Pathways for Recognition: Indigenous Land Rights in Panamá

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Claremont McKenna College

Pathways for Recognition: Indigenous Land Rights in Panamá

submitted to
Professor William Ascher

by
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Abstract

Indigenous communities in Panamá face the same challenge that many Indigenous communities experience around the globe: a lack of recognition of their land rights. Over the last several decades, the Panamanian government has developed policies and ratified international agreements that recognize Indigenous rights. The comarcas that institutionalize these rights have had some success. However, despite a seemingly progressive framework for recognition, Indigenous communities across the country continuously have their rights violated by conservation projects and resource extraction efforts in the name of economic development. The Panamanian government crafts recognition policies using loopholes, exceptions, and ambiguous language that allow for them to become unfulfilled mandates. While Indigenous communities in Panamá are faced with significant barriers to obtaining full recognition of their rights, they can use elections, national and international litigation, activism, and external support to expand and advance social movements fighting for recognition.
Table of Contents

Chapter 1: Introduction ................................................................. 4
Exploitation and Exclusion .............................................................. 4
  Generational Wealth ............................................................... 5
Economic Interests and Unfulfilled Mandates .................................... 6
Environmental Considerations and Conflicts .................................... 7
  Indigenous Health and the Environment ....................................... 7
  Stereotypes and Romanticization ............................................... 8
Reactions to Violations of Rights .................................................. 9
Chapter 2: Background ............................................................... 12
  Theories of Indigenous Rights .................................................... 12
    Granting vs. Recognizing .......................................................... 14
    Free, Prior, and Informed Consent ............................................. 14
    Cultural Property ................................................................. 15
  International Standards and Agreements .................................... 17
Latin America ................................................................................. 19
  Extraction of Natural Resources .................................................. 19
  Models of Recognition ............................................................... 20
Panamá .......................................................................................... 20
Chapter 3: Comarcas and Conflict ................................................ 23
  Panamanian Comarcas ............................................................... 23
    The First Steps in Recognition ................................................ 23
    Expansion of Comarcas and Other Recognitions ......................... 24
    Water and Mineral Rights ......................................................... 26
  Protected Areas and Conservation .............................................. 27
Chapter 4: Creating Collective Land Titles ..................................... 29
  Establishing a Comarca .............................................................. 29
    Violations Call for Recognition ............................................... 29
  Collective Land Titles Outside of a Comarca ................................ 30
  The Role of Political Capital ....................................................... 32
    Adopting Formal Structures ..................................................... 33
Chapter 5: A Comparative Perspective .......................................... 35
  Bolivia ....................................................................................... 35
  Colombia ................................................................................... 36
  Costa Rica .................................................................................. 38
  Chile ........................................................................................... 38
  Indonesia .................................................................................... 41
Chapter 6: Pathways to Recognition ............................................... 43
  Loopholes and Enforcement ....................................................... 43
  Elections ..................................................................................... 43
  National and International Litigation .......................................... 44
  Activism ...................................................................................... 45
  External Support .......................................................................... 46
  Recommendations and Insights .................................................. 47
References ..................................................................................... 49
Chapter 1: Introduction

Indigenous land rights are a global issue that operate within the intersection of poverty-relief, conservation, climate change, land and resource rights, and culture. International conventions and agreements have outlined why and how countries should develop policies that recognize resource and user rights of Indigenous communities and have created a standard and expectation that these rights are formally recognized by national and local governments. Across the globe, governments are developing policies to recognize the rights of Indigenous groups, at least in some capacity. The recognition of these rights is increasingly being discussed as a method of decreasing high rates of poverty and poor health, and increasing other important indicators of well-being in Indigenous communities.

Exploitation and Exclusion

Centuries of genocide and colonization have physically and systemically restricted the rights of many Indigenous groups including access to and control over their ancestral lands (Short, 2014). Many Indigenous groups engage or engaged in subsistence practices and utilize ecosystem services and natural resources from the land that their ancestors lived on (Hunn, 1999). While some Indigenous groups have been able to maintain their land practices, many have been forcibly removed from their land, have limited access to it, or do not have adequate representation in the decision-making processes regarding what occurs on the land. Areas where Indigenous people live or have rights to are often vulnerable to pollution and extraction as governments and companies take advantage of communities that do not have substantial political power (Fernández-Llamaza at al., 2020).
Generational Wealth

While some Indigenous communities are impacted because subsistence-based livelihoods are threatened by environmental degradation and exploitation, there are many Indigenous groups that do not rely on subsistence practices. These groups are still negatively impacted when their land rights are unrecognized or infringed upon. They do not have access to opportunities to financially benefit from the user and resource rights. Not only are communities limited from these opportunities currently, but exclusion from land ownership and user rights for centuries has restricted the ability of families and communities to build generational wealth.

As a result of being removed and restricted from those resources, as well as having them exploited and contaminated, many communities face poverty and health threats. Globally, when compared with non-Indigenous people, Indigenous people have a lower standard of living and are at a higher risk for early death and disease. They are less likely to have access to safe drinking water and nutrition (The World Bank, 2024a). “Indigenous peoples worldwide continue by and large to be disadvantaged in every area of life”, as stated by the United Nations Working Group for Indigenous Populations (UN Subcomission, 1993).

Recognizing the rights of Indigenous groups provides opportunities for people to manage the resources they have rights to, use subsistence practices, and build financial capital, all mechanisms for poverty alleviation (Macfadyen and Corcoran, 2002). With access to natural resources through property and resource rights, Indigenous communities that face high rates of poverty, hunger, poor health, etc. can improve their wellbeing. To minimize the barriers that Indigenous communities face when exercising their rights, national and local governments have established agreements and laws that recognize the land rights of Indigenous people (Roldán Ortega, 2004).
Economic Interests and Unfulfilled Mandates

While the country is still classified as a developing country by the International Monetary Fund (IMF), Panamá has an increasingly fast-growing economy due to success of the Panamá Canal as an international hub and recent expansions in the tourism sectors as well as other industries (The World Bank, 2024b). Opportunities for economic development are an important priority for Panamanian government, including the utilization of natural resources, despite consequences for the environment and communities. As a result, the rights of Indigenous communities, whether they have been formally recognized or not, are often infringed upon for the sake of furthering the economic development of Panamá (Cansari and Gausset, 2013).

While many, but not all, Indigenous groups have had their land rights formally recognized, the extent to which they are able to act with agency and exercise their rights varies immensely. Policies that recognize Indigenous land rights are often crafted to include exceptions, exemptions, and considerations for the needs of the country or state that is recognizing the rights. Additionally, many are accompanied by minimal enforcement (Feiring, 2013). This allows for economic and environmental interests to influence how the policy is, or is not, implemented. These influential interests often lead to the violation of Indigenous land rights and a lack of enforcement, limiting how effective policies are at providing an Indigenous group with access to or control over their land and natural resources (Roldán Ortega, 2004). Many Indigenous communities in Panamá, and around the world, seek recognition and enforcement of their rights today.

The significant amount of Indigenous autonomy and authority that is recognized through Panamanian law has earned the country a reputation for progressive recognition of Indigenous land rights. However, obtaining recognition of these rights was not an easy accomplishment and
the process includes bureaucratic delays and significant resistance (Cansari and Gausset, 2013).

With a high level of competition over land and natural resources, economic interests often outweigh concerns about conservation and Indigenous land rights in the public and private sectors. Due to economic and environmental interests, Panamá’s strong land tenure policies often go unenforced (Rayo et al., 2024). With a plethora of corruption and agency capture in Panamanian government, Indigenous user and resource rights that have been formally recognized are often still violated.

Environmental Considerations and Conflicts

Land management plans designed by Indigenous communities often incorporate protections against land use projects and developments that threaten ecosystems with exploitation, contamination, and degradation (Greaves, 2018; Feiring, 2013). They frequently focus on long-term conservation goals to maintain access to natural resources, especially for future generations, and many Indigenous communities prioritize sustainable resource use and land management. Many Indigenous groups live in rural areas where natural resources and ecosystems services are key components to a happy and healthy community which incentivizes sustainable land management. However, prioritizing sustainability and conservation should not be a prerequisite for the recognition of Indigenous land rights.

Indigenous Health and the Environment

Indigenous groups in Panamá are impacted by the exploitation and degradation of natural resources as their health and well-being are often intertwined with the health of the ecosystems around them (Sharma, 2015). While Indigenous groups are sometimes restricted from using resources or other proactive land management practices in Panamá, they are more consistently being excluded from discussions and decision-making processes about development and resource
use (Wickstrom, 2003). Most often, the developments that are built cause damage to the environment they live in and the resources they use. Projects that are conducted in Indigenous territories, or areas surrounding them, often in the name of economic development or environmental initiatives, restrict the access that people have to basic resources such as clean water, sustainable food systems, medicine, building materials and tools, and many other important aspects of life (Finley-Brook and Thomas, 2011). Hydroelectric projects, protected areas, mining practices, timber industries, as well as many other drivers of poor environmental and human health, can lead to a lack of basic resources, and contribute to poverty traps (Wickstrom, 2003).

**Stereotypes and Romanticization**

It should be noted that the relationship between Indigenous people and their environment is often romanticized and perceived as a perfect, harmonious exchange. These relationships are sometimes seen as a way to support the health of ecosystems and conservation efforts (Gadgil et al., 1993). While the benefits of Indigenous land management for a variety of ecosystems around the world are evident, the extent to which increasing Indigenous land rights benefits the environment varies greatly. With place-based practices such as harvesting, foraging, hunting, and farming, as well as knowledge about spiritual connections to the environment and long-term, sustainable land management goals, some Indigenous communities do play a key role in land care. For these reasons, Indigenous land management is often considered an important component of the environmental movement. However, it can be harmful to refer to conservation and sustainability as pillars of Indigenous land rights as it could restrict Indigenous communities in what land practices they can use or their access to land at all. The land rights of Indigenous
communities are pre-existing rights and should be recognized regardless of environmental concerns.

Ironically, conservation and climate initiatives can also come in conflict with Indigenous land rights (Feiring, 2013). Panamá, the isthmus between North and South America, is a biodiversity hotspot where evolutionary processes have created incredibly complex ecosystems (Brooks et al., 2002). The value of biodiverse ecosystems and international discussions about the responsibility that countries have to conserve biodiversity have led to the creation of several protected areas in Panamá. The ways in which these areas are created and maintained can infringe upon the rights of Indigenous groups in Panamá, highlighting a need for rights-based conservation (Pelletier et al., 2019; Rayo et al., 2024; Shibia, 2010). Despite a strong official commitment to recognizing and respecting Indigenous land rights, economic and environmental influences lead to governments, businesses, and organizations violating their rights.

**Reactions to Violations of Rights**

In response to the violations of land and resource rights as well as the consequences it has on Indigenous people, Indigenous communities in Panamá use different methods to create change. To some degree they aim to increase their representation in government and politics and advocate for their needs through formal processes and systems. In a country with extensive corruption, however, it is difficult for any coalition to see their efforts result in the implementation of an effective and enforced policy (Wickstrom, 2003). Despite efforts to develop a presence in politics and influence policy-making, Indigenous groups continue to have their rights violated. For these reasons, they use other methods of advocating for recognition and enforcement as well. Indigenous activism in Panamá centers around disruptions and political
demonstrations that are conducted with the purpose of advocating for their rights including land and resource rights (Fisher, 2014).

Throughout the last few months of 2023, highways in Panamá were shut down, isles in the grocery store were empty, and protestors filled the streets. Law 406, a contract between Panamanian government and a Canadian mining company, had been passed by the National Assembly of Panamá and signed by the President in October. The contract authorized the company to continue and expand operations, as well as grant a significant amount of land and resource rights (Landires et al., 2023). The agreement had very few restrictions on what, when, and where the company can look for and extract a variety of minerals. It would have resulted in a significant increase in mining operations impacting the health of the environment and surrounding communities, especially the Ngäbe and Bugle communities that live extremely close to the mine. After several weeks of protests and strikes across the country, the Supreme Court ruled the contract as unconstitutional and the mine was closed. This success story highlights how Indigenous people, and other Panamanians, mobilize to defend natural resources from exploitation and emphasizes how important land rights to the Panamanian and Indigenous people.

To assess pathways to recognition of Indigenous land rights and bring attention to the barriers to recognition, this thesis investigates how and why Indigenous land rights are recognized, or not recognized, in Panamá. The next chapter provides background information on theories of Indigenous rights, Indigenous rights in Latin America, and international standards and agreements. The barriers to and violations of Indigenous land rights in Panamá are then discussed in the third chapter. The following chapter outlines the tumultuous process of obtaining a collective land title and the fifth chapter provides a comparative perspective and
investigates how Indigenous land rights are recognized in other countries. Finally, the last chapter summarizes the reasons for unrecognized Indigenous land rights in Panamá and offers suggestions for Indigenous communities that are seeking the recognition of their land rights.

This thesis also presents recommendations for recognition policies and government actions. However, in most cases, Indigenous communities have already made these clear and governments are making informed decisions that violate Indigenous land rights. While Indigenous communities should not bear the responsibility of pressuring government to recognize their rights, they often do. My suggestions and insights are merely a fraction of the knowledge that Indigenous communities have on obtaining recognition. Therefore, this thesis offers ideas for Indigenous communities, but it also aims to inform governments, organizations, researchers, and anyone who wishes to support Indigenous communities in their fight for recognition.
Chapter 2: Background

With variability in the structure and effectiveness of Indigenous land policies and movements, different outcomes occur with implications for environmental and community health (Roldán Ortega, 2004). Several types of Indigenous land rights policies with different structures, requirements, frameworks and stipulations have emerged. Some land rights recognize private, individual rights, while many communities have public, collective rights to their land. While some recognition policies offer an Indigenous community formal ownership and control over a piece of land, others only allow the group to use a certain resource (Keay and Metcalf, 2021). They usually include specific requirements such as restrictions during certain times of the year or a general cap on how much of the resource can be used. While having the legal rights to utilize a resource creates opportunities for poverty-relief, the abundance and quality of that resource may be impacted by factors outside of the community’s control (Wickstrom, 2003). With the recognized right to have their voices heard in decision-making processes about the land or water they manage, Indigenous communities can protect their resources and communities.

Theories of Indigenous Rights

Recognizing rights of Indigenous groups requires recognition of community-based property rights. It is often presumed that property rights can be either private or public. A third type of property rights, ones that are not owned by one family or the public such as community-based property rights, is often ignored. This type of property rights allows the community to have collective ownership and control of the land or natural resource. For governments to craft policies that recognize Indigenous rights, they must acknowledge the shared ownership.

Governments also decide how they will define Indigenous to distinguish between Indigenous communities and non-Indigenous communities. Indigeneity has different meanings
around the world as colonization, conflict, and culture, have shaped how it is defined. Each
definition raises distinctive considerations. While in some societies Indigeneity requires a pre-
colonization presence, in others it simply refers to the identity of minority groups that are
marginalized (Guenther et al., 2006). Another consideration is whether Indigeneity includes
people with mixed ancestry. In the United States, some tribes use blood quantum laws to require
proof of ancestry for enrollment. Some people believe these laws prevent the erosion of culture
while others view them as harmful restrictions that exclude Indigenous people (Villazor, 2008).

The meaning of word “Indigenous” depends on social and historical contexts, resulting in
a variety of definitions and criteria that impact how and if rights are recognized. José R.
Martínez-Cobo, UN Special Rapporteur on Discrimination against Indigenous Populations,
defines:

“Indigenous communities, peoples, and nations are those that, having a historical
continuity with pre-invasion and pre-colonial societies that developed on their
territories, consider themselves distinct from other sectors of the societies now
prevailing in those territories, or parts of them. They form at present non-dominant
sectors of society and are determined to preserve, develop, and transmit to future
generations their ancestral territories, and their ethnic identity, as the basis of their
continued existence as peoples, in accordance with their own cultural patterns,
social institutions and legal systems (Martinez Cobo 1986).”

This definition includes an aspect that is important to consider. He states that Indigenous people
“are determined to preserve, develop, and transmit to future generations their ancestral
territories, and their ethnic identity, as the basis of their continued existence as peoples, in
accordance with their own cultural patterns, social institutions and legal systems”. This criterion
for Indigeneity requires a determination to pass resources and culture on to young generations,
which could exclude Indigenous people who do not prioritize the continuation of their ethnic identity or ancestral territories.

**Granting vs. Recognizing**

All Indigenous land rights are pre-existing rights of an Indigenous community to use or inhabit an area of land or water. While many people refer to “granting” Indigenous land rights, this framework implies that those rights can be removed or withdrawn. It also implies that the Indigenous community did not previously have a right to inhabit, manage, or use their land, which they did (Lynch, 1999). Even Indigenous groups that have migrated, or have been forcibly removed from their original ancestral lands over the last hundred years, have rights to the land they have occupied or continue to occupy.

Governments can recognize, as opposed to grant, those rights through formal processes to minimize barriers to engagement with the pre-existing rights. Indigenous people that have tried to exercise their rights, for example by utilizing resources or protecting the resources from extractive forces, often face repercussions if their rights have not been recognized. Recognition and enforcement of Indigenous land rights can strengthen a group’s legal standing, provide avenues to poverty-relief, offer access to resources and land, and decrease the consequences that Indigenous people face for exercising their pre-existing rights (Roldán Ortega, 2004). Successful Indigenous land rights policies reduce the barriers that Indigenous people face when exercising their rights.

**Free, Prior, and Informed Consent**

An important component of recognizing Indigenous land rights is recognizing the right to Free, Prior, and Informed Consent (FPIC). It has become clear that issuing a collective land title does not effectively recognize the full set of rights that Indigenous communities have, as
exploitative operations continue to occur despite legal ownership and close proximity to the communities. To protect Indigenous communities from land use projects that threaten their health and wellbeing, or simply are not something communities want happening on their land, they have the right to withhold their consent for a project to occur (Hanna and Vanclay, 2013). Their consent should be required and it should be free, prior, and informed. FPIC requires that consent is given without coercion or manipulation, before a project is authorized and begins, and after communities have been offered all relevant information about a project in a way that can be easily understood (Simms and Moolji, 2011). This includes providing the information in their traditional language.

Scholars of Indigenous land rights in Latin America make an important distinction between consultation and consent. Consultation often allows for members of government or industry representatives to control the administrative and procedural details of the consultation process. An entity that recognizes an Indigenous community’s right to consultation tends to have the power to diminish Indigenous voices in the consultation process. Consent offers a more comprehensive understanding that allows an Indigenous community to reject a proposed project, regardless of how well their concerns are understood, or heard at all (Thorpe, 2020). FPIC has become a fundamental concept to consider in conversations about Indigenous land rights and is considered an important step in recognizing them.

**Cultural Property**

Another important concept to consider is cultural property. One author’s perspective on cultural property and how it is demonstrated in a specific case is discussed here. Wiersma (2005) describes how an Indigenous territory can be categorized as cultural property, as opposed to being under “traditional Western property regime”. Cultural property is property that is protected
due its cultural value to the community. She then distinguishes between two arguments for why Indigenous land rights should be recognized as cultural property. The first argument is that cultural property should be protected because culture has intrinsic value to all of society. For example, Indigenous land rights are often recognized with the condition that the community operates within what has previously been established as their culture.

The second argument is that cultural property should be protected to maintain the culture to which the property belongs. This argument aims to protect the cultural property for the benefit of the group that finds them significant which the author claims is a more foolproof framework for obtaining recognition of Indigenous land rights. The United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) recognizes the right that Indigenous people have to develop “future manifestations of their culture” (Article 11). This recognizes that Indigenous communities, much like other communities, evolve over time and often come to create and integrate new traditions beliefs, and practices into their culture. Their culture is redefined by the community over and over again. To illustrate how this perspective can lead to rights being successfully recognized, a case study is discussed (Wiersma, 2005).

The Awas Tingni, an Indigenous community in Nicaragua, brought their case to the Inter-American Court for Human Rights (IACHR) after being repeatedly denied an autonomous territory (Lynch, 2011). They wanted a land title to protect against logging efforts that were occurring on their land, but they faced opposition from the Nicaraguan government. Using conventional property law, the Awas Tingni would have lost this case. Wiersma argues that they won the case because the court recognized the value the land has, not intrinsically to society but to the Awas Tingni community specifically. The decision and the framework they used to make the decision allows them to exercise autonomy and control over their own territory. While the
court did not directly name the concepts that she suggests to decide in favor of the Awas Tingni, their arguments were reminiscent of the perspectives presented by Wiersma. This case and her analysis of it provide an example of how Indigenous land rights can be conceptualized to encompass full autonomy and territorial control using the idea of cultural property.

The arguments of cultural property are increasingly being used by Indigenous communities that are seeking recognition of their rights. Wiersma recommends using the second cultural property argument that she presents to avoid a recognition policy that restricts an Indigenous community from conducting activities on the basis that it does not preserve their culture as defined by society. For an Indigenous community’s land rights to be fully recognized, it should be acknowledged that the property is being protected for the purpose of benefiting the community regardless of how it benefits them.

This framework of cultural property may serve as a mechanism for obtaining recognition, as long as the term culture and how the property supports a culture, is defined by the community within the culture. If the Panamanian government recognizes Indigenous land rights under the notion that the land’s value is partly determined by its contribution to the community’s culture, it could allow for some lands to be deemed unimportant to local culture and therefore unrecognizable as Indigenous land. It could also allow the Panamanian government to potentially restrict what activities and use of natural resources Indigenous communities conduct on their land. To ensure this argument of cultural property recognizes the full rights of Indigenous people, how their land contributes to their culture must be decided by the community itself.

**International Standards and Agreements**

Enacted in 1957 and 1989, International Labor Organization (ILO) Conventions 107 and 169 on the Rights of Indigenous and Tribal Peoples in Developing Countries have been two of
the primary international legal instruments for obtaining Indigenous land recognition for decades. ILO Convention 169 states that governments shall consult Indigenous and tribal peoples “whenever consideration is being given to legislative or administrative measures which may affect them directly”, emphasizing issues relating to their territories (Clavero, 2005). It was one of the first recognition frameworks to highlight FPIC. While Panamá accepted ILO Convention 107, it never ratified ILO Convention 169.

The most significant international statement on Indigenous rights, historically and currently, is the UNDRIP. The Declaration recognizes that Indigenous people have a right to “participate in decision-making in matters which would affect their rights,” and confirms their right to self-determination (Article 3, Article 18). Specifically, it recognizes resource-use rights. (Article 8, Article 20). It also recognizes Indigenous peoples’ right to FPIC in a number of processes such as legislative action and the development of any projects affecting their territories or resources. Specifically, minerals and water are both stated as examples of resources included in this categorization (Article 32). Another important right that the Declaration recognizes, mentioned earlier, is the “right to maintain, protect and develop the past, present and future manifestations of their cultures” (Article 11).

The UNDRIP provides a national standard for the recognition of Indigenous land rights and outlines key components of recognition. However, the UN does not have a mechanism for proactively enforcing the Declaration; the UNDRIP is considered “soft law”. While pieces are incorporated into national laws and constitutions, recognition frameworks often look very different than the Declaration. The Declaration does however play a role when the Inter-American Court of Human Rights is reviewing a case about Indigenous rights.
Latin America

Extraction of Natural Resources

Examining how Indigenous rights can be challenged is usefully focused on Latin America broadly, particularly in the context of natural-resource extraction. Throughout the 1990s and 2000s, Latin American countries implemented significant reforms to social policy programs such as healthcare, education, and social assistance (Arsel et al., 2016). Following an era of rising hyperinflation, debt, and poverty, came expansions of welfare and poverty-relief initiatives, namely minimums wages and conditional cash transfers (CCT) (Osorio Gonnet, 2019). The Gini coefficient for the Latin American and Caribbean region fell from .568 in 2000 to .503 in 2022. While these social reforms decreased poverty and inequality rates, many were structured to be reliant on tax revenue collected from natural resource exports (Veltmeyer, 2012). Resource extraction, mostly mining and agricultural production, increased significantly in the early 2000s due to a commodity price boom and new trade agreements (Arsel et al., 2016; Kröger and Lalander, 2016)

Rural populations, including Indigenous communities, became vulnerable to extractive industries and development (Veltmeyer, 2012). Pre-existing land management systems and practices were disrupted, and people were exposed to environmental degradation as infrastructure projects and resource exploitation were developed. Land conflicts emerged as Indigenous groups became increasingly frustrated with the lack of consideration for their livelihoods and wellbeing (Runk, 2012). Indigenous groups in many Latin American countries were, and are, faced with violent oppressive reactions when conducting political demonstrations to protect their land and resources. Some governments are also motivated by the demand for resource exports to avoid recognizing rights of Indigenous groups that display opposition to
extractive industries (Canel et al., 2010). Environmental justice and Indigenous rights have continued to become increasingly important topics of discussion in Latin America as tensions between economic, social, cultural and environmental spheres continue to build.

Models of Recognition

The World Bank Environment Department analyzed the strength of legal frameworks in Latin America that address Indigenous land ownership and resource rights. A country’s system for recognition was categorized as either a superior legal framework, a legal framework in progress, or a deficient legal framework. To have what is considered a superior legal framework, a country must either have a constitutional provision that recognizes the rights of Indigenous groups or sign an international agreement to provide recognition. Additionally, the government needs to have implemented a concrete framework for Indigenous communities to exercise their rights (Roldán Ortega, 2004). Out of the 17 countries included in the study, seven were categorized as having a superior legal framework, including Panamá.

Panamá

With 4.4 million residents and 29,157 square miles of area, Panamá is a relatively small country in population and size. In the last few decades, Panamá’s economy has been steadily growing. The services sector, including tourism, is the primary driver of economic growth in Panamá, and the mining industry is also quickly becoming a competitor for the second-largest economic sector. One of the largest contributor to the services sector is the Panamá Canal, which directly accounted for 3.5 percent on Panamá’s GDP in 2020 (International Trade Administration, 2023). According to data collected before the COVID-19 pandemic, Panamá’s GDP growth rate was four times that of the Latin American and Caribbean (LAC) regional average. Despite increases in GDP and economic development, poverty rates and inequality
indicators are high (World Bank, 2024a). In 2021, the World Bank reported a Gini Index of 48.9 and Indigenous communities are disproportionately impacted (The World Bank, 2023a). The national poverty rate in 2023 was 13.4 percent, while 47.4 percent of Indigenous people in comarcas lived under the poverty line.

Located between North and South America, Panamá serves as a land bridge between the two continents and a key piece of the Mesoamerican corridor, creating a biodiversity hotspot; its ecosystems are considered extremely valuable (Meyer at al., 2019). The value placed on Panamá’s natural environment brings national and international attention to conservation and climate change mitigation efforts, as well Indigenous land rights (Kapos et al., 2015). In some cases, these environmental initiatives and movements to gain recognition of Indigenous rights are collaborators in rights-based conservation and in other cases they compete for natural resources.

Protected areas account for 35.8 percent of land area in Panamá, which often overlap with Indigenous territories (Vergara-Asenjo and Potvin, 2014). The country has also recently begun conducting Reducing Emissions from Deforestation and Forest Degradation (REDD+) programs with forest-dependent communities. REDD+ programs are funded by international and national public organizations as well as private entities, and aim to financially support forest conservation projects that increase carbon sequestration. In 2008, the UN-REDD National Joint Programme (NJP) was created by Panamá and other partners, which has funded 14 projects with Indigenous and non-Indigenous communities (Kapos et al., 2015; UN-REDD, 2024). Clean energy projects, mostly solar and hydroelectric production facilities, have also been prioritized by the Panamanian government and private energy companies. The prioritization of conservation and climate initiatives and the impacts they have on Panamanian Indigenous groups will be examined in following chapters.
Indigenous property rights are an important issue in Panamá. There are several Indigenous groups that currently seek recognition and enforcement of their rights. There are seven Indigenous populations in Panamá; Guna, Naso, Ngäbe, Buglé, Bri Bri, Emberá and Wounaan, each with their own language and culture. While these populations are unique and information about them should not be generalized, they experience similar power struggles and threats to their communities.

While the Panamanian government has not ratified ILO 169, the Constitution of 1972 declares that Indigenous groups must be given land as property. Through this framework, the Legislative Assembly has recognized collective landholding rights of Indigenous groups through the formation of comarcas, Panamá’s formal Indigenous territories. While Panamá’s legal framework for recognition appears robust and theoretically allows Indigenous groups to exercise their rights, the lack of enforcement behind the recognition policies reduces that impact that the polices actually have. In many cases, Panamá has not taken “concrete actions to ensure those rights” and therefore its legal framework should perhaps not be considered superior (Roldán Ortega, 2004).
Chapter 3: Comarcas and Conflict

Panamanian Comarcas

Over several decades, the Panamanian government has developed policies that recognize the property rights of almost all these Indigenous groups, at least to a certain extent. They have established two types of Indigenous territories: collective rights within a comarca and collective rights outside of a comarca (Walker, 2021). A comarca is an administrative-territorial area of land, or ocean, where an Indigenous group has a degree of autonomy and authority. The Omar Torrijos administration recognized indigenous territories as ‘reserves’ in the 1970s and with that juridical categorization came substantial protections to indigenous ancestral territories (Constitute Project, 2024). The Seventh National Agricultural Census of 2011 defined comarcas as a result of the State recognizing and guaranteeing Indigenous peoples and communities their habitat and original rights over the ancestral land they traditionally occupy, as well as the collective ownership of these lands, which are necessary to guarantee their way of life (Seventh National Agricultural Census, 2011). They have also been defined as a “politico-administrative unit wherein indigenous political structures are granted legal recognition by the state, which also superimposes politico-administrative structures of the state on Indigenous governments”. While comarca lands are “inalienable and imprescriptible”, the state maintains the authority to exploit resources on those lands (González, 2015).

The First Steps in Recognition

The first Panamanian comarca, Guna Yala, was formalized in 1938 after the Guna Revolution in the 1920s, in which Guna communities claimed rights to their territory (Castillo, 2023). Since then, comarcas, and the rights of comarca residents, have continued to be legally defined by court decisions and legislation. Over the last several decades, there has been a
continuous push-and-pull between Panamanian government and Indigenous communities (and their supporters/collaborators) to establish clear recognition of Indigenous rights. Policies will be established and then later amended or repealed, and often result in contradicting laws and regulations. The progression of Indigenous rights recognition is often followed by a regression, a theme that is reiterated throughout the development of Panamá’s legal framework for recognizing Indigenous rights.

The Constitution of 1972 included the first broad declaration that Indigenous people had rights to their territories. It outlined a formal process for establishing a comarca but did not include details about what rights Indigenous people could exercise without repercussions. In 1998, the General Law on the Environment (Law 41) was passed (Runk, 2012). It established a new agency for environmental affairs, Mi Ambiente, and included several articles that emphasized the collaboration the new agency should have with Indigenous people. It recognized that Indigenous populations have the right to manage and use resources on their lands (Articles 63 and 98). “Studies of exploration, exploitation, and use of natural resources on indigenous” were required to have authorization (Article 101) and that Indigenous lands could not seized by someone that is from outside that Indigenous community (Article 102). However, in 2003, all five articles referenced above were repealed. Many of the country’s most active Indigenous rights lawyers have noted that the piece of legislation that repealed the articles, Law 18, was primarily a redistrictive policy and obscured the repeals so well that it took many of them years to even discover the changes to the General Law on the Environment (Runk, 2012).

Expansion of Comarcas and Other Recognitions

It was not until 1983 that Panamá established a second comarca, Comarca Embera-Wounaan, but then Indigenous groups in Panamá had their land rights recognized more quickly.
Between 1996 and 2000, the Madungandi Comarca, the Ngäbe – Bugle Comarca, and the Comarca of Wargandi were established and formalized. The legislation that was passed to recognize the Ngäbe Bugle Comarca, Organic Charter of the Ngäbe-Buglé Comarca (Law 10), had ramifications for all Indigenous groups and their land rights, as Article 28 stated that “the government retains the rights to develop all natural resources within the comarca in accordance with development plans and policies that benefit the nation” (Wickstrom, 2003; Ford, 2015).

Article 127 of Panamá’s Constitution states “the State guarantees to indigenous communities the reservation of necessary lands and collective ownership thereof, to ensure their economic and social well-being. Procedures to be followed for obtaining this purpose, and the definition of boundaries within which private appropriation of land is prohibited, shall be regulated by law.” In 2008, the Panamanian government established a new collective land titling system for Indigenous people through Law 72, and reinforced the mandate through Executive Decree 223 of 2010. It allowed communities to have a collective title without going through the process to become a comarca. Over 25 Indigenous territories have been recognized with collective land titles, partially due to Mi Ambiente’s progressive resolution in 2019 that highlights international law and the legitimacy of Indigenous land titles (Runk, 2012). While Law 72 has allowed for many Indigenous communities to obtain official land ownership, there has been speculation about the intention behind the bill. It gives authority to Mi Ambiente and includes their approval as a necessary step to establishing a comarca. This stipulation ensures that land titles and land use plans align with the objectives of the protected area system.

After Naso communities had attempted to establish a comarca for many years and faced bureaucratic and legal barriers along the way, Law 72 was a setback for establishing the Naso Tjer Di Comarca. It changed the systems through which Indigenous land rights can be
recognized and disrupted their efforts. After a presidential veto in 2019 presented yet another obstacle, the Naso Tjer Di Comarca was finally established in 2020 (Mayhew et al., 2010). Each community has spent decades obtaining an official land title and continues to face threats of land grabbing, resource exploitation and contamination, and restrictive policies that violate their rights. In the following sections, examples of Indigenous rights violations in Panamá, as well as community responses are presented.

Another important development in the legal recognition of Indigenous rights in Panamá was the passing of Law 37 in 2016 that recognizes Indigenous communities’ right to consultation and FPIC (Thorpe, 2020). However, the ostensible FPIC policies include ambiguous language that can be used to weaken their effectiveness and the implementation and enforcement of FPIC in Panamá has been weakened by policymakers over the last few decades. However, Law 37 does reduce some of the barriers that Indigenous communities in Panamá face when exercising their right to control their territories.

Water and Mineral Rights

There is a variety of extractive industries that impact Panamá’s Indigenous populations and the land they live on. There are however, two sectors that are consistently used by large companies to exploit Indigenous land and communities: mining and hydroelectric energy. Many of the land conflicts between Indigenous communities and natural resource extraction arise when a mining operation or hydroelectric dam is proposed, being built, or actively in use.

Multinational mining projects have long been prevalent throughout Latin America and have been constructed in many areas of Panamá, often near Indigenous communities – legally or illegally – without their consent. Similarly, the pursuit of hydroelectric power has been referred to as “carbon colonialism”, as it often has detrimental effects on rural Indigenous communities.
Highly productive water systems and large mineral deposits on Indigenous lands attract hydroelectric and mining companies along with foreign investment.

The rights to water or minerals are often not included in collective land titles and therefore become an easy target for exploitation. The extent to which Indigenous communities have ownership of water and minerals remains unclear. Instead, Indigenous communities are supposed to have control over these resources through FPIC. Even if an Indigenous community has not had its legal right to certain resources on its land recognized, it still has a recognized right to disallow land use projects that occur on its land. Weak FPIC policies and a lack of enforcement, combined with unclear and ambiguous resource rights, result in high rates of natural resource exploitation, namely mining and the hydroelectric dams, and the violation of Indigenous land rights (Moolji and Simms, 2011).

Protected Areas and Conservation

As discussed earlier in this thesis, efforts to expand the recognition of Indigenous land rights and conservation initiatives can sometimes work collaboratively. However, conservation projects can also be a formidable barrier to obtaining recognition. Law 72, and other policies regarding Indigenous land use, shape the role that conservation and protected areas play in determining the extent to which Indigenous land rights are recognized. The policies establishing protected areas have restricted the issuing of collective land titles and have limited the use of Indigenous land practices. It was estimated in 2016 that 80 percent of unrecognized Indigenous lands had some overlap with protected areas (Lichtenstein, 2016).

Even if a collective land title is obtained for land within a protected area, the status of protected area can threaten the agency and self-determination of Indigenous communities. Restrictions on land use in protected areas often prohibit subsistence agriculture, which many
Indigenous communities in Panamá rely on. While the rules for protected areas, for example bans on deforestation and agriculture, are often not enforced, the threat that protected areas pose remains a barrier to land tenure security for Indigenous communities.
Chapter 4: Creating Collective Land Titles

Establishing a Comarca

Each Indigenous community that has obtained comarca status fought hard to gain the recognition of its communal rights and faced legal and administrative obstacles along the way. These challenges often continue even after a comarca has been established, and in many ways, the fight for recognition of a community’s rights continues well past any formal recognition. Nevertheless, the creation of a comarca is an important step in gaining full recognition and is considered a victory for an Indigenous community, as it opens new doors to protect their community and territory from environmental, economic, and cultural threats.

Violations Call for Recognition

Faced with exploitative companies and land grabs, Indigenous communities aim to expand the opportunities they have to defend their resources and livelihoods. The formalization of a comarca or other collective land holdings offers a community legal authority and control that can be used to remove and cancel exploitative operations or other threats to their land and community. It is often sought as a means to an end, a way of bringing an end to efforts that violate an Indigenous community’s rights.

The Guna Revolution of 1925 was sparked by policies and actions of the Panamanian government that aimed to assimilate Guna communities. After series of confrontations and negotiations, “Law 2”, was passed in 1938, establishing a territory for Guna communities living in or near the Guna Yala Islands as the first comarca in Panamá (Litchenstein, 2016). Gaining legal recognition as an autonomous group with its own territory allowed for the high-level of self-determination that Guna communities have developed today. Ngäbe communities, faced with exploitative practices occurring on their land such as the Cerro Colorado Copper Mine and
Tabasará hydroelectric projects, formed a coalition with Bugle communities that were also in opposition to companies that were violating their rights, the two communities succeeded gaining recognition as one comarca (Ford, 2015). Around the same time, an Embera community and another group of Guna mobilized against the construction of Bayano hydroelectric dam (Sarmiento-Lamus, 2015).

Violations of Indigenous rights can unite and motivate Indigenous communities to politically mobilize and go through the process of establishing a comarca. However, it is not until years later the original violation(s) are actually shut down. Naso communities experienced the impacts from hydroelectric projects and other developments for decades before they gained comarca status (Paiement, 2007).

**Collective Land Titles Outside of a Comarca**

After years of advocating and persevering, several Indigenous communities gained comarca status. However, there are many Indigenous communities that live outside the boundaries of any comarca. Only half of the area that the Embera-Wounaan group requested to be recognized was included in the comarca boundaries encompassing, only 31 of the 53 communities in the area (Koller-Armstrong, 2010).

For many decades, a comarca was the only collective land title that could be formalized for an Indigenous community. It was not until 2008 that Law 72 was passed allowing for the titling of collective lands for Indigenous people living outside of a comarca (Mayhew et al., 2010). This provided a new option for Indigenous communities that sought some form of recognition of their land rights but were unable to establish a comarca.

In Eastern Panamá, Embera, Guna and Wounaan communities and organizations have mapped and submitted applications for several territories to obtain collective land rights outside
of a comarca. As of 2016, 30 applications were submitted by these communities and five of the applicants had received collective land titling. Two of those communities, the Guna of Madugandi and Embera of Alto Bayano, received their titles after arguing their case to the Inter-American Court of Human Rights (Litchtenstein, 2016). They alleged the Panamanian government was responsible for the lack of recognition and demarcation of their land, and the continuous violations that they experienced, namely the lack of compensation for the stripping and flooding of their land during the construction of a hydroelectric dam from 1972-1976. The Court declared that several articles in the American Convention of Human Rights had been violated by Panamanian government. Their failure to recognize and demarcate Indigenous lands and the absence of laws prior to 2008 that established the process were unanimously decided to be violations of international law (Sarmiento-Lamus, 2015). As a result, the two communities received their collective land title.

In Western Panamá, Indigenous communities also face issues with obtaining collective land titles outside a comarca. Law 72 prohibited the creation of any “annex areas” which had previously been established as communities adjacent to comarcas but not technically included within the comarca boundaries. When Law 10 was passed creating the Ngäbe - Bugle Comarca, 15 Ngäbe communities outside the comarca where labeled as “annex areas” that technically had the same legal rights. However, the boundaries were never established and with each passing year the communities lose land due to commercial efforts. It was not until 2008, after the Panamanian government received a $47.9 million loan from the World Bank to improve land tenure and equitable access to land, that any effort was made to demarcate the annexed lands. The Panamanian government never reached an agreement with Ngäbe communities, and despite
the prohibition of “annex areas” in 2008, the ones around the Ngäbe-Bugle comarca are still designated as “annex areas” today (Rosario, 2011).

**The Role of Political Capital**

An Indigenous community’s success in gaining comarca status or another collective land title is dependent on a number of factors. The broad recognition of Indigenous rights across much of Latin America in the 1990s and the willingness of the elected officials to prioritize Indigenous rights increased the likelihood of a comarca being established. Through different periods of political turmoil and conflict over land, comarcas and other collective lands have been recognized.

The number and size of potential and current economic developments that may overlap with the boundaries of a comarca or another legally recognized territory with collective rights also determine whether or not the territory becomes recognized. Greater competition over land and prospects for development decrease the likelihood that a collective land title will be given to an Indigenous community.

Another important variable is the extent to which an Indigenous community strengthens its political capital. It is possible that the uncertainty, bureaucratic obstacles, and delays in the process of establishing a comarca occur in order to deter Indigenous communities from continuing to press for comarca status. To navigate a system that in effect fails them, Indigenous communities in Panamá have mobilized local civic action and became politically active at a national level (Fisher, 2014). To have an Indigenous territory recognized, communities pursue formal administrative avenues to gaining recognition of its rights, as well as activism and informal avenues.
Adopting Formal Structures

Without the efforts to establish a well-organized government internally, gaining recognition as a sovereign community is difficult, if not impossible. Once a system of government is in place, it is much easier for community members to organize political demonstrations and represent themselves at the national level.

Each Indigenous community that has had its land rights recognized has first developed communication networks and formal structures of government to build its political capital. While Indigenous communities have had their own ways of governing themselves forever, to have them recognized by the Panamanian government they must have a structure similar to the Panamanian government, most importantly a Congress or an equivalent entity. The elected cacique system, developed through an Organic Charter, provides an Indigenous community with a hierarchal structure that is accepted by Panamanian government.

In the early 20th century, the sovereignty and culture of Guna communities were threatened by the Panamanian government’s assimilation policies. The Guna Revolution began in Guna Yala and quickly gained support. The movement aimed to gain legal recognition of the right for Guna communities to govern themselves and have sovereign authority over their territory (Howe, 1998). Over several decades, Guna people had internally established an organized governing body and political structure that allowed them to mobilize efficiently and present a united front. The Organic Charter that Guna communities created outlined a structure for the Guna Congress and regional caciques, as well as processes for decision-making. When the Guna Yala comarca was created, the Organic Charter and their institutions of government were recognized as having authority (Castillo, 2023).
The Organic Charter, and the *cacique* system they created, have been adopted and used by other Indigenous communities to increase their level of organization and political capital. Prior to the establishment of a *comarca* for Embera and Wounaan communities, no former tribal leaders or councils existed. The communities honored *jaibanás*, who were elders and healers, and some communities selected their members to represent them in decision-making, or *nokos*. To have their authority recognized, they developed a congress and regional chiefs similar to *caciques* when their Organic Charter was written, and subsequently formalized by the Panamanian government in 1938 (Law 22) (Koller-Armstrong, 2008). Other Indigenous communities have adopted and developed similar systems to organize internal affairs and build political capital.
Chapter 5: A Comparative Perspective

Examining the recognition of Indigenous land rights in other countries provides important insights about potential pathways to recognition. While constitutional recognition is often considered a critical aspect of recognizing Indigenous land rights, the countries with the most comprehensive constitutional recognition in Latin America nevertheless violate Indigenous land rights. Different lessons can be learned from the ways in which communities have, and have not, gained recognition of their land rights. Several Indigenous communities in Latin America that have faced challenges with obtaining legal recognition of their land rights have taken their case to court. While there have been many decisions made in favor of governments and exploitative efforts, there have been cases that outline the pre-existing rights Indigenous people have to their land and suggest how Indigenous land rights should be recognized and enforced. Other communities have focused their efforts on activism with varying success.

Bolivia

Considered to have one of the most comprehensive and progressive systems for recognizing Indigenous land rights, Bolivia has chosen policies that consider the “diverse realities of Indigenous peoples” (González, 2015). The Bolivian Constitution outlines which rights are guaranteed to Indigenous communities, including control over their territories. (Article 2). The Constitution also states that Indigenous people have a right to “prior obligatory consultation by the State with respect to the exploitation of nonrenewable natural resources in the territory they inhabit shall be respected and guaranteed, in good faith and upon agreement” (Article 30). This acknowledges that natural resource exploitation efforts can violate Indigenous land rights, and establishes a constitutional requirement for Indigenous consultation. While the Panamanian Constitution recognizes the rights Indigenous people have to their territory, there is
no mention of how Indigenous people can voice their concerns about developments on their land. However, Article 30 of the Bolivian Constitution only mentions prior obligatory consultation, not consent, being required for the exploitation of nonrenewable, excluding non-renewable resources such as hydroelectric dams.

Furthermore, Article 356 of the Bolivian Constitution provides an avenue for ensuring the exploitation of nonrenewable resources will continue, despite consultation being required by the constitution. It states that the “activities of exploration, exploitation refining, industrialization, transport and sale of nonrenewable natural resources shall have the character of state necessity and public utility” (Article 356). By establishing the right to exploitation as a state necessity, it leaves room for the bypassing or overriding of an Indigenous communities’ disapproval. Bolivia is an example of how even countries with comparatively comprehensive constitutional frameworks include loopholes to advance the use of natural resources, despite the recognition of Indigenous land rights.

There have been instances in which Indigenous communities in Bolivia have been obtained recognition through constructional provisions and law. In 2006, Evo Morales was elected president and recognized the land rights of several Indigenous communities. His framework for recognition, implemented through seven executive Decrees, was based on the ratification of ILO 169 (Fontana, 2014). While constitutional amendments may be performative, international legally-binding agreements put recognition on the national agenda.

**Colombia**

In the 1980s, Colombian President Barco expanded Indigenous territories, termed *resguardos*, to encompass large areas of land that the state “could not control directly” (Rueda-Saiz 2017). He also affirmed the rights that Indigenous communities have to control their own
territories and govern themselves with their own systems and rules, as long as they are unconstitutional. While the rights established in both the Bolivian and Colombian constitution are often unfulfilled mandates, they do, along with binding international agreements, provide a foundation for elected leaders to proactively recognize rights. However, this is largely contingent on the policy agenda at that time so ensuring that Indigenous land rights are put on the policy agenda is key to obtaining recognition. To do this, you can assure government officials that stable and cooperative governance can be led by Indigenous communities in certain areas.

Colombia was one of the leading countries for recognizing Indigenous land rights through the ratification in constitutional reform in the early 1990s. It developed general principles of recognition and appeared to be committed to recognizing Indigenous rights (Roldán Ortega, 2004). The Colombian Constitution of 1991 recognizes Indigenous territories referred to as resguardos and outlines which rights they are allowed to exercise. Article 286 lists the types of territorial entities that can be established, including Indigenous reservations (Article 286). Instructions on how Indigenous communities are to collaborate with the Commission of Territorial Planning to delimitate a territory are also outlined in their constitution (Article 329).

The Colombian Constitution also clearly states that Indigenous communities have the right to regulate themselves “according to the uses and customs of their communities” including “oversee the conservation of natural resources” (Article 330). It also specifically states that natural resource exploitation will not impair “the cultural, social, and economic integrity of the indigenous communities” (Article 330, Paragraph). However, similar to the Bolivian Constitution, the Colombian Constitution includes prerequisites for Indigenous people to exercise their rights. Indigenous communities are subject to the Institutional Act of Territorial Planning which allows the Colombian government to implement “necessary fiscal regulations
and other matters relating to the functioning of the indigenous [Indian] territories” (Article 329). It also only allows Indigenous communities to operate within their own territorial jurisdiction with their own laws and procedures as long as they are “not contrary to the Constitution and the laws of the Republic.”

Despite Colombia’s efforts to constitutionally recognize Indigenous land rights, gaps in recognition and a lack of enforcement have allowed for the land rights of many Indigenous communities to be violated (Gonzáles, 2015). While the willingness of a government to recognize Indigenous land rights, and the existing legal avenues to do so, influence the extent to which Indigenous land rights are recognized, the successes can be seen in individual cases and the frameworks and methods they use to obtain recognition.

Costa Rica

Another leader in recognizing Indigenous land rights in Latin America is Costa Rica. The country ratified ILO Convention 169 and the Indigenous Law of Costa Rica (Law 6172 of 1977) provides support for territorial claims. It also recognizes that Indigenous communities have a right to administrative autonomy. It describes Indigenous territories as inalienable imprescriptible, and untransferable. However, the Constitution, which was last amended in 2011, only mentions the word “Indigenous” once in reference to languages that are to be maintained. There are no constitutional protections for Indigenous land rights in Costa Rica. Despite this, the Supreme Court has made several decisions in support of Indigenous territories being delineated and has created a precedent for communities seeking recognition currently or in the future (Roldán Ortega, 2004).

Chile

Similarly to Costa Rica, Chile has no constitutional recognition of Indigenous land rights. They have however, ratified ILO Convention No. 169 and established Indigenous communities’
rights to communal land titles. The Law on Agricultural Communities, No. 5 of 1968, and Indigenous Law, No. 19 of 1979, are the principal laws that recognize their right to collective land ownership (Wily, 2018). The Indigenous Law states that Indigenous communities are the lawful owners of their own land that cannot be ‘sold, seize, taxed or acquired by prescription’ (Article 13). While this can protect Indigenous land from being used without consent from Indigenous communities, it also restricts the communities in their ability to use their land as they wish, including selling land.

Like many other countries in Latin America, the economic interests of the Chilean government are often prioritized over adhering to their own legal frameworks that recognize Indigenous rights. The legal frameworks for recognizing Indigenous rights in Chile and other countries are designed in a way that allows for natural resource exploitation projects to be exempt from the restrictions that protect Indigenous land. However, for many decades, despite significant efforts to diminish them, Indigenous movements led by Mapuche communities have become powerful interest groups in Chilean politics (Kowalczyk, 2013).

The conflicts between the Chilean government and Mapuche communities and the ways in which the Mapuche have secured victories in strengthening the recognition of their rights provide hopeful examples of how others can do the same. Through political activism and international litigation, Mapuche communities have strengthened legal protections for their members and their resources. These examples are especially relevant to Indigenous land rights movements in Panamá, as they partially revolve around the same natural resources that cause conflict in Panamá, minerals and water. While Indigenous land rights have been recognized across Latin American countries, the right to use and control the resources that flow through them and underneath them have not.
In the late 1970s, the Water Code was established in Chile. It created a free market system for water rights that enforced privatization. Several Mapuche communities that had collectively managed water resources for many years were forced to divide their water rights amongst community members, fragmenting their ownership. The Chilean Mining Code established in 1983 created a similar system for privatizing mineral rights. This threatened the communal water and land management systems that the communities had maintained and led to the expropriation of Mapuche resources by large private investment projects (Azócar et al., 2005).

In 1989, the Pangue-Ralco hydroelectric project was announced, and construction began in the upper Bio Bio watershed, in a Mapuche territory. Over several years, Mapuche communities protested in opposition to the construction as it would disrupt natural water flow patterns and contaminate the water, threatening a resource they relied on. They not only organized political demonstrations but collaborated with nonprofits, environmentalists, and government agencies focused on Indigenous rights to raise concerns about the impacts of the proposed dams (LADB, 2002). A long court battle ensued that ended with a decision by the Chilean Supreme Court in favor of the hydroelectric company. Several other court battles occurred filed by different Mapuche organizations that consistently reaffirmed the lack of recognition for the water rights of Mapuche communities.

When the project was 70 percent complete, a group of Mapuche women filed a complaint to Inter-American Commission for Human Rights (ICHR) based on several articles of the American Convention on Human Rights. The Commission requested the Chilean government to halt construction while the case was considered. The case was never adjudicated, as an agreement was reached between Chilean government and Mapuche communities that would
compensate families that were affected by dams. While the agreement also prohibited any future hydroelectric developments in the upper Bio Bio region, it did not recognize the water rights that all Mapuche and other Indigenous communities in Chile have (Barbera-Hernandez, 2005). However, this success story highlights the influence that pressure from the ICHR can have. The Pangue-Ralco case did not even have to reach the Commission to create change. The possibility of international criticism, along with growing activist movements in the upper Bio Bio region drove Chilean politicians to consider the ramifications of the Pangue-Ralco project.

Indonesia

While Indonesia is not a Latin American country, and the definition of Indigeneity and social context around Indigenous communities is very different, it provides an example of an important success story that can be translated to Panamá and other countries. Indigenous communities in Indonesia have faced similar land conflicts with natural resource exploitation efforts supported by the Indonesian government. Obtaining full recognition for their land rights has been a long and complicated process as it has been in many countries. The Alliance of the Indigenous Peoples of the Archipelago (AMAN), a coalition of NGOs dedicated to improving the lives of Indigenous people throughout Indonesia, has advanced its mission through its support for political activism, including support for candidates. (Duile, 2020). They mobilize support for either Indigenous candidates or candidates who are committed to reducing the frequency to which Indigenous land rights are violated. Candidates at both the local and national levels supported by AMAN have been elected, and have used their power to recognize the land rights of Indigenous communities (Ismira, 2017). In 2014, AMAN endorsed a presidential candidate, Joko Widodo (Jokowi), who promised to recognize 12.7 million hectares of land as Indigenous land by 2019 and he won. However, elected officials do not always follow through
on their guarantees to provide recognition and Indigenous communities often receive only part of what was promised by candidates. By 2018, only 27,000 hectares had been recognized as Indigenous land and there had been several instances in which Indigenous activist had been criminalized by the Jokowi government. For these reasons, AMAN did not support or endorse Jokowi when he ran for president again in 2019 (Duile, 2020).
Chapter 6: Pathways to Recognition

Loopholes and Enforcement

There are many Indigenous communities in Panamá still seeking recognition of their land rights. Even when a community receives a collective land title and has the technical authority to voice concerns about land use and development, the policies often include loopholes for the Panamanian government and corporations to override any concerns from Indigenous communities. Using ambiguous language and long lists of exceptions, policies that recognize Indigenous land rights do not recognize the full set of rights that Indigenous communities have. Ambiguity is sometimes used as a tool to weaken the rights of Indigenous communities as ambiguous language can be interpreted in a variety of ways. It can be interpreted in a way that prioritizes economic concerns and allows for Indigenous rights to be violated.

Even if there were no loopholes in a recognition policy, it is likely that it simply will not be enforced. After construction begins on a mine or hydroelectric dam that violates Indigenous land rights, the local Indigenous communities must plead their case to the Panamanian Government to have the operation shut down. Even if the communities have a legal right to voice their concerns about land-use projects, their perspectives are often blatantly ignored.

Elections

Elections can be opportunities to advance social movements to expand the recognition of Indigenous land rights. Although elections are considered an instrumental part of many movements, seeing a preferred candidate win an election is not always a priority of Indigenous communities. A lack of trust, reinforced by decades of broken promises and a lack of political representation, discourages voting. If Indigenous candidates, or at least candidates deeply
committed to serving Indigenous communities, are on the ballot and have a chance at victory, elections become a useful tool for Indigenous people.

As seen in Indonesia with AMAN, when coalitions unite to support a national party they can vote in candidates that will recognize Indigenous land rights. Political parties in Panamá are highly fragmented and decentralized (Madrid, 2005). Indigenous communities should establish, or strengthen an existing, nation-wide organization that harnesses the momentum from Indigenous land rights movements already occurring at the local level across the country.

However, potential voters perceive rampant political corruption in the Panamanian government, the country is ranked 102 of 177 countries in the Corruption Perceptions Index by Transparency International. Even if candidates win, strings are pulled behind the scenes to prevent them from pursuing their political agenda, in this case recognizing Indigenous land rights (Wade and Thompson, 2014). However, elections should still be considered an important avenue for securing recognition of Indigenous land rights, as long as it is used in conjunction with other avenues (Schleiter and Voznaya, 2016).

National and International Litigation

As discussed earlier, national and international courts can be an important avenue for securing the recognition and enforcement of Indigenous land rights. While some countries, such as Costa Rica, have Supreme Courts that have decided in favor of Indigenous communities, very often the exploitative companies win national cases. In response, Indigenous communities can bring a case against the national government to the Inter-American Court of Human Rights. The decisions in favor of the Guna - Embera in Panamá and the Awas Tingni in Nicaragua are only two of 14 cases in which the Court decided the country was found responsible for the lack of recognition of Indigenous land rights (Espinoza, 2015). When a national government denies an
Indigenous community recognition of its land rights, and community’s efforts to obtain recognition using Panamanian systems have been exhausted, the community should look to international litigation.

While countries vary to the extent to which they recognize and enforce Indigenous land rights, and how they go about doing so, the ICHR bases its decisions on the UNDRIP. The Court has stated:

“The close ties of indigenous people with the land must be recognized and understood as the fundamental basis of their cultures, their spiritual life, their integrity, and their economic survival. For indigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations” (UN Human Rights Office of the High Commissioner, 2014).

This perspective, which employs the argument that Indigenous land is cultural property, has contributed to decisions being made in favor of Indigenous communities (Wiersma, 2005). However, if ambiguous terms such as “material and spiritual element” or “cultural legacy” are interpreted narrowly, this perspective could prevent other Indigenous communities from holding their countries responsible for violating their rights, and therefore be denied recognition of their rights. As discussed earlier, if a cultural property argument is used to try to obtain recognition of Indigenous land rights, the cultural value that the land provides should be defined by the community itself.

**Activism**

Another effective method that Indigenous groups have used throughout Latin America to influence policy decisions is activism. While political demonstrations are often considered to be a less effective approach than election or litigation to actually change laws, they put pressure on
elected officials to consider the repercussions of continued political disruptions, and therefore may be more disposed to recognize Indigenous land rights. Indigenous activist movements in Panamá have had several victories in recognition by means of protesting. The “Guna Revolution”, the first recorded major activist-movement led by Indigenous people in Panamá, not only led to the creation of the Guna Yala Comarca, but sparked Indigenous activist movements across the country that continue to fight for the recognition of their land rights.

In 2011, Ngäbe communities protested against a revision to Panamá’s 1963 Mining Code that aimed to increase foreign investment in mining operations and issued a water concession for the construction of a hydroelectric dam. After months of protests, including roadblocks along the Pan-American Highway, the law was reversed and a ban on mining exploration, exploitation and hydroelectric energy development in the comarca was passed (Simms and Moolji, 2011). By obstructing transportation on a road that the entire country relies on for resources and services, they disrupted systems that not only serve the Panamanian citizens and help maintain national economic stability, but are also used by countries throughout Central and South America.

This activist strategy was used again more recently in opposition to the mining contract that First Quantum Minerals proposed in 2023, resulting in the Supreme Court striking down the contract. The magnitude of these most recent nationwide protests, the impacts they had, and the victory that they secured creates momentum for current and future Indigenous land rights movements.

External Support

Because Indigenous people only account for 12 percent of the total population in Panamá, gathering political support from non-Indigenous coalitions increases the likelihood that politicians will be pressured into enhancing recognition of Indigenous land rights (The World
Bank Group, 2023b). Whether Indigenous communities are using elections, litigation, or activism to secure the recognition of their land rights, joining forces with other coalitions to support their cause is key to success. Environmentalists, human rights activists, researchers, students, professors, and other groups have supported the expansion of recognized Indigenous land rights across the world. Indigenous land practices and traditional ecological knowledge (TEK) are becoming important parts of conversations about ecosystem recovery, conservation, and climate change. This unprecedented support for Indigenous communities can be carried forward through the avenues discussed in this thesis. It is important to note that non-Indigenous coalitions, while they may have similar policy goals, drawing on their support can eventually lead to compromises and Indigenous communities loosing political power within the larger coalition.

**Recommendations and Insights**

Like many other countries, Panamá’s recognition of Indigenous land rights is neither comprehensive or nonexistent. While collective land titles have been issued, the economic pressures to exploit and export natural resources drive the rapid development of land use projects. Indigenous communities, who tend to live on environmentally valuable land and have little to no protections against large corporations, become targets for exploitative efforts. The Panamanian government ensures that recognition policies are full of loopholes and exemptions that allow resource exploitation to continue, regardless of pre-existing Indigenous land rights. However, there are pathways to recognition that when used in combination with one another can successfully lead to the recognition of Indigenous land rights. With the support of other interest groups, activism, elections, and national and international litigation can be used to obtain recognition.
To ensure that Indigenous land rights are fully recognized, there are conceptual aspects that should be considered and incorporated into a movement for recognition. Framing land as cultural property allows Indigenous communities to use their land as they wish. Using conservation as a reason for recognition can aide certain communities in obtaining recognition but should not become the standard or a prerequisite. Finally, FDIC recognizes communities right to not only live and use the resources on their land but to disallow unwanted land use projects. Using these concepts and the strategies listed above, Indigenous communities in Panamá can navigate a pathway to recognition.

Through the research and writing process of this thesis, it has become clear that there are gaps in research about Indigenous land rights. The literature is rife with the ways that Indigenous land rights are violated and not recognized. While it is important to highlight the severity of this issue worldwide, it is also important to highlight success stories and discuss what communities can realistically do to push their movement forward. Researchers and scholars should expand the available literature on comprehensive, enforced recognition policies currently in place and how they came to be. Researchers should communicate and learn from communities that have found success and share their insights with other communities. Supporting Indigenous communities in their fight for recognition can take many forms including research. While Indigenous communities should lead the movement to have their rights recognized, we can all play our part to ensure these communities have the rights and resources to thrive. We should all offer the external support that helps Indigenous communities obtain recognition of their land rights.
References


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