policies on indigenous peoples approved by the Bank’s Board on February 22, 2006.*”

11. A carta orgánica, or organic charter, lays down the laws and forms of organization as agreed upon with the Panamanian government.

14. According to the Request, PRONAT “*has violated the indigenous land rights, since PRONAT’s main objective is to title land and not to demarcate territories.*” They claim that the Project is restricting the areas recognized as Ngäbe to lands used for housing while excluding the areas that the communities use “*for materials, medicines, craft items, workshops and other production activities.*” The Requesters argue that

*the lack of territorial protection has allowed tourism, mining and hydroelectric enterprises to speculate with our land which is shamelessly given away by the national authorities by way of Law number 2 of 2006 on concession and titling of islands and coasts ...*¹²

15. The Second Requesters state that the Government rejected their proposals on how to demarcate the Annex Areas (defined as such in Law No. 10 of 1997) and, as a result, these areas or territories “*were left out*” of the Ngäbe-Buglé Comarca. They claim that in meetings with Bank staff the Bank promised to address their concerns, but the Bank did not act to do so. They also state that Bank staff asked them not to submit a complaint to the Bank and promised to attend a Congress of the Annex Areas on March 2, 2008, but failed to attend.

16. The Second Request also claims that the Bank-financed Project supported a new bill of law, approved by the National Assembly on December 3, 2008, as Law No. 72, which established collective land property in indigenous territories and specifically prohibited the creation of new “*áreas anexas.*” In the Requesters’ opinion, Law No. 72

constitutes a flagrant and very serious violation of the sole and true aspiration of the communities of the “áreas anexas,” that is, the creation of a juridical framework that would respect the cultural and all forms of political life of the Ngäbe-Buglé people.

17. The Second Requesters state that they hold the Government and Government institutions “*directly responsible*” for their problems but, at the same time, that they “*are also disappointed with the World Bank, who has not enforced its operational policies on indigenous peoples,*” adding that for this reason they are “*requesting the Inspection Panel to carry out an in-depth and detailed investigation of all that has happened since the arrival of PRONAT in our territory.*”

12. The Request refers specifically to “*the concession of 6,215 hectares in the rural area of Valle de Riscó, a Ngäbe-Buglé indigenous territory, granted by ANAM [National Environmental Authority] for the construction of the hydroelectric project Chan 75,*” and points out that complaints was filed with the Supreme Court of Justice of Panama, the Inter-American Commission on Human Rights, and the United Nations Special Rapporteur on Indigenous Peoples.

B. Management Response

1. General Observations

18. The Management Response¹³ contends that in Projects like the one under consideration, *“technical inputs are necessary but not sufficient to meet the stated objectives, given the complex political and socio-economic conditions surrounding this issue in the country.”*¹⁴
19. The Bank’s level of engagement has changed over time. The Response notes that between 2000 and 2004, economic growth and policy reform in Panama slowed with a change in Government and the *“Government turned increasingly to capital markets for financing, leaving much of the Country Assistance Strategy unimplemented. Bank engagement in Panama dropped off dramatically and portfolio performance fell significantly.”*¹⁵ The Bank’s lending portfolio, policy dialogue, and country partnership in Panama were subsequently *“rejuvenated”* after 2004, with a new Country Partnership Strategy and other activities, including this Project, which had been originally launched in 2001.
20. The Response further notes that long-standing conflicts and wars in Latin America have been rooted primarily in land tenure issues, and poor peasants as well as indigenous peoples have increasingly lost land in this process. The Response indicates that since the mid-1990s land tenure security and efficient land administration services were identified as important aspects of the Government Poverty Reduction Strategy, with a holistic approach that would cover all types of lands and all tenure regimes, including indigenous peoples’ land rights. Management states that it has always been aware that this context would pose challenges for Project implementation but determined *“that supporting Indigenous Peoples in the consolidation of their territories is a worthwhile development endeavor.”*¹⁶
21. Management states that land issues in the Naso and Ngäbe territories find their origins in the considerable tourism, economic, scientific, and hydroelectric potential of these lands, which have attracted national and international interest. In this context, the Government has recognized some indigenous peoples’ claims to their territories, but has also transferred part of these regions to the protected area system and has awarded concessions for the use of natural resources, including for mining and hydroelectric power generation purposes. In the Ngäbe territory, a Government concession allows for the construction of the Chan 75 dam, for which people are being relocated, and there are allegations of forced evictions and violence perpetrated against affected communities.

13. Management Response to Request for Inspection Panel Review of the Panama: Land Administration Project (Loan No. 7045-PAN), submitted April 20, 2009.

14. Management Response, ¶ 16

15. Management Response, ¶ 11.

16. Management Response, ¶ 7.

22. Management states that not only external pressures but internal conflicts among indigenous groups exacerbate the magnitude of issues related to land use, land tenure, and decision-making processes, as the particular case of the Naso community bears witness. A “*schism*” within the Naso community happened in 2004 when Tito Santana “*agreed to allow*” the Government and a Colombian firm to build the Bonyik dam in the Bonyik River in the Naso territory. Some community members disagreed with this decision and, as a result, ousted Tito Santana and installed a new King, Valentín Santana.

2. Response to the First Request

23. In response to the First Requesters, Management states that it supports the creation of a comarca for the Naso territory. One of the Project objectives provided precisely for the preparation, in consultation with the Naso, of a bill and charter establishing the Naso Comarca, the highest aspiration of the Naso people for their territory. The Project-supported bill for the Naso Comarca was, however, submitted twice to the National Assembly and twice rejected.
24. In light of this, Management decided to consider a bill about to be discussed by the Legislative Assembly, the bill of Collective Lands, as a “*viable if less ideal measure to continue the momentum for improved security of tenure*” for the Naso and the indigenous peoples of Panama in general. It was also “*Management’s understanding that adoption of the Law of Collective Lands would not preclude a renewed attempt in the future to create a Comarca for the Naso People.*”¹⁷ The First Requesters have been objecting to this position and the Law of Collective Lands since early 2008 because they believe only a full comarca is an acceptable solution for the Naso people. Management states that other members of the community, headed by Tito Santana, believe instead that, though a comarca would be the best solution, this law is a step forward for the indigenous peoples of Panama.
25. The Law of Collective Lands was approved on December 3, 2008, as Law No. 72 of 2008. According to Management, it included a “*surprise*,” Article 17, which provides for the adoption of an organic charter for a *corregimiento comarcal*¹⁸ Teribe. Article 17 was not provided for in the bill of law submitted to the National Assembly. Management claims that it “*became aware*” of Article 17 only five days after the approval of the law and that it did not have any information about it before it was included in the law. However, Management also states that as soon as it learned about Article 17 it promptly took up the issue with the Government to express concerns about the implications of the law for the Naso people, in particular about the organic charter to be issued and applied under Law No. 72 in the Naso territory. The Response adds that “*it is now the Government’s intention to place*

17. Management Response, ¶ 54.

18. A *corregimiento comarcal* is a comarca more akin to a municipality than to a province.

*Naso territory under the political-administrative jurisdiction of the Province of Bocas del Toro.”*¹⁹

26. With respect to the Naso people’s internal conflict, the Management Response notes that both sides claim to be the legitimate representatives of the Naso people, while the Government of Panama recognizes only Tito Santana as the legitimate king. Management points out that “*in spite of*” the Government’s official recognition of Tito Santana, “*Management’s view is that informed participation, consistent with OD 4.20, means that the Project should consult with both groups rather than assigning unique legitimacy or representativeness to either one.*”²⁰ Management has therefore stressed to Project staff the importance of taking steps for resolving the conflict and has encouraged mediation between the two factions, recognizing that the division within the community is detrimental to the Naso people’s aspiration to consolidate their territory.
27. Management states its belief that it has been responsive to the First Requesters’ concerns. It has met with them, as well as with the other faction, encouraged solution of the conflict, and conveyed the importance of a solution to the Government. In June 2008, the Bank mission agreed on an action plan with the Government to call for mediation between the opposing groups of the Naso. The Project also offered to finance mediation. Tito Santana’s group accepted, while Valentín’s group refused the proposed mediator and suggested a new one. These efforts faded for a time but Bank staff persist in recommending that the Government continue its efforts to resolve the conflict.
28. Management concludes by stating that actions were being taken to address the First Requesters’ concerns. Among these are Management’s request to the Government for clarification of the consultation efforts during the preparation of the organic charter (opposed by the Requesters), and
- it asked Government not to use Loan proceeds to finance any activities related to the Naso, except those related to the mediation process between the two competing factions; and (iii) it recommended to Government not to approve the draft Charter until Management had an opportunity to review the requested documentation and exchange views with Government on the matter.*²¹

The status of actions to address the concerns of the First Requesters and related recent developments are described in chapter 3.

3. Response to the Second Request

29. Management states that it agrees with the Second Requesters that the Annex Areas, which are territories of the Ngäbe-Buglé Comarca (created in 1997) outside the

19. Management Response, ¶ 57.

20. Management Response, ¶ 59.

21. Management Response, ¶ 70.

comarca's core area, were not delimited and shares their concerns about this problem. Management also agrees that the Project "*has not fully demonstrated the principle*" of informed participation and consultation with respect to the delimitation of these Annex Areas.

30. The Management Response goes on to state that after the Second Requesters raised their concerns about consultation and land delimitation, in March 2008 a Bank mission visited 9 of the 15 Annex Areas to evaluate the work being carried out under the Project and was accompanied by the Ngäbe Cacique General (chief) and two caciques for the Annex Areas. The mission recognized the weaknesses in the consultation process and lack of knowledge even among Project staff of the Indigenous Peoples Strategy.²² The mission made several recommendations to Project staff to correct these problems and, in this regard, asked them to prepare a Consultation Plan. Subsequent missions requested an action plan for other activities, including land tenure studies.
31. In July 2008, Project staff presented the requested action plans, with budgets and timetables. Staff also informed the Bank mission that 14 out of 15 Annex Areas had been delimited. Management states that "[b]ased on the information provided by Project staff at the time, there was no reason to believe that the delimitations of the Annex Areas did not meet beneficiaries' expectations"²³ and no further discussions followed on this. Management recognized in hindsight that this was a missed opportunity to inquire about consultations, and as a result requested the Government a report on consultations and delimitation work carried out under the Project in the Annex Areas.
32. Management clarifies in its Response that the Project's objective is to delimit (map) and demarcate (physically mark) territories of indigenous peoples, rather than lands, given that the Project's land administration activities under the subcomponent addressing indigenous territories are based on the concept of "territory." A total of 1,000 linear kilometers of territorial boundaries of the main area of the Ngäbe-Buglé Comarca have already been demarcated, as have six Annex Areas in the provinces of Chiriqui and Veraguas.
33. For the Annex Areas in Bocas del Toro, the Management Response maintains that in February 2007 an agreement was reached with Ngäbe leaders to start the delimitation of 15 Annex Areas and to include in this delimitation the so-called *trabajaderos*—areas used for productive and working activities—in addition to housing areas. Management also indicates that Ngäbe communities can choose whether they want to be delimited as Annex Areas. As a result, following consultations in this regard conducted in 2007–08, Management understands that seven of the 15 Ngäbe communities participating in the process have chosen to be Annex Areas. Management has also requested the Government to report on

22. Excerpts of the Project Social Assessment were summarized and annexed to the Project Appraisal Document (PAD) as an Indigenous Peoples Strategy. See *infra* next section.

23. Management Response, ¶ 76.

consultations with the people before the process of legalization of Annex Areas is finalized.

34. Management further states that it acknowledges the Second Requesters' concerns about the pressure on their territory from development activities such as tourism and hydroelectric projects. It adds that the Project was not involved in granting the concession for the Chan 75 dam, nor in the process leading to approval of the laws regulating tourism and other concessions. With respect to the above-mentioned Law No. 72, according to the Response, Management understands that the law does not supersede the 1997 law creating the Ngäbe-Buglé Comarca and does not apply to Annex Areas, but it will ask the Government for clarification of this issue, as well as for clarification of the potential impacts of another law, Law No. 18 of 2009, on the status of certain Annex Areas.
35. Management states that it believes it has been responsive to the Second Requesters as well, and especially argues that *"none of the four Bank staff present at a meeting with the Second Requesters on January 31, 2008 recall asking them to refrain from sending a complaint to the Bank's Executive Board, or anyone else in Washington."* Management acknowledges that information about Project activities was conveyed to the caciques with the expectation that they would inform their constituents but commits to *"engage more regularly with the Second Requesters to inform them and consult with them about follow-up actions."*²⁴

4. Special Issues and Action Plan

36. Management states that a Social Assessment, which was done in consultation with indigenous peoples and dealt with indigenous peoples' issues, was carried out during Project preparation but it was not disclosed. Excerpts of the Social Assessment were summarized and annexed to the PAD as an Indigenous Peoples Strategy. This strategy, Management argues, contains *"key elements"* of an Indigenous Peoples Development Plan (IPDP) but *"no free-standing IPDP in accordance with OD 4.20 was prepared."*²⁵
37. During the preparation for Additional Financing for the Project, a Social Assessment and an IPDP were prepared and disclosed in December 2008. However, this 2008 assessment and IPDP, in Management's view, *"do not meet the full requirements of OD 4.20"* because they do not *"address all the Indigenous Peoples in the Project, including the Requesters."* A new IPDP that meets Bank policy requirements was expected to be completed by August 2009. Management stated that it also decided to *"pause"* the preparation of the Additional Financing operation requested by the Government to support a geographical extension of Project activities.

24. Management Response, ¶ 89.

25. Management Response, p. vii.

38. The Management Response presents an action plan with related timeline to follow up on issues raised by the Requesters. The Action Plan includes

- finalizing the IPDP as noted above, and its dissemination through consultations;
- requesting clarification from the Government about the implications for the Naso territory of Law No. 72 of 2008 and following up on the possibility of reintroducing the Naso Comarca bill to the National Assembly;
- verifying that the delimitation of the Ngäbe-Buglé Annex Areas include the trabajaderos in addition to housing areas;
- verifying the consultation work carried out thus far and continuing support for mediation efforts to solve internal conflicts among the Naso people; and
- meeting with the Requesters to discuss the issues raised and actions proposed by Management.

C. Eligibility of the Requests and Board Decision

39. As established in its founding Resolution, the Panel determined whether both Requests for Inspection met the eligibility criteria set forth in the Resolution and in its subsequent 1999 Clarifications. To do so, the Panel reviewed the Requests and Management's Response and visited the Project Area. Panel Member Roberto Lenton, together with Executive Secretary Peter Lallas and Panel expert consultant Eduardo Abbott, visited Panama June 8–12, 2009.

40. During its visit, the Panel team met with Government officials and representatives of the Project Coordinating Unit, representatives of the newly elected Government set to take office shortly, and staff of the World Bank country office in Panama City. The Panel also visited Bocas del Toro province where both groups of Requesters live, and met with the signatories of the two Requests for Inspection and affected people and communities of both the Naso and Ngäbe communities. The Panel also met groups of indigenous peoples who are not signatories of the Requests but belong to the same communities.

41. In its Eligibility Report, the Panel determined that both Requests for Inspection met the eligibility requirements for an investigation and noted there were important questions of compliance and harm raised by the Requests, which could only be evaluated as part of an investigation.

42. In light of this, the Panel recommended that an investigation be carried out but also that the beginning of the investigation be delayed for approximately four months both because a new Government was about to take office in Panama and to allow time for implementation of the actions proposed by Management in its Response. The Panel noted that it was taking this approach

. . . in the spirit of promoting additional opportunities for the issues to be addressed, in light of the interest of the Requesters in pursuing this approach and the indications by Management that they will act on these opportunities.

The Panel further wished

to highlight that its investigation report would focus mainly on any unresolved concerns raised by the Requests” and “on steps and actions taken by Management before and during the course of the investigation to address the issues of compliance and the concerns raised by the Requesters.

43. On July 7, 2009, the Board of Executive Directors approved the Panel’s recommendation on a non-objection basis.

D. The Investigation Process and Methodology

44. Consistent with its recommendation, the Panel began the preparatory work for its investigation in November 2009, approximately four months after the Board approved the recommendation that an investigation was warranted.
45. The Panel conducted a two-part investigation led by Panel Member and lead investigator Alf Jerve. The first part involved detailed research into Bank records related to the Project and extensive review of Project documents. The second part entailed a fact-finding visit to the Project area and interviews with Bank staff involved in the Project. The Panel retained Prof. Anthony Stocks, an anthropologist with extensive experience and knowledge of indigenous peoples’ land rights and claims and mapping of indigenous peoples’ lands in Central and South America, to assist in the investigation.
46. A Panel team composed of Panel Chairperson Roberto Lenton, Panel Member Alf Jerve, Executive Secretary Peter Lallas, Senior Operations Officer Tatiana Tassoni, legal expert consultant Eduardo Abbott, and expert consultant Anthony Stocks visited Panama from January 27 to February 4, 2010. Prof. Stocks prolonged his stay until February 10 to visit additional Naso and Ngäbe communities and to meet with other representatives of these two groups of Panamanian indigenous people. During its visit the Panel team met with Government officials, representatives of the Project Coordinating Unit, and staff of the World Bank country office in Panama City. In Panama City the Panel also met with members of civil society interested in the issues under investigation.
47. The Panel then visited Bocas del Toro province, where both groups of Requesters live, and met with the signatories of the two Requests for Inspection and affected people and communities of both the Naso and Ngäbe communities who did not sign the Requests. The Panel visited the Naso communities of Sieykín and Solón and the Ngäbe communities of Quebrada Pastor and Norteño in the mainland, and the Ngäbe communities of Salt Creek and Buena Esperanza on the islands of Bocas del

Toro. The Panel traveled in both the Naso and the Ngäbe territory and met with members and communities of both groups who did not sign the Requests for Inspection. In addition, Prof. Stocks visited Cayo de Agua and Popa Island in the Ngäbe area, and the communities of San San and San San Druy in the Naso territory.

48. Before starting the investigation, the Panel met with members of the Project team and Senior Management to receive a report on Project status and progress in the implementation of the actions proposed in the Management Response to the Requests for Inspection. Shortly before visiting the Project area, the Panel also met with Bank staff involved in the Project to receive a further update on the situation on the ground. Upon its return from the visit, the investigation team carried out interviews with Bank staff currently involved in the Project or who were involved in previous stages of the Project cycle.
49. During its investigation, the Panel team 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.
50. This Report presents the results of the Panel's investigation regarding the different issues the Requesters raised in the Requests for Inspection.
51. **Key questions for the investigation.** In this investigation, the Panel has borne in mind distinctions between issues of policy compliance on the one hand, and the question of whether a Project is meeting its stated outputs and objectives on the other. This is relevant in the present case because at least one of the claims in the First Request can be viewed at least partially as a complaint that the Project did not achieve one of its main objectives, namely to consolidate the Naso indigenous territory.
52. The Panel notes, in this regard, that a lack of progress in meeting project objectives or specific development results is not, in and of itself, an issue of policy compliance. Lack of policy compliance, however, may be an integral factor in whether core project objectives are successfully met as well as, of course, whether a project is leading to social, economic, or environmental harm.
53. With this in mind, and as noted above, the focus of the Panel's investigation has been 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 noncompliance were found, they caused, or were likely to cause, the harm or potential harm alleged by the Requesters and the people they represent. Key issues of compliance, considered in detail in chapters 3 and 4, include the following:
 - Did the decision not to produce a *stand-alone IPDP* during Project design violate provisions of OD 4.20? Did this, in turn, weaken the quality and scope of

the analytical work required under OD 4.20 underpinning project design? Did this have adverse impacts on the Naso and Ngäbe peoples?

- Was the approach to *consultation* during Project preparation and implementation in accordance with OD 4.20 and OP13.05? Did weaknesses, if any, in the consultation process contribute to intensifying the internal strife among the Naso or have adverse impacts on the Ngäbe land rights in the Annex Areas? Did the Bank fail to comply with relevant policies in supporting Law No. 72, and in respect to the consultation process with project-affected people?
- Was progress in formalizing indigenous territories slow as a result of failures in *supervision* by the Bank? Did this, in turn, contribute to increased conflicts over land in these territories, taking into consideration the rapid pace of private land investment and development in the country? Did Project activities in support of private titling hamper or undercut the ability of the Naso and the Ngäbe to advance and consolidate their land tenure rights as indigenous peoples?

Chapter 2: The Project, Its Context, and Relevant Bank Policies

A. Overview

54. As described below, the Panama: Land Administration Project was approved in early 2001 with two interrelated operational objectives: to consolidate protected areas (national parks) and indigenous territories; and to improve land security through titling activities and a modernized land administration system. The overall goals were articulated as achieving equitable access to land and enhancing conservation of natural resources.
55. The context within which the Project is taking place, particularly with respect to factors affecting indigenous peoples, is an important foundation for the Panel's analysis. Panama is home to eight indigenous ethno-linguistic groups, including the Naso and the Ngäbe, with a long history of struggle for land, political and cultural autonomy, and development that is consistent with their cultural values and under their control. Panama has, in recent decades, established autonomous territories for several of these groups. It also is working to advance its continued development, and has experienced rapid expansion in private investment for ventures such as tourism and hydro-power. One of the key concerns underlying the Requests for Inspection is that some of these land-related activities—part of the “development context” within the country—are coming into direct conflict with the land claims, rights, and aspirations of indigenous communities.
56. This chapter describes the basic objectives and elements of the Project that are relevant to the present investigation, and links between PRONAT and other projects. This is followed by a short review of the history and current status of the quest for land tenure security of indigenous peoples in Panama, with a focus on the Naso and Ngäbe peoples and the development context of the complaints. The chapter concludes with a description of key Bank policies relevant to both the Project and the allegations contained in the Requests for Inspection. These discussions together provide background and context for the Panel's analysis of issues of Bank policy compliance and harm in chapters 3 and 4.

1. The Land Administration Project (PRONAT)

57. The PRONAT Project is partially financed by a loan from the International Bank for Reconstruction and Development (IBRD, the “Bank”) in an amount equal to US\$47,900,000, which was approved by the Board of Executive Directors on January 16, 2001. After experiencing some implementation difficulties, the Project was restructured on June 23, 2006, to narrow the project scope and outputs, and improve “*implementation and financing modalities.*”²⁶ The Closing Date was June 30, 2010.

²⁶. Memorandum and Recommendation of the President on a Proposal to Restructure the Land Administration Project – Loan No. 7045- PAN for the Republic of Panama, dated March 27, 2006. SEC. R2006-0047, dated March 30, 2006.

58. **Objectives.** According to the original Loan Agreement, the objectives of the Project were “(a) to promote equitable access to land and improve land tenure security by providing Land Administration Services in the Project Area; and (b) to enhance natural resources conservation through the consolidation of the SINAP”²⁷ and *Indigenous Peoples Territories*.²⁸ The amended Loan Agreement provides that “the objective of the Project is to modernize the land administration system, including priority protected areas and Indigenous Peoples Territories.”²⁸

59. **Components.** The original Project components were three: Land Policy, Legal and Institutional Framework, and Project Monitoring (Part A); Land Regularization Activities (Part B); and Consolidation of Protected Areas and Indigenous Territories (Part C). After being restructured in March 2006, the Project had four components:²⁹

- (1) Land Policy, Legal and Institutional Framework, which includes activities aimed at improving the existing policy and legal institutional framework and strengthening the institutions providing land administration services;
- (2) Land Regularization Services, supporting the modernization of the Borrower’s geodetic network and the gathering and analysis of land tenure–related data, including the development and implementation of an Integrated Cadastral and Registry Information System (SIICAR) and “the carrying out of legal cadastre surveys and area-based measurement and land demarcation activities”;
- (3) Consolidation of Protected Areas and Indigenous Territories, which supports the consolidation of the National Protected Areas System (SINAP), the establishment and consolidation of protected areas within SINAP, and the establishment and consolidation of indigenous territories in the Project area; and
- (4) Project Administration, Monitoring and Evaluation, providing technical assistance services and support for land administration entities at national and local levels.

Component 3 of the Project, and specifically subcomponent 3.2, which is the subject of the Requests for Inspection, remained substantially unchanged after the restructuring.

60. **Land regularization and titling.** According to the Project Appraisal Document (PAD), Project-supported land administration activities cover a range of land regularization actions, including legal rights recognition, titling, conflict resolution,

²⁷ Loan Agreement (Land Administration Project) between Government of Panama and International Bank for Reconstruction and Development, April 2, 2001, Schedule 2.

²⁸ Panama-Loan No. 7045 – Land Administration Project, Amendment to the Loan Agreement, dated June 23, 2006.

²⁹ 2006 Project Information Document.

legal cadastre, and registry. The consolidation of SINAP and indigenous territories includes mapping, field demarcation, buffer zone limits, determination of the legal status of the territories, and land management plans in selected areas developed through local and participatory consultation processes.³⁰

61. **Consolidation of protected areas and indigenous territories.** The PAD states that the component related to consolidation of protected areas and indigenous territories allows “*legal recognition and demarcation of indigenous lands*”³¹ and aims at addressing issues of established and unestablished indigenous territories.³² This component includes, among other things, technical and baseline studies “*to provide the foundation for the regularization and legalization of Selected Comarcas*,”³³ the preparation of the draft law and charter for establishing and legally recognizing the Naso Comarca; and carrying out physical demarcation of selected comarcas.³⁴ The PAD also states that “*consolidation of indigenous peoples’ territories includes not only technical actions related to demarcation*” but also a number of complementary activities, including conflict resolution and “*support to design or complete the Cartas Orgánicas [organic charters] and other regulations and norms dealing with the administration of indigenous territories*.”³⁵
62. In the PAD, Project targets are defined as, among others, completing the establishment of the Ngäbe-Buglé Comarca and creating an additional comarca, “*the proposed Comarca Teribe-Naso*.”³⁶ The PAD goes on to say that the land claims of the Naso and the Ngäbe will be legalized as comarcas, if still pending, and their lands demarcated. The PAD also states that “*Component 3 [of the Project] would serve as the Indigenous Peoples Development Plan required under OD 4.20*.”³⁷ Annex 2 of the PAD summarizes the main land regularization and consolidation activities in relation to the Naso’s and the Ngäbe’s territory along with activities related to other indigenous groups in Panama.³⁸
63. **Responsibility for implementation.** Implementation of the Project is the responsibility of the Ministry of Finance in collaboration with the Ministry of Agriculture, the Ministry of Governance and Justice, the Ministry of Public Works, the Ministry of Housing—all of which act through various agencies under their competence—and the Project Coordination Unit. Two new entities were created specifically for this Project, the Superior Council for Land Administration and the

³⁰. Project Appraisal Document (PAD) on a Proposed Loan in the Amount of US\$ 47.9 million to the Republic of Panama for a Land Administration Project, dated December 14, 2000, p. 3.

³¹. PAD, p. 48.

³². PAD, p. 49.

³³. According to the Loan Agreement, “‘*Selected Comarca*’ means the indigenous territories of Ngäbe-Bugle and Kuna Yala, established pursuant to Law 10 of March 1997 and Law 2 of September 1938, respectively, and others as the Bank and the Borrower may agree from time to time.” Loan Agreement, Article I (General Conditions; Definitions).

³⁴. PAD, p. 49.

³⁵. PAD pp. 6–7.

³⁶. PAD, p. 29.

³⁷. PAD, p. 91.

³⁸. PAD, p. 94.

Technical Operational Committee, which are responsible for the policy and technical regulatory frameworks necessary for Project implementation. Temporary decentralization units in each province represent the national agencies.

64. **Links with other projects.** PRONAT is closely linked to the Atlantic Meso-American Biological Corridor project, which was a Global Environment Facility (GEF) project from 1998–2004 that was financed by the IBRD, the state of Panama, and private donations.
65. As one of its goals, the GEF project aimed to “*support indigenous goals to protect biodiversity*” and included a component to “*assist indigenous communities in critical areas of the corridor in managing their lands to ensure their access to them and the biological resources they contain according to community needs and principles of sustainable use.*” One of the “critical areas” of the corridor was the lands inhabited by the Naso. The GEF project financed the first diagnostic study to determine an appropriate boundary for the Naso Comarca, consultations with the Naso people were carried out, and a stand-alone Indigenous Peoples Development Plan (IPDP) was prepared under this project.
66. PRONAT also built upon an Inter-American Development Bank (IBD) project, the Program of Modernization of Agricultural Services, which had a component responsible for land titling. This component, however, seems not to have dealt with indigenous issues directly, but rather influenced the formation of PRONAT. The necessity for PRONAT to report and coordinate separately with the Bank and the IBD tended to slow down the implementation of the Project.³⁹

2. The Quest for Land Tenure Security for Indigenous Peoples in Panama

67. The post-conquest history of indigenous people in the Americas is a history of a struggle for land, political and cultural autonomy, and development that is consistent with indigenous people’s cultural values and can be under their control. In addition, indigenous people generally seek access to health and education services that are open to all citizens but that take into account their own languages and cultural values. Some groups, such as certain clans of Ecuador’s Waorani people, have made the decision to remain in voluntary isolation and seek little but land security and autonomy from nation-states that contain them.
68. That indigenous people have a “right” to the lands they historically occupy by virtue of being indigenous was affirmed by the international court of the Organization of American States in 2001:

The rights of indigenous peoples were reaffirmed by the Inter-American Court of Human Rights in its judgment of August 31, 2001. The Mayagna (Sumo) Awastegni Indigenous Community of the Atlantic Coast of Nicaragua secured recognition of its rights to its ancestral lands in a case presented by the Inter-

³⁹. Aide memoire, PRONAT Coordination Mission, June 18–26, 2001, Washington, DC.

American Commission on Human Rights (IACHR) to the Inter-American Court, establishing a historical precedent at the international level in the struggle of indigenous peoples for their communal rights. This decision represents extremely important progress in the protection of the human rights of indigenous peoples in the Americas.

*The court's judgment is that, "indigenous peoples, by virtue of their very existence, have the right to live freely on their own lands; the close bond of indigenous peoples with their land should be recognized and understood as an essential element of their cultures, spiritual lives, well-being, and economic survival. For indigenous communities the relationship to land is not merely a question of ownership and production but a material and spiritual element they must enjoy fully, among other reasons to preserve their cultural heritage and pass it on to future generations."*⁴⁰

3. Ethnography and History of the Naso and the Ngäbe

69. Panama is home to eight surviving indigenous ethno-linguistic groups. Six of them, the Kuna, Ngäbe, Naso, Buglé, Bokotá (Bogotá),⁴¹ and Bribri are related within one macro-linguistic family, the Chibchan. This heritage relates them to a number of Colombian highland groups and to nearly all of the surviving Central American groups as far north as Honduras.

70. The Ngäbe are the largest indigenous group in Panama with more than 270,000 people, whereas the Naso are one of the smallest with just over 4,000 people.⁴² Both groups currently inhabit lands in Bocas del Toro province, in the Changuinola River basin: the Naso inland along the Teribe River, the Ngäbe along the Caribbean coast including the Bocas del Toro islands. Naso territory is more than 80 percent contained in two protected areas, the La Amistad International Park and the Palo Seco Protection Forest.

71. Both the Naso and Ngäbe peoples are subsistence farmers who sell small surpluses to the market and still emphasize hunting and gathering as part of their economies. However, the Ngäbe people have been much more connected than the Naso with Panama's developing markets. The Naso, who have been much influenced by evangelical Christian missionaries, have been also somewhat isolated from the direct impact of development trends in the past because their location is essentially in roadless areas. However, Bocas del Toro recently has been singled out for

⁴⁰. Mayagna (Sumo) Awas Tingni Community versus Nicaragua, Inter-Am. Ct. H.R. (Ser.C) No. 79 (31 August 2001), at <http://www.oas.org/OASpage/press2002/en/press2001/sept01/IACHR.htm>. Other important recent judgments of the Inter-American Court of Human rights include Yakye Axa Indigenous Community versus Paraguay (Judgment of June 16, 2005) and Sawhoyamaya Indigenous Community versus Paraguay (Judgment of March 29, 2006), and Saramaka People versus Suriname (Judgment of 28 November 2007).

⁴¹. Some linguists consider Bogotá and Buglé to be dialects of the same language.

⁴². See Annex 1 for a more extended description and the method of calculating present numbers.

development of both tourism and hydroelectric power, and both groups are affected by these developments. This is discussed below.

72. The genetic DNA markers of the Ngäbe are the best known of this group and the indications are that they emerged as a distinct group about 7,000 years ago; it is likely that the Naso share this time depth with the Ngäbe and it is likely as well that they have been in Panama for that time. Formerly much more numerous and widespread along the Panama and Costa Rican borders, the Naso population has been assaulted historically by slavers and disease. It is today one of the two most endangered indigenous peoples in Panama.⁴³

Picture 1 Ngäbe people



Picture 2 Naso children



⁴³A more detailed ethnographic description of the Naso and Ngäbe people, including a description of their way of life and long-standing efforts to gain tenure and security over their lands, is contained in Annex 2 to this report.

73. The Ngäbe are Panama's largest indigenous group, inhabiting coastal and inland areas from the Caribbean shore to the Pacific in Chiriquí, Veraguas, and Bocas del Toro provinces. Unlike the Kuna people, whose political hierarchy is well developed and is probably carried down from their pre-Columbian organization as a complex chiefdom,⁴⁴ the Ngäbe are neither highly organized nor well placed politically. Despite their numbers, their lands remained unprotected by law until they were granted a comarca that included a smaller related group, the Buglé, in 1997. Even then, the boundaries remained undemarcated until the Bank-financed project made the demarcation the second priority in subcomponent 3.2 (consolidation of indigenous territories) of PRONAT.

4. The Comarca: Autonomous Territory for Indigenous People in Panama

74. The nation-state of Panama was created in 1903. During the construction of the Panama Canal during the early part of the 20th century, many North Americans befriended or at least became aware of the Kuna people, who at that point in their long history lived in the San Blas islands along Panama's northwest Caribbean coast. Thus, after the canal was finished, when the Kuna—alleging mistreatment and cultural suppression—revolted against the state in 1925.⁴⁵ As part of the settlement of these complaints, Panama created a unique legal regime for the Kuna, the comarca. The geographer, Peter Herlihy, describes the comarca as follows:

*Comarcas are Indian homelands in which there is internal administration of laws and social policies under the jurisdiction of the federal government. The concept [as it is now understood] emerged during the 1960s with the political support of the former military dictator, Gen. Omar Torrijos. Kuna Yala, as the Comarca San Blas is called, is now an institutionalized political force with its own federal legislators, representatives, and lobbyists. As a result, Indian politics are taken more seriously in Panama than in any other Central American country.*⁴⁶

75. While the state does not release its jurisdiction, authority within the comarca over internal cultural and political affairs is indigenous. Each comarca is created by law and its regulations (organic charters) are adopted by executive decree. Organic charters concern matters such as justice administration and conflict resolution, use and enjoyment of the land, and education. The comarca is considered to be one of only two models in Central America in which environmental concerns and indigenous residence are combined, the other being (at least in theory) the international biosphere reserves. In the Panama context, the comarca exercises a great deal of autonomy and tends to satisfy most of the requirements (land security, autonomy, and so forth) of indigenous people in general. It is frequently referred to as an "autonomous territory," thus implying that the requirements of International Labor Organization (ILO)

⁴⁴See Annex 2 for more discussion of this topic.

⁴⁵James Howe, *A People Who Would Not Kneel: Panama, the United States, and the San Blas Kuna* (Washington, DC: Smithsonian Institution Press, 1998).

⁴⁶Peter Herlihy, "Central American Indian Peoples and Lands Today," p.228, in *Central America: A Natural and Cultural History*, ed. Anthony G. Coates, 215–40 (New Haven: Yale University Press, 1997).

Convention 169 on Indigenous and Tribal Peoples are somehow met, even though Panama has not signed this treaty. As noted in Annex 1, the internal organization of each of the comarcas is different.

76. The Kuna Comarca was slow to develop. The rights to autonomy were given to the Kuna in 1930, followed by the creation of the Comarca of San Blas in 1938. The organic charters (internal statutes) were approved in 1953 when the name Kuna Yala was given to the Comarca. Since autonomy was granted in 1930, the Kuna have had 80 years to develop an effective government based on a nested hierarchy of traditional authorities. It is a model that all of Panama's comarcas try to emulate, with varying success.
77. The construction of the Bayano dam in 1976, displacing 2,500 indigenous people, made the land rights of inland Kuna and Emberá peoples an issue.⁴⁷ Similarly, the highway to the Darien region sparked an enormous surge in land speculation and deforestation in the late 1970s through the 1990s and accentuated issues of the land security of other inland Kuna, Emberá, and Wounaan people.
78. Eventually, more than 40 years after recognition of Kuna autonomy, the government acted to create new comarcas. Table 1 shows the existing comarcas and dates of their foundation.

⁴⁷Alaka Wali, *Kilowatts and Crisis: Hydroelectric Power and Social Dislocation in Eastern Panama* (Boulder, CO: Westview Press, 1989). Also see <http://www.nadir.org/nadir/initiativ/agp/free/imf/panama/bayano.htm> and http://en.wikipedia.org/wiki/Bayano_Dam.

Table 1 Comarcas, Laws, Gazette

Comarca	Law	Gazette
Kuna Yala	Law No. 2 of February 16, 1938	Second law of September 16, 1938
Emberá-Wounan	Law No. 22 of November 8, 1983	No. 19976 of January 17, 1984
Madugandi Kuna	Law No. 24 of January 12, 1996	No. 22951 of January 15, 1996
Ngäbe-Buglé	Law No. 10 of March 7, 1997	No. 23242 of March 11, 1997
Wargandi Kuna	Law No. 24 of July 25, 2000	No. 24106 of July 28, 2000

Source: Various years of Gaceta Oficial de la República de Panamá.

79. The Ngäbe-Buglé Comarca is the largest comarca in Panama. Two of the Kuna comarcas (the Kuna Yala and the Madugandi Kuna) and the Ngäbe-Buglé comarca are considered to be at the level of provinces, but comarcas, such as the Emberá-Wounan comarca, may also be at the level of *corregimiento*.⁴⁸ Three groups are left who exclusively occupy specific historical lands but lack comarcas: the Naso, the Bri Bri, and the Kuna of Dagargun Yala. The Naso told the Panel they have been struggling to obtain their own comarca since 1973.

80. The Ngäbe-Buglé Comarca was created by Law No. 10 of 1997, which also named 15 Ngäbe communities—each with populations of more than 300 people—in Bocas del Toro province that were physically outside the comarca, but were to be included within the comarca regime as *áreas anexas* (Annex Areas) upon measuring (delimitation), physically marking (demarcation), and titling them. They would then constitute noncontiguous “islands” of comarca land, meaning that they would belong to the Ngäbe-Buglé Comarca politically and administratively, but would not be contiguous to the comarca.

81. According to Law No. 10, these Annex Areas were to be delimited, demarcated, and legalized annexing them to the comarca within two years after passage of the law, that is, in 1999. This schedule was not met, and when PRONAT began in 2001, the work had still not been done, much to the consternation of the comarca leaders and the residents of the would-be Annex Areas.⁴⁹

5. Indigenous Lands and the Development Context of the Requesters' Complaints

82. At the time Law No. 10 of 1997 creating the Ngäbe-Buglé Comarca was passed, the islands of Bocas del Toro contained mostly communities of Ngäbe people and had little in the way of tourist concessions. The old United Fruit Plantation on Colón

⁴⁸. Panama's political divisions are, in order of inclusivity, provinces, districts, and corregimientos.

⁴⁹. Field Notes, February 5, 2010. Interviews with Second Requesters, and residents and leaders of Cayo de Agua and Popa Islands.

Island had been abandoned because of diseases affecting bananas, and, after a hiatus during which the industry moved to the Pacific coast, the Chiquita Banana Company began to operate extensive plantations in the Changuinola district on the mainland, shipping bananas through the port at Almirante Bay.⁵⁰ Most of the plantation workers were Kuna and Ngäbe people while Afro-Panamanians were dock workers.

83. As the Management Response notes, the ancestral lands of the Naso, Ngäbe, and other indigenous peoples of Panama hold significant potential for tourism, hydroelectricity generation, and in general, economic return that has attracted national and international interest. In this context, Management indicates that since the 1980s, the Government transferred large sections of these regions to the Government's system of protected areas (Palo Seco Protected Forest and La Amistad International Park). Within these protected areas, the Government has then granted concessions for commercial development of natural resources, including for mining and hydroelectric power.⁵¹

Picture 3 Road Construction along the Teribe River



⁵⁰. Richard P. Tucker, *The United States and the Ecological Destruction of the Tropical World* (Berkeley, CA: The University of California Press, 2000).

⁵¹. Management Response, ¶ 17.

84. A move to increase tourism is also underway, following what is known as the Tourism Support Law (Law No. 8 of 1994). The Law offers property tax exemptions, including land; Income tax exemption for a period of 15 years; 20 years' exemption from Import taxes; and 20 years income tax exemption on the interest charged by creditors in the tourism activity investment.⁵²
85. The passage of the 2002 Special Tourism Zone legislation allowed land to be acquired by investors and concessions. These areas, however, were mainly in the possession of indigenous (Ngäbe) families who could show that they have had uninterrupted residence for at least two years prior to the law, as verified by the Government's cadastral office. The 2002 legislation sparked a flurry of investments in Bocas del Toro, and, beginning in 2006, tourist development sprouted all over the islands.⁵³
86. Law No. 80 of 2009, Titling Possession Rights (*Titulacion Derechos Posesorios*), furthered the process by regulating how possessions (either original or purchased from the original possessor) can become titled land. The following quote from a Panama real estate company illustrates remaining ambiguities in the determination of possessory land rights:

On the last day of 2009, the Panamanian National Assembly, and Panamanian President Ricardo Martinelli, passed Law 80, a law designed to help define how coastal land and offshore islands that were purchased as Rights of Possession (ROP) can become legally titled land. For years people were buying ROP land with the hope of someday obtaining legal title which would make the land their permanent possession. When the government announced that they wanted to create a new law over the titling of land there was great controversy over whether or not the government would recognize ROP land in the new law. That concern was solved when the government inserted into the new law a list of titling prices for different amounts of ROP land. This implicitly allows people to title their ROP lands. Also inserted into the new law is the zoning of beach property in the Bocas del Toro region and Pearl Islands – popular spots to buy ROP land - as “special development zones” which means ROP lands will be recognized by the Panamanian government in those zones. The insertion of titling prices and special development zones has quieted most of the outrage the government faced when it announced it wanted coastal and offshore island property titled. The law states that the first 5 hectares of ROP land can be titled for free. After that it would cost \$1,000 per hectare. The real question now for the government is ascertaining which lands are really ROP lands. A lot of land in Panama is government land but is claimed by subsistence farmers or large landowners as their own. Is this land ROP or government land? Can a person title this land in

⁵² “Tourism Support Law” Law 8, June 14, 1994, Article 17.

⁵³ In 1998, the Smithsonian Tropical Research Institute bought land on Colón Island, which became a research station in 2003. At that time, the area was still relatively pristine. With growth between 2006 and 2008, it was practically a suburb of the tourist town of Bocas del Toro.

*their name and then sell it? The government will in the end be the one to decide these very complex questions over land ownership.*⁵⁴

87. This group of laws—Tourism Support in 1994, Special Tourism Zones in 2002, the concession law in 2006, and Law No. 80 of 2009 that clarifies the conversion of possessions into titled land on islands and coasts—exempt indigenous land within comarcas from their provisions, but not the Ngäbe Annex Areas, which still awaited delimitation and legalization within the comarca regime as these laws were passed. Ngäbe holdings in Annex Areas still are legally classified as possessions, and as such, can be sold and are being sold. The \$1,000/hectare titling fee for properties over five hectares would apply to these lands and is a strong incentive to sell because most people cannot afford payment of taxes.
88. A similar situation occurs in Naso lands. As noted, the Naso still do not have their own comarca, which would provide them with certain political and administrative rights over their territory. These rights would be particularly important considering that 80 percent of Naso land overlaps with the La Amistad International Park and the Palo Seco Protection Forest, protected areas in which concessions can be granted.
89. A further development significantly affecting land rights, especially of the Ngäbe people, is the highway constructed in 2002 to connect the port town of Almirante and the banana town of Changuinola with the town of Chiriqui Grande. Not only does this highway provide access to the islands, it also connects with the older road from Guabito to Costa Rica, providing a tourist corridor through the heart of the Ngäbe Annex Areas to the lower Teribe River. Ngäbe people in the islands and along the new highway to the Changuinola district were confronted with hyper-development. Rumors circulated that their lands would be expropriated or excessively taxed if they did not sell.⁵⁵ At the same time, speculators, both indigenous and non-indigenous, were appearing among them offering to buy land possessions.
90. Tourism on the Naso ancestral land, however, seems not to have developed as rapidly as on the Bocas del Toro islands. La Amistad International Park is still forested precisely because it is remote and in the hands of indigenous people who carry on traditional economies. Access remains difficult, although the road allowed several projects in Naso historical lands and in Ngäbe proposed Annex Areas on the Changuinola River to be realized, notable among them the Chan 75 dam on Ngäbe land and the Bonyik dam on Naso land, both indigenous areas still formally unprotected by law.

⁵⁴. <http://www.offshorewave.com/offshorenews/2010-in-panama-law-80-and-other-news-by-matthew-atlee.html>.

⁵⁵. Field notes, February 8, 2010, Popa Island.

B. Bank Policies Relevant to the Issues Raised by the Requests

91. This section sets forth Bank policies relevant to the claims of the two Requests for Inspection submitted to the Panel. The analysis of whether the Bank has complied with these policies is set forth in chapter 3 for the Naso and chapter 4 for the Ngäbe.

1. Bank Policy on Indigenous Peoples (OD 4.20)

92. **Basic objectives.** The Bank's broad objective toward indigenous peoples, as for all people in its member countries, is *"to ensure that the development process fosters full respect for their dignity, human rights and cultural uniqueness."* More specifically, the objective at the center of OD 4.20 is to ensure that indigenous people *"do not suffer adverse effects during the development process, particularly from Bank-financed projects, and that they receive culturally compatible social and economic benefits."*⁵⁶

93. **Consultation and informed participation.** If the presence of indigenous people is confirmed, OD 4.20 requires a number of actions to ensure their informed participation. It states that *"[t]he Bank's policy is that the strategy for addressing issues pertaining to indigenous peoples must be based on the informed participation of the indigenous people themselves."* The policy adds that *"identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources."*

94. OD 4.20 also addresses the particularly important question of representation of indigenous peoples. This issue is set forth in the Bank's provisions relating to the development of an Indigenous Peoples Development Plan (IPDP), noted below.⁵⁷

95. **Preparation of an Indigenous Peoples Development Plan.** The policy also contains provisions for the development of an IPDP as a key action for projects that affect indigenous people, and specifies the prerequisites for and contents of such a plan. Any project that affects indigenous people is expected to include components or provisions that incorporate such a plan. Notably, the policy also provides that if the *"bulk of the direct project beneficiaries are indigenous people, the Bank's concerns would be addressed by the project itself and the provisions of this OD would thus apply to the project in its entirety."*

⁵⁶. OD 4.20, ¶6.

⁵⁷. OP 4.01 on Environmental Assessment also contains requirements for consultations with project-affected communities more generally, and specifies that affected people and local nongovernmental organizations should be consulted during the Environmental Assessment 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.

96. An IPDP should be culturally appropriate, “*based on full consideration of the options preferred by the indigenous people affected by the project.*” OD 4.20 specifies the prerequisites for and contents of an IPDP. As suggested by the above, a key prerequisite is to involve the indigenous people affected by the project in developing the IPDP. Studies “*should make all efforts to anticipate adverse trends likely to be induced by the project and develop the means to avoid or mitigate harm.*”⁵⁸ (emphasis in original) During project identification, the approximate number of potentially affected people and their location should be determined and shown on maps of the project area, and their legal status should be discussed. Task Managers should initiate anthropological studies necessary to identify local needs and preferences.⁵⁹

97. **Contents of an IPDP.** The contents of an IPDP include, among other items:

- (a) **an assessment of the legal framework** in the country relevant to the groups covered by the policy, giving particular attention 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.*”
- (b) **baseline data** on the area of project influence and the areas inhabited by indigenous people, including accurate, up-to-date maps and aerial photographs of these areas, as well as an analysis of social structures and income sources;
- (c) **land tenure**; when local legislation needs strengthening, the Bank should offer to advise and assist the borrower in establishing legal recognition of the customary or traditional land tenure systems of indigenous peoples;
- (d) **strategy for local participation**; mechanisms should be devised and maintained for participation by indigenous people in decision making throughout project planning, implementation, and evaluation, guided by sociological and technical advice. Indigenous people’s representative organizations provide effective channels to communicate preferences, and traditional leaders should be brought into the planning process, “*with due concern for ensuring genuine representation of the indigenous population.*”⁶⁰

98. **Disclosure of IPDP.** The Bank Policy on Disclosure of Information (2002), applicable to the present Project, states that whenever the Bank requires an IPDP for an operation, it should be prepared by the proposed borrower as a “*free-standing document.*” As a condition of appraisal, the borrower “*provides the draft . . . IPDP, which conforms to the relevant policy, and makes it available at a place accessible*

⁵⁸. OD 4.20, ¶14(b).

⁵⁹. OD 4.20, ¶16.

⁶⁰. OD 4.20, ¶15(d). The provision further states that “[n]o foolproof methods exist, however, to guarantee full local-level participation. Sociological and technical advice . . . is often needed to develop mechanisms appropriate for the project area.”

to, and in a form, manner and language understandable to the displaced or affected people and local NGOs.” Once the Bank accepts the draft IPDP as an adequate basis for appraisal, and before the Bank begins formal appraisal, the Bank makes it publicly available. In addition, after the Bank has approved the final IPDP, the borrower again makes it available at a place accessible to, and in a form, manner, and language understandable to, the displaced or affected people and local NGOs.⁶¹

99.OP 13.05 on Supervision. OP 13.05, paragraph 2, states project supervision covers monitoring, evaluative review, reporting, and technical assistance activities in order to

- a. *ascertain whether the borrower is carrying out the project with due diligence to achieve its development objectives in conformity with the legal agreements;*
- b. *identify problems promptly as they arise during implementation and recommend to the borrower ways to resolve them;*
- c. *recommend changes in project concept or design, as appropriate, as the project evolves or circumstances change;*
- d. *identify the key risks to project sustainability and recommend appropriate risk management strategies and actions to the borrower (...).*

2. Bank Policy Related to Supervision

100. **BP 13.05 on Supervision.** BP 13.05 spells out the provisions of OP 13.05 in more detail at the operational level for Bank staff. It states that during project implementation, Bank staff, among other activities, regularly monitors progress in all substantive aspects of the project and targets, development objectives and performance monitoring indicators, ascertains the extent of compliance with loan covenants, including those related to environmental and social safeguards, assesses risks to successful implementation of the project.

101. **OD 4.20 on Indigenous Peoples (as relates to supervision).** OD 4.20 on Indigenous Peoples also contains provisions on Bank supervision responsibilities for projects, such as in the present investigation, where OD 4.20 applies. Specifically, paragraph 19 (Implementation and Supervision) provides that supervision planning “*should make provisions for including the appropriate anthropological, legal, and technical skills in Bank supervision missions during project implementation. . .*” It adds that “[s]ite visits by TMs [Task Managers] and specialists are essential. Midterm and final evaluations should assess progress and

⁶¹. World Bank Policy on Disclosure of Information, 2002, ¶34.

recommend corrective actions when necessary.” OD 4.20 also states that an IPDP should include, as needed, an element on “Monitoring and Evaluation.”⁶²

⁶². Specifically, ¶15(h) notes states that “*Independent monitoring capacities are usually needed when the institutions responsible for indigenous populations have weak management histories. Monitoring by representatives of indigenous peoples' own organizations can be an efficient way for the project management to absorb the perspectives of indigenous beneficiaries and is encouraged by the Bank. Monitoring units should be staffed by experienced social science professionals, and reporting formats and schedules appropriate to the project's needs should be established. Monitoring and evaluation reports should be reviewed jointly by the senior management of the implementing agency and by the Bank. The evaluation reports should be made available to the public.*”

Chapter 3: Issues Related to the Naso People

A. Overview

103. This chapter presents the claims of the First Requesters, related to the Naso people, and the Panel's analysis and findings on the Project's compliance with Bank policies with respect to those claims. The discussion is organized according to the five main claims of the Requesters, which are summarized as follows.
104. The first, and most general, claim is that the Project has failed in supporting the true aspiration of the Naso people, namely to have a comarca for the lands they occupy. This is an issue of fundamental importance for the Naso, for whom their ancestral lands are tantamount to their survival as a group and who have been struggling to obtain a comarca of their own since 1973.
105. A second, and more specific, claim is that the Project, since 2005, did not consult with the legitimate leaders of the Naso people, but instead consulted with a king who was no longer their valid leader. This problem contributed to strong divisions in the community, and also led the Project to support actions that have undermined the interests of the Naso people.
106. Third, the Requesters are particularly concerned about Law No. 72 of 2008 (Law of Collective Lands), which the Project supported after the comarca law failed in the National Assembly in 2004 and 2005. They claim that the consultation process related to draft Law No. 72 were inadequate; hence the bill was "imposed" on the Naso.
107. Fourth, and related to the above, the Requesters claim that Law No. 72 introduces great uncertainty as to the territorial rights of the Naso with regard to both area and jurisdiction, as "*an uncertain regime of regional rezoning*."
108. Finally, the Requesters, particularly during meetings with the Panel, claimed that there have been other actions and omissions under the Project that have either supported or enabled private development activities that are contrary and harmful to the territorial rights of the Naso people, including invasions of lands that are rightfully theirs. This claim, like the previous one, raises important questions about the adequacy of Bank supervision, particularly during the critical post-2005 period of Project implementation.
109. The discussion below describes these claims in more detail together with the corresponding responses of Bank Management. For each claim, the chapter sets forth the Panel's analysis and findings on issues of noncompliance and harm presented by the Request.
110. To assist the reading of this discussion, box 3.1 presents a chronology of main events relevant to the concerns of the Naso Requesters.

Box 1 Chronology of Events

- 1980 *Request to the Government of Panama for recognition of a Naso Comarca* in a letter from Lazaro Santana (then Naso King) and others, dated January 30, 1980.
- 2001 *Loan approved for Panama Land Administration Project.* The Loan Agreement for Panama's Land Administration Project (PRONAT) is approved by the World Bank on January 16, 2001.
- 2002 *A bill of law for a Naso Comarca is presented* to the Commission for Indigenous Affairs of the National Assembly in October 2002.
- 2004 *Bonyik hydroelectric dam approved.* Tito Santana supports the agreement for Empresas Medellin de Colombia (successor to Hidroeléctrica del Teribe) to begin construction of the controversial Bonyik hydroelectric dam.
Schism in Naso leadership. Disagreement allegedly over land use and Bonyik dam leaves the Naso divided. Two "factions" emerge, each insisting that it be the only one with whom the Government and the World Bank engage. One side is led by Valentín Santana, the other by Tito Santana, each claiming to be king and legitimate representative of the Naso.
Government recognizes Tito Santana as the maximum authority of the Naso. A note from the National Directorate for Indigenous Policy of June 4, 2004, states that controversy over the Bonyik hydroelectric dam and the true representation of the Naso makes it necessary for the Government to officially recognize a Naso leader.
Naso Comarca bill rejected in the National Assembly. The comarca bill of law fails to pass in the Second Round of the National Assembly. The bill is rejected by three votes in the plenary vote.
New Government under President Martin Torrijos. September 2004.
Naso Comarca bill submitted a second time. September 2004.
- 2005 *Government reaffirms recognition of Tito Santana as the maximum authority of the Naso.* In a note of April 17, 2005, the National Directorate for Indigenous Policy confirms its recognition of Tito Santana as head of the Naso, stating that policy discussions are to be held solely with his faction.
Naso Comarca bill turned down by the National Assembly. End of 2005.
- 2006 *The Land Administration Project restructured.* The Project is restructured (June 23, 2006) to narrow its scope. The component dealing with the Naso and indigenous groups is not altered.
Letter [to Bank] from Naso led by Valentín Santana against Law of Collective Lands (Law No. 72). November 26, 2006.
- 2007 *Letter [to Bank] from Naso led by Valentín Santana highlighting problems of land demarcation and consultation process, requesting urgent Bank visit.* December 6, 2007.
Management analysis of situation, December 2007. The December 2007 aide memoire notes that there did not then exist a favorable environment for creation of new indigenous comarcas; therefore the new bill of collective lands would be studied and, based on dialogue with traditional authorities, it was indicated that a strategy would be defined to follow up on this indicator.

- 2008 *Naso opposition to Law No. 72 reaffirmed.* The Naso under Valentín Santana inform the Bank and the Project (October 5, 2008) that an assembly of the Naso people has decided to oppose the Law of Collective Lands and they propose mediation facilitated by an expert from the Organization of American States.
- Possible suspension of Project.* Bank staff meets Project authorities to (a) inform them of suspension of additional financing with respect to activities related to demarcation of indigenous lands, and (b) request continuation of the mediation. December 18, 2008.
- Law No. 72 is published* on December 30, 2008. The law provides the opportunity for indigenous groups outside a comarca to apply for collective land titles. Article 17, referring to a “corregimiento comarcal,” becomes a focal point of question and controversy about implications for Naso aspiration to achieve a comarca.
- 2009 *Violent eviction of Naso from community of San San Druy.* In January 2009, Panel is informed that members of the Naso community of San San Druy were forcibly evicted, and of the destruction of six houses, crops, and property. Land is claimed by a cattle company.
- Request for Inspection received.* On February 25, 2009, the Inspection Panel receives a Request from members of the Naso affiliated with Valentín Santana’s “faction”
- Law No. 18 of 2009 is published* on March 4, 2009. Law No. 18 lists the corregimientos [areas of local government jurisdiction] that make up the district of Changuinola.
- Management declares ineligible expenses related to the drafting of the Naso organic charter under Article 17 of Law No. 72.* Bank notifies the Government on March 18, 2009, that it will not finance expenses related to the organic charter, and asks for the process to be postponed.
- Forced evictions of Naso at San San Druy,* on March 30, 2009. Panel is informed that machinery is used to enter San San Druy and force the eviction of numerous Naso over a disputed boundary.
- Legal opinion concerning the implications of Law No. 72 of 2008 for the Naso people.* Upon the World Bank’s request, a Panamanian law firm issued its opinion on May 4, 2009.
- New government under President Ricardo Martinelli* on July 1, 2009. The Board agrees to the Panel’s recommendation to postpone the beginning of the Panel’s investigation because the Presidential transition may yield important responsive action.
- 2010 *Naso factions sign an Agreement for the Consolidation of Naso Lands* on March 2, 2010. With support of scaled-up Bank supervision, the two leaders of the Naso factions agree to participate in a new commission to consolidate the Naso Comarca, using the Naso Comarca Bill of Law No. 19 of 2005 (not adopted at that time) as a reference for the comarca’s boundaries. The commission is intended to engage the community and supervise agreement on the boundaries, between March 1 and June 30, 2010. The commission’s work is to include an effort to resolve some 57 specific areas of disputed land between the Naso and others, including Ganadera Bocas. Bank Management informs the Panel in early 2010 that the great majority of these disputes might be readily resolved.

B. Claim that Project Has Undercut Naso Aspiration for a Comarca

1. Requesters' Claim and Management Response

111. The first and most general claim of the Naso Requesters is that the Project failed in supporting the true aspiration of the Naso people, that is, to have a comarca, and has, especially since 2005, taken actions that undermine this aim, contrary to Bank policy. This is an issue of fundamental importance for the Naso, for whom their ancestral lands are tantamount to their survival as a group and who have been struggling to obtain a comarca of their own since 1973.
112. The First Requesters acknowledge that in its initial years, Bank financing helped to enable agreement on a proposed bill of law to create a Naso Comarca. They believe, however, that this bill was rejected, at least in part, because the Project was supporting a bill of law on collective lands, which eventually became Law No. 72 of 2008, without proper and adequate consultation with the Naso's legitimate representatives.
113. More specifically, the Requesters believe that Law No. 72 is being "imposed" on them and, as opposed to a comarca law, has caused "uncertain zoning" of the Naso's lands. Additionally, they believe that Article 17 of Law No. 72 envisages a *Carta Orgánica* (organic charter) that would grant a much lower level of administrative and political authority than they would have under a comarca law, and which will inhibit them from obtaining their own comarca. As indicated during the investigation visit, the Requesters further worry that this same Article 17 implies territorial rights for the Naso over an area far smaller than the area that has previously been recognized as belonging to their proposed comarca.
114. Management responds to this claim by stating that it has supported and still supports the Naso Comarca as "*the solution to the Naso territorial and administrative aspirations.*"⁶³ Precisely for this purpose, Management adds, one of the Project's objectives was to support the preparation of a bill and organic charter for establishing and legally recognizing the Naso Comarca, by financing consultations, awareness campaigns, and various activities related to the drafting of the bill of law.
115. Management further notes that after 2005, when the National Assembly suspended discussion on a bill to create a Naso Comarca, Management lent its support to Law No. 72 of 2008, which it viewed as a "*viable if less ideal measure to improve the momentum for improved security of tenure*"⁶⁴ for the Naso and other indigenous peoples of Panama.

⁶³. Management Response, ¶ 53.

⁶⁴. Management Response, ¶ 54.

116. In the light of its investigation, the Panel divides its analysis of issues of compliance and harm in relation to this claim into three parts:

- Project design and appraisal with respect to the question of the Naso Comarca, with a focus on issues of compliance with OD 4.20 on Indigenous Peoples;
- the early years of Project implementation, 2001–05, when there was action to support the presentation of a bill of law to create a comarca to the National Assembly, with a focus on issues of compliance with OP 13.05 on Supervision; and
- the second phase of Project implementation, post-2005, including in particular the decision by Bank Management to support Law No. 72 of 2008, again with a focus on OP 13.05 on Supervision.

2. Project Design and Appraisal: The Question of a Naso Comarca

117. **Project included a component on Naso indigenous territory.** As noted above, the Project at appraisal included an indigenous territory element that specifically supported the delimitation of territory for a proposed Naso Comarca, and the drafting of a bill of law for the comarca. Subcomponent 3(b) of the original Loan Agreement provides for “*the preparation of the draft law and charter required to establish and legally recognize the Naso Teribe Region...*”

118. The problems of land tenure security for the Naso was also one focus of the Bank-supported Global Environment Facility project, the Meso-American Biological Corridor (1998–2004), under which the first diagnostic study of the potential boundaries for a Naso Comarca was carried out in association with PRONAT.

119. **Social analysis emphasized the critical need for a Naso Comarca.** The Panel observes that the inclusion of a specific Project objective to support the delimitation and drafting of a bill for a Naso Comarca flows directly from analysis contained in the Social Assessment (SA) prepared for the Project.

120. The SA contained in the Project Appraisal Document (PAD)⁶⁵ analyzes five scenarios in different social and geographic areas in which the project would function. According to the executive summary of the SA, the team used methods that included the collection of primary data in the field and direct consultation with the actors involved to recommend design features to the eventual PRONAT Project. Among the analytical categories was an analysis of conflict in indigenous areas that identified the following categories⁶⁶:

- overlapping claims between indigenous and non-indigenous families;
- lack of physical demarcation;

⁶⁵. PAD, Annex 15, executive summary of the Social Assessment.

⁶⁶. PAD, p. 114

- invasion by colonists, extractive industry, and commercial interests such as tourism;
- incomplete statutes (organic charter); and
- overlap of indigenous areas with protected areas.

121. In regard to the “Teribe Naso Indigenous Territory,” the SA states that it is “*the most critical traditional territory to be demarcated and consolidated,*” because the Meso-American Biodiversity Corridor Project had included, since 1998, an as yet unfulfilled promise to the Naso for demarcation. “*The Social Assessment has pointed to this activity as one that should be given **high priority** and warn the World Bank about the negative consequences that a new postponement of this activity will imply for the protection and development of **one of the most vulnerable indigenous people in Panama.***”⁶⁷ (Emphasis added.) The SA identified the importance of working with the traditional indigenous organizations, such as Congresses, and predicted some conflict between “traditional” leaders and “new” leaders, as well as possible conflicts between indigenous nongovernmental organizations (NGOs) and traditional leaders.⁶⁸

122. Furthermore, the PAD, which includes an Indigenous Peoples Strategy (IPS),⁶⁹ reflects this finding of the SA. It notes that the establishment of the “Teribe-Naso” territory was made the first priority—an “*imperative*”—of the IPS, recognizing that the survival of the Naso people depended on this.⁷⁰

Picture 4 Panel team with Naso Requesters on its way to the community of Siey Kin up the Teribe river



123. **Lack of a stand-alone Indigenous Peoples Development Plan (IPDP).** As noted in the Management Response, however, the Project did not prepare a stand-alone IPDP at the time of Project appraisal, and the SA was not publicly disclosed. The Panel

⁶⁷. PAD, p. 128.

⁶⁸. PAD, p. 118.

⁶⁹. PAD, Annex 12.

⁷⁰. PAD, p. 96: “*It is imperative to give high priority to this territory because it is not yet recognized and the survival of the Teribe-Naso people is at stake.*”

considered whether this constituted noncompliance with the provisions of OD 4.20 on Indigenous People (discussed in chapter 2) and if so, whether it weakened the quality and scope of the analytical work underpinning Project design, and undercut the Naso aspiration for a comarca.

124. In its Response to the Request, *“Management acknowledges that no separate or free-standing IPDP in accordance with OD 4.20 was prepared.”* It states that a comprehensive SA, which included *“consultations with different groups, including representatives of Indigenous Peoples,”* was carried out, and that the PAD also includes an Indigenous Peoples Strategy (IPS). The PAD noted that the subcomponent dealing with indigenous territories *“would serve as an Indigenous Peoples Development Plan required under OD 4.20.”*⁷¹ At least one representative of Management confirmed to the Panel that a separate IPDP was not considered necessary at the beginning of the Project because subcomponent 3.2 in itself constituted an indigenous development plan.
125. However, as also acknowledged by Management in its Response, neither a final version of the IPS nor the SA was disclosed in Spanish in Panama or in English at the Infoshop. Management *“acknowledges the importance of this, since the lack of a stand-alone document makes it harder for key stakeholder groups, including the indigenous communities in Panama, to know what rights they have under the Project.”*⁷²
126. Taking into account Project documents assessing critical risks facing the Naso and other indigenous groups affected by the Project, noted above, the fact that Component 3 of the Project was designed specifically to advance and consolidate indigenous peoples’ land rights, and paragraph 13 of OD 4.20,⁷³ **the Panel considers that it is understandable how staff might have come to the conclusion that they had met the requirements under OD 4.20 regarding the preparation of an IPDP.** The Panel further notes in this regard that it has received explanations from Management that the interpretation of these provisions has been clarified and evolved over recent years in favor of preparing a stand-alone IPDP in such situations.
127. The Panel determined, nevertheless, that the development and proper dissemination of a stand-alone IPDP would likely have placed the Bank in a better position to support to deal with the challenges that subsequently unfolded. Moreover, as described in chapter 4, the failure to prepare a stand-alone IPDP, and carry out the corresponding participatory consultation process with affected communities, had serious adverse consequences for Ngäbe communities because key issues and concerns relating to the Annex Areas were overlooked during preparation and the early years of Project implementation. **The Panel concurs with the view of**

⁷¹. PAD, p. 91.

⁷². Management Response, ¶ 90.

⁷³. Paragraph 13 provides, among other things, that if the *“bulk of the direct project beneficiaries are indigenous people, the Bank’s concerns would be addressed by the project itself and the provisions of this OD would thus apply to the project in its entirety.”*

Management that the absence of a stand-alone IPDP, and failure to disclose publicly the Social Assessment prior to appraisal, was not in accordance with OD 4.20.

128. **Consequences for the Naso of not having a stand-alone IPDP.** The Panel notes that one of the most important consequence of not preparing an IPDP is the lack of dissemination of key project information (such as contained in the SA, IPS, and PAD) in a manner essential for meeting the requirements of OP 4.20 for “*informed participation*” and of Bank Policy on Disclosure of Information requiring that both the draft and final IPDP be disclosed as free-standing documents. The process of developing an IPDP leads to a situation in which a broader spectrum of project beneficiaries can understand the Project’s aims and the timetable with which it approaches the issues. Bank staff interviewed by the Panel noted that an IPDP provides an essential framework and lays a solid foundation for addressing indigenous peoples’ issues even when the Bank is no longer directly involved. Staff noted that the IPDP may become a document to empower indigenous peoples in their fights for their rights and interests.
129. Recognizing these concerns, **the Panel finds that the absence of a stand-alone IPDP at appraisal did not prevent the Bank from taking important actions in support of the aspiration of the Naso to have their own comarca. The Panel further finds that the Social Assessment and PAD prepared for the Project properly highlighted the core need to give high priority to the work to develop a comarca, in light of risks faced by the Naso people. The Panel finds that this is consistent with the objectives of OD 4.20.**

3. Working toward a Naso Comarca: Early Years of Project Implementation

130. The Panel’s investigation revealed that in the early years of Project implementation, 2001–05, significant actions were being taken to seek passage of a new bill of law to create a Naso Comarca. As described in the previous section, the development of a comarca bill and the consultations involved in this activity were judged to be a high priority for the Project at the time of its appraisal. The Panel’s investigation further determined that work on this issue commenced early on in Project implementation. The Panel’s review of the evidence indicated that during the period from 2001 to the suspension of discussions of the bill of law by the National Assembly in 2005, the indigenous territory component of the Project supported the delimitation of a proposed Naso Comarca territory and the drafting of a bill of law for the comarca.
131. The evidence also indicates that the Naso were adequately informed and participated heavily in the process of determining comarca boundaries, addressing conflicts with regard to the boundaries, and elaborating the comarca bill. The contractor retained to conduct a diagnostic study of the Naso territory (*Estudio Tenencial de Tierra*), the Dobbo Yala Foundation (a Kuna NGO), found it relatively easy to communicate with the Naso; the level of participation in identifying an appropriate polygon, or land

area, was high, and the work went well.⁷⁴ The comarca draft bill presented to the National Assembly in 2004 was “*massively approved*” by the Naso according to all discussions the Panel held with Naso people in the Project area.

132. Further evidence of the Project’s efforts in this early phase is the fact that the bill had already been submitted to a legislative subcommittee in November of 2002.⁷⁵ This indicates very rapid work indeed considering the relatively unorganized state of the Project at that point. In Bank supervision visits between 2002 and 2005, subcomponent 3.2 dealing with indigenous territories was considered to be virtually the only part of the Project that was judged to be performing satisfactorily and the work on the Naso Comarca was the most important part of the subcomponent at that time.⁷⁶ It is also worth noting that the Project had started helping to define the terms of co-management between the comarca and the protected areas with which it overlapped.

133. The Bank’s and Project’s efforts in this critical area seemed to be about to bear fruit in September 2004 when a bill to create a Naso Comarca was formally presented to the National Assembly. The Naso’s hopes of finally getting the comarca at that time were short-lived, however, because the bill was rejected. A second effort in 2005 did not yield better results; discussion on the bill was suspended by the Assembly in December of that year. While not an outright rejection, the action may have signaled the prevailing political mood in Panama that the approval of more comarcas was not politically viable.

134. The Panel finds that the Project’s support for the preparation of a comarca bill in the early years of Project implementation was directly supportive of the territorial and administrative aspirations of the Naso, and consistent with OD 4.20 on Indigenous Peoples and OP 13.05 on Supervision. The failure of the bill to pass National Assembly in 2004 and again in 2005 does not alter this assessment.

4. Project Implementation and Supervision: Later Years

135. The period beginning in 2005 constitutes a distinct second period of Project implementation, when the bill to create a Naso Comarca failed again to pass the National Assembly. Events during this period led to the Request for Inspection and to the claim that the Bank (and the Project) failed in supporting the territorial aspirations of the Naso and delivering on the commitments enshrined in the Project’s design. According to the Requesters, this is evidenced in the issues analyzed in sections C, D, E, and F below.

⁷⁴. Panel Field interviews during investigation visit in January 2010.

⁷⁵. Aide memoire, May 2003 supervision visit, ¶ 46.

⁷⁶. Aide memoire, June 2004 supervision visit, ¶¶ 27, 36, 37, 38.

B. Claim that the Project Did Not Consult Properly with Legitimate Leaders

1. Requesters' Claim and Management Response

136. As noted above, a second core claim of the Naso Requesters is that there was a failure under the Project to consult properly with the legitimate leaders of the Naso people, particularly since 2005 and the failure of the bill to establish the Naso Comarca.

137. According to the Requesters, the Project carried out initial implementation in the Naso territory with the support of then King Tito Santana. The Requesters' claim, however, that the situation facing the Project changed mid-stream in Project implementation because the Naso people decided in 2004 to remove Tito Santana and designate a new king, Valentín Santana. The Requesters claim that PRONAT and Bank Management, however, continued to consult with Tito Santana on matters related to the Project, even though he was no longer the legitimate representative of the Naso people.

Picture 5 Meeting with representatives of the Naso Requesters at Siey Kin



Picture 6 Meeting with Valentín Santana

138. Management responds to these claims by indicating that it has not favored one faction over the other because Management's view is that both groups should be consulted to ensure informed participation of Project-affected people, consistent with OD 4.20. In this light, Management states that once it learned of concerns relating to this schism, in a letter from Requesters in December 2007, it has *"tried to impress upon Government authorities and Project staff the need to consider the views and concerns of both groups."*⁷⁷

139. The Management Response further notes that engaging in dialogues with the two groups, and pushing the Government to do likewise, *"has been delicate"* and has strained its relations with the Government, which recognizes Tito Santana as the only

⁷⁷. Management Response, ¶ 59.

Naso king (see the chronology of events in box 3.1). In this context, Management also stressed the need to take action and promote mediation between the two groups.⁷⁸ Management further stated that “*it asked Government not to use Loan proceeds to finance any activities related to the Naso, except those related to the mediation process between the two competing factions.*”⁷⁹

140. In examining the Requesters’ claim, it is important to note certain key events and issues that arose during Project implementation that seriously bear on both the schism in the Naso leadership and concerns underlying the claim relating to improper consultations. These events and issues are reviewed below.

2. Panel Observations and Findings

141. **Split in the Naso internal body politic and the Bonyik dam.** During 2003–04, when appropriate boundaries for the Naso Comarca were being identified and a bill of law was being crafted, the Naso internal body politic ripped apart. The split appears to have been primarily based on then King Tito Santana’s support for a hydroelectric project, which came to be known as the Bonyik dam.

142. The Bonyik dam is a hydroelectric facility under development on land envisioned for the Naso Comarca. The Bonyik dam project had been in discussion since 1997 with former Naso King Cesar Santana and the President of the Naso Council Timoteo Bonilla. However, Tito Santana’s support for the project was challenged by then Naso Council President Adolfo Villagra, and an assembly called by the dissident faction named Tito Santana’s uncle, Valentín Santana, as king. The assembly was challenged by Tito Santana’s supporters as illegal. Eventually an election supervised by the National Electoral Commission was held in 2005, but Valentín Santana withdrew and left Tito Santana as the only candidate and he won the election.

143. Tito Santana has since been officially recognized as Naso King by the National Directorate of Indigenous Policy, a division of the Ministry of Government and Justice. PRONAT also recognized Tito Santana as the legitimate King.⁸⁰ The Government of Panama continues to recognize Tito Santana as the only legitimate representative of the Naso.

144. The Panel was also informed during the investigation that this internal dispute, and the lack of support by some Naso people for the Bonyik dam, is considered by some as among the reasons for the 2005 suspension of the discussion in the National Assembly of the comarca law.⁸¹ Additionally, the Panel was told that this internal

⁷⁸. While mediation by outsiders was rejected by the Naso, the Panel has learned from Management that the Naso have recently formed a commission that represents both factions for the purpose of dealing with the verification of the territorial boundaries. See section F, *infra*.

⁷⁹. Management Response, ¶ 70.

⁸⁰. PRONAT, 2008, *Cronología de las Acciones Realizadas en el Territorio Naso*.

⁸¹. It is the belief of some Bank officials that the comarca bill’s rejection also involved development plans for Naso territory that included the construction of the Bonyik dam.

conflict over the dam among the Naso is one of the reasons the Inter-American Development Bank withdrew its offer of financing for the Bonyik dam in 2005.

145. **Compliance analysis.** As noted previously, OD 4.20 on Indigenous Peoples requires a number of actions to ensure the informed participation of indigenous peoples in project activities that may affect them. Of relevance to the present analysis, it states that “[t]he Bank’s policy is that the strategy for addressing issues pertaining to indigenous peoples must be based on the informed participation of the indigenous people themselves.” The policy adds that “*identifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources.*”
146. OD 4.20 also addresses the question of representation of indigenous peoples, which has become an issue of particular concern in the present case. In the context of preparing an IPDP, OD 4.20 states that mechanisms should be devised and maintained for participation by indigenous people in decision making throughout project planning, implementation, and evaluation, guided by sociological and technical advice. Indigenous peoples’ representative organizations provide effective channels to communicate preferences, and traditional leaders should be brought into the planning process, “*with due concern for ensuring genuine representation of the indigenous population.*”
147. During its investigation, the Panel observed the effects of the schism that emerged in the Naso body politic in 2004 between people supporting Valentín Santana and those supporting Tito Santana. As noted above, the Management Response indicates that once it learned of concerns relating to this schism, by letter of Requesters in December 2007, it tried to impress upon the Government authorities and Project staff the need to consider the concerns and views of both groups.
148. **The Panel determined that Bank Management, upon learning of these concerns in late 2007, tried to deal with both factions of the Naso people, and repeatedly interacted with the Project directly to make attempts to resolve the conflict.**⁸² The reports from the supervision missions beginning in early 2008, reviewed by the Panel, record various attempts and meetings to discuss the issues of the failed comarca law and the Project’s support of Law No. 72 on Collective Lands with both parties.
149. **The Panel finds that these recent efforts denote a good faith attempt on the part of Management to ensure that the consultation process was meaningful, and that the genuine representatives of the Naso indigenous peoples participated in the process, consistent with the provisions of OD 4.20.** The Panel also notes more

⁸². Management Response, Annex 4, Chronology of Bank and Project Engagement with the Naso people.

recent proposals and efforts by Bank Management to foster resolution of the internal conflict among the Naso (see section F).⁸³

150. **As a matter of supervision, however, the Panel notes with concern the significant lapse in time before Management seems to have reported, and recommended action in response to, the risks posed for Project objectives resulting from the Naso schism.** This issue is addressed under Supervision and Systemic Issues in chapter 5 of this Report.

D. Claim of Inadequate Consultations in Relation to Project Support for Law No. 72

1. Requesters' Claims and Management Response

151. A second and related concern of the Naso about the Project consultation process is focused on the Project's decision to support Law No. 72, adopted December 2008. The Requesters believe that adequate consultations were not carried out with the legitimate representatives of the Naso people regarding the Bank's and the Project's support for Law No. 72, and that this law is being "imposed" on them.

152. According to Management, its support for Law No. 72 was a "*good faith effort to address the situation of Indigenous People's inequality*" given that some indigenous groups, including the Naso, did not otherwise have a specific legal framework for having their land claims recognized.⁸⁴ On the issue of consultations, Management notes that it "*concurred with the Project's support to the consultation process related to the bill of Collective Lands, which enjoyed broad support from other indigenous groups.*"⁸⁵

153. Management also notes that the controversies over these consultations occurred in the context of the internal conflict for leadership of the Naso. Management states that Law No. 72 was discussed with all interested indigenous groups, including Valentín Santana's group, which claimed this bill was "*unacceptable,*" and Tito Santana's group, which supported it as a "*step forward.*"⁸⁶ Management also indicated its understanding that Law No. 72 would not preclude the Naso from attaining the comarca regime.

⁸³. Management indicated to the Panel, and the Requesters confirmed during the field visit, that both factions of the Naso, while still not agreeing on a number of issues, concur that their division should not be mediated by external parties.

⁸⁴. Management Response, ¶ 54.

⁸⁵. Management Response, ¶ 54.

⁸⁶. Management states that it has been aware of the First Requesters' opposition to the Collective Lands bill initiative since early 2008, and in supervision missions in January and February 2008 states that ". . . Valentín Santana and others indicated that the Collective Lands Bill was unacceptable to the Naso, and that only the full Comarca would suffice. Tito Santana said that although he wished for a Comarca, he was supporting the bill of Collective Lands as a step forward for Panama's indigenous People." Management Response ¶ 55.

154. With respect to Article 17 of Law No. 72, Management states in its Response that “[a]lthough the Project has supported the consultation process for the bill of Collective Lands,” it “had no information about the inclusion of Article 17 in it.”⁸⁷ Management states that it learned about Article 17 of the law on December 8, 2008, five days after the law was adopted. It further states that as soon as Management became aware of the article it met internally to consider its implications for all Naso stakeholders, “as well as the position of the Government with respect to the appropriate consultation framework as applicable to the Project.”⁸⁸

155. With respect specifically to the controversial “organic charter” referred to in Article 17 (discussed in more detail in section E), Management acknowledges that Project staff were involved in its preparation, stating that

*Management acknowledges that the Project’s staff was involved from end of December 2008 to mid-February 2009 in the preparation of this Charter, but neither the Government nor the Project informed the Bank until after the Law was approved about this involvement, in response to a specific request for clarification from the Bank.*⁸⁹

156. Management further states that when it learned about the First Requesters’ objections to the drafting of the charter mandated by Article 17, in March 2009, it requested and received a copy of the draft charter from the Project and took several steps, as follows:

*(i) it requested clarifications from Government on the consultation process that led to the preparation of the draft Charter; (ii) it asked Government not to use Loan proceeds to finance any activities related to the Naso, except those related to the mediation process between the two competing factions; and (iii) it recommended to Government not to approve the draft Charter until Management had an opportunity to review the requested documentation and exchange views with the Government on the matter.*⁹⁰

2. Panel Observations and Findings

157. The Panel notes that after discussion of the bill of law for a Naso Comarca was suspended by the National Assembly in 2005, the climate in Panama’s political circles seemed not to have been supportive of new comarcas.⁹¹ Furthermore, the

⁸⁷. Management Response, ¶57.

⁸⁸. Management Response, ¶69. Management further explains that the outcome of a legislative process “is beyond its control and responsibility.”

⁸⁹. Management Response p. 31.

⁹⁰. Management Response, ¶70.

⁹¹. In numerous interviews with Government people, the figure of 10 percent of Panama’s people (the supposed indigenous component holding 22 percent of Panama’s land (the amount involved in comarcas) comes out. This statistic is invoked to support the opinion that Panama has been overly generous with its indigenous people. Management also reports (BTO, Feb. 2008) that there was some opinion in political

Panel notes that Management, in an effort to maintain momentum in the protection of indigenous lands, decided to support the consultation process related to a new law being proposed to regulate land under collective management outside established comarcas. The law was passed as Law No. 72 of 2008 (Collective Lands).

158. With respect to the need for consultation, Management emphasized to PRONAT the “*importance of a complete and systematic documentation of processes of consultation and alternative resolution of conflicts.*”⁹² Interviews with Management indicate that the internal decision to support Law No. 72 was by general consensus, without much discussion. Nevertheless, in February 2008, work on Law No. 72 is noted in supervision reports and Management assures that there was consultation “*with all interested groups.*”⁹³ Management states that the bill of collective lands was discussed with all interested indigenous groups, including Valentín Santana’s group, who claimed this bill was “*unacceptable,*” and Tito Santana’s group who supported it as a “*step forward.*”⁹⁴

159. In Panel interviews with Tito Santana, he freely states that he was consulted on Law No. 72 and claims broad community support.⁹⁵ However, Valentín Santana’s group denies having been consulted on this issue and also claims broad community support. Valentín Santana’s supporters have made no secret of their adamant opposition to that law,⁹⁶ while Tito Santana has made no secret of his approval of same, while insisting that he acted with the full support of village leaders in Naso territory.⁹⁷ Whether the majority of the Naso opposes or supports the law is difficult for the Panel to ascertain, but there certainly has been strong opposition, as reflected by the Request for Inspection.

circles that Afro-Panamanians would begin to demand comarcas if any more were granted to indigenous people.

⁹². Aide memoire, March 2007.

⁹³. BTO, Feb 2008, ¶ 7.

⁹⁴. BTO, Feb 2008, ¶ 7.

⁹⁵. Field Notes, February 3, 2010, Bocas del Toro, interview with Tito Santana and advisors.

⁹⁶. Numerous conversations with Naso supporters of Valentín Santana between January 30 and February 10, 2010.

⁹⁷. Field Notes, February 3, 2010, Bocas del Toro, interview with Tito Santana and advisors.

Picture 7 Panel team meets with Tito Santana



Box 2 In their own words: King Valentín

“The former Kings struggled for a Comarca. When I was elected it was my fight too. Now I’m old, but it’s still the Comarca, not Collective Lands which comes as a surprise. Nevertheless despite the last 40 years [of different government] the problem goes on. There is no adequate policy of protection for us. Even though we are divided, the point remains the same. We all struggle for land and our rights. After my reign, the next ones will carry it on. We want the Comarca.”

-- King Valentín Santana

Box 3 In their own words: King Tito

“The failure to pass the Comarca Law affected me a lot. The second time in 2005 we also worked hard for it. Who was against it? [The names several people among the complainants]. The father of [name] was also against everything we did. It goes on and on. Now they have complained to the Bank. Five years of them denouncing and accusing me of all kinds of things. How can we believe someone who is not an authority, not authorized, not representative. We can be excused because we don’t know anything about this situation. The muchachos don’t rest, don’t sleep.”

--King Tito Santana

160. In its Progress Report of December 2009, Management acknowledges that the inclusion of Article 17 of Law No. 72 and the preparation of the draft organic charter “*were not adequately consulted with the Naso.*” The Progress Report further notes that in this light, Management followed up with its notification to the Government of March 18, 2009, that Loan proceeds were not to be used for activities related to the draft charter. Consistent with this approach, on May 26, 2009, Management sent a letter to the Government declaring such expenditures ineligible for financing under Loan 7045-PA.

161. **Compliance analysis.** The Panel recognizes that the evidence before it regarding the consultation process is mixed. During its visit, the Panel heard various claims regarding Law No. 72 that appeared to demonstrate both disagreement and misunderstanding of the law by the Naso, as well as poor information about its

content. Many of the Naso the Panel met with, nevertheless, were aware of this law and, as noted, had serious concerns about its implications.

162. Management states that, in an effort to maintain momentum in the protection of indigenous lands, it decided to support the consultation process related to the new bill of law (eventually Law No. 72) being proposed to regulate land under collective management outside established comarcas. **Management acknowledges, however, that there were inadequate consultations with the Naso on the inclusion of Article 17 of Law No. 72 and the preparation of the draft organic charter. The Panel concurs in this assessment.**

163. During its investigation, the Panel observed disagreement and misunderstanding about the meaning of Law No. 72 for the Naso people. Whether this was due to inadequate consultations is not easy to determine, but the many unanswered questions about the effect of the law on the Naso's aspiration for a comarca, and the meaning of Article 17, generated both anxiety and tensions within the community.⁹⁸

164. The Panel notes the importance of ensuring broad dissemination of information among the Naso on matters having direct implications for their land rights and claims, such as Law 72 and the organic charter, and appropriate and meaningful consultations on these matters. The Panel's investigation confirmed that the understanding of the law on the part of the Naso indigenous communities may be critical for their decisions about appropriate ways of protecting their territory in the absence of a law establishing a Naso Comarca.

165. It is important to observe, again, that the internal conflict among the Naso has created a complex and difficult dynamic for Project officials and Bank Management to deal with, which may have contributed to misunderstandings and poor information, or even disinformation, on the objectives and implications of Law No. 72. The Panel also notes that once Management learned about the draft organic charter and shortcomings in consultation, Management reacted promptly to seek further information and then to ask the Government not to use loan proceeds for activities relating to the organic charter or land demarcation. These actions, and the implications of Law No. 72 for the territorial aspirations of the Naso, are discussed in more detail in the next section.

⁹⁸. Management recently reported having received a *Plan de Participación Indígena* (PPI) that supposedly would answer an earlier request to PRONAT for detailed documentation of the exact sequence of consultations in the project. The Panel reviewed this document but found no such listing of details. Aide Memoire, November 2009, Paragraph 11)

E. Claim that Project Support for Law No. 72 Has Caused “An Uncertain Regime of Regional Rezoning” of Naso Territory

1. Requesters’ Claims and Management Response

166. In addition to concerns relating to the consultation process, the First Requesters claim that the decision of the Project and the Bank to support Law No. 72 is contrary to the interests of the Naso people, and particularly to their aspiration for a Naso Comarca. The concerns of the Requesters about the negative effect of Law No. 72 appear to rest on several considerations:

167. First, Law No. 72 in general is less comprehensive than existing comarca laws (for example, Law No. 10 of 1997 creating the Ngäbe-Buglé Comarca), particularly as it pertains to provisions regulating governance of the territory. The Requesters fear that a territory gazetted under Law No. 72 enjoys weaker protection of territorial rights for the indigenous population than under a comarca law.

168. Second, gazetting Naso land under Law No. 72 may hinder the Naso from obtaining a comarca. This concern refers in particular to Article 17 of the law, which states “[T]he Ministry of Governance and Justice, through an executive decree, shall adopt the Organic Charter of the Teribe Comarca Indigenous Corregimiento of the Changuinola District in the Province of Bocas del Toro.” This article is believed to impose the adoption of an organic charter, which will prevent the Naso from obtaining their own comarca, or at least inhibit that process.

169. Third, the “*Teribe Comarca Indigenous Corregimiento*” referenced in Article 17 represents a geographical area substantially smaller than the territory delineated in the original Naso Comarca bill. Allowing an organic charter to be adopted for this area is seen by the Requesters as an indirect way of reducing what will become recognized Naso territory.

170. As described above, Management indicates that its support for Law No. 72 was a “good faith effort” to address issues of inequality among indigenous peoples, given that some groups (including the Naso) did not otherwise have a specific legal framework under which to have their land claims recognized.⁹⁹ Management also indicates that it understands that the law would not preclude the Naso from future efforts to obtain a comarca.

2. Panel Observations and Findings

171. The Panel found that Law No. 72 would be mainly been used to benefit Embará and Wounaan communities that hold land collectively, but are outside the comarcas designated for them. Law No. 72 allows these constellations of communities to

⁹⁹. Management Response, ¶ 54.

receive collective titles. The Coordinadora Nacional de Pueblos Indígenas de Panama (COONAPIP) refers to 26 “territories” having been gazetted.¹⁰⁰

172. Whether the provisions of Law No. 72 limit the prospects of a future Naso Comarca as envisaged in the original comarca bill seems to depend in part on the legal interpretation of the controversial Article 17, which was inserted into the bill without prior consultation with key stakeholders, including the Project and Management. It is not within the purview of the Panel to interpret domestic law; rather, the Panel is to determine whether the Bank’s policies that require the Bank to analyze the legal framework within which a Project is implemented were complied with by Bank Management.

173. As part of its preparation, appraisal, and later on, supervision activities, the Bank analyzes local laws to ensure that the local legal framework is appropriate for the project or program to be financed and to enable attainment of its objectives. The same internal analysis is made with regard to legislation and regulations issued in relation to certain conditions of tranche release, effectiveness, or disbursement to ensure that such legislation is consistent with the objectives of the project or program in question. The attainment of the objectives of the Bank’s operational policies related to indigenous peoples requires a full and thorough understanding of the local legal framework when the implementation of a given project may affect those peoples’ legitimate rights and aspirations. In this sense, OD 4.20 contains a number of other provisions that refer to the legal situation of indigenous people, some of which are very important for the Panel’s analysis of policy compliance.¹⁰¹

174. Management’s Response, for example, refers to its “understanding” of several provisions of Law No. 72 and other legislation regarded as detrimental to their rights by the Requesters (see paragraphs 52–58 of the Management Response). For purposes of its legal analysis, which is not binding on borrowers but informs the Bank’s perceptions and actions regarding a given project, the Bank often relies not only on the opinions provided by local authorities but also on independent local legal counsel. In this case, Management requested a legal opinion from a leading local law firm¹⁰² (the private legal opinion) to understand better a rather confusing, and at times contradictory, legal situation directly related to the Project, which is at the core of the Requesters’ concerns. In addition, Management obtained a legal opinion from the Ministry of Government and Justice,¹⁰³ and an apparently informal legal opinion from

¹⁰⁰. Law No. 72 of December 23, 2008. Table by COONAPIP, 2009. The Panel notes that use of the term “territories” in this case may not meet the international criteria for this designation.

¹⁰¹. For example, OD 4.20 requires that “*for an investment project that affects indigenous peoples, the borrower should prepare an indigenous peoples development plan that is consistent with the Bank’s policy,*” while ¶ 15 of OD 4.20 provides that key elements of IPDPs include a thorough study and actions related to the “legal framework” and the “land tenure” situation of Indigenous Peoples. Also, ¶18 provides that the project’s “*Appraisal should assess..... the suitability of policies and legal frameworks, the capabilities of the agencies charged with implementing the plan, and the adequacy of the allocated technical, financial, and social resources.*”

¹⁰². Legal opinion dated March 4, 2009.

¹⁰³. Dated December 2009.

the staff of PRONAT¹⁰⁴ regarding the application of some provisions of Law No. 18 of February 26, 2009, in the demarcation of, and administrative and property regimes in, certain Annex Areas in the Ngäbe-Buglé Comarca (noted also in chapter 4). As Management states, these initial efforts were consistent with the provisions of OD 4.20 and OP/BP 13.05.

175.Summary of legal provisions and Management actions. The following is a summary review of legal provisions that the Requesters regard as detrimental to their rights, their interpretation, and Management's actions in this regard.

176.As stated in the private legal opinion, the apparent purpose of Law No. 72 of 2008 is to establish procedures to request and award collective property to indigenous peoples in Panama who do not belong to the existing comarcas. In this sense, Law No. 72 seems consistent with Article 127 of Panama's Constitution, which reads as follows:

The State guarantees to indigenous communities the reservation of the necessary lands and the collective property of the same to achieve their economic and social wellbeing. Laws shall regulate the procedures to be followed to achieve this goal and the corresponding limits within which the private property of land is forbidden.

177.The private legal opinion, as well as the opinions of several experts contacted by the Panel, coincide in not regarding Law No. 72, in and of itself, as a legal obstacle for the Naso people to obtain the approval of a comarca-type law if they can gather enough support at Panama's National Assembly.

178.There are, however, important differences in the procedures and nature of the property rights established by Law No. 72 and an eventual comarca law. First and foremost is the fact that, while Law No. 72 allows the indigenous peoples groups to obtain collective property title over the lands that they have traditionally occupied, and this title is protected by law and the country's Constitution,¹⁰⁵ a typical comarca law, in addition to granting property rights, establishes a new political-administrative division of the country that is under the indigenous peoples' control.

179.Other important differences relate to the procedures. A typical comarca law would normally establish the boundaries of the comarca, thereby defining the areas under collective title without recourse for third parties. Law No. 72, by comparison, establishes rather lengthy procedures that allow for objections and challenges from other people that live in the area and can claim ownership or possessory rights over individual plots of land. They are accorded the same rights as indigenous peoples who

¹⁰⁴. The copy received by the Panel was undated and not signed.

¹⁰⁵. Collective titles granted under these procedures are perpetual, non-assignable, non-attachable, and inalienable.

do not even get the “right of first refusal” when the non-indigenous sell their lands, which is a common right under comarca laws.¹⁰⁶

180. Another source of concern for the Naso Requesters is the provision of Article 17 of Law No. 72 that reads as follows:

The Ministry of Government and Justice, by means of an executive decree, will adopt the Organic Charter for the “Indigenous Corregimiento Comarcal Teribe” in the District of Changuinola of the province of Bocas del Toro.

181. As noted above, the Naso Requesters are concerned about the implications of the provisions of this article for the proper establishment of a Naso Comarca, their main aspiration. These concerns are two-fold. The first concern is whether the apparently implicit establishment of an Indigenous Corregimiento Comarcal Teribe would preclude the establishment of a Naso Comarca;¹⁰⁷ the second is the fact that the territory of an already existing Corregimiento Teribe, which may Law No. 72 may indeed refer to, was far smaller than the Naso’s territorial aspirations.

182. The Management Response states that “*once this article came to Management’s attention, the Bank expressed its concern about its inclusion in the Law 72 of 2008 and its implications for the constitution of a Naso territory*” and adds that on December 10, 2008, the Project informed Management that “... *it is now the Government’s intention to place the Naso territory under the political-administrative jurisdiction of the Province of Bocas del Toro.*” In other words, Management’s Response confirms the legitimacy of the Requesters’ concerns.

183. Management requested further explanations from the Government “*on the consultation process that led to the preparation of the draft Charter,*” asked “*the Government not to use Loan proceeds to finance any activities related to the Naso*” except for a mediation process “*between competing factions,*” and asked the Government not to approve the organic charter until it had exchanged views with the Bank on this matter.

184. After submission of the Request, Management obtained the private legal opinion mentioned above, which arrived at some startling conclusions on the basis of Constitutional provisions, existing legislation and practices, and the approval of Law

¹⁰⁶. In other words, Management’s notion that Law No. 72 is a “*viable if less ideal measure to improve the momentum for improved security of tenure*” is, to a certain extent, debatable given that the Naso are poor and lack resources and, in the words of the private legal opinion, “*the award procedure shall respect existing property titles without offering any preference to the Naso*” and “*third parties may oppose the award of the lands and delay the award process.*”

¹⁰⁷. According to Article 5 of the Panamanian Constitution the country’s territory is divided politically in the following hierarchical order: provinces, districts, and corregimientos. The National Assembly may create by means of a law other political divisions of the territory, such as comarcas. As a rule, comarcas are regarded as provinces, but the Wargandi Comarca, established in 2000, was given the status of corregimiento.

No. 18 of 2009 that, among other things, established new corregimientos and listed all the existing ones in the district of Changuinola, Bocas del Toro province.

185. After noting that *“The authority of establishing and reforming the country’s political division, according to the constitutional mandate, lies exclusively with the National Assembly, as provided in Article 159, paragraph 7 of the Political Constitution of Panama”* and that the *“Assembly, by Law 18 of 2009, modified the boundaries of the Changuinola District, disregarding the creation of a new ‘Distrito Comarcal,’”* the private legal opinion concludes that *“It is our legal opinion that Article 17 of Law No. 72 does not create an Indigenous ‘Corregimiento Comarcal’ in favor of the Teribe indigenous group.”*

186. As far as the Panel can ascertain, the organic charter for the Teribe Indigenous Corregimiento Comarcal referred to in Article 17 of Law No. 72 has not been issued but its potential issuance continues to be of great concern to the Requesters, especially in view of the legal opinions cited in the Management Response. In this context, the Panel requested from Management an update on any developments related to this matter, especially after the issuance of the private legal opinion on May 4, 2009.

187. According to Management, the *“Government has manifested two contradictory intentions regarding how Naso territorial claims may be recognized. One position has expressed the Government’s willingness to reconsider the creation of a Naso Comarca.”* A second position has been *“that the Government expects to recognize the Naso territorial claims as Collective Lands (under Law 72 of 2008).”*¹⁰⁸

188. Management responded as follows to a request by the Panel for further clarification of this rather unique legal and political situation: *“There are no legislative or regulatory developments that we are aware of which in our view would necessitate a new legal opinion. We understand that the Panel has held discussions in Panama with the law firm which prepared the legal opinion.... Management has no objection for the Panel to seek further clarification from the firm or any other legal source in Panama if it deems necessary.”*¹⁰⁹

189. The Panel appreciates Management’s good intentions but notes that is not the role of the Panel to supervise projects. The legal and regulatory situation continues to be confusing and may result in a situation detrimental to the rights and aspirations of the Requesters.

190. **Compliance analysis.** Although Management cannot be held responsible for the legislative actions of a sovereign country, as acknowledged in the Management Response, OD 4.20 and OP/BP 13.05 provide guidance on how to follow up on this kind of situation. The Management Response lists a number of actions taken by the

¹⁰⁸ Management’s note in response to Inspection Panel’s questions, dated May 27, 2010 [hereinafter Management’s note dated May 27, 2010].

¹⁰⁹ Management’s note dated May 27, 2010.

Bank to comply with these policies in the face of the rejection of the comarca law for the Naso and the enactment of new legislation regarded as detrimental to the rights and aspirations of both groups of Requesters, and having a direct impact on Project demarcation and delimitation activities. It should be noted, however, that recent progress reports mention a number of efforts on the part of the Bank.

191.Indeed, Management did not follow up on several inconclusive and, at times contradictory, legal opinions and reports on legal and regulatory developments directly affecting the Requesters' rights and aspirations; this failure to follow up had a negative impact on the execution of the Project and the attainment of its objectives regarding indigenous people. Management made the decision to informally suspend disbursements for certain Project activities that affect the Naso. **The Panel finds the suspension is consistent with the requirements of OP/BP 13.05 but also finds that such a contradictory situation warrants seeking further explanations from the borrower to achieve full compliance with OP/BP 13.05 and the objective of OD 4.20, to address the concerns of intended Project beneficiaries.** Unfortunately, many of the unresolved issues will remain after the closing of the Loan and many may even blame the Project for them.

192.In light of the above observations and factual background, **the Panel is of the view that Management's decision to support the process of establishing Law No. 72 was a good faith measure that seemed reasonable under the prevailing political situation.** The Panel has determined that the decision cannot be viewed as deliberately backing off from the commitment enshrined in the PAD to support the aspirations of the Naso people. **The Panel finds, however, that this decision, consistent with the policy on Project Supervision, should have been followed by stronger efforts to seek clarity on the legal ambiguities of Law No. 72 with respect to the territorial aspirations of the Naso.**

F. Claim that Project Actions Are Linked to Invasions of Naso Lands

193.A final basic claim of the Requesters is that after discussion on the comarca law was suspended in 2005, the Project and Management failed to follow up on Project activities such as verification and demarcation of their territorial boundaries. This omission, they say, left them unprotected.

194.In this connection, the Panel notes the PAD's statement that "*delimitation and demarcation are necessary*" to ensure land rights to indigenous peoples, though "*not sufficient*." The Project adopted a more comprehensive approach, including activities such as "*assessment of potential land and resource use conflicts or overlaps with non-indigenous peoples*," and "*satisfactory resolution of these conflicts*." The PAD specifies the need for various actions to identify and resolve potential conflicts over lands and resources,¹¹⁰ notes the concern that territories of some indigenous peoples

¹¹⁰. PAD, pp. 7–8, 14. The PAD states that "*The Project will support actions to improve indigenous peoples' access to land and other natural resources and promote their participation in the process of recognition of the rights and demarcation of lands. Establishment of the still pending indigenous territories*

overlap with both protected areas and potential land regulation areas,¹¹¹ and states the objective to “*support the establishment and consolidation of both established and unestablished indigenous areas*” within the Project area.¹¹²

Picture 8 Meeting with the Naso community of Solon



195. Hence, a key element underlying the alleged failure to protect Naso lands relates to the management and resolution of land conflicts, including through actions to verify the originally proposed territorial boundaries for the comarca. More concretely, the Requesters allege that the Project’s lack of protection of indigenous land rights in the face of competing claims and interests and Management’s failure to follow up on the borrower’s obligations with respect to Naso territories, led to

- the approval of the Bonyik hydroelectric project¹¹³ on land claimed by the Naso, and
- forced eviction resulting from conflict over land with the cattle ranching company Ganadera Bocas.

as well as consolidation of the established Comarcas will be included as a specific sub-component of the project. Consolidation of indigenous peoples territories includes not only technical actions related to demarcation but also complementary activities such as: (i) socio-economic and ecological assessments; (ii) rapid evaluations of the nature, size and scope of potential conflicts; (iii) resolution of land tenure and other related conflicts; (iv) capacity strengthening of indigenous organizations (Congresos, Consejos, etc.) to manage their territory; and (v) support to design or complete the Cartas Organicas and other regulations and norms dealing with the administration of land territory.”

¹¹¹. PAD, p. 14. In this respect, the PAD states that the alternative of addressing land regularization activities without the component on protected areas and indigenous lands was rejected because, among other reasons, this would “*unacceptably exclude the poorest of the poor, Panama’s indigenous peoples (some of whose territories overlap with protected areas and with potential land regulation areas)*” from receiving land-related services and the associated benefits of secure and equitable land tenure.

¹¹². PAD, p. 50.

¹¹³. The “uncertain zoning” issue relates to the fact that, without the comarca, there was no zoning impediment to the entry of the Empresas Públicas de Medellín in the Naso Comarca claim, apart from the Palo Seco restrictions. The “private investment” also relates primarily to the Bonyik dam issue, but also includes a tourism concession.

196. These two issues, which have been the sources of significant division and conflict, are noted below.

1. Approval of the Bonyik Hydroelectric Project

197. The Project's Indigenous Peoples Strategy (IPS) put the establishment of the Naso Comarca as a first priority "*because the situation is viewed as urgent.*" One of the problems identified in the IPS was the overlapping of the Naso territory with the La Amistad International Park and the fact that this territory is "*part of the watershed of the Bonyik Hydroelectric Facility.*" The IPS notes that "*resolution of these overlapping jurisdictions...is probably the best guarantee of protection of the watershed and the relevant sections of the park.*"

198. The Bonyik dam discussions, agreement, and subsequent political ramifications for the Naso happened around the time the bill for a Naso Comarca was being considered by the National Assembly. The dam is within the area defined as part of the Naso Comarca according to the draft bill of law considered in 2005, but never adopted. Because the comarca bill failed in the National Assembly, however, the Naso were in a much weaker position in discussions relating to the dam than if they had had their own comarca.¹¹⁴

199. The Panel observed during its fact-finding process that the Bonyik dam has been a root cause of serious divisions within the Naso people. During its visit, the Panel met with members of Naso communities living near the site who expressed serious concerns not only about the potential impacts of this dam, but also that it had been approved improperly on Naso lands. The Panel also learned that this activity was supported by Tito Santana, who signed an agreement in 2004 with the company sponsoring the dam project for it to go forward, and was a key factor in the schism in the Naso leadership. Some people, including Bank staff, have expressed the view that the Bonyik dam, and the lack of support for it by some Naso people, may also have been a factor in the failure of the Naso Comarca bill to pass the National Assembly.

200. The Panel notes the tension and strife resulting from activities and decisions associated with the Bonyik dam during these middle years of Project implementation. Management has informed the Panel that the Bank has not provided any financing for the Bonyik dam, and the Panel observes that Management's efforts in the early years of Project implementation to support the Naso Comarca bill were a significant, if unrealized, effort to address the territorial needs of the Naso in this larger context.

¹¹⁴. As noted elsewhere in this Report, the establishment of a comarca is not a "release" of state jurisdiction, but does create an autonomous homeland in which the authority of the indigenous people is integrated politically and administratively. While the Panel does not wish to comment on specific legal questions or outcomes, the establishment of a comarca would have provided a more secure legal foundation for the Naso in negotiations relating to activities such as the proposed Bonyik dam.

201. In terms of Project supervision, however, Bank Policy requires Management to identify problems promptly as they arise during implementation, and recommend to the borrower ways to resolve them. Although Management cannot be held responsible for actions not financed by the Bank, it has a responsibility to identify promptly, and recommend ways to address, significant actions or events in the Project environment that may undermine key Project objectives.

202. By many accounts, the evolving events relating to the Bonyik dam in the middle years of Project implementation became intertwined with these problems. This was not surprising, given that Management itself had warned about this issue and the need for close monitoring during Project preparation, and one of the specific priorities for the Naso listed in the PAD was to “*establish negotiation mechanisms among the parties: community of Teribe and its authorities, the hydropower station of Bonjic ...*”¹¹⁵. The Panel notes, however, that Bank supervision records from the period 2004–07 are silent on the Bonyik issue and its disastrous aftermath with regard to its political consequences for the Naso, both internally (the schism between the Naso) and externally (the possibility that Bonyik proponents managed to undermine the Naso Comarca bill at the National Assembly). One must conclude that Bank Management either did not know of the situation or chose to ignore it during those years (see chapter 5 on Supervision and Systemic Issues).

2. Land Demarcation and the Conflict with Ganadera Bocas

203. As noted previously, during the early years of Project implementation, the Project contracted a Kuna NGO, the Dobbo Yala Foundation, to prepare a diagnostic study of the Naso territory to identify the boundaries of the proposed Naso Comarca.

204. According to Dobbo Yala’s study (*Estudio Socio-Economico y Tenencial del Territorio Naso Tjer Di*), there were 57 points of conflict in 13 areas within the proposed boundaries of the comarca. In the same 2002, however, the majority of these conflicts were solved and most of the occupants of these lands had agreed to the proposed boundaries for the comarca. The major remaining conflict related to Predio 42, an area in dispute between the Naso and a cattle ranching company, Ganadera Bocas, S.A.

205. In 2006, PRONAT began a process of verifying conflicts along the proposed Naso Comarca boundary as identified in the first diagnostic study¹¹⁶ and found that most of the 57 conflicts had been resolved with the notable exception of the conflict with the cattle ranching company.

¹¹⁵ PAD, p. 94.

¹¹⁶ PRONAT. *Reunión de Concertación y Jornada de Campo. Propuesta Técnica Para Facilitar el Dialogo y Resolucion Del Conflict Entre el Pueblo Naso Tjër Di y la Empresa Ganadera Bocas, en el área de San San y San San Druy*. August 9–17, 2006 (actual date of the visit was August 13–21, 2006). (hereinafter PRONAT. *Reunión de Concertación y Jornada de Campo*)

206. This conflict was judged by PRONAT to be sufficiently serious that in August 2006, a joint visit by a commission formed of representatives of the National Office of Indigenous Policy, the National Boundaries Commission, and the PRONAT Unit of Indigenous Territories made an attempt to resolve the conflict through dialogue in the field. The commission also involved the *alcaldía* (office of the Mayor) of Changuinola, representatives from Ganadera Bocas, and both of the Naso kings,¹¹⁷ although the Government only recognized one of them as legitimate, Tito Santana.
207. In the village of San San Druy, this commission found 28 houses within the Ganadera Bocas landholding (Predio 42), 16 of them with an estimated two years of residency and 12 still under construction. Of the latter 12 owners, 10 were willing to leave the property. Additionally, two older family cemeteries were located in Predio 42. In the village San San the commission found 18 houses in Predio 42, 10 of them inhabited for about a year and the remaining 8 under construction.¹¹⁸ A PRONAT official who participated in the original Naso Comarca boundary proposal and the 2006 attempt at reconciliation indicated to the Panel that while there was no violation of Ganadera Bocas property in 2003 by Naso families, by 2006 there clearly was such a violation.¹¹⁹
208. However, the commission also found that fences constructed in recent years by Ganadera Bocas did not match the fences shown on a former map of Ganadera Bocas property presented by a surveyor. Nor did they match the fences shown on a 1911 map of the property sold by United Fruit to Ganadera Bocas. Additionally, part of the Ganadera Bocas lands, those near the slopes on the edge of the valley where the community of La Tigra is located, were ceded to the Naso Queen Rufina Santana, because otherwise the community would have had no flat land whatsoever on which to locate. The recently constructed fence also cut across land that belonged to the state. According to the PRONAT report on the meeting, while all the actors present were willing to discuss solutions, the government commission held that only Tito Santana had the authority to negotiate any concrete solution, whereas the government agencies investigating the case were not represented by people able to commit to a concrete solution on the ground. Therefore, it was decided to submit the process to higher levels in Government to continue.¹²⁰
209. In a second field visit by the commission on October 23, 2006, from the Naso only Tito Santana and his advisors participated. In a subsequent visit on November 13 and 14, Valentín Santana's supporters (the Requesters) stated that they would not support the work of verifying the boundaries of the comarca unless the Government recognized Valentín Santana as king.
210. On November 2, 2007, the NGO Alianza para la Conservación y Desarrollo (ACD) expressed its concerns about the failure of the Naso Comarca bill and the

¹¹⁷. PRONAT. August 9–17, 2006 (actual date of the visit was August 13–21, 2006).

¹¹⁸. PRONAT. August 9–17, 2006 (actual date of the visit was August 13–21, 2006).

¹¹⁹. PRONAT. *Reunión de Concertación y Jornada de Campo*.

¹²⁰. PRONAT. *Reunión de Concertación y Jornada de Campo*.

Government's refusal to recognize Valentín Santana's claim to be king.¹²¹ On December 6, the Requesters complained to Management about the same issues and requested a field visit to the area and requested that all work on boundaries be suspended. PRONAT responded by identifying the complainants as "*sectors opposed to the forward movement of investment projects*," but Management suspended support for work on the Naso boundary issue.¹²²

211. The land conflict with Ganadera Bocas deteriorated in 2009, when, after repeated warnings, members of the Naso communities of San San Druy and San San were violently evicted from their houses on two occasions between March and November by court order at the petition of Ganadera Bocas. The Panel was informed that this eviction included the destruction of a community center, crops, and trees at various times during the year. The Panel was also informed that PRONAT officials were instructed not to intervene in the matter to verify the true legal boundaries of the private company's holdings, although PRONAT had conducted a technical study three years earlier that exposed some weaknesses in the original Naso Comarca boundary delimitation.¹²³

212. **It is the Panel's view that the lack of resolution of the proposed comarca boundaries may have contributed to the progressive deterioration of the land conflicts, which eventually led to evictions in 2009 of some Naso families found to be encroaching on the Ganaderas' land. However, the Panel also notes that the Naso internal dispute seems to have also played a role in preventing a resolution of these issues.** Tito Santana claims that certain families opposed to him have created the problem deliberately.¹²⁴ He showed the Panel a document signed by some 60 Naso families in the area protesting the "invasion" of Predio 42 by these families because the trouble they were causing had prevented the protesting families from receiving certain state assistance.¹²⁵ The findings of the National Boundaries Commission and PRONAT are that the Naso invaded private property. Conversely, Valentín Santana and some Naso in San San Druy say they have always been there.¹²⁶

213. Interviews with Bank staff and records examined by the Panel show that within six months following the failure of the Naso Comarca bill in the National Assembly, the Project undertook activities to verify the proposed (delimited) boundaries, particularly

¹²¹. Chronology of Bank and Project Engagement with the Naso People, Annex 4 to the Inspection Panel's eligibility Report and Recommendation, p. 43.

¹²². File "Reports on the Naso" Dec 2008.

¹²³. PRONAT. *Reunión de Concertación y Jornada de Campo. Propuesta Técnica Para Facilitar el Dialogo y Resolución Del Conflicto Entre el Pueblo Naso Tjër Di y la Empresa Ganadera Bocas, en el área de San San y San San Druy*. August 9–17, 2006 (actual date of the visit was August 13–21, 2006). The weakness lay in the fact that the original Dobbo Yala boundary study in 2003 contained some arbitrary boundaries that did not coincide with the Ganadera Bocas land claim.

¹²⁴. PRONAT. *Reunión de Concertación y Jornada de Campo. Propuesta Técnica Para Facilitar el Dialogo y Resolución Del Conflicto Entre el Pueblo Naso Tjër Di y la Empresa Ganadera Bocas, en el área de San San y San San Druy*. August 9–17, 2006 (actual date of the visit was August 13–21, 2006).

¹²⁵. Field Notes, February 3, 2010, Bocas de Toro, interview with Tito Santana and advisors.

¹²⁶. Field Notes, February 3, 2010, Bocas de Toro, and Field Notes, February 8, 2010, San San Druy.

with regard to the conflict between Ganadera Bocas and the communities of San San and San San Druy.

214. The Panel's fact-finding does not indicate that the Project ignored the delimitation and protection of Naso lands in its later phase. While aides memoirs of supervision missions conducted in 2005 and 2006 are silent on the conflicts in Naso territory, PRONAT was clearly undertaking actions. In the proposal for a restructured Project, PRONAT also proposed a budget for "consolidating" the Naso territory and to assist the Naso with "the formulation of its own rules."¹²⁷ The Panel finds that while the verification of the proposed boundaries of the Naso territory between 2004 and 2006 might have prevented the progressive worsening of events, the Bank cannot be held responsible for the violent eviction of members of the Naso in 2009.

215. **At the same time, the Panel identified significant concerns with Project supervision activities with respect to these issues.** The Panel notes that the Project, by its own terms, indicates a responsibility to take actions to address and resolve conflicts to advance and consolidate the land rights of the affected indigenous peoples. The issues of supervision are noted in the final part of the Report (see chapter 5, Supervision and Systemic Issues).

216. As discussed in the next section, there are signs of improvement. Management has informed the Panel that there is now a Naso commission for the boundary issues that involves both factions. Also, the old agreement between Queen Rufina Santana and the owner of the company regarding the ceding of certain lands to the Naso may now be formalized, to the benefit of the community of La Tigra. Given the serious nature of this particular conflict, the Panel notes the importance, as a matter of supervision, of the Bank's active engagement in efforts to address and resolve the conflict with Ganadera Bocas, in line with relevant Bank policies.

G. Recent Bank Actions and Events Following the Request

217. As previously noted, Bank Management planned a number of steps to address the concerns of the Naso people as raised in their Request for Inspection. These actions are noted below.

1. Preparation of an IPDP

218. In light of concerns noted above, Bank Management states in its Response to the Request for Inspection that it decided to have an IPDP prepared for the Project.¹²⁸ A draft was completed in December 2008. However, because Management determined that this 2008 draft IPDP did not meet the requirements of OD 4.20, it supported additional work to finalize the IPDP, which, according to the Response, was to be finalized in August 2009.

¹²⁷ Mission Supervision, Nov.-2005.

¹²⁸ . Management Response, ¶ 106.

219. The progress report on the implementation of these proposed steps indicate that although the IPDP was ready, the Government had not submitted it to the Bank yet and that “*Government has agreed to complete the related consultations with key stakeholder groups by December 15th, 2009.*”¹²⁹ In meetings with Bank staff in March 2010, Management reported that an IPDP had been received and that it was satisfactory.

220. Even though this document comes extremely late in the Project, Management informed the Panel that it believes it to be important as a model for the way in which similar projects should approach regularization of indigenous land. Management also feels that the omission of dissemination of Project intentions and plans for the indigenous subcomponent will be rectified by the dissemination of this document.

221. The Panel now has a copy of this IPDP, but has concluded that it does not contain the elements of an IPDP as required by OD 4.20, referred to above.¹³⁰ The Panel notes and appreciates the effort and the intent behind Management’s action on this issue. **It is the Panel’s view, however, that the new document could only serve as a positive model for later IPDPs in Panama if it contained the elements of an IPDP required by Bank policy, which, in the Panel’s judgment, it does not.** The Panel also observes that the purpose of this so-called IPDP appears not to have been clearly articulated and is not clearly understood or shared by the Project authority.

2. New Developments and Actions to Address Concerns about the Comarca, Law No. 72, and Conflicts over Lands

222. As noted in the summary of the Management Response included in chapter 1, in response to the Request for Inspection, Management proposed a number of actions to follow up on the Requesters’ concerns and try to address them. Some of these actions, including the request for clarification of the legal implications for the land rights of the indigenous peoples of Law No. 72 and other laws recently enacted in Panama, are dealt with in specific sections of this report.

223. Management prepared a progress report on the status of implementation of these actions in December 2009. The progress report is attached to this Report at Annex 3. In the progress report, of the 15 actions identified to respond to the concerns of the Naso and Ngäbe Requesters, Management states that six of these actions were completed, four were in progress, and five were incomplete.

¹²⁹. Management’s Action Plan, Included in Management Response (dated April 20, 2009) To The Requests for Inspection of the Panama: Land Administration Project (Loan No. 7045-Pan).

¹³⁰. Specifically, the IPDP is not in compliance with ¶ 14(a) a development plan based on the preferred options of the Ngäbe, and (b) the anticipation of adverse trends; also ¶¶ 15 (d) Strategy for Local Participation, (e) Technical Identification of Development or Mitigation Activities, (f) Assessing the Capabilities and Needs of Government Institutions Dealing with Indigenous Peoples, (g) Implementation Schedule, and (h) Independent Monitoring and Evaluation.

224. In general, the Panel would like to highlight the importance of a number of other recent actions taken by Bank Management, including actions on the ground, to address concerns about the Naso Comarca, Law No. 72, and ongoing conflicts over land boundaries. Repeated supervision missions have been carried out in the Project area beginning in November 2009 close to one visit a month—since the Project closing date was extended to June 2010.
225. With respect to the conflict among the Naso, Management informed the Panel that there has been progress in 2010 regarding the two Naso factions working together. In November 2009, in the context of a World Bank mission, the two groups agreed to work together with PRONAT to address the issue related to Ganadera Bocas. More recently, on March 3, 2010, under the auspices of PRONAT, Valentín Santana and Tito Santana established a Naso commission (composed of 10 members, including Valentín Santana and Tito Santana) to work together to complete the delimitation of the Naso territory.
226. A World Bank mission met with the Naso commission (attended by both Valentín Santana and Tito Santana) on April 14, 2010. According to Management, the commission expressed satisfaction with the Bank’s responsiveness to their concerns, but worried that PRONAT’s financial support for the work of the commission was not forthcoming. While Bank staff has requested PRONAT to be more responsive to these concerns, PRONAT leadership is reluctant to be more supportive given the position adopted by Indigenous Peoples Directorate in favor of a collective land title, as opposed to a comarca, and Bank staff continue to impress upon PRONAT staff the need to support the Naso commission.
227. Critical issues remain for both the Naso and the Ngabe. At the same time the Panel has been informed by the Requesters and Management of some recent developments in this regard, including indications that there may be a re-instatement of the Naso Comarca bill at the National Assembly.
228. **The Panel notes and commends Bank Management for these more recent expanded supervision actions, which the Panel finds are in compliance with OP/BP 13.05 and OD 4.20. The Requesters have also indicated to the Panel their appreciation for these efforts of Bank Management.** Management also indicated to the Panel that it continues to convey to the Government the importance of “adequate consultations”,¹³¹ with indigenous peoples and the importance of including Bank staff recommendations into Project implementation.

¹³¹. Management Response, pp. 20–21, ¶ 80.

CHAPTER 4: Issues Related to the Ngäbe People

A. Overview

229. This chapter addresses the issues raised by the Ngäbe Requesters (the Second Requesters) in their Request for Inspection to the Panel. It is organized around the five main claims of their Request, including related issues and concerns that the Requesters brought to the Panel's attention during its investigation in late January 2010. These claims relate to actions and omissions under the Project that, according to the Requesters, have adversely affected the land and territorial rights of the Ngäbe indigenous people in Bocas del Toro province in western Panama.

230. The first claim of the Second Requesters is that the Project failed to identify and prioritize the need to verify and demarcate the so-called Annex Areas¹³² to the Ngäbe-Buglé Comarca. They believe that this failure contributed to a situation whereby Ngäbe lands have been left unprotected from development pressures and encroachments over the course of the many years of Project implementation, contrary both to general Project objectives and Bank policy.

231. Second, the Requesters claim that consultations with the Ngäbe indigenous communities living in the Annex Areas were inadequate, both at the outset of the Project and during Project implementation. The Requesters believe that consultations carried out under the Project should have, as required by Bank Policy OD 4.20 on Indigenous Peoples, involved a more participatory and timely approach to ensure the informed participation of the affected communities. They contend that such an approach would have produced offers of land more acceptable to the people of these areas. More specifically, they claim that shortcomings in the consultation process led to offers of "polygons" (land areas) to be included in the delimitation of the Annex Areas that were not acceptable to the Ngäbe communities concerned.

232. Third, the Requesters allege that the changing legislative framework, especially referring to Law No. 18 of 2009 establishing new local government units in their area, affects the integrity of the Ngäbe-Buglé Comarca.

233. Fourth, the Requesters brought an additional claim to the attention of the Panel during the course of its investigation: possible boundary changes in the comarca itself that improperly left a large Ngäbe community, Norteño, outside of, but contiguous to, the Ngäbe-Buglé Comarca. Requesters and community members expressed great concern that something went wrong in this demarcation process.

¹³². As described elsewhere in this Report, the "Annex Areas" are, according to Law No. 10 of 1997, areas of land that are home to the Ngäbe indigenous people, and that, in a legal sense are "annexed" to the main Ngäbe-Buglé Comarca created in that law. Law No. 10 was adopted prior to the Project and called for, among other things, the delimitation and demarcation of these Annex Areas, as described in more detail in this chapter.

234. Finally, and linked to the above, the Requesters believe that poor consultations and improper methods of determining the Annex Area boundaries have enabled invasions and encroachment on their ancestral lands. One of the encroachments about which they complain is related to the Chan 75 hydroelectric project, which is being implemented in land claimed by the Ngäbe people.

235. This chapter analyzes these issues and claims, with a focus on whether Bank Management complied with relevant Bank policies and, if not, whether such noncompliance led to harm or potential harm to the Requesters and affected communities. In line with the Panel's mandate, the discussion considers these issues at the stages of Project design, appraisal, and implementation.

236. The analysis begins (section B) by analyzing how the Annex Area issue was (or was not) identified at the design stage, what consultation activities were carried out in respect to this issue, and how the issue was framed to be acted upon within the timeline and prioritization of Project activities. The discussion also considers the implications for the Ngäbe communities of the decision under the Project not to prepare a stand-alone Indigenous Peoples Development Plan (IPDP) at the outset of the Project (as described in chapter 3).

237. The chapter then turns to the issue of consultation in relation to the polygons of land offered to people of the Annex Areas during Project implementation (section C). The analysis continues by examining implication of a changing legal framework (Section D), and the allegation that the Norteño community has been excluded improperly from the comarca (section E). Finally, the chapter examines the issues of encroachment in Ngäbe land, including the claim concerning harm caused to Ngäbe land rights as a result of the Chan 75 project (section F).

B. The Claim That the Issue of Annex Areas Was Not Adequately Addressed During Project Preparation

1. Requesters' Claims and Management Response

238. A central concern of the Second Requesters is that the Project, from its beginning stages of design and appraisal, failed to give appropriate attention to the rights and interests of the Ngäbe communities in the Annex Areas in the Bocas del Toro province. As noted above, Law No. 10 of 1997 that created the main Ngäbe-Buglé Comarca identified Annex Areas to this comarca and established a process for their demarcation and titling as Annex Areas. However, this process was not completed before Project activities commenced in 2001.

239. In its Response, Management states that both the creation of the comarca and the failed attempt to address the Annex Area issues preceded the Project. The Management Response adds that it shares the Ngäbe's concerns regarding the lack of delimitation of these areas. It further states that *"that is why from its inception, one of the Project's objectives under Subcomponent 3.2 has been to complete the*

*demarcation of the boundaries of the already created Ngöbe-Buglé Comarca, as well as some of the territories outside the core area, known as Annex Areas, as defined by Law 10 of 1997.”*¹³³ The Response also indicates that a “*comprehensive social assessment*” was carried out in Project preparation, which included consultations with representatives of indigenous peoples’ groups.¹³⁴

240. In its investigation, the Panel considered these issues during both Project design and Project implementation. As background, the discussion below also briefly notes relevant events that occurred before commencement of the Project.

2. Events Prior to the Project: Law No. 10 of 1997

241. A few years before the Project began, Panama adopted Law No. 10 of 1997. This law established the Ngäbe-Buglé Comarca and provided that 15 noncontiguous Ngäbe communities left outside the main comarca were to be demarcated and titled as Annex Areas within two years.

242. One contentious issue of this law relates to the definition of Annex Areas in Bocas del Toro. Law No. 10 mentions the Annex Areas in Bocas del Toro but does not define their boundaries. Furthermore, the law is unclear with respect to the number of Annex Areas that can be delimited and demarcated as such. Some have interpreted Law No. 10 in a restrictive way to mean that only the 15 Annex Areas mentioned in the law can be legalized; others believe that the list is not exhaustive and more Annex Areas could be created, provided that they are inhabited by more than 300 people.

Picture 9 Panel team meeting with Ngäbe communities at Quebrada Pastor



¹³³. Management Response, ¶ 73.

¹³⁴. Management Response, ¶ 90.

243. Before the Project began, there was an unsuccessful attempt in 1998–99 to delimit the Annex Areas.¹³⁵ According to accounts of various people the Panel met during its field visit,¹³⁶ this attempt failed because, in the aftermath of ceding a sizable part of Chiriquí, Veraguas, and Bocas del Toro province to the Ngäbe-Buglé Comarca, legislators were reluctant to part with more territory in an area slated for both hydroelectric and tourism development.

244. According to the information reported to the Panel in the field, in the initial negotiations between the Government and the Ngäbe, the Annex Area communities in Bocas del Toro were offered legalization of the land containing their houses but excluding lands used for subsistence and cultural purposes. The Ngäbe rejected the Government's offer as too limited, and the Annex Area residents submitted their own proposal to the National Assembly in 1999. The proposal according to statements made to the Panel, was, in turn, rejected by the Government.

3. Project Design and Appraisal

245. The Panel observes that the project was designed with no attention given to the Annex Areas in Bocas del Toro. Despite the field research that was claimed to have gone into the preparation of the Social Assessment (SA) and the Indigenous Peoples Strategy (IPS), the Panel found that there is no mention of the early controversy related to the Annex Areas in Bocas del Toro in relevant Project preparation documents and studies (for example, the Project Appraisal Document [PAD], SA, IPS). No field study of sufficient depth to detect possible problems in these areas seems to have been conducted.

246. The Panel considers that it is somewhat surprising that, given the preceding history, analysis conducted in Project preparation failed to mention this issue. **The Panel finds that this flaw in the studies underpinning the Project, as it relates to the Ngäbe people, does not comply with OD 4.20. This is of particular concern as these were areas where significant problems could arise, given the history of failed attempts to delimit them.**

247. Similarly, the Panel notes that none of these documents mentions consultation activities involving people living in the Annex Areas and apparently no involvement of people of the Annex Areas was sought to provide input to Project design. The Management Response acknowledges that an adequate consultation process was not carried out in the Annex Areas in Bocas del Toro.¹³⁷ As is evident from the SA, consultations were carried out primarily with the official leaders of the Ngäbe, who do not seem to have raised concerns about the delimitation of the Annex Areas, while

¹³⁵. Second Request, March 17, 2009. Also Management Response, ¶ 72.

¹³⁶. Field Notes, February 4, 2010. Interview with Ngäbe leader and long-time member of the commission that negotiated the boundaries of the Ngäbe-Buglé Comarca.

¹³⁷. Management Response, ¶ 11.

there was no involvement at this early stage of the Project of people living in Annex Areas.

248. The Panel recognizes the difficulty of identifying and addressing an issue that official leaders representing an indigenous group did not bring to the attention of Project officials. **It is the Panel's judgment, however, that more-inclusive consultations should have been carried out, and would likely have brought the Annex Area issue to light.**¹³⁸ This in turn could have called for greater attention to these critical issues early in the Project cycle,. It is the Panel's view that failing to identify the Annex Area as an issue during Project design had adverse consequences for the indigenous population as tourism and other development activities started to take place in Bocas del Toro province.
249. The decision not to prepare a stand-alone IPDP for the Project may partly explain why the consultation activities related to the consolidation of the Ngäbe-Buglé Comarca did not include residents and local leaders of the Annex Areas. As noted in chapter 3, the Management Response acknowledges that an IPDP was not prepared during Project preparation, but that a comprehensive SA and IPS were undertaken.¹³⁹ The Panel was informed that, during Project preparation, staff determined that a stand-alone IPDP was not necessary because the subcomponent dealing with indigenous peoples would serve as the IPDP required by OD 4.20.
250. **It is the Panel's view that an IPDP with adequate consultations and studies that inform an IPDP could have identified the Annex Areas in Bocas del Toro as a critical issue requiring timely attention. The Panel finds that, with respect to the Ngäbe people, the studies underpinning subcomponent 3.2 (the SA and the IPS), and the consultations supporting them, did not meet the requirements of OD 4.20 for an IPDP.** The Panel notes that this seems to be implicitly acknowledged by Bank staff in 2008 when the need for a new IPDP and SA was agreed upon with the borrower as indicated in the Management Response.¹⁴⁰
251. As noted in chapter 3, the Panel understands the reasoning by which Bank staff may have adopted this approach at the time. It is the Panel's judgment, however, that the decision not to prepare a stand-alone IPDP affected the quality of Project preparation pertaining to the extent of consultation (mentioned above), dissemination of project information, and the analysis of risks.
252. **The Panel finds that dissemination of project information of particular relevance to the indigenous people in the Project areas did not comply with the**

¹³⁸. OD 4.20, ¶ 8. As described in the previous chapters, a fundamental requirement of Bank Policy OD 4.20 on Indigenous Peoples is that Bank-financed activities pertaining to indigenous peoples "*must be based on the informed participation of the indigenous people themselves*" and that "*core activities*" for any project that affects indigenous peoples and their rights to natural and economic resources must identify "*local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists.*"

¹³⁹. Management Response, p. vi, vii, ¶ 9(ii).

¹⁴⁰. Management Response, ¶ 91.

requirements of OD 4.20. Neither the SA nor the IPS were disclosed in Spanish in Panama or in English at the Infoshop. The content of the IPS was not disseminated in the Ngäbe language. A summary of both documents became public only with the publication of the PAD following Project approval by the World Bank Board of Executive Directors.

Picture 10 Members of Ngäbe community of Buena Esperanza



253. **It is the Panel’s view that the process of preparing a policy-consistent and stand-alone IPDP also would have better prepared the Project for the challenges and risks associated with land use development in Bocas del Toro.** According to OD 4.20, an IPDP would begin with discussing the options available to indigenous people and representing their preferences. This was clearly not the case in the SA or the IPS. Similarly, a policy-consistent IPDP would have predicted adverse trends and made arrangements to take them into account. It would have analyzed in depth the conflicts and other risks to land rights of the Ngäbe and other indigenous groups, including hydroelectric and tourist developments on indigenous lands. It is the Panel’s judgment that this analytical work could have helped to mitigate these risks in a timely manner.

254. In line with OD 4.20, an IPDP would also, on the basis of its participatory process, provide baseline data on the areas inhabited by the Ngäbe, including adequate and up-to-date maps, and an assessment of the relevant legal framework of the country, giving particular attention 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.”*¹⁴¹ Among other things, this assessment would have analyzed relevant

¹⁴¹. OD 4.20, ¶ 15(a)

international instruments and whether the Project would be supportive of the borrower's international obligations with regard to indigenous peoples.¹⁴²

255. In this latter regard, the Panel considers that a careful review by Management of the borrower's international obligations would have highlighted the need for an IPDP. At the same time, the Panel notes again (as described in Chapter 3) that the basic Project objective was to support actions to establish and consolidate the territories of indigenous peoples. In this sense, **the Panel finds that this basic Project objective is consistent with the requirements of OMS 2.20, paragraph 24.**

256. As noted in chapter 3, when Management recognized in 2008 that an IPDP was needed it made efforts to bring the Project into compliance with the provisions of Bank policy. However, by Management's account, this 2008 effort was not successful and development of a new IPDP was supported in 2009, after submission of the Requests for Inspection.

257. The Panel notes and appreciates this good-faith effort by Management to rectify an earlier shortcoming in policy compliance. Staff interviewed in the course of the investigation acknowledged that the 2009 IPDP may not have practical effects in the course of this Project, but considered that it may be a good basis for future dialogue with the Government on indigenous peoples' issues.

258. As described in chapter 3, however, the Panel has determined that the recently developed IPDP does not contain the elements of an IPDP as required by Bank policy, which undercuts its ability to serve as a positive model for future dialogue.

4. Project Implementation

259. **Late start of boundary delimitation activities in Annex Areas.** Although the Annex Area issue, especially in the Bocas del Toro province, had not explicitly been identified in the Project design it was taken up during Project implementation in 2007. Accordingly, the Panel has analyzed the timing of these activities in relation with the Second Requester's complaint.

260. According to the IPS included in the PAD, the consolidation of the Ngäbe-Buglé Comarca is considered a "*Second Priority*" of the Project's subcomponent 3.2, the first priority being the establishment of the Naso Comarca. In this regard, the IPS provides that PRONAT "*should begin with the Chiriqui districts in the first year of execution and continue to the limits with Veraguas and Bocas del Toro in following years.*"¹⁴³

¹⁴² According to paragraph 24 of OMS 2.20, "The 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. The project should adapt the standards of protection to the circumstances of the project and country, and incorporate those environmental measures that are considered essential and appropriate. Should international agreements exist that are applicable to the project and area...the Bank should be satisfied that the project plan is consistent with the terms of the agreements."

¹⁴³ PAD, Annex 12: Indigenous Peoples Strategy, p. 95.

261. Management acknowledges the slow development of activities in Bocas del Toro province, which “*was due to a hiatus of relations between the Bank and the government of Panama*” and that it was the arrival of a new administration in 2004 that permitted opportunities for “*re-engagement*.”¹⁴⁴ This, however, seems not to be documented in the aide memoires from the supervision missions with regard to Component 3, which is given high marks uniformly until 2007.

262. The Panel found that the first discussion of beginning work in the Annex Areas occurred in October 2006, a decision to begin such work was made in February 2007,¹⁴⁵ and a Bank visit occurred in March 2007. Paragraph 21 of a report from the March 2007 visit contains the following note [Panel translation]:

*The preparatory activities have begun for the third phase of demarcation in the Boca de Toro [sic] province. These consist of the definition of boundaries for the 15 indigenous communities that were uniquely mentioned by the Law of the Comarca. PRONAT is working together with the National Boundary Commission and the traditional comarca authorities on a proposal of boundaries that will be presented to the National Assembly once the communit[ies] have been consulted.*¹⁴⁶

263. **The Panel finds that this lateness in attending to the Annex Areas issues in Bocas del Toro is hard to understand given that there were warnings sounded as early as 2003 by the Panamanian government,** which stated the need to “...[give] priority to island areas and coastal zones of Bocas de Toro, where a growing process of land speculation and the increase in conflicts is observed.”¹⁴⁷ The Panel notes that, as a result, Management recommended the formation of a group composed of the Project Coordination Unit and the Bocas del Toro Sustainable Development Project financed by the Inter-American Development Bank (IDB), to analyze the situation in terms of whether a land tenure study was needed or to take “appropriate measures” to slow down the land speculation and “*initiate a predictable process of regularization in the zone.*”¹⁴⁸

264. Bank staff could not provide more precise information, other than that the study was supposed to be undertaken by the IDB. In any event, the issue seems to have been dropped if one were to judge from supervision reports. When it crops up four years later, in 2007, it is in terms of the process of delimitation under way quoted above from the March 2007 visit.

¹⁴⁴. Management Response, Executive Summary, p. vii, ¶ 11(iii).

¹⁴⁵. Management Response, p. 45, Annex 5: Chronology of Bank and Project Engagement with the Ngäbe Buglé People.

¹⁴⁶. Aide memoire, March 2007 on Disk, ¶ 21.

¹⁴⁷. Aide memoire, March 2003.

¹⁴⁸. Mision Conjunta Banco Mundial-BID, 27 April – 2 May, 2003.

265. While the issue of serious land conflicts in the Bocas del Toro islands was noted for the first time in a 2003 supervision mission Aide Memoire, the Panel found no record to indicate that Management emphasized with Project officials the need to address it. **It is the Panel's view that this is not in compliance with OP 13.05, which provides that, if circumstances surrounding a project change, it may be necessary to make corresponding changes in the project or its implementation arrangements.**¹⁴⁹

266. Work in the Annex Areas began in mid-2007. By then, there were serious conflicts relating to the loss of land tenure security stemming from the development of the Bocas del Toro islands as a tourist destination, the changes accompanying the highway that connected Grand Chiriqui with Guabito, and the granting of hydroelectric concessions over areas inhabited by indigenous people, principally the Ngäbe and the Naso.¹⁵⁰

267. **The Panel notes that this lateness may have had important impacts on the land rights of the Ngäbe communities of the Annex Areas.** Since the creation of the comarca in 1997, the Annex Areas were subjected gradually but steadily to pressures from speculators and investors that, arguably, caused erosion in the perception of the viability of the being annexed to the comarca as the appropriate land tenure system, as well as actual loss of land through sale, expropriation, or concession. Problems in the Annex Areas in the islands had to do with speculation, tourism, and retirement investments. On the mainland, significant issues surfaced with regard to construction of the Chan 75 dam, where the lack of early delimitation and demarcation of two Annex Area communities, Nance de Riscó and Valle de Riscó, seems to have had implications for the rights of four so-called daughter communities¹⁵¹ severely affected by the hydroelectric project.¹⁵²

268. It is difficult to judge, in hindsight, what degree of responsibility the lack of identification of the Annex Area issue during Project preparation, and the consequent delay in beginning their delimitation, may have with respect to the harm caused to the land rights of the Ngäbe. **Nonetheless, the Panel believes that a policy-consistent social analysis early on in the Project, one that included meaningful participation and consultation with the affected communities could have led to addressing in a timely manner the delimitation and demarcation of the Annex Areas in Bocas del Toro. This might have mitigated harm to the land rights of**

¹⁴⁹. OP13.05 Supervision, ¶16, “During project implementation, if priorities or circumstances surrounding the project change, it may be desirable to introduce corresponding changes in the project, its design, or the implementation arrangements . . .”

¹⁵⁰. See chapter 1 for more context.

¹⁵¹. A “mother” community is one named in Law No. 10 of 1997 as a potential Annex Area. Daughter communities are those that have hived off from the mother community as contiguous communities since 1997, including the daughter communities’ *trabajaderos* (work areas and areas of forest used for cultural purposes such as hunting, collection activities, and conservation).

¹⁵². However, interviews with Management indicate that Valle de Riscó people were more concerned in 2008 with the administrative drawbacks accompanying comarca membership than they were with the extent of the polygon offered to them.

the indigenous communities and provided them with a strong legal basis to protect their rights.

C. The Claim That Consultations Relating to the Delimitation of the Annex Areas Were Inadequate

1. Requesters' Claims and Management Response

269. Another central complaint of the Requesters is that the size of the Annex Areas proposed by Project officials does not reflect the aspirations of the Ngäbe people, because the polygon (land area) that would be demarcated and legalized included only areas where the houses are located, and excluded the so-called *trabajaderos* (in English, work areas), that is, areas that Ngäbe people use for materials, medicines, craft items, workshops, and other productive activities and that they believe are an integral part of their ancestral lands. In the Requesters' opinion, inadequate consultations with the affected communities in the Annex Areas led to the a situation, in which at the time they submitted the Request for Inspection no Annex Area had yet been legalized and recognized as part of the Ngäbe-Buglé Comarca.

270. Management states that it *"agrees with the Second Requesters that the Project has not fully demonstrated the principle of informed participation in relation to the delimitation of the Annex Areas of the Ngöbe-Buglé Comarca in the Bocas del Toro Province."* Of Management adds that after the Requesters brought the issue of the polygons to the attention of the Bank for the first time in 2007, meetings were held with the Requesters and, in March 2008, a Bank mission, accompanied by the Ngäbe Cacique General (general chief) and two caciques of Annex Areas, visited 9 of the 15 Annex Areas identified in Law No. 10. According to the Response, the mission found that, though consultations had been carried out, the consultation process had *"several weaknesses"* and many people were not aware of the SA or the IPS.

271. Recommendations were made to improve this process, including the preparation of a Consultation Plan. This plan was submitted to the Bank in June 2008. A month later, a further Bank mission was informed that 14 Annex Areas had been delimited and *"based on the information provided to Project staff at the time"* Management states *"there was no reason to believe that the delimitations of Annex Areas did not meet beneficiaries' expectations."*¹⁵³ During a July 2008 mission, Management states that Project officials informed the Bank team that the delimitation of 14 of 15 Annex Areas had been completed.¹⁵⁴

272. Management also notes, in its Response, that *"communities can choose whether to be delimited and demarcated as Annex Areas."*¹⁵⁵ In this regard, the Management Response indicates that in consultation events organized by the Project in 2007 and

¹⁵³ Management Response, ¶ 76.

¹⁵⁴ Management Response, ¶ 76.

¹⁵⁵ Management Response, ¶ 79.

2008 in the 15 Annex Areas, only 7 chose to be delimited as such.¹⁵⁶ With respect to the actual composition of the Annex Areas to be delimited, Management indicates that in February 2007, as a result of the visit with the Cacique General, the Project reached an agreement with Ngäbe leaders to initiate the delimitation of the 15 Annex Areas, which would include the trabajadores in addition to the housing areas.¹⁵⁷

2. Panel Findings on Consultations and Delimitation of the Annex Areas

273. The inclusiveness of the process to delimit the boundaries of the Annex Areas has been an issue since the beginning of the Government of Panama's interactions with these areas. According to a highly respected Ngäbe leader with whom the Panel met during its investigation visit, and who was involved in the earliest days of the creation of the Ngäbe-Buglé Comarca, at the time of the creation of the comarca the Government conceived the Annex Areas as consisting of the houses and a "*couple of hundred meters*" around them, while the Ngäbe thought that their total trabajadores should be included.¹⁵⁸ In 1998, faced with inadequate offers from the government, all 15 communities refused the offer to be annexed to the comarca, although in 1997 they all had embraced the idea of a Ngäbe-Buglé Comarca.¹⁵⁹

274. In 2004, according to the same Ngäbe leader who was involved in the Annex Area issues from the beginning of comarca planning, there was contact with at least some Annex Area leaders by Project officials to discuss a proposed private titling process for Bocas del Toro. The communities, according to this account, refused to participate until the Annex Areas were defined. At that time, higher levels in government suspended the operation and the issue was not revisited until 2007.

275. A PRONAT office opened on the islands in June 2007. Two previous meetings had been held, one in October 2006 to begin work in the Annex Areas and the next in February 2007 with the General Cacique, to discuss concrete issues of what lands would be included in the Annex Areas. The second meeting concluded with an agreement to address the trabajadores as well as the housing areas.¹⁶⁰

276. **Different responses among Ngäbe communities.** The Panel considered the information contained in the Management Response that seven Annex Areas have voluntarily refused to be part of the comarca.¹⁶¹ The Panel was told on various occasions that these Annex Area communities have refused to be demarcated as

¹⁵⁶ Management Response, ¶ 79.

¹⁵⁷ Management Response, ¶ 79.

¹⁵⁸ Management Response, ¶ 76.

¹⁵⁹ See Map No. IBRD 36871 attached to Management Response and to this Report, in which Annex Areas that chose to be part of the Ngäbe-Buglé Comarca or to remain outside of it are indicated in green and red, respectively.

¹⁶⁰ "Acuerdos Emanados de la Reunión De Homologación de Criterios Técnicos y Legales para Definir la Metodología de Atención a la Problemática de la Tenencia de Tierra En Provincia de Bocas Del Toro y la Región No Kribo De la Comarca Ngobe Bugle," 8 de febrero de 2007.

¹⁶¹ See Management Response, Map, Annex Areas with "green" dots versus "red" dots.

Annex Areas and be in the comarca primarily because they do not agree with the polygon that has been offered to them.

277. However, when the Annex Area issue was specifically addressed in the field in 2007/2008, in conjunction with the National Boundaries Commission, PRONAT officials encountered a situation of internal conflicts and disagreements among the people. The Management Response indicates that on April 8, 2008, PRONAT received a letter from Nance de Riscó leaders rejecting the idea of being annexed to the comarca in favor of being part of a corregimiento (an administrative division of a territory in Panama) because the land area of the corregimiento would apparently be much than the annex. They also rejected comarca membership, alleging the administrative problems that it would entail. Other communities, such as the islands of Cayo de Agua and La Tigra, had sold so much land that there seemed little point to many residents in trying to create an Annex Area polygon.¹⁶² Other communities mentioned in Law No. 10 of 1997 wanted their daughter communities to be included, as well as their trabajaderos. Finally, there were small communities, such as Salt Creek on Bastimentos Island (a protected area), that accepted a negotiated polygon.

278. The growing “*movimiento indígena*”¹⁶³ (the Requesters’ group) seemed to revert back to the first position of the Ngäbe-Buglé Comarca negotiators in the 1990s, that the entire Bocas del Toro province was basically Ngäbe land except for Changuinola and Almirante. They visualized contiguous Annex Areas that would fulfill this hope.

Picture 11 Meeting with the Cacique of the Ngäbe Annex Area of Salt Creek



279. In two letters to Project officials and Management in 2009, the Ngäbe General Cacique provided a list of Annex Areas that still wanted to join the comarca. According to the General Cacique, the creation of new corregimientos in 2009 was at the root of the desire of some Annex Areas not to be legalized as such. This list of

¹⁶². 2010 meeting with leaders in Cayo de Agua and Isla Popa 2.

¹⁶³. Indigenous Movement.

communities was developed, according to the Cacique, in a March 2008 visit to the Annex Areas accompanied by Project officials and Bank staff.¹⁶⁴¹⁶⁵

280. The Panel notes that other factors, in addition to size of the proposed polygons, also seem to have contributed to the weakening of community support for the Annex Areas being part of the Ngäbe-Buglé Comarca:¹⁶⁶

- People in the Annex Areas had seen the Government's offer in 1998 and had rejected it. PRONAT's entry in 2004 was both brief and uneventful with regard to new offers. The same offers were made again at the beginning of the 2007 work with Annex Areas.
- People in Annex Areas were insufficiently organized and capitalized to maintain representative organizations with political access.¹⁶⁷
- The traditional leaders of the Ngäbe were too involved in the demarcation of the main comarca (and perhaps in national-level politics) to spend sufficient time maintaining solidarity in the Annex Areas.¹⁶⁸
- Rumors of expropriation and offers from speculators, tourism developers, and foreign recreational and retirement owners to buy land informally contributed to an erosion in the land base itself in the islands.¹⁶⁹
- Communities on the mainland, such as Nance de Riscó, were made into new corregimientos in 2009. This political act may have undermined support for continuing to support Annex Area status.

281. While recognizing the factors above, **interviews in the field suggest that, if adequate polygons were offered, many of the Annex Areas now listed as having rejected comarca membership would prefer to be in the comarca because it would provide stronger land tenure security than they presently enjoy.**

282. **Land versus territory.** The Panel notes that most of the different responses among the Ngäbe communities to being part of the comarca can be summed up in the

¹⁶⁴. Field Notes, 6 February 2010, Alto Caballero, Interview with Maximo Saldaña, Cacique General Ngäbe Buglé Comarca

¹⁶⁵. This list is reflected in the map of Annex Area communities attached to the Management Response, where areas coded red did not want to be an Annex, and green did want to be an Annex.

¹⁶⁶. This issue was taken up by UN Special Rapporteur James Anaya, who singles out the slow development of the project as a strong contributor to the dislocations. See James Anaya, 2009, "Observaciones sobre la situación de la Comunidad Charco la Pava y otras comunidades afectadas por el Proyecto Hidroeléctrico Chan 75 (Panamá)" (Geneva: Office of the UN High Commissioner for Human Rights).

¹⁶⁷. Field Notes, February 5, 2010, interviews on islands of Cayo de Agua and Popa 2. Also with leader of movimiento indígena.

¹⁶⁸. Field Notes, February 4, 2010, Panama City, Interview with (name on file), Ngäbe leader in the delimitation and demarcation of Ngäbe-Buglé Comarca.

¹⁶⁹. Field Notes, February 5, 2010, interviews on islands of Cayo de Agua and Popa 2. Also with leader of Movimiento Indígena. It also should not be thought that the erosion in community solidarity with regard to the Annex Area issues was strictly a case of "us," the Ngäbe, against "them," the non-indigenous swarm of speculators and investors. Ngäbe people with some capital were also involved in offering to buy from neighbors all or part of their land.

concept of land tenure epitomized in the Ngäbe Request to the Panel that the Project's "...main objective is to title land and not to demarcate territories." In numerous interviews in the field, the concept of "land" versus "territory" was raised, and it is important to understand the intended meanings of the relevant terms. The Panel's understanding is that the Ngäbe people in Bocas del Toro province consider a territory in this context to be the settlement of a mother community (named in Law No. 10 of 1997) plus the communities that have hived off from the mother community as contiguous daughter communities since 1997, including their *trabajaderos* and areas of forest used for cultural purposes such as hunting, collection activities, and conservation. This concept of territory would involve a much larger and more inclusive polygon than anything that had yet been offered.¹⁷⁰ This bigger polygon has not yet been endorsed by the Project, although the agreement with Ngäbe Buglé leaders in February 2007 included the notion that "territories" could include both housing and *trabajaderos*.¹⁷¹

283. A letter from the General Cacique to the Project, dated April 24, 2010, has a slightly different expectation, but nevertheless one that includes something more than the mother community and its associated *trabajaderos*: *"For us, the Annex Areas are the measure of a sufficiently large area [to] include houses, work areas and other places of interest for the inhabitants of an area to become an annex area."*

284. Furthermore, the Cacique General interviewed by the Panel pointed out that Law No. 10 identifies **any** Ngäbe community of more than 300 people as a possible Annex Area. In his interpretation, the 15 communities mentioned in Law No. 10 of 1997 were not meant to set an upper limit on the possible numbers of Annex Areas.

285. The Panel observes that the polygons offered to Ngäbe communities in the Annex Areas did not meet the expectations of the communities.¹⁷² According to

¹⁷⁰ In the complaint, the distinction between "lands" and "territories" is less a technical distinction than a reference to the size, purpose and even history of a given area; "lands" seem to be small areas of limited use, mainly house locations, whereas "territories" seem to be much larger areas that could include multiple uses and history, including houses, farms, areas of cultural (spiritual) interest, areas of biodiversity conservation and even new communities deriving from a historically-identified Annex Area.

¹⁷¹ Management Response to Second Request, Key Observations, 10(ii)

¹⁷² The Panel notes in this regard that paragraph 15(a) of OD 4.20 provides that *"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, wild-life, and water) vital to their subsistence and reproduction."* Article 26 of the United Nations Declaration on the Rights of Indigenous Peoples, Adopted by General Assembly Resolution 61/295 on 13 September 2007, provides as follows:

"1. Indigenous peoples have the right to the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired.

2. Indigenous peoples have the right to own, use, develop and control the lands, territories and resources that they possess by reason of traditional ownership or other traditional occupation or use, as well as those which they have otherwise acquired.

3. States shall give legal recognition and protection to these lands, territories and resources. Such recognition shall be conducted with due respect to the customs, traditions and land tenure systems of the indigenous peoples concerned."

the people the Panel met, there have not yet been any concrete offers from PRONAT and the National Boundary Commission that would encompass an expanded “territorial” land base that would take into account the concepts of daughter communities along with trabajadores.

286. Deficiencies in the consultation process. The Panel notes that local people seem not to have been advised of their rights in relation to the Annex Areas during Project preparation and early years of implementation. It seems apparent that when the communities were consulted in 2007, problems surfaced immediately. The communities in general were unhappy with the polygons offered to them and with the consultations leading to the determination of these polygons.

287. The Panel further notes that shortcomings in the consultation process may explain the discrepancy between Management’s understanding of whether people in Annex Areas desire to be part of the comarca, as reflected in the Management Response, and statements made to the Panel during its visit. In its Response, Management acknowledges that in 2008 it found weaknesses in the consultation process—Project staff had not adequately consulted with the Second Requesters in the delimitation of the Annex Areas—and states that a consultation plan to improve the quality of consultations was then agreed on with the Government. The Response indicates that a subsequent mission in 2008 “*missed*” the opportunity of following up with the Government on this point,¹⁷³ and in the Response to the Request for Inspection, Management commits to “*verify improved consultations*” and “*support further strengthening as required.*”¹⁷⁴

288. The Panel finds that the methodology used for determining the boundaries of the Annex Areas included consultation with only the main leaders of the Ngäbe people may not have been “local” residents of the Annex Areas, but did not involve the interested communities. These communities, which in some cases had views different from those of the main leaders, were the last to be involved, as supervision reports note. The Panel notes that this methodology was not adequately participatory as required by OD 4.20.

289. The above analysis also raises important questions relating to Project supervision over issues arising for the Ngäbe people and communities during Project implementation. These are considered in chapter 5 of this Report.

D. Claim That a Changing Legal Framework Weakened Ngäbe Territorial Rights

290. As analyzed in chapter 3 with respect to the Naso people, the changing legal framework for land tenure and land rights must be analyzed as part of Project supervision to determine what impacts, if any, new laws may have on the Project, its implementation, and the attainment of its objectives.

¹⁷³ Management Response, ¶ 76.

¹⁷⁴ Management Response, Table 2, Action Plan, p. 27

291. In this context, the Panel has reviewed claims of the Requesters regarding the effects of Law No. 18 of 2009 on the provisions of Law No. 10 of 1997, which established the Ngäbe-Buglé Comarca. The Ngäbe Requesters have raised concerns about the impact of this law on the political and administrative integrity of their comarca and on their collective property rights to the land upon which they live.

292. Law No. 18 of 2009 reformed the political distribution and the geographical limits of Changuinola and Chiriquí Grande districts in Bocas del Toro province. Changuinola is adjacent to the Ngäbe-Buglé Comarca and, even though this law does not include express modifications to Law No. 10 of 1997, nor to Law No. 72 of 2008, in establishing new corregimientos and modifying the boundaries of others, it has altered the boundaries of some Annex Areas associated with the comarca.

293. A private legal opinion solicited by the Bank explains the emerging situation as follows:

*Law 18 of 2009 establishes the political limits of the Districts of Chiriquí Grande and Changuinola and it does not establish nor does it modify property rights over the lands found within the limits of said districts. Therefore, this law does not modify the collective property that the Ngöbe-Buglé people hold over the lands that are comprised in the “Comarca.”*¹⁷⁵

294. This is so because the Constitution protects the right to property, and the rights previously acquired by a group or individual cannot be revoked or modified by law, but only exceptionally for reasons of “public order” or “social interest.”¹⁷⁶

295. As for the political or administrative boundaries of the Ngäbe-Buglé Comarca, the private legal opinion states the following: “we are of the opinion that this political regime is independent from the property regime and that the National Assembly has powers under the Constitution to establish and modify the political division of the national territory.”¹⁷⁷ ...In the event that the boundaries assigned to any of the ‘corregimientos’ by Law 18 of 2009 crossed the political limits of the ‘Comarca,’ it is our understanding that said portion of the collective property would become subject to the new political regime.”¹⁷⁸

296. Management informed the Panel that, in addition to the private legal opinion, it had received two legal opinions on issues related to the impact of Laws No. 72 of 2008 and No. 18 of 2009 on the Ngäbe property and political and administrative rights. The first one, issued by PRONAT staff, sees no conflict among these laws because Law No. 10 of 1997 is a “special law” that prevails over laws of a more general nature. In

¹⁷⁵. “Legal Opinion with respect to the Legal Aspects of Property Rights of Indigenous Communities in Panama.” May 4, 2009.

¹⁷⁶. Panama’s Constitution, Article 46.

¹⁷⁷. Panama’s Constitution, Article 159, number 7.

¹⁷⁸. “Legal Opinion with respect to the Legal Aspects of Property Rights of Indigenous Communities in Panama.” May 4, 2009.

addition, Law No. 18 repeals or amends expressly a number other laws ¹⁷⁹ and does not include Law No. 10 among them.

297. However, an opinion issued by the Ministry of Government and Justice arrives at the opposite conclusion because it regards Law No. 18 as a special law enacted after Law No. 10, adding that the only way of restoring the application of Law No. 10 would be through new legislation.

298. In short, Management has obtained three conflicting legal opinions on a subject of great concern to the Ngäbe Requesters, and Management reports that *“These two opposing interpretations were presented and discussed with PRONAT staff and indigenous community leaders during consultation workshops in March 2010.”* Management added: *“To our knowledge, no further legislative or regulatory developments have taken place in this regard.”*¹⁸⁰

299. **The Panel is of the opinion that Management, to meet the requirements of OP/BP 13.05 on Project Supervision, should have followed up on several inconclusive and, at times contradictory, legal opinions and reports on legal and regulatory developments directly affecting the Requesters.** It is evident that these legal ambiguities may have a negative impact on the execution of the Project and the attainment of its objectives regarding indigenous people.

E. The Claim That the Comarca Boundary Has Been Improperly Restricted: The Case of Norteño

300. During its investigation, the case of the community of Norteño was brought to the attention of the Panel. This case has to do with the demarcation of the Ngäbe-Buglé Comarca in the early years of the Project. The Panel met with the Norteño community (42 people present, 17 of them women), who told the Panel that they were originally within the boundaries of the comarca as laid out in Law No. 10. However, when PRONAT officials came to demarcate they were left outside the comarca.¹⁸¹ The comarca boundary is now about two kilometers to the southwest of Norteño at the Quebrada (creek) Simón.

301. The Requesters expressed the view that the boundary of the community was changed—without consulting with the community—so that a stretch of the Norteño River where a dam was being planned would be outside the comarca boundary. Members of the community further stated that there are no intervening private properties that would have caused them to be isolated as a community from the comarca.

302. The PRONAT office in Changuinola visited by the Panel has a 2004 map showing Norteño as being within the comarca, but no one present in the office could remember

¹⁷⁹. Law No. 18 of 2009, Article 22.

¹⁸⁰. Additional information provided by Bank Management to the Inspection Panel, May 27, 2010.

¹⁸¹. Field notes, January 30, 2010, Community of Norteño, Veraguas Province.

why the map showed this location or when the map was prepared. A Ngäbe leader who met with the Panel and who worked on the demarcation of this community remembers that when he participated in the delimitation activities with Project officials, most of Norteño was inside the comarca with the Norteño River as the boundary. Because a smaller part of the community was on the far side of the river (the northeast side) there was an agreement to change the boundary to include them.

303. The National Boundaries Commission members interviewed by the Panel stated at first that Quebrada Simón is the boundary because the Norteño River changed its course and the new riverbed left Norteño out.¹⁸² Then a member opined that they were “*always outside*.” Finally, it seemed evident to the Panel that no one present actually knew the case well, and the National Boundaries Commission members discussed the possibility that, in the future they might have to change the law.¹⁸³

Picture 12 Community of Norteño



Picture 13 Meeting with the community of Norteño



¹⁸². The Panel failed to include a geologist, but looking at the locations of Q. Simón and the Norteño River on a topographic map, it seems unlikely to an ecological anthropologist/topographer/cartographer present that Q. Simón could have been the course of the Norteño River at any geologically recent time.

¹⁸³. Field Notes, February 4, 2010 Panama City.

304. **Given the confusion evidenced by everyone but the community of Norteño, it seems possible that the boundary was changed at some point subsequent to 2004 during the demarcation process and that the community was not consulted about this. If so, this change may have harmed their land tenure security by leaving them unprotected. However, without clarification from PRONAT as to the exact sequence of field events and decisions, it is impossible for the Panel to establish the facts on this point.** In two separate Management interviews, another possibility was adduced, that PRONAT appropriately demarcated the boundaries that were identified in the 1980s and made into law with Law No. 10 of 1997. However, in the meantime, the community had expanded to no longer match those boundaries.
305. The Panel notes the great importance of this issue to the indigenous community of Norteño. However, the Panel has not been able to obtain clarification as to the exact sequence of field events and decisions. **The Panel finds, nevertheless, that anxiety and confusion surrounding this issue is evidence of deficiencies with respect to consultations and informed participation, as prescribed in OD 4.30.**
306. Bank Management has informed the Panel that it is in the process of seeking to clarify and further understand the issues raised at Norteño. **The Panel notes and appreciates these ongoing efforts, and stresses the importance of both clarification and follow-up in line with Bank policy and the relevant Project objectives.**

F. The Claim That Project Actions Are Linked to Encroachments in the Annex Areas

1. Requesters' Claims and Management Response

307. The Requesters believe that the lack of proper consultations with the Annex Area communities and the failure to conclude the delimitation and demarcation activities left their land unprotected, thus facilitating invasions and loss of land. The Requesters point in particular to two Annex Areas. Valle de Risco and Nance de Risco, where the Government gave a concession for the construction of the hydroelectric project known as Chan 75.
308. Management acknowledges the Requesters' concerns about pressures on their land rights caused by development activities in the area but states that the Project was precisely intended "*to address the concern about these pressures.*" Management, however, notes that implementation was slow between 2001 and 2004 because of a "hiatus" of relations with the borrower.
309. With respect to the two Annex Areas where the Chan 75 project is being executed, the Management Response indicates that these two areas chose not to be annexed to the comarca and expressed willingness to be part of a corregimiento.

2. Encroachment and Loss of Lands

310. That encroachment occurred in Annex Areas, both in the islands and on the mainland, is undisputed. It is evident that different types of encroachment took place in the past decade in Annex Areas as a result of tourism and other development activities, both on the mainland and on the islands of Bocas del Toro.¹⁸⁴ Anyone in touch with development trends in Panama or Central America was aware that the Bocas del Toro islands (and mainland with ocean views) were a “hot” place to invest.¹⁸⁵

3. Particular Issues of Concern: Chan 75 and Project Titling Activities

311. Two particular aspects of this issue are noted below: the question of Government concessions in indigenous lands for hydroelectric projects, in particular the Chan 75 dam; and the question of whether titling activities under Component 2 of the Project may themselves have affected indigenous Ngäbe lands.

312. **Effects of the Chan 75 on Ngäbe communities.** The Chan 75 hydroelectric project is being carried out by a subsidiary of the Arlington-based AES energy corporation, AES Changuinola, on the Changuinola River in Bocas del Toro province. AES was granted a government concession within the Palo Seco Protection Forest in 2005 by Autoridad Nacional del Ambiente (ANAM; National Environmental Agency) as one of 107 hydroelectric projects¹⁸⁶ currently being considered in Panama.

313. The Palo Seco Protection Forest is part of the greater La Amistad International Biosphere Reserve. The project is one of several planned for the Changuinola River watershed (including the Bonyik dam in Naso territory; see chapter 3). When the Palo Seco Protection Forest was created in 1983, a number of Ngäbe communities were scattered along the Changuinola River and nearby highlands within the protected

¹⁸⁴. During its investigation, the Panel received documentation from affected people about continuous land sales in tracts that newspaper notices listed as “*areas baldias*” (empty lands), but that members of the Ngäbe claim to be lands that belong to them as part of the Annex Areas.

¹⁸⁵ See this description from a Web site from a Google search, “Bocas de Toro Investment” (sic): ***Bocas del Toro** - Archipelago consists of nine islands, 52 keys and some 200 tiny islets. The largest and most developed island is Colón Island, where the capital of the province, the town of Bocas del Toro, is located. Bocas Del Toro - a place where serenity and natural beauty abound...a place where time seems to stand still...but where investments are bound to gain substantially in the years ahead...These islands are known for their pervading tranquility, their intriguing residents, their natural beauty, and for their plethora of opportunities to explore and discover. The water is perfect and the surf is spectacular. Investment in Real Estate is an Excellent option since the Tourism is High, Rentals are very good. Further one can invest in a land today to develop later and by doing this the Investor is Entitled to a Tax Benefit. Investment is therefore on an Increase thereby boosting the Real Estate Prices.* <http://www.insight-realestate-panama.com/bocasdetoro.html>

¹⁸⁶. “Observatorio de Multinacionales en América Latina,” Burica Press, December 8, 2007. Cited in Philip Young, “Hydroelectric Power and Indigenous Rights in Panama: The Ngöbe Case.” Paper presented at the Society for Applied Anthropology meetings, Santa Fe, NM, March 2009.

area. Two of these communities off the main river, Nance de Riscó and Valle de Riscó, were identified by Law No. 10 of 1997 as Annex Areas.

314. The Second Request complains about the hydroelectric concession in general and specifically the expropriation of 6,215 hectares of Valle de Riscó land in connection with the dam. Valle de Riscó is one of the 1997 Annex Areas. One supposes that the specific area mentioned would have been part of their claim for an Annex polygon. Also, the four communities actually dislocated by Chan 75 are part of what Valle de Riscó and another Annex Area, Nance de Riscó, would have claimed as “daughter communities” in negotiations with the National Boundaries Commission.

315. The Requesters believe that implementation of the Chan 75 hydroelectric project in these two Ngäbe Annex Areas is the result of the lack of timely execution by PRONAT of delimitation and demarcation of the Annex Areas. Management notes in its Response to the Second Request that “...neither the Project, nor any other Bank-financed project, is involved in the concessions for, or the construction of, the hydroelectric dams in this area.”¹⁸⁷

316. Allegations that PRONAT officials had participated in establishing the polygon for the dam project and in the delimitation of proposed resettlement areas arose during the Panel’s visit to the Project area. The Panel has not been able to validate the Requesters’ allegation about officials of PRONAT participating in Chan 75 activities.

317. From reviewing the project supervision reports, the Panel notes that, when the Second Requesters sent letters to the Bank in early 2008 raising issues of human rights abuses in the context of the resettlement being carried out under the Chan 75 project, Management reacted by proposing urgent actions to determine whether there was any link between the PRONAT project and the Chan 75, and whether Bank safeguard policies applied. In the subsequent supervision visit in March 2008, the Bank mission determined that PRONAT was not associated in any way with the hydroelectric project being carried out in the area.

318. The Panel finds that Management’s actions following the concerns raised by the Requesters beginning in early 2008, are consistent with the requirements of OP/BP 13.05 on Project supervision.

319. However, as a matter of supervision, the Panel notes the absence of any earlier reference in supervision reports to the potential risks for Project objectives by the Chan 75 concession. This lapse in supervision is similar to that identified by the Panel with respect to emerging developments and problems affecting the Naso during Project implementation. (see chapter 3).

320. Moreover, with respect to Chan 75, the Panel notes that a key underlying issue raised by the Request is what might have happened in the negotiations concerning the impacts of the dam project had the communities of Nance de Riscó and Valle de

¹⁸⁷. Management Response, ¶ 22.

Riscó been consulted early on in the PRONAT project, in accordance with OD 4.20 and, as a result, given tenure security in a timely manner.

321. The two communities mentioned lie within the Palo Seco Protection Forest. The Panel has not seen a polygon proposed for these Annex Areas so it is impossible at this point to verify to what degree the Chan 75 project affects those claims, but in an increasingly bitter exchange of letters between Alianza para la Conservación y el Desarrollo (ACD; Alliance for Conservation and Development) and PRONAT in 2008,¹⁸⁸ a letter from ACD to Rolando Armuelles at PRONAT (May 28, 2008) claims that the communities of Charco de la Pava, Valle Rey, and Guayabal are daughter communities to Valle de Riscó and Nance de Riscó.

322. Even before the Project, the Bank had requested the Government to research property rights under various legal figures:

*The Mission emphasized the necessity to pay due attention and develop adequate analysis with respect to the distinct legal figures in the Panamanian legal system to protect the land rights of indigenous groups.*¹⁸⁹ [Panel Translation]

323. In 2003, the Bank was more specific:

*The Mission recommended that guidelines and regulations be written for the **policy of co-administration of protected areas in Comarcas** and that the demarcation of these areas be accompanied by an ANAM technician. In the protected areas of the La Amistad International Park and the Palo Seco Protection Forest, for example, there is an 80% overlap with comarcas.*¹⁹⁰ (Emphasis added)

324. Similarly, in 2004, Bank Management reiterated the need for co-management rules: “[t]he mission recommends that the law of the Naso Teribe territory indicate explicitly the shared responsibilities of co-management of overlaps between the

¹⁸⁸. ACD’s Coordinator of International Affairs, Oswaldo Jordan, to Rolando Armuelles, Director of PRONAT, 11 April 2008; Armuelles to Orlando [sic] Jordan, 23 April 2008; ACD’s President, Ariel Rodriguez to Armuelles, 28 May 2008; ANAM Ministra en Asuntos Relacionados con la Conservación del Ambiente y Administradora General, Ligia C. de Doens to Ariel Rodriguez 10 June 2008.

¹⁸⁹. Aide memoire, Supervision Mission, August 12–16, 2002 (AM mission de supervision tecnica)

¹⁹⁰. Spanish text is as follows: *La Misión recomendó que se elaboren las pautas y reglamentos para la **política de administración conjunta de áreas protegidas en Comarcas** y que la demarcación de estas áreas sea acompañada por un técnico de ANAM. En las áreas protegidas del Parque Internacional La Amistad (PILA) y Bosque Protector y Palo Seco, por ejemplo, existe un 80 por ciento de traslape con comarcas. El Lic. Rivera de la ANAM aclaró que a nivel de Centro América se dictarían pautas y reglamentos para la administración conjunta (o cogestión) de estas áreas. La Directora de la Dirección de Políticas Indigenistas aclaró que mientras estas pautas y reglamento se aclaren, se trabajaría con un técnico de ANAM y las comunidades indígenas en el desarrollo de Planes de Manejo y a través de Mesas de Dialogo, el vinculo principal para la participación de actores locales, para la definición y sugerencias sobre el desempeño de las actividades del sub-componente [3.2 indigenous territories] (mapeo, titulación, etc).*” [Emphasis added.]

*Comarca and the protected areas La Amistad International Park and the Palo Seco Protection Forest. Similarly, the delimitation of the Comarca Ngäbe Buglé is recommended as a high priority.”*¹⁹¹

325. It seems clear that if issues of co-management had been properly addressed and the delimitation of the Annex Areas had occurred in a timely way, the Ngäbe would have been in a better position to negotiate the terms and conditions of a concession within their land.

326. Project-supported titling activities and protection of indigenous lands. A separate issue brought to the Panel involves the question of whether titling activities supported under Component 2 of the Project were potentially taking place within indigenous land areas, including Annex Areas, intended for protection under Component 3. Indeed, the Panel was informed, during its investigation and interviews, about a potential conflict between these two components—the “left-hand” and the “right-hand”—of the Project; the scale and rapid pace of titling activities under the Project has amplified this concern.

327. Management recently has recognized and acknowledged that this problem did arise during Project implementation. In a November 2009 supervision report, Management notes that it learned that in 2008 individual titles had been given, mostly to Ngäbe people, for land on a Government property; more than 500 families received titles. Similarly, 132 titles were given for land along a power transmission line. The report notes that this titling process occurred rapidly, without proper consultations, and in response, Management recommended, among other actions, a suspension of titling in Bocas del Toro subject to further review of the situation. Specifically, Management recommended

- that a detailed audit of titling processes be carried out in the areas surrounding the Ngäbe-Buglé Comarca in the provinces of Bocas del Toro, Chiriqui, and Veraguas, noting that if these processes did not include appropriate consultations with all key stakeholders, the Bank may declare the expenditures as ineligible;
- a detailed ex post review of procurement contracts, particularly those related to demarcation in these areas, which again may lead to declaration of ineligible expenditures;
- for PRONAT not to issue any more titles in Bocas del Toro until these processes are reviewed.¹⁹²

328. In light of the potential conflict between the two components of the Project, the Panel examined Project documents, including the loan agreement, to determine whether there were relevant covenants to help safeguard against the possibility that titling activities under the Project could come into conflict with the Project objectives to advance and consolidate indigenous lands. The Panel learned that while the loan

¹⁹¹. Aide Memoire, June 14, 2004, supervision mission.

¹⁹². BTO, Supervision Mission, Panama PRONAT, November 2009.

agreement contains a specific covenant stating that titling shall not take place in areas under consideration for designation as “protected areas”, it does not contain a parallel safeguard for lands claimed by affected indigenous communities. During interviews with Bank staff, the Panel heard views that the inclusion of such a covenant in support of the rights of affected indigenous peoples would likely have been a valuable safeguard both to avoid an internal mis-alignment in Project activities, and to help attain the core Project objectives relating to the component on indigenous peoples. The Panel concurs with this view.

Chapter 5: Supervision and Systemic Issues

329. The PRONAT Project, which lasted for almost a decade and dealt with complex issues of indigenous peoples and land administration in a very challenging environment, revealed weaknesses in the Bank's supervision of the Project as well as other challenges of a more systemic character related to the broader objective of securing the territorial land rights of indigenous peoples. This chapter discusses both of these sets of issues.

A. Findings on Adequacy of Project Supervision

330. As noted in chapter 2, OP 13.05 on Project Supervision requires Management to *“identify problems promptly as they arise during implementation and recommend to the borrower ways to resolve them . . .”* and to *“recommend changes in project concept or design, as appropriate, as the project evolves or circumstances change.”* OD 4.20 on Indigenous Peoples highlights the need to include *“the appropriate anthropological, legal, and technical skills in Bank supervision missions during project implementation.”*

331. The Panel commends the Bank for financing a Project aimed at securing territorial rights for the Naso and the Ngäbe, and acknowledges the challenging environment in which the Bank was pursuing this objective. **The Panel finds, however, that Management, in critical stages of the Project, did not supervise in a way that was commensurate with these challenges.** The Panel's specific findings in this respect are presented below.

332. **Inadequate Attention to Emerging Problems on the Ground.** The Panel notes that between 2002 and 2007, supervision visits identified subcomponent 3.2 (on Indigenous Lands) as progressing satisfactorily. Satisfaction was based on PRONAT reports of progress in delimitation of the Naso Comarca and demarcation of the Ngäbe-Buglé Comarca, as well as work on other indigenous lands.

333. During the middle years of Project implementation, however, a number of events took place that posed significant risks for the achievement of Project objectives relating to indigenous peoples, thus requiring close supervision under Bank policy. As described in this Report, these included the 2004 schism in Naso leadership, the failure of the Naso Comarca bills in 2004 and 2005, the risks to Project objectives posed by the unfolding and controversial events relating to the Bonyik dam and the Chan 75 hydroelectric project, and the Project's approach to demarcation of Ngäbe and Naso lands.

334. As discussed in more detail in chapters 3 and 4, **the Panel found that these critical events and risk factors affecting the local population were not reported accurately in the middle years of Project supervision.** A Bank mission conducted in December 2007 detected no serious problems in the indigenous component of the

project. The Back to Office Report (BTO; an internal Bank memorandum) from that visit casts the Naso and Ngäbe problems in a common framework of disputes between older traditional leaders and younger leaders. The BTO indicates that the Bank is not at fault, but rather “*caught in the middle of the internal conflicts.*”

335. The Panel also noted, in this regard, an important **failure to analyze changing circumstances**. With respect to the Naso, the Panel observes that it may be understandable not to have anticipated that the Naso Comarca would fail in the Panamanian National Assembly. When it did fail, the Project reacted with a fall-back position of support for an alternative law (Law No. 72) that Management believed would help to continue to advance the cause of indigenous collective land tenure security.
336. The Panel could not find, however, a formal analysis of the implications arising from the rejection of the Naso Comarca bill of law and of the potential need for concrete mitigation measures to protect the Naso territory during the legislative vacuum. Indeed, the analysis of the implications of Law No. 72 for the Naso found by the Panel was prepared well after the Request for Inspection, when Management requested a legal analysis.
337. In view of the seriousness of the threat to the Naso as a people from encroachments on their still unprotected lands, **the Panel is of the view that supervision should have met a higher standard**. The Panel has determined that the key emerging problems should have been detected much earlier, and been accompanied by actions and recommendations appropriate to addressing the changing circumstances.
338. With respect to the Ngäbe, the Panel finds, similarly, that supervision did not promptly react to early warnings and emerging issues related to the Annex Areas until 2007 when the future Requesters began raising their concerns to Bank Management. As described in the Report, the Panel found that Ngäbe land rights were compromised by the delay in the start of the effort in Bocas del Toro, and that the resulting consultations that led to action in 2007 were inadequate.
339. The Panel notes that once the Project began work on the Annex Areas in Bocas del Toro in 2007, Management, at the time, accepted the account of PRONAT with regard to whether the Annex Areas favored incorporation into the comarca. During the July 2008 supervision mission, PRONAT informed the Bank that 14 of the 15 Annex Area polygons had been delimited, presumably successfully. Bank officials did not follow up with an empirical check on these data and admits to a “*missed opportunity.*”¹⁹³ **It is the Panel’s view that Management, as a matter of supervision, should have been more active and engaged to guide and verify Project actions, according to Bank policy, with regard to consultations and land demarcation with the Ngäbe Annex Area communities.**

¹⁹³. Management Response, ¶ 76.

340. **The Panel finds that supervision of the Project did not promptly and adequately react to warnings and emerging issues during certain key phases of the Project. This is not consistent with OP 13.05 on Project Supervision.**

341. **Engagement of Social (Anthropology) Specialists.** Despite the sensitive nature of the indigenous land issues, the broad experience gained by the World Bank in Nicaragua and Honduras, the warnings placed in the Social Assessment, and the explicit provisions in the Bank's Indigenous Peoples policy on engaging social (anthropology) specialists, the Panel's review of Management supervision reports indicates that **supervision visits did not include a social specialist until March 2007. This does not comply with OD 4.20 on Indigenous Peoples.**

342. In line with Bank policy, a social specialist would have played a key role in assisting the Project to properly assess the evolving situation and could have recommended appropriate responsive actions, particularly in light of the issues emerging during Project implementation. The Panel has determined that the lack of adequate engagement of social specialists on supervision teams may have been a significant factor in the shortcomings in supervision described above.

343. **Recent Strengthening of Supervision.** The Panel notes that supervision intensified greatly more recently, particularly following Management's receipt of a letter in 2007 indicating concerns from the Naso Requesters. A December 2007 supervision mission recommended a review of the formulation process for Law No. 72 of 2008, a legal interpretation of Law No. 72 with regard to its effect on the "Naso-Teribe" Comarca, and a review of the adequacy of conflict resolution mechanisms. Management requested a full report on the Annex Areas consultation process.¹⁹⁴ These initiatives signaled new momentum in the Bank's supervision.

344. A review of supervision reports since 2008 shows that Management reaction was prompt and thorough. A February 2008 supervision mission recommended intensifying supervision of the social and environmental aspects of the Project, especially in relation to the indigenous lands component. As described in this Report, **Management has taken many important actions since that time to review and address the concerns raised in these Requests. The Panel notes that the intensity of supervision has increased since 2008. The Panel finds that this meets the standards set forth in OP/BP 13.05 and OD 4.20.**

B. Observations on Systemic Issues

345. This investigation has revealed systemic issues relevant to the Bank's compliance with its operational policies and procedures in the context of this Project. Some of these issues are noted and discussed briefly below in the hope that they may provide some lessons that could help strengthen future policy compliance and overall development effectiveness.

¹⁹⁴. Management Response, p. 19, ¶ 76.

346.**Application of the Bank's Policy on Indigenous Peoples (IP).** The planning and implementation of the PRONAT Project have revealed at least three key issues with respect to the application of the Bank's IP policy.

347.The first issue relates to the requirement to prepare an Indigenous Peoples Development Plan (IPDP) and carry out the corresponding participatory consultation process with affected communities. As discussed in chapters 3 and 4, no stand-alone IPDP was developed during Project preparation, on the grounds that the subcomponent of the Project dealing with indigenous territories would serve as the IPDP. While the Panel understands why Bank staff may have adopted this approach, our investigation has shown that this lack of a stand-alone IPDP prepared through a participatory process led to adverse consequences, especially for the Ngäbe people of the Annex Areas. As this case suggests, safeguard policies, particularly in land projects involving indigenous people, play a crucial role in anticipating and preventing harm and thereby avoiding possible future grievances. This reinforces the need to ensure that not only the *content*, but the *purpose* of safeguard policies and the *potential consequences* of policy noncompliance, are properly understood by staff.

348.A second issue is that the proper implementation of the Bank's IP policy hinges on not only strong and clear foundations during Project preparation, but also appropriate allocation of resources for supervision, in particular to engage the services of staff and consultants with specialized training in indigenous peoples' issues and participatory development. The Panel's experience in this investigation and others suggests that while the Bank is making progress in ensuring that more projects trigger the IP policy, especially in Africa, it still faces serious challenges in implementation of these policies, as the result, in part, of insufficient attention to supervision and to the deployment of appropriately trained social specialists.

349.A third issue that arose in the context of this investigation and others that relate to indigenous peoples concerns the role of the Bank in the context of what may often be a conflict between indigenous peoples and their governments. In the present Project, for example, there was a dispute over the question of leadership of the Naso people. While the Bank sees the Government as its primary client and partner, the Bank's IP policy also requires the Bank to take a proactive role to ensure that its provisions are applied, including provisions on the informed participation of and representation of indigenous communities. The proper application of these policies is intended to provide crucial safeguards for the affected indigenous peoples, and is of special significance in light of the risks and vulnerabilities that they may face. This has important implications for other Bank-supported projects, including those related to financing for the sustainable use of forest resources and biodiversity conservation under Reducing Emissions from Deforestation and Forest Degradation (REDD) activities.

350.**The Challenges of Land Management and Administration Projects.** A recent analysis by Management has highlighted the risks associated with land management and administration projects, as well as the "*high reward nature of land projects and*

*the growing demand across all regions.”*¹⁹⁵ The Panel’s investigation of this Project, as well as its ongoing investigation of the Cambodia: Land Management and Administration Project, clearly illustrates these risks and shows that land projects are generally extremely complex and difficult to implement effectively, particularly when they involve indigenous peoples. The Panel notes that Management has highlighted that staffing may be a potential barrier to effective Bank engagement in land administration and management projects, and is reviewing measures to “*strengthen ... technical support in this area, including targeted supplemental training of existing staff.*”¹⁹⁶

351. Although they may constitute an important contribution to social and economic development, land projects in developing countries not only pose significant operational risks but are often politically controversial. It is important for the Bank to systematically assess, both during design and during project implementation, operational risks and risks of a political economy nature, and devote adequate trained staff and resources to the project. **This investigation suggests that the Bank should be given credit for engaging in this extremely important Project in Panama, though it may not have invested sufficient resources to address the risks involved, especially with regard to supervision.**

352. **Discontinuity and Turnover of Project Personnel.** The Panel’s investigation has shown that the PRONAT Project experienced discontinuity and turnover in personnel, particularly of Task Team Leaders, during its almost decade-long life. This discontinuity, while not unusual in Projects of this duration, is of relevance in the case of the PRONAT Project because core Project activities related to indigenous lands took place during a period in which private investment and disputes over land grew swiftly. This affected Project supervision and the effective implementation of safeguard policies.

353. **Conflicting Project Components.** Another challenge is the potential conflict between different Project components. As discussed in chapter 4, the design of this Project appears to have led to the potential for conflict between the “left-hand” of the Project (titling activities) and the “right-hand” of the Project (protection of indigenous land areas), which were exacerbated by the scale and pace of titling activities under the Project. **The Panel notes and appreciates that once Bank Management discovered this problem during implementation, it promptly took responsive action.** Based on its experience with this investigation and others, and in line with suggestions made during staff interviews, the Panel observes that the inclusion of relevant covenants in Project documents can help safeguard against the possibility that activities under one project component could come into conflict with project objectives and related policy requirements under other components. This is

¹⁹⁵. Summary, 2nd Implementation Support-Operations Committee Meeting, Inspection Prone Operations: Issues Related to Land Administration and Land Management Projects, Wednesday, May 5, 2010.

¹⁹⁶. Summary, 2nd Implementation Support-Operations Committee Meeting, Inspection Prone Operations: Issues Related to Land Administration and Land Management Projects, Wednesday, May 5, 2010

particularly important for projects in which one component deals with the protection of the rights of indigenous people.

354. A related concern that arose in the Panama case is that the co-financing arrangements for the Project provided additional financing for those components of the Project that related to titling, but not to the component that related to protection of indigenous territories. While these co-financing arrangements undoubtedly played an important role in increasing the overall impact of the Project, particularly in relation to its important land titling objectives, this characteristic of the Project may have heightened the possibility that titling activities could take place within indigenous land areas intended for protection under Component 3 of the Project. Interviews with staff responsible for the Project in its early days also suggest that considerable time and effort was involved in securing Project co-financing, which may have contributed to delays in implementation of crucial aspects of Project Component 3.

355. **The Importance of the World Bank's Role in Indigenous Peoples' Issues.** As noted elsewhere in this report, **Bank Management has played a leadership role in seeking to support the land rights of indigenous peoples in Panama through this Project.** The Project included a core component responding to fundamental aspirations of the indigenous communities, and unlike other donors the Bank was willing to take on the risks inherent in this kind of work. Furthermore, once the Requests for Inspection were filed, Bank staff constructively engaged with the affected communities to help resolve the issues. **For all these reasons, the Requesters and affected people have expressed their hope that the Bank will remain engaged in these issues in Panama in the future, following relevant policy safeguards. The Panel is likewise of the view that continued Bank engagement on indigenous issues in Panama, in line with policy, is critical.**

356. The importance of indigenous peoples' issues in the Bank's work is likely to intensify given the increased interest by Panama and other Governments for financing for the sustainable use of forest resources and biodiversity conservation under REDD. Future Bank financing for virtually any infrastructure project in Panama, and many other countries, will also require proactive engagement in these issues. The Panel hopes that its investigation will yield useful lessons for the work ahead.

ANNEX 1: Table of Findings

ISSUE	MANAGEMENT RESPONSE	PANEL FINDINGS
Panel Findings on the Claims of the Naso People		
Claim that the Project has undercut the Naso aspiration for a Comarca—Project Design and Appraisal	Management states that it supports the creation of a Comarca for the Naso territory. One of the Project objectives provided precisely for the preparation, in consultations with the Naso, of a bill and charter establishing the Naso Tjer Comarca, the highest aspiration of the Naso people for their territory.	<p>Panel concurs with view of Management that absence of stand-alone IPDP, and failure to disclose publicly the Social Assessment prior to appraisal, was not in accordance with OD 4.20.</p> <p>Panel finds absence of a stand-alone IPDP at appraisal did not prevent Bank from taking important actions in support of aspiration of Naso to have own Comarca. Panel further finds that Social Assessment and PAD prepared for Project properly highlighted core need to give high priority to work to develop a Naso Comarca, in light of risks faced by Naso people. Panel finds this is consistent with objectives of OD 4.20.</p>
Claim that the Project has undercut the Naso aspiration for a Comarca—Project Implementation and Supervision.	The Project-supported bill for the Naso Comarca was submitted twice to the National Assembly and twice rejected. As a result, Management considered a bill about to be discussed by Parliament, the bill of Collective Lands, a “ <i>viable if less ideal measure to continue the momentum for improved security of tenure</i> ” for the Naso and the Indigenous Peoples of Panama in general. It was also “ <i>Management’s understanding that adoption of the Law of Collective Lands would not preclude a renewed attempt in the future to create a Comarca for the Naso People.</i> ”	Panel finds Project’s support for preparation of a comarca bill in early years of Project implementation was directly supportive of territorial and administrative aspirations of Naso, and consistent with OD 4.20 on Indigenous People and OP 13.05 on Project Supervision. Failure of a Comarca bill to pass National Assembly in 2004 and 2005 does not alter assessment.
Claim that Project did not Consult Properly with Legitimate Leaders	Management states that both sides claim to be the legitimate representatives of the Naso people, while the Government of Panama recognizes only Tito Santana as legitimate King. Management points out that “ <i>in spite of</i> ” the Government’s official recognition of Tito Santana, “ <i>Management’s view is that informed participation, consistent with OD 4.20, means that the Project should consult with both groups rather than assigning unique legitimacy or representativeness to either one.</i> ” ¹⁹⁷ Management has therefore	Panel determined Management, upon learning of concerns in late 2007, tried to deal with both factions of Naso people and repeatedly interacted with Project directly to attempt to resolve conflict. Panel finds recent efforts denote good faith attempt on part of Management to ensure consultation process was meaningful, and genuine representatives of Naso indigenous peoples participate in process, consistent with provisions of OD 4.20.

¹⁹⁷ Management Response, ¶ 59.

ISSUE	MANAGEMENT RESPONSE	PANEL FINDINGS
	<p>stressed to Project staff the importance of taking steps for a resolution of the conflict and has encouraged mediation between the two factions, in recognition that the division within the community is detrimental to the Naso people's aspiration of consolidating their territory. Management states its belief that it has been responsive to the First Requesters' concerns. It has met with them, as well as with the other faction, encouraged a solution of the conflict and conveyed the importance of this to the Government. In June 2008, the Bank mission agreed on an action plan with the Government to call for mediation between the opposing groups of Naso. The Project also offered to finance mediation. Tito Santana's group accepted, while Valentín Santana's group refused the proposed mediator and suggested a new one. These efforts faded for a time but Bank staff are persistent in trying to renew mediation efforts.</p>	<p>As a matter of supervision, Panel notes with concern significant lapse in time before Management seems to have reported, and recommended action in response to, risks posed for Project objectives resulting from Naso schism.</p>
<p>Claim of Inadequate Consultations in Relation to Project Support for Law No. 72</p>	<p>Management states that, in an effort to maintain momentum in the protection of indigenous lands, it decided to support the consultation process related to the new Bill of Law (eventually Law 72) being proposed to regulate the acquisition of collective property rights over indigenous lands outside established Comarcas.</p> <p>Management acknowledges, however, that there were inadequate consultations with the Naso on the inclusion of Article 17 of Law 72 and the preparation of the draft organic charter.</p>	<p>Panel concurs in [Management] assessment [of consultations].</p> <p>Panel notes importance of ensuring broad dissemination of information among Naso on matters having direct implications for land rights and claims, such as Law No. 72 and organic charter referred to in article 17 of Law No. 72, and appropriate and meaningful consultations on these matters.</p>
<p>Claim that Project Support for Law 72 has Caused "An Uncertain Regime of Regional Rezoning"</p>	<p>The Law of Collective Lands was approved on December 3, 2008 as Law 72 of 2008. It included Article 17, which created a special regime for the Naso that was not provided for in the bill of law submitted to the Assembly. Management claims that it "became aware" of this Article 17 only five days after the approval of the Law and that it did not have any information about it before it was included in the law. However, Management also states that as soon as it learned about Article 17 it promptly took up the issue with the Government to express</p>	<p>Panel finds [informal suspension of disbursements] is consistent with requirements of OP/BP 13.05 but also finds such a contradictory situation warrants seeking further explanations from borrower to achieve full compliance with OP/BP 13.05 and objective of OD 4.20, to address concerns of intended Project beneficiaries.</p> <p>Panel is of the view Management's decision to support process of establishing Law No. 72 was a good faith measure that seemed reasonable under prevailing political</p>

ISSUE	MANAGEMENT RESPONSE	PANEL FINDINGS
	<p>concerns about the implications of the law for the Naso people, in particular about the Charter (<i>Carta Orgánica</i>) to be issued and applied, under Law 72, in the Naso territory. The Response adds that <i>“it is now the Government’s intention to place Naso territory under the political-administrative jurisdiction of the Province of Bocas del Toro.”</i>¹⁹⁸</p> <p>Management expects to complete a new IPDP that meets Bank policy requirements by August 2009. Management states that it also decided to “pause” the preparation of the Additional Financing operation requested by the Government to support a geographical extension of Project activities.</p>	<p>situation.</p> <p>Panel finds, however, this decision, consistent with policy on Project Supervision, should have been followed by stronger efforts to seek clarity on legal ambiguities of Law No. 72 with respect to territorial aspirations of the Naso.</p>
<p>Claim that Project has Improperly Failed to Address Invasions of Naso Lands</p>		<p>It is Panel’s view that lack of resolution of proposed Comarca boundaries may have contributed to progressive deterioration of land conflicts, which eventually led to evictions in 2009 of some Naso families found to be encroaching on Ganadera’s land.</p> <p>Panel also notes that Naso internal dispute has played important role in preventing resolution of these issues. Panel finds that while verification of proposed boundaries of Naso territory between 2004 and 2006 might have prevented the progressive worsening of events, Bank cannot be held responsible for violent eviction of members of Naso in 2009.</p>
<p>Recent Actions</p>	<p>Management states in its Response to the Request for Inspection that it decided to have an IPDP prepared for the Project.</p>	<p>Panel now has copy of IPDP, but has determined it does not contain elements of IPDP as required by OD 4.20. Panel appreciates intent behind Management’s action and good faith effort to bring Project into compliance. It is Panel’s view, however, that new document could only serve as positive model for later IPDPs in Panama if it contained elements of IPDP required by Bank policy.</p> <p>Panel notes and commends Bank Management for more recent expanded supervision actions, which Panel finds in compliance with OP/BP 13.05 and OD 4.20.</p>

¹⁹⁸ Management Response, ¶ 57.

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		Requesters also have indicated to Panel appreciation for efforts of Bank Management.
Panel Findings on the Claims of the Ngäbe People		
Claim that Annex Area Issues were not Adequately Addressed	<p>Management has requested the Government a report on consultations before the process of legalization of Annex areas is finalized. Management states that a Social Assessment, which was consulted on and dealt with indigenous peoples' issues, was carried out during Project preparation but it was not disclosed. Excerpts of the Assessment were summarized and annexed to the PAD as an Indigenous Peoples Strategy. This strategy, Management argues, contains "<i>key elements</i>" of an Indigenous Peoples Development Plan (IPDP) but "<i>no freestanding IPDP in accordance with OD 4.20 was prepared.</i>" During the preparation for Additional Financing for the Project, a social assessment and an IPDP were prepared and disclosed in December 2008. However, this 2008 assessment and IPDP, in Management's view, "do not meet the full requirements of OD 4.20" because they do not "address all the Indigenous Peoples in the Project, including the Requesters."</p>	<p>Panel finds flaw in studies underpinning Project, as they relate to Ngäbe people. This does not comply with OD 4.20.</p> <p>It is Panel's judgment, that more-inclusive consultations should have been carried out, and would likely have brought Annex Area issue to light.</p> <p>Panel finds that lack of stand-alone IPDP generated adverse consequences for Ngäbe people of Annex Areas. It is Panel's view that IPDP with adequate consultations and studies that inform IPDP could have identified Annex Areas in Bocas del Toro as critical issue requiring timely attention.</p>
Claim that Consultations in Delimiting the Annex Areas were Inadequate	<p>Management states that it agrees with the Second Requesters that the Annex areas, which are territories of the Comarca Ngöbe-Buglé (created in 1997) outside the Comarca's core area, were not delimited and shares their concerns about this problem. Management also agrees that the Project "<i>has not fully demonstrated the principle</i>" of informed participation and consultation with respect to the delimitation of these Annex areas. Management Response goes on to state that after the Second Requesters raised their concerns about consultation and land delimitation, in March 2008 a Bank mission visited nine of the 15 Annex areas to evaluate the work being carried out under the Project and was accompanied by the Ngöbe-Buglé General Chief (<i>Cacique</i>, in Spanish) and two Caciques for the Annex areas. The mission recognized the weaknesses in the consultation process and lack of knowledge among the people of the Indigenous Peoples Strategy. The mission</p>	<p>Panel observes polygons offered to Ngäbe communities in Annex Areas failed to meet expectations of communities.</p> <p>Panel finds methodology used for determining boundaries of Annex Areas included consultation with only main leaders—who may not have been "local"—but did not involve interested communities. Panel finds this methodology was not adequately participatory as required by OD 4.20.</p> <p>Interviews in field suggest that, if adequate polygons had been offered, many of Annex Areas now listed as having rejected Comarca membership would have preferred to be in Comarca because it would provide stronger land tenure security than they presently enjoy.</p>

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	made some recommendations to Project staff to correct these problems and, in this regard, asked them to prepare a Consultation Plan. Subsequent missions requested an action plan for other activities, including land tenure studies.	
Claim that a Comarca Boundary had been improperly restricted: the Case of Norteño		<p>It seems possible that boundary was changed during demarcation process and that community was not consulted. If so, change may have harmed their land tenure security by leaving them unprotected.</p> <p>Panel notes and appreciates recent efforts by Bank Management to gather further information on question, and stresses importance of both clarification and follow-up in line with Bank policy and relevant Project objectives.</p>
Claim that Project Failed to Address Encroachments in the Annex Areas	<p>Management states that it acknowledges the Second Requesters' concerns about the pressure on their territory by development activities such as tourism and hydroelectric projects. It adds that the Project was not involved in granting the concession for the Chan 75 dam, nor in the process leading to approval of the laws regulating tourism and other concessions. With respect to the above-mentioned Law 72, according to the Response, Management understands that the law does not supersede the 1997 law creating the Ngöbe- Buglé Comarca and does not apply to Annex areas, but it will ask the Government clarifications on this issue, as well as on the potential impacts of another law, Law 18 of 2009, on the status of certain Annex areas.</p>	<p>Seems clear that if issue of co-management had been properly addressed and delimitation of Annex Areas had occurred in timely way, Ngäbe would have been in better position to negotiate terms and conditions of a concession within land.</p> <p>Panel finds Management's actions following concerns raised by Requesters are consistent with requirements of policy on supervision.</p> <p>As matter of supervision, Panel notes absence of any earlier reference in supervision reports to potential risks for Project objectives by Chan 75 concession. This lapse in supervision is similar to that identified by Panel with respect to emerging developments and problems affecting Naso during Project implementation.</p>

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Supervision and Systemic Issues		
Adequacy of Project Supervision		<p>Panel commends Bank for financing Project aimed at securing territorial rights for Naso and Ngäbe, and acknowledges challenging environment in which Bank was pursuing objective. Panel finds, however, Management, in critical stages of Project, did not supervise in a way that was commensurate with challenges.</p> <p>Panel found critical events and risk factors affecting the local population were not reported accurately in middle years of Project supervision.</p> <p>Panel also noted important failure to analyze changing circumstances.</p> <p>In view of seriousness of threat to Naso as a people from encroachments on still unprotected lands, Panel finds that to be consistent with applicable policies supervision should have met higher standard.</p> <p>It is Panel's view that Management, as a matter of supervision, should have been more active and engaged to guide and verify Project actions, according to Bank policy, with regard to consultations and land demarcation with Ngäbe Annex Area communities.</p> <p>Panel finds supervision of Project did not promptly and adequately react to warnings and emerging issues during certain key phases of Project. This is not consistent with OP 13.05 on Project Supervision and related provisions of OD 4.20.</p> <p>Supervision visits did not include social specialist until March 2007. This does not comply with OD 4.20 on Indigenous Peoples.</p> <p>Management has taken many important actions since [February 2008 Supervision Mission] to review and address concerns raised in Requests. Panel notes intensity of</p>

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		supervision has increased since 2008. Panel finds this meets standards set forth in OP/BP 13.05 and OD 4.20.

ANNEX 2: Indigenous Peoples in Panama: The Ngäbe and the Naso¹⁹⁹

Professor Anthony Stocks

This annex provides a cultural context for the Panel's investigation into the specific allegations of the Ngäbe²⁰⁰ and Naso²⁰¹ Tjërdi Requesters. The comments are derived from the author's experience with indigenous groups in Central and South America, from online resources, and from anthropological literature.²⁰²

Questions most people have when they encounter indigenous people in the region involve the length of time they have been here, their history, their numbers, and how they are organized. These questions are addressed in this annex.

Origins

It is generally agreed that indigenous people came from Asia over the Bering land bridge beginning about 30,000 years ago. The oldest unassailable evidence of their presence in Central America shows a time depth of 11,000 years.²⁰³ Fluted stone points found in Panama are very similar to the Clovis points well-dated in the north at about 11,000 years.²⁰⁴ These points characterize a subsistence pattern of hunting and gathering. The most recent interpretations of Panamanian archaeology refer to a "tropical forest archaic" period²⁰⁵ of farming combined with hunting and gathering that began about 7,000 years before the present. An interesting variant of this lifestyle is Cerro Brujo in the wet lowlands of Bocas del Toro province, where farmers fallowed plots for many years and villages moved frequently to be near new fields because burning was not possible and yields from unburned fields tend to be low.²⁰⁶

Panama is home to eight indigenous ethno-linguistic groups today. While the indigenous groups of the modern Darien (Emberá and Wounaan) speak languages in the Chocó-Paezan family (more related to Colombian and Ecuadorian Pacific lowlands), the rest of Panama's indigenous peoples speak languages in the Chibchan family, which relates them both to the modern indigenous peoples of Costa Rica, Nicaragua, and the Caribbean region of Honduras and to many groups in today's highland Colombia. These groups include the Kuna, Ngäbe, NasoTjërdi,

¹⁹⁹ This Annex represents the view of the author, which are not necessarily those of the Inspection Panel.

²⁰⁰ . The common spelling in Panama of this group is "Ngobe," which is being replaced gradually by the linguistically more accurate "Ngäbe." The vowel in question (ä) may be formed by saying "oh" and unrounding the lips slightly. The "ng" is the last sound (of three) in "s-i-ng," a palatalized nasal. The group is also known in much of the literature in Panama as Guaymi.

²⁰¹ . The Naso Tjërdiare, also known in Panama and elsewhere as the Teribe. The pronunciation of "Tjër" is "Tyer" with the vowel slightly more lax than the Spanish "e."

²⁰² . For in-depth resources, see the Latin American Information Center operated by the University of Texas at <http://lanic.utexas.edu/la/region/anthropology/#panama>.

²⁰³ . Richard Cooke, "The Native Peoples of Central America During Precolumbian and Colonial Times," in *Central America: A Natural and Cultural History*, Anthony G. Coates, ed., pp. 137–76 (New Haven: Yale University Press, 1997).

²⁰⁴ . Ibid. p. 138.

²⁰⁵ . See, for example, the Barriles archaeological site for chronology (http://en.wikipedia.org/wiki/Barriles_Panama).

²⁰⁶ . Cooke, op. cit. p. 142.

Bribri, Buglé, and Bokotá. Studies of mitochondrial DNA (MtDNA)²⁰⁷ of the Ngäbe suggest that their emergence as an ethnic group with distinct genetic characteristics occurred about 6,800 years ago, or roughly consistent with the beginning of the Tropical Forest Archaic period. A similar time depth may be surmised for the Naso.

Population

Table A2.1 is an estimate based on the 2000 census, using a 2.5 percent per year population increase among indigenous peoples. While Panama's population as a whole is estimated to be increasing at 1.96 percent per year,²⁰⁸ indigenous populations grow at a much faster pace.²⁰⁹ The figure of 2.5 percent is a conservative estimate, particularly for the Ngäbe whose population growth rate may exceed 3 percent annually. The 2000 census separates indigenous populations according to their location at time of census. Panama has established five indigenous "comarcas," areas in which the political and administrative mechanisms are in the hands of specific indigenous ethno-linguistic groups generally supervised by the state.²¹⁰ The comarca form of land-holding is discussed below.

Table A2.1 Indigenous Populations in Panama

COMARCA	Kuna	Ngäbe	Buglé	Naso	Bokotá	Emberá	Wounaan	Bribri	Undeclared	TOTALS
Kuna Yala	40,059	37	0	1	0	50	12	3	1	40,163
Madungandi	6,415	nd	nd	nd	nd	nd	nd	nd	nd	6,415
Wargandi	2,053	nd	nd	nd	nd	nd	nd	nd	nd	2,053
Ngäbe-Buglé	136	184,601	6,893	27	420	3	6	9	0	192,095
Emberá-Wounaan	18	28	0	0	19	8,065	1,657	3	0	9,790
PROVINCE										
Bocas del Toro	767	53,519	3,936	3,315	117	111	1125	353	0	63,243
Chiriquí	405	25,488	7,943	472	183	140	772	372	162	35,937
Coclé	119	372	103	5	4	40	32	126	19	820
Colón	4,151	225	127	15	37	772	201	268	28	5,824
Darién	115	309	94	31	49	9,395	2,445	41	7	12,486
Herrera	190	131	62	7	3	43	10	24	1	471
Los Santos	72	80	16	3	1	7	15	14	7	215
Panamá	24,547	3,433	1,569	323	248	10,169	2,502	1,885	384	45,060
Veraguas	132	3,953	2,004	38	192	53	53	137	4	6,566
TOTALS	79,179	272,176	22,747	4,237	1,273	28,848	8,830	3,235	613	427,704

Source: Author.

Note: nd = No data. Estimated for 2010 using the 2000 census and a 2.5 percent per year population growth rate.

²⁰⁷. C. J. Kolman, E. Bermingham, R. Cooke, R. H. Ward, T. D. Arias, and F. Guionneau-Sinclair, "Reduced mtDNA Diversity in the Ngöbe Amerinds of Panama," *Genetics* 1995 (May) 140 (1): 275–83.

²⁰⁸. CIA Factbook. http://en.wikipedia.org/wiki/Demographics_of_Panama#Total_fertility_rate.

²⁰⁹. Kendra McSweeney and Shahna Arps, "Demographic Turnaround: The Rapid Growth of the Indigenous Populations in Lowland Latin America," *Latin American Research Review* 2005, 40 (1): 3–29.

²¹⁰. See chapter 1 for a contemporary description of the comarca.

Given the estimated population growth rates, the population of Panama (3,448,970)²¹¹ is now 12.4 percent indigenous, not the 10 percent widely quoted from old census data; the indigenous population is growing at a much faster rate than the rest of the population. Another statistic widely quoted in Government circles is that the total area of the indigenous comarca lands is 22 percent of the country's area, which is viewed as excessive by many officials. However, the Gini index of land concentration in Panama²¹² was .87 in 1990, the highest in Central America, which indicates that the issue is not quite so clear cut. The number indicates concentration of land ownership in a group much smaller than the indigenous population and much more concentrated than in the United States (US Gini Index for land = .74).

Economics and Ecology

Ngäbe and Naso Tjërdi people today are traditionally subsistence swidden²¹³ farmers who sell small quantities of surplus to local markets. Coastal Ngäbe populations add fishing to their repertoire. Some who are closer to markets attempt small-scale cash cropping of vegetables and root crops. As a practice, swidden farming has very little permanent impact on the land if adequate fallow periods are observed. However, cattle ranching is increasing at various scales, especially among the Ngäbe. Cattle ranching has grave impacts on the land and also has the tendency to develop what amounts to private property amid the collective holdings. Ngäbe women have also been increasingly involved in the production of handicrafts, principally traditional clothing, net bags, and jewelry. The Naso are just beginning to enter these markets. Additional sources of cash, important to both groups, involve the seasonal sale of labor to coffee plantations, ranchers, cash-crop farmers, or year-round to the banana company in Changuinola. Despite these sources of income, indigenous people are the poorest people in Panama as measured by income.

Prehistory Issues

What sociopolitical structures did the Ngäbe and the Naso Tjërdi have before the arrival of Europeans? Recent discoveries on Colón Island have indicated much more social complexity and ranking in the region than was understood in the past.²¹⁴ Between the complex civilizations of Meso-America and Peru lie what was known archaeologically as the “intermediate area,” which included some complex ranked societies such as the Colombian chiefdoms.

Panama has been well known for gold artifacts, but the “staggering wealth of Panamanian and Costa Rican chiefdoms” was not accompanied by the pyramids of Mayan and Central Mexican cultures.²¹⁵ The Caribbean coast area has been interpreted as inhabited by “segmentary

²¹¹. Projected from figures for 1996 at 1.96 percent per year growth.

²¹². <http://www.fao.org/economic/ess/world-census-of-agriculture/additional-international-comparison-tables-including-gini-coefficients/table-1-number-and-area-of-holdings-and-ginis-index-of-concentration-1990-round-of-agricultural-censuses/en/>

²¹³. Swiddens are multi-crop slash-and-burn plots that are cultivated for varying periods—depending on the difficulties associated with weeds—and then left fallow, again for varying periods depending on land pressure and the time it takes the secondary forest that grows back to shade out the grasses.

²¹⁴. Thomas Wake, a UCLA archaeologist, describes the archaeological site on Colón Island at <http://www.sscnet.ucla.edu/ioa/backdirt/winter03-04/sitio.html>.

²¹⁵. Cooke, op. cit., p.166.

societies,” tribal systems in which separate kin groups are not ranked and everyone is assumed to undertake much the same activities for subsistence. Social solidarity is maintained through kinship and reciprocities, especially in marriage exchanges. However, in Bocas del Toro, the Colón Island archaeological site, Sitio Drago,²¹⁶ indicates a much more complex system with mounds, trade goods, and ranking. Because the two ethnic groups remaining in the region today are the Naso Tjërdi and the Ngäbe, the question about their earlier history is left open. Columbus found Teribe on the islands of Bocas del Toro in 1502 and they were identified again by Coronado 62 years later. At that time they were widely dispersed from the Sixaola River to the Teribe River. However, the only indigenous group in Panama that clearly has maintained a ranking system is the Kuna, whose organizational traditions left them in good shape to confront both the Panamanian Government and the banana industry that took over the Bocas del Toro area in the early 20th century.²¹⁷ The Kuna probably constituted a complex chiefdom before the European invasion. Whether the Naso Tjërdi and Ngäbe were likewise organized remains a matter of connecting an archaeological culture to a living culture, a chancy assumption as many archaeologists will attest.

The fate of Panama’s indigenous people mirrors the circumstances in all the Americas. Within 80 years of contact in 1492, 89 percent of the indigenous people were dead of diseases, principally smallpox.²¹⁸ Most never saw a European.

Colonial History under the British

The Mosquito Kingdom, established by the British between the mid-17th century and the mid-19th century along the coasts of Central America, included the Bocas del Toro islands. The British set up a Miskitu King based in Bluefields, Nicaragua, and seem, from the evidence in Panama, to have bestowed the title to some allied groups as well. Thus, it is probable that the Naso Tjërdi were British allies, because they are the only group left in the Americas with the governing figure of a king. Additionally, their memory of kings extends back through 11 generations (thus, perhaps overlapping with the Miskitu occupation) and the first and fourth kings have arguably English names. Possibly their alliance was based on common enemies such as the Ngäbe. Because of their location, it was most probably the Ngäbe (or perhaps the Kuna) who prevented further expansion of the Mosquito Kingdom east of the Bocas del Toro islands and who most seriously threatened the Naso who inhabited both the mainland and possibly the islands. After the withdrawal of the British, however, all truces seem to have been negated and the Naso were assaulted on all sides. They took refuge in the canyons of the Teribe River.²¹⁹

Modern Organization and Land Holding

Most indigenous people in Panama live within political divisions called comarcas. The figure of the indigenous comarca as a way to hold land is unique in Latin America because it allows

²¹⁶. Wake, op. cit.

²¹⁷. Philippe Bourgeois, “Conjugated Oppression: Class and Ethnicity among Guaymí and Kuna Banana Workers” *American Ethnologist* 1998, 15 (2): 328–48.

²¹⁸. William Denevan, ed., *The Native Population of the Americas in 1492*, 2nd edition (Madison, WI: University of Wisconsin Press, 1992).

²¹⁹. Teobaldo Hernandez, 2009, PRONAT, Plan de Participación Indígena.

indigenous groups policy and administrative autonomy within a specific area as long as internal governance does not contravene the Panamanian Constitution. In some cases, as in the Kuna Yala Comarca, the comarca amounts to an indigenous territory. Governed by a “General Congress” that elects traditional leaders called “caciques,” the comarca sets the rules for governance through its “organic charter” (*carta orgánica*) and as a rule has political representation at all levels of government above it, including the National Assembly. Many would argue that the comarca laws of Panama provide more protection for indigenous lands and cultural autonomy than any other system in Latin America.²²⁰

Comarcas can differ markedly in their organization and function depending on the ethno-linguistic group involved. In some ways, the organization of a comarca seems mirrors organization outside the comarca. For example, Panama is divided politically into provinces, districts, and corregimientos. The oldest comarca, Kuna Yala, has three divisions called corregimientos,²²¹ which would indicate that the comarca is somehow parallel to a district within a province in the greater system. However, it is commonly stated in Panama that Kuna Yala is equivalent to a province and, indeed, the five existing comarcas are recorded in any listing of Panama’s political divisions, right along with the provinces. In the Kuna Yala Comarca, each corregimiento has a cacique and its own congress.²²² However, the comarca exercises much more independence than a district on the outside. Each of the three Kuna Yala corregimientos, for example, is entitled to a representative (*diputado*) in the National Assembly. Within Kuna Yala, political representation tends to bypass the corregimiento. Each corregimiento has a number of communities and each community, regardless of size, has its own representative in the General Congress of the Kuna Yala Comarca, which meets twice a year.

The Ngäbe-Buglé Comarca is organized differently from the Kuna Yala Comarca. The Ngäbe-Buglé Comarca has three “regions” defined by the three provinces (Veraguas, Chiriquí, and Bocas del Toro) that gave up land to the comarca. Each region has at least two “districts” and each district has a number of corregimientos, 58 in total. The Ngäbe-Buglé General Congress meets only every five years and it has one member for each 50 people (including non-indigenous peasants). The General Congress sets the conditions for the election of a Cacique General, but the plenary of the congress does not actually vote on the Cacique General. Rather, the Cacique General’s election requires a general vote of the entire comarca²²³ and the election is organized and administered by the congressional secretariat called the “Directiva.” The Directiva acts administratively during the times between General Congresses. The Directiva consists of familiar offices such as President, Vice President, and so on. The Directiva has the ability to call a meeting of leaders (*Dirigentes*) who must be accredited by the Directiva. How one qualifies as a Dirigente is left somewhat opaque to outsiders, but the group is larger than might be expected given the number of corregimientos. The organization seems to invite some confusion, although

²²⁰. Peter Herlihy, “Panama’s Quiet Revolution: Comarca Homelands and Indian Rights,” *Cultural Survival Quarterly* 1989, 13 (3): 17–24.

²²¹. A corregimiento within a comarca is often distinguished from a corregimiento outside by referring to it as a *corregimiento comarcal*. The *corregimiento comarcal* is governed by the internal mechanisms of the comarca, not the political system outside but exists within a province.

²²². To make matters even more complex, each Kuna island community has a congress every night to discuss daily happenings, resolve conflicts, and make policy.

²²³. Lic. Guillermo Jiménez Miranda, (no date), *Un Aporte a la Solución de las Crisis Comarcal*. (Document held by Panel.

everyone seems to agree that the Cacique General is the maximum leader (until a meeting of Dirigentes calls his leadership into question).

Each region of the Ngäbe-Buglé Comarca has a congress as well as a regional cacique. Each district within a region has a congress and a local cacique. These seven caciques are sometimes referred to as the “authorities” and the term *jefe* is sometimes heard to refer to any cacique. Election at all levels must be democratic according to people with knowledge of the system. In Law No. 10 of 1997, the following “traditional” authorities are recognized by the state:

1. The General Cacique
2. The regional caciques
3. The local caciques
4. The “immediate chief” (*jefe inmediato*)
5. The spokesperson for the community (*vocero*)

Governance issues are made even more complex because there are a number of “official,” as opposed to “traditional,” posts in the comarca as an attempt to relate to the political system of the state. Without going into detail, it is fair to say that a number of ambiguities in governance relate to this fact. More ambiguities are created by the frequent mention in the comarca’s organic charter of councils that include non-indigenous peasants (*campesinos*). Exactly what rights the campesinos enjoy in the comarca is not thoroughly explained in either the law that created the comarca or in its organic charter.

Law No. 10 of 1997, which created the Ngäbe-Buglé Comarca, made provisions for areas where populations of Ngäbe of over 300 people who lived separately from the comarca to become “Annex Areas.” The law identified 15 Annex Areas in Bocas del Toro and Changuinola districts by name, but without describing a specific polygon (boundaries) that would encompass them. The polygon was important because each Annex Area, once legalized, would become a corregimiento comarcal and thus relate politically and administratively to the comarca rather than to the district of the province in which they were located. Annex Areas were viewed by the traditional authorities negotiating the comarca boundaries as a way to protect Ngäbe lands outside the Ngäbe-Buglé Comarca when the prime objective of the Ngäbe was to finalize the polygon of the comarca and resistance was encountered from the state regarding ceding the coast and islands of Bocas del Toro province to the Ngäbe.²²⁴ Even in 1997, the lands inhabited by the Ngäbe were being threatened by colonists concessions, and rumors of expropriation. A Congress of the Annex Areas was formed to address the issue, but apparently it did not last. In 2010, a number of local informal congresses sprang up, but without formal support from the traditional leadership of the comarca.

The Naso Tjërdi still lack a comarca. A bill before the National Assembly in 2004 and again in 2005 that would have created a Naso Comarca failed to pass. The group is organized in a traditional way under a king, but seems to lack a thorough organic charter that would define how the king relates to the various Naso villages scattered along the Teribe River and around old banana plantations in Changuinola district. The most widely governing seems to be the Council

²²⁴. Notes, February 4, 2010, interview with (name on file), Ngäbe leader involved in demarcation.

of Village Leaders (*Consejo de Dirigentes*), which has both consulting and decision-making powers. The king also has an elected representative from each community. The state stepped in through Law No. 72 of 2008 referred to a corregimiento that included most of the Naso villages but not all their forested historical lands. The corregimiento has an alderman (*regidor*) and Naso communities have *corregidores* who work with the regidor, but the relationship between these “official” leaders and the various village traditional leaders is unclear. In at least one village, San San Druy, there is no agreement at all between the corregidor and the traditional local leader.²²⁵ The Council of Village Leaders includes the king, the council president and secretary, the king’s representative from each village, plus each community’s representative to the corregimiento. Each village also has an “assembly,” which is open to all, including representatives from any state institution.

The Problems of Tradition

At least some of the problems within the Ngäbe-Buglé Comarca and the Naso corregimiento are due to unclear statutes and competing spheres of authority. Other issues arise from the underlying organization of these and other indigenous peoples through kinship—problems that relate to old family hostilities and competing kin groups. Outsiders find it extremely difficult to penetrate these levels of politics without long residency and knowledge of the language. Even though the Naso are said to have been extremely acculturated to Euro-American cultural patterns by missionaries and the general lack of endogamic²²⁶ prescriptions, kinship still plays a large role in their society, and the interaction of kin loyalties and jealousies with the more formalized aspects of their politics probably plays a role equal to that within the Ngäbe communities. In 2005, at least some Naso had meetings, alleged by the government and the formally recognized king to lack “traditionalism,” and selected a competing king, an act that, regardless of any merit it may have had, has posed a severe challenge to the unity of the Naso voice in trying times. Similarly, political actions in the Ngäbe-Buglé Comarca, done outside their own organic charter, have threatened the position of the Cacique General. In both these cases, kinship and personal ambitions have put the leadership on uncertain footing. In a sense, the ambiguities and rivalries are part of a traditional system much older than the comarca.

The gradual long-term organizational achievements of Latin American indigenous people should never be undercut by outsiders, an act known as “ethnic divisionism,” which tends to work against any good the outside group may intend.

The Issue of Collective Land Ownership

Nearly all indigenous groups in the Americas prefer collective property over private property.²²⁷ Most contemporary indigenous groups in Latin America (and some in North America, such as the Shoshoni of Idaho and Nevada) have wealth-leveling mechanisms that tend to preserve a rough equality within the society. Many groups allow the exchange of material wealth for

²²⁵. Field Notes, February 9, 2010, San San Druy.

²²⁶. Endogamy is the practice of marrying within a defined social group. While the Kuna, for example, strongly discourage marriage with non-Kuna, the Naso seem relatively unconcerned with such practices today.

²²⁷. Philip Wearne, *The Return of the Indian: Conquest and Revival in the Americas* (Philadelphia: Temple University Press, 1996).

prestige through ritual systems that, in effect, tax better-off members to support public events, thereby gaining a reputation as generous people. Stinginess is a sin that may merit capital punishment²²⁸ in the philosophy of some groups because it is viewed as antisocial.

Private property undercuts social solidarity and is based on an economic system that encourages differential individual accumulation; indeed, the very point of life for many people in developed societies is private accumulation and these societies tolerate enormous wealth differences. The occasional philanthropist is viewed as somewhat eccentric. Social solidarity, such as it is, is maintained through larger scale politico-religious and economic rituals, including the rituals of high consumption. Violence based on extreme imbalances in material wealth is suppressed by the state through elaborate systems of laws, regulations, courts, and especially police and military presence.

Conversely, indigenous people depend for their survival as distinct ethno-linguistic groups on social solidarity gained through extensive systems of kinship and reciprocity between individuals and between groups. Collective property supports this philosophy by preventing or minimizing irrevocable accumulation of land, and it is typical of indigenous collective property laws that land cannot be sold or mortgaged. Individuals or families hold land in usufruct—they can derive profit or otherwise benefit from the land, but never own it. However, because indigenous groups are also embedded in monetary systems that encourage some level of individual accumulation, outsiders note a certain level of property transfer between members through individual-to-individual sale of usufruct rights rather than transfers that flow to the collective and hence to the new usufruct. Such transfers are generally not considered alienation by insiders as long as outsiders do not gain land rights by means of them.

The land tenure form known as “possession” is somewhat different. Possession is de facto occupation of state lands, abandoned private lands, or lands that have never been surveyed and added to the state’s holdings. The latter are generally called *baldios*. In the absence of a collective (which an “annex” would be), individuals who “possess” land can freely sell it either informally (with only a bill of sale) or formally (by converting the possession into property title and selling it). The Annex Areas of the Ngäbe-Buglé Comarca in Bocas del Toro are not yet a formal collective. Thus, the sale of possessions to outsiders is destructive to the social group seeking Annex Area status because it alienates land that would have gone to the collective. The interaction of a private property system with a traditional land tenure system that is not protected through formal titling or mechanisms—such as the comarca system—can be extremely dangerous to an indigenous group’s cultural survival. For example, when the Dawes Act in the United States converted indigenous reservation land into private individual property titles in 1887, indigenous people lost 75 percent of their land within 30 years through sales to outsiders and became viewed as an urban social problem, many of the people having been made homeless. The same happened after independence from Spain in South America when Simon Bolivar removed communal land from indigenous people of the Andes. Eventually the communal systems had to be restored.

²²⁸. This brings to mind such things as the “evil eye” that can kill and often results from envy. The idea that one should not have things that others lack fuels this belief. The Cocamilla of Peru have a concept of *mal de gente* (bad stemming from the people) that is used to explain the death of people who, for example, are known to be stingy.

**ANNEX 3: Progress Report on Management Action Plan, Dated November 4,
2009**

**PROGRESS REPORT ON MANAGEMENT'S ACTION PLAN INCLUDED
IN MANAGEMENT RESPONSE (DATED APRIL 20th, 2009) TO THE
REQUESTS FOR INSPECTION OF THE
PANAMA LAND ADMINISTRATION PROJECT (Loan No. 7045-PAN)**

On April 20th, 2009, Management presented to the Inspection Panel the Management Response, which included a detailed Action Plan, to two Requests for Inspection of the Panama Land Administration Project (Loan No. 7045-PAN). Management has prepared the following Progress Report to the Inspection Panel on such Action Plan.

EXECUTIVE SUMMARY

Management's Action Plan to address the concerns of the Naso and Ngöbe Requesters contains 15 actions, out of which six have been completed, four are partially completed or ongoing, and five have yet to be completed. Those actions under direct Management control were completed, including (i) carrying out an independent legal review of the implications of Art. 17 of Law 72 of 2008, (ii) following up with Government regarding the potential for re-introducing a new draft Naso Comarca bill, (iii) organizing training events for Project staff on social assessment processes and consultations, (iv) meeting with both groups of Requesters to summarize key points of the Management Action Plan, (v) providing direct feedback to both groups of Requesters on future Bank missions, and (vi) building national capacity related safeguard issues, particularly related to environmental management and Indigenous Peoples' rights. **In addition, Management has repeatedly stressed to Government authorities and Project staff the importance of completing those actions under their direct control. Management is monitoring this ongoing process.**

I. PROJECT STATUS

With a new Government administration in Panama in place since July 2009, the endorsement of PRONAT's work and continuation of Project activities was fairly smooth. Nevertheless, it took the new authorities and Project staff several weeks to act on critical pending Project issues. The Project ran out of operating funds shortly before the new administration was inaugurated on July 1st, 2009. The arrival of a new team and other transition issues, discussed in more detail below, made it difficult for the new Project team to follow up immediately with many of the recommendations of the agreements reached during the prior supervision missions, including those included in Management's Action Plan.

Management promptly engaged the new Government administration to address pressing issues of Project implementation, including Management's Action Plan (detailed in Section II below). At the Project level, Bank staff coordinated closely with the Project's counterparts to discuss Management's Action Plan, provide technical support, and follow-up on its implementation (during supervision missions on April 27-29, June 21-27, August 26-28, September 21-25, and October 6-8, and via videoconferences on June 24th, July 7th, and July 30th; see chronology below). In addition, the importance of attending to various pending Project issues was emphasized by senior Bank Management during a meeting with the new Minister of Finance on July 15th, 2009 and through a detailed follow-up letter dated July 28th, and again through a September 14th letter to the Minister of Finance.

Lack of adequate budgetary support to the Project (which affected the entire Bank portfolio in Panama) has severely hampered the Project team's ability to implement many of the activities agreed to in Management's Action Plan. During the July 21-27, 2009 supervision mission, through a Management letter to the Minister of Finance on July 28th, 2009, and again through a letter on September 14th, 2009, Management requested the new Government authorities to immediately address the Bank's two main concerns related to PRONAT, namely, the lack of adequate budgetary support to the Project and the regularization of Indigenous Peoples' lands, particularly those of the Naso and Ngöbe-Buglé. The September 14th, 2009 letter alerted Government of the possibility of suspension of loan disbursements by Management unless adequate resources were allocated to the Project. Finally, on September 28th, 2009

Government notified Management that an additional \$4.4 million had been allocated to the Project.

During the October 6-8, 2009 supervision mission, Government authorities assured Bank staff that these additional funds were already readily available for use by the Project. Moreover, an action plan on the use of these resources has been submitted to the Bank and is currently under review. This plan includes budgetary allocations for the critical Indigenous Peoples' consultation and mediation activities agreed to under Management's Action Plan.

In addition, Management has followed up with other important developments which, although not directly related to the Project, affect its implementation. These are summarized in Annex 1. For a chronology of key events since April 20th, 2009, see table in Annex 2.

Status of Management's Action Plan

Management's Action Plan to address the concerns of the Naso and Ngäbe Requesters contains 15 actions, out of which six have been completed, four are partially completed or ongoing, and five have yet to be completed. The specific actions taken in each case are detailed below.

Lack of Stand-alone Indigenous Peoples' Development Plan (IPDP)

Although an IPDP is ready, Government has not yet submitted to the Bank. Government has agreed to complete the related consultations with key stakeholder groups by December 15th, 2009. During a June 2009 supervision mission, Bank staff made specific recommendations for the preparation of an IPDP, which were reiterated to the new Project team (including a new person responsible for the Indigenous Peoples' subcomponent) throughout July, and particularly in two videoconferences on July 7th and 30th, 2009. On August 4th, 2009 a draft IPDP was submitted to the Bank; detailed comments were sent on the same day. However, the project team did not submit a revised version of the IPDP as agreed. In addition to the repeated reminders by Bank staff at a technical level, the importance of completing this document was emphasized by senior Bank Management during a meeting with the new Minister of Finance on July 15th, 2009 and through the July 28th letter to the Minister. This issue was also stressed during the September supervision mission, when a series of actions were agreed to (detailed in a matrix summarizing the mission's recommendations). Finally, during the October 6 - 8, 2009 Bank supervision mission, a revised version of the IPDP was shared with Bank staff by the project team. It reflected most of the comments made in August. Government has not yet submitted the final version to the Bank for our consideration.

Government has agreed to allocate sufficient resources to carry out IPDP consultations with key stakeholder groups throughout November and early December, 2009. During the October 6-8, 2009 Bank supervision mission, it was agreed that IPDP consultation activities would be financed out of the \$4.4 million additional budget recently allocated to the Project. Bank staff will continue to monitor these activities through the end of the year.

Aspirations of Naso People regarding a Naso Comarca remain unfulfilled

On March 18th, 2009, Management requested that the Government not approve the draft Charter (*Carta Orgánica*) mandated by Art. 17 of Law 72 of 2008. In response, the Government indicated on April 2nd, 2009 its agreement to abstain from approving the

charter until it had a chance to discuss its contents with the Bank. Management looks forward to this discussion if and when the new Government administration considers the possibility of moving ahead with the drafting of the Charter. In response to a suggestion by Bank staff during the last supervision mission on October 7th, 2009, it was agreed that in the near future the Project Coordination Unit (PCU) would call for a meeting of the Project Operational Technical Committee (CTO) to discuss the Naso concerns regarding their territorial claims, as well as the need to define a broader indigenous peoples policy by the new Government administration.

Management has declared ineligible for financing under Loan 7045-PA those expenses related to the drafting of the Charter mandated by Art. 17 of Law 72 of 2008. After verifying that inclusion of Art. 17 of Law 72 of 2008 and the preparation of the draft Charter (*Carta Orgánica*) were not adequately consulted with the Naso, Management followed up with its March 18th, 2009 notification to Government that Loan proceeds not be used for activities related to the draft Charter. Consistent with this approach, Management sent on May 26th, 2009 a letter to Government declaring such expenditures ineligible for financing under Loan 7045-PA.

Management commissioned an independent legal review of the implications of Art. 17 of Law 72 of 2008 which concluded this Article does not preclude the future creation of a Naso Comarca by way of separate law as was originally intended by the Project. Moreover, considering other legal provisions currently in force in the country, the review noted that implementation of this Article could be problematic. In fact, in May 2009 the Naso Requesters informed Bank staff that they had filed a complaint with the country's Supreme Court challenging the constitutionality of this Article. The Court has not yet ruled on this case.

Management has continued to impress upon Government authorities and Project staff the need to promote mediation between the two Naso factions, led by Tito Santana and Valentín Santana, respectively. In addition to the repeated reminders by Bank staff at a technical level (with the previous and new administration), the importance of continued Project engagement in Naso mediation efforts was emphasized by senior Bank Management during a meeting with the new Minister of Finance on July 15th, 2009, through a July 28th letter to the Minister, and again through a letter on September 14th, 2009.

Despite interventions by both Bank staff and PRONAT staff, mediation efforts have not resolved the differences between the two Naso factions. During the April 27–29, 2009 supervision mission, Bank staff met separately with both Tito Santana and Valentín Santana and the Requesters. During the June 21–27 supervision mission, Bank staff were informed by PRONAT staff that the *Coordinadora Nacional de los Pueblos Indígenas de Panamá* (National Coordinating Agency of Panama's Indigenous Peoples, COONAPIP) wanted to organize a meeting in San San on July 31st, 2009 to discuss the Naso conflict. Bank staff stressed it was important for the Project to support this event, considering the importance that mediation efforts play in bringing about the consolidation of the Naso territory. On July 9th, 2009, Bank staff met with representatives of COONAPIP in response to their offer to mediate in the Naso conflict, and recommended that they submit a mediation proposal to PRONAT. Unfortunately, the initiative did not progress. On August 26th, the new Project team (with the presence of Bank staff) met separately with both Naso factions. PRONAT has also suggested the possibility of having new elections among the Naso as a way to break the current impasse. Although Panama's Electoral

Tribunal has agreed to carry out Naso elections, following traditional customs, which include voting rights to people aged 15 and older, the two factions have not agreed to hold a new election. **Management continues to encourage Government authorities and Project staff to use Project resources to promote mediation and find a solution to the concerns of the Naso.** During the October 6-8 supervision mission, it was agreed that the Project would contact COONAPIP to evaluate the possibility of a mediation effort, financed by PRONAT, given that funding is now available.

Management has impressed upon the new Government authorities the Bank's support for a reconsideration of Naso Comarca Bill. At the technical level, this issue has been repeatedly raised by Bank staff during the last five supervision missions. It was explicitly raised by senior Bank Management during a meeting with the new Minister of Finance on July 15th, 2009 and followed up by the September 14th, 2009 letter to the Minister. Moreover, at a meeting between Bank and PRONAT staff, it was agreed that the Project would promote a meeting with the new Ministers of Justice and Finance to discuss the Project's role in addressing the issue of a Naso Comarca. Finally, as noted above, during the last supervision mission in October 2009, it was agreed that PRONAT would convene a meeting of the CTO (which includes the Indigenous Policy Directorate) to discuss Naso issues, including the prospects of a new Naso Comarca bill, as well as the need to define a broader indigenous peoples policy for the country.

Concerns among the Ngöbe-Buglé about inadequate delimitation of Annex Areas

During the April 27-29, 2009 supervision mission, Bank staff met with the Ngöbe Requesters and reported back to them on Management's Action Plan. Bank staff also met with Maximo Saldaña, the highest traditional Ngöbe authority (*Cacique General*), in response to his direct request to the Bank on April 24th, 2009 that PRONAT complete as soon as possible the demarcation of the main area, including the Annex Areas as defined in Law 10 of 1997, of the Ngöbe-Buglé Comarca.

On April 7th, 2009 Management asked Government to clarify the implications of Law 72 of 2008 and Law 18 of 2009 on Project implementation in Annex Areas of the Ngöbe-Buglé Comarca. Government carried out a legal assessment in this regard and, in June 2009, **Government reported back to Management that these laws did not affect the definition of Annex Areas which remained regulated by Law 10 of 1997 that created the Ngöbe-Buglé Comarca.** Management has attempted twice to meet the Ngöbe Requesters again to report back directly to them about the implications of these laws on Annex Areas. Bank and Project staff attempted unsuccessfully to meet with the Ngöbe Requesters during the August 26-28, 2009 supervision mission. Bank staff wrote to the Ngöbe Requesters again on October 2nd, 2009 requesting a new meeting, but to date they have not responded. **Management will continue to reach out to the Ngöbe Requesters and attempt to address their concerns about Project implementation in Annex Areas.**

Management has received assurances from Project staff that the delimitation of Annex Areas has included the broader territory including *trabajaderos*, but Government has not yet submitted to Management a detailed report on the Project's activities and consultations in Annex Areas of the Ngöbe-Buglé Comarca. Despite repeated Management requests for reports on the consultations and field activities in the Annex Areas (April 7th, 2009 letter to Minister of Finance, May and June, Bank supervision missions, senior Bank Management

meeting with new Minister of Finance on July 15th, 2009, video-conferences in July and August, September and October supervision missions), Management has not received a full report from Government on these issues. Nevertheless, in a July 28th, 2009 letter to the new Minister of Finance, Management recommended that the Project (a) increase its efforts to address the territorial concerns of Ngöbe-Buglé Annex Areas residents and (b) stop the land regularization activities being carried out by private contractors working in regions near the Ngöbe-Buglé Annex Areas until the residents of these areas have been adequately consulted and their concerns have been incorporated in the land regularization process. On August 27th, 2009, at the request of its *Cacique* (Alfredo Jimenez), Bank staff visited the community of Salt Creek, which is part of the 15 Annex Areas of the Ngöbe-Buglé *Comarca*. The *Cacique* and other community members expressed their satisfaction with the delimitation of their Annex Area by PRONAT and urged that the demarcation and regularization of their area be completed as soon as possible. Due to security concerns, Bank staff have not been able to visit more Annex Areas. During the October 6-8 supervision mission, Bank staff were informed that all contracting firms had stopped field activities and were given until October 30th, 2009 to submit their deliverables. **Management intends to review these deliverables in detail and declare as ineligible for funding by Loan 7045-PA any activities which resulted from inadequate consultations with all stakeholders. Moreover, provided security conditions allow it, Management intends to visit Annex Areas project sites during its next supervision mission in November 2009.**

Concerns over inadequate consultations in the Project

Management continues to impress upon Government authorities and Project staff the importance of adequate consultations with Indigenous Peoples during project implementation, and to integrate the recommendations made by Bank staff following the March 2008 field visits (reiterated during videoconferences of July 7th and July 30th, 2009). Similarly, during the September 21-25, 2009 supervision mission, it was agreed that PRONAT would prepare a report on the consultation and mediation process carried out in the Naso territory. PRONAT has recently submitted to the Bank some information related to the consultations in Ngöbe Annex Areas which is currently under review.

Management's view is that Project staff remain committed to using Project resources to promote mediation efforts between the two Naso factions. Management will continue to monitor these efforts in the coming weeks.

Strengthened Project capacity to address Safeguard issues

A comprehensive three-day training workshop on Bank safeguard policies was carried out in Panama during September 21-23, 2009 with participation of relevant PRONAT staff and other key stakeholders. On day four, there was a special session with all of PRONAT staff to go over once more through all the critical safeguard issues related to the Project, where it needed strengthening, and how to go about implementing remedial actions. A representative of the Ministry of Finance also attended this special training session.

Concern among Requesters that Bank has not been responsive

As noted in paras. 13 and 15 above, in late April, 2009 Bank staff met with the Naso Requesters and the Ngöbe Requesters and summarized the key points in Management's Action Plan. Bank staff met again with the Naso Requesters in Changuinola, Bocas del Toro Province, on August 26th, 2009 and, separately, also with the Tito Santana faction. A follow-up

meeting with the Ngöbe Requesters has not been possible. **Provided security considerations allow for it, Management will continue to attempt to meet with both groups of Requesters and their constituents for the remainder of Project implementation to provide direct feedback about Bank supervision missions and Bank efforts to direct Project activities in a direction that addresses their concerns.**

Concerns about poverty and marginalization of Indigenous Peoples

Management has explicitly impressed upon the new Government authorities the importance that the Bank attaches to addressing Indigenous Peoples' development issues. In addition to the technical discussions at the Project level, these issues were discussed with the new Minister of Finance during his meeting with senior Bank Management on July 15th, 2009 and will be further elaborated in the context of the upcoming Country Partnership Strategy (CPS) discussions. Government has expressed an interest in seeking Bank support for analytical work on Indigenous Peoples and poverty. In August, 2009, the Bank joined a recently-established United Nations working group working on Indigenous Peoples issues. More recently, Management is encouraged by the recent agreement by PRONAT's team to convene a meeting of the CTO to discuss the need for the new Government administration to define a broad Indigenous Peoples policy for the country. **Management looks forward to a constructive dialogue with Government on this front.**

Status of Management's Action Plan

ISSUES AND CONCERNS, WITH CURRENT AND PROPOSED ACTIONS	STATUS and TIMELINE
Lack of stand-alone Indigenous Peoples' Development Plan (IPDP)	
1. Finalize IPDP, including consultations with key stakeholder groups.	Draft agreed to and completed. Only awaiting formal submission. Consultations planned for November and December 2009
2. Disseminate IPDP through consultations, in-country web sites, and World Bank Info-Shop.	To be completed by December 2009
Naso Comarca Bill was not approved by the National Assembly, and Article 17 in the Ley de Tierras Colectivas does not meet the aspirations of the Naso people	
3. Clarify implications of Article 17 of Law 72 of 2008, and support further mediation and consultations among the Naso.	Independent legal review completed. Mediation efforts continue.
4. Follow up with Government regarding potential for reintroduction of new draft <i>Comarca</i> Bill, with offer to support consultations and other work within the scope of the Project.	Completed. Bank's support for reintroduction of <i>Comarca</i> Bill has been raised several times with new Government. Monitoring continues.
Concern among Ngöbe-Buglé that the delimitation of Annex Areas is inadequate	
5. Clarify and report to Requesters on the implications of Law 72 of 2008 and Law 18 of 2009 regarding Annex Areas.	Clarifications have been received, but unable to meet with Ngöbe Requesters a second time.

ISSUES AND CONCERNS, WITH CURRENT AND PROPOSED ACTIONS	STATUS and TIMELINE
6. Verify that delimitation includes the broader territory including <i>trabajaderos</i> .	Project has given assurances to this effect, but due to security concerns, unable to verify <i>in-situ</i> . Monitoring continues.
Concerns over inadequate consultations in the Project	
7. Verify improved consultations regarding delimitation of Annex Areas among Ngöbe-Buglé as per previous supervision recommendations; support further strengthening as required.	Government submitted report to Bank, under review. Monitoring continues.
8. Continue to support efforts to mediate between the two Naso factions.	Ongoing. Mediation efforts continue.
Need for strengthened Project capacity to implement recommendations from Social Assessment, consultation framework, and IPDP	
9. Organize training event(s) for Project staff and national resource persons on social assessment processes including consultations.	Completed.
Concern among Requesters that the Bank has not been sufficiently responsive	
10. Summarize key points in Management Response and Action Plan related to the Requests for Inspection, and offer to meet and discuss follow-up actions.	Completed, offers to meet again continue.
11. Provide direct feedback about previous and future missions and interactions.	Completed, with both groups of Requesters. However, unable to meet Ngöbe Requesters a second time.
12. Continue to interact with both Tito Santana and Valentín Santana and their constituencies, as well as different groups among the Ngöbe-Buglé.	Ongoing. Bank staff met with both Requesters, will continue to seek meetings as required until December 2009.
Overall concerns about poverty and marginalization of Indigenous Peoples, and pressures on their resources	
13. Continued country level dialogue to strengthen attention to Indigenous Peoples' rights in the Bank's portfolio.	Ongoing. Has been addressed with new Government administration in several contexts.
14. National capacity building on international good practice standards related to safeguards, in particular environmental management and Indigenous Peoples' rights.	Completed.
15. Offer to assist Government to develop more sustainable and equitable solutions for Indigenous Peoples.	Ongoing. New Government interested in Bank support for analytical work on IP issues. Project to convene meeting to discuss broad national policy on IP issues.

Future Actions

Management reaffirms its commitment to work with Government in the implementation of Management's Action Plan, seek meetings with the Naso and Ngöbe Requesters, and

monitor closely the satisfactory completion of remaining Project activities by December 31st, 2009. To these ends, Management intends to carry out the following tasks:

- Continue to seek meetings with Naso Requesters, promote mediation efforts between both Naso factions, and promote the use of PRONAT resources in seeking a resolution to the conflict between Naso communities and the firm Ganadera Bocas.
- Follow up with Government on the consultations for the IPDP and the Ngöbe Annex Areas
- Provided security considerations allow it, verify *in-situ* the quality and extent of consultations in Annex Areas and that their delimitation includes *trabajaderos*.
- Follow up with Government on the proposed meeting by the PRONAT's CTO to discuss (a) prospects for a Naso Comarca and (b) the definition of a broad Indigenous Peoples' Policy for the new Government.
- Continue to offer Bank technical assistance and support in discussing socio economic development and social inclusion issues for Indigenous Peoples in Panama.
- As part of the requirements for Project closure, Management will request Government to submit to the Bank a detailed project evaluation report and a plan describing:

Its plans to ensure the sustainability of the investments made under the project, including the institutional future of PRONAT. (For example, creation of a Vice-Ministry of Lands is currently under consideration.)

Government's strong interest in rationalizing the Project's operational structure, streamlining its administrative procedures, and reducing implementation bottlenecks.

Government's plans regarding the satisfactory completion of those activities related to the demarcation of Ngöbe-Buglé Comarca Annex Areas, making use of the provisions and consultation requirements included in the revised Indigenous Peoples Development Plan (IPDP).

Government's regarding actions to achieve full consensus between the two Naso factions to determine the modality for titling the Naso territory.

Beyond the scope and time frame of the Project, Management will raise the interests of Indigenous Peoples in its future country dialogue. Management and the new Government Administration recently initiated the discussion of the new Country Partnership Strategy for the Republic of Panama (CPS). A policy dialogue on the welfare of Indigenous Peoples is part of this process and is complemented by the fact that other Bank supported programs in sectors such as human development and agriculture also are directed at Indigenous Groups. These operations, as well as the Bank's continued country dialogue in other areas such as, for example, the recently completed Country Environmental Assessment, afford a platform for sustained dialogue on the country's Indigenous Peoples' policies.

Annex 1

Management has been following up on some developments in Panama which, although not directly related to the Project, affect its implementation. There have been important developments regarding two conflicts in Bocas del Toro involving Naso and Ngöbe communities.

Conflicts in Naso areas

A conflict over limits between the cattle ranching company Ganadera Bocas SA and Naso populations from San Drudy resulted in the eviction on March 30, 2009 of Naso families from a parcel of land that—according to the High Level Presidential Commission created to deal with his issue—belongs to Ganadera Bocas. In response to the Government's action, in September 2009, the Nasos established a camp in front of the Cathedral Plaza of San Felipe. It was subsequently dismantled by police units under the direction of the Ministry of Government and Justice. The Government has publicly indicated that the Naso are invading private property. Management is following up on this issue closely and has requested PRONAT to prepare a detailed report on the conflict and the activities carried out to this date to resolve it. During the October 6-8 supervision mission, it was agreed that the Project would call for a CTO meeting in the near future to discuss possible actions to find a resolution of this conflict.

Conflicts in Ngöbe areas

A 15-day march was organized in September 2009 by Ngöbe-Buglé indigenous groups to protest against the concessions for hydroelectric projects in the Ngöbe territory. On October 8th, 2009, representatives of the Ngöbe communities of Charco La Pava, Valle del Rey and Changuinola Arriba, the Government, and the company AES Changuinola signed a joint declaration through which they agreed to guarantee the construction of the Changuinola I hydroelectric project in the province of Bocas del Toro. Despite this agreement, the Ngöbe communities remain concerned about this hydroelectric project. On November 2nd, 2009 the Inter-American Commission on Human Rights (IACHR) held a hearing on this issue. Back in June, 2009, the IACHR granted precautionary measures for Ngöbe communities along the Changuinola River which the petitioners argue have not been implemented by Government. A friendly agreement process among the three parties (Government, the company, and the Ngöbe communities) is under way.

Annex 2
Chronology of key events since April 20th, 2009

VC Bank staff with Ngöbe Cacique General, Máximo Saldaña	April 21, 2009
Letter from Máximo Saldaña to Bank requesting completion of demarcation of Ngöbe-Buglé Comarca, including Annex Areas	April 24, 2009
Supervision mission, meetings with Naso Requesters and Ngöbe Requesters	April 27 to 29, 2009
General Elections in Panama	May 3, 2009
Panama Country Portfolio Review, including discussions on indigenous peoples issues affecting Project implementation.	May 13, 2009
Valentín Santana (Naso) files demand of unconstitutionality of Art. 17 of Law 72 of 2008	May 13, 2009
Management letter declaring ineligibility of expenditures related to preparation of draft Charter	May 26, 2009
Supervision mission	June 21 to 27, 2009
Inauguration of new Government administration	July 1, 2009
COONAPIP sends letter to Bank requesting meeting to address mediation in Naso conflict	July 6, 2009
Meeting of Bank staff with new PRONAT team (videoconference)	July 7, 2009
Meeting of Bank staff with COONAPIP (VC)	July 9, 2009
Bank RVP and CD meet with new Minister of Finance	July 15, 2009
Management letter to new Minister of Finance	July 28, 2009
Meeting of Bank staff with PRONAT team (VC)	July 30, 2009
PRONAT sends Bank revised IPDP, Bank sends comment the same day	August 3, 2009
Supervision mission, meetings with both Naso factions in Changuinola; Bank staff attempt to meet Ngöbe Requesters, but meeting does not take place	August 26 to 28, 2009
Management letter alerting of possible suspension of disbursements	September 14, 2009

Safeguards workshop in Panama	September 21 to 25, 2009
Bank staff meet with MEF and PRONAT representatives to follow up on Sep 14 letter	September 25, 2009
Government informs Bank allocation of \$4.4 additional budget for Project	September 28, 2009
Bank letter to Ngöbe Requesters requesting follow-up meeting	October 2, 2009
Supervision mission, introduction of new TTL	October 6 to 8, 2009
Bank and PRONAT agree on next supervision, Nov 16 to 20, including field visits and meetings with Naso and Ngöbe Requesters	October 29, 2009

ANNEX 4: Biographies

Panel Members

Mr. Roberto Lenton (Argentina) was appointed to the Panel in September 2007 and became its chair in November 2009. He earned a civil engineering degree from the University of Buenos Aires and a Ph.D. from the Massachusetts Institute of Technology (MIT). A specialist in water resources and sustainable development with more than 30 years of international experience in the field, he serves as chair of the Water Supply and Sanitation Collaborative Council and member of the board of directors of WaterAid America, and served until July 2009 as chair of the technical committee of the Global Water Partnership. Mr. Lenton is a coauthor of *Applied Water Resources Systems* and coeditor of “Integrated Water Resources Management in Practice,” and a lead author of *Health, Dignity and Development: What Will it Take?*, the final report of the United Nations Millennium Project Task Force on Water and Sanitation, which he cochaired. Earlier, Mr. Lenton was director of the Sustainable Energy and Environment Division of the United Nations Development Programme in New York, director general of the International Water Management Institute in Sri Lanka, and program officer in the Rural Poverty and Resources program of the Ford Foundation in New Delhi and New York. He has served as adjunct professor in the School of International and Public Affairs at Columbia University and assistant professor of civil and environmental engineering at MIT.

Mr. Alf Jerve (Norway) was appointed to the Panel in November 2008. Mr. Jerve brings to the Panel close to three decades of work in the field of development. A social anthropologist by training, he has been engaged in a wide range of development activities, including extensive field research in Africa and Asia. Among his assignments was a three-year posting to Tanzania with the Norwegian Agency for Development Cooperation as coordinator of a rural development program. From 1993 to 1995, he was responsible for resettlement and rehabilitation issues with projects in Bangladesh during an assignment with the World Bank. In 1995, he became Assistant Director, and served as Director in 2005 and 2006, at the Christian Michelsen Institute in Norway, an internationally recognized development research institution, where he has also devoted his energies and expertise to research and analysis of a wide variety of policy and program issues affecting people in developing countries. Over the years, Mr. Jerve has led and participated in numerous independent evaluations commissioned by bilateral and multilateral development agencies, and served as a member of the Roster of Experts for the Asian Development Bank’s Inspection Function. He earned his magister degree in social anthropology from the University of Bergen, and his bachelor’s degree is in the areas of environmental science and biology. His publications have focused on rural development, decentralization, and poverty reduction and most recently on issues of ownership in development aid cooperation.

Ms. Eimi Watanabe (Japan) was appointed to the Inspection Panel on November 1, 2009. Throughout her career, Ms. Watanabe has demonstrated a commitment to applying analytical as well as participatory approaches to development programs, and a strong track record of working collaboratively with civil society organizations, governments, and other development organizations. A sociologist by training, she has been involved in a wide range of substantive areas, at both the project and policy levels, including poverty reduction, governance, gender,

child health and nutrition, capacity development, environment, and international migration. Ms. Watanabe earned an M.Sc. and Ph.D. from the London School of Economics and received a B.A. in sociology from the International Christian University in Tokyo. From 1998 to 2001, she served as assistant secretary general and director of the United Nations Development Programme (UNDP) Bureau for Development Policy. Prior to that, she was UN resident coordinator and UNDP resident representative in Bangladesh, and UNICEF Representative in India. Recently she has served as a member of the Strategic and Audit Advisory Committee of the United Nations Office for Project Services. Ms. Watanabe brings to the Panel more than 30 years of experience in the field of development.

Expert Consultant

Anthony Stocks, Professor Emeritus at Idaho State University, received a Ph.D. in Social Anthropology and Latin American Studies in 1979 from the University of Florida where he studied with the Amazonist, Charles Wagley. Specializing in the human ecology of the tropics, he has worked with indigenous cultures of the Upper Amazon and Central America since 1976. His interests have gradually focused on fostering the material conditions necessary for the cultural survival of tropical forest peoples. His work over the past 20 years has focused on providing technical assistance to indigenous groups for mapping, delimitation, demarcation and zoning of indigenous lands, as well as demographic/economic self studies that support land tenure security and biodiversity conservation.