Bio-cultural protocol of the Indigenous Miskito People

The right to free, prior and informed consent in our Honduran Miskito territory
Bio-cultural protocol of the Indigenous Miskito People

The right to free, prior and informed consent in our Honduran Miskito territory
BIO-CULTURAL PROTOCOL OF THE INDIGENOUS MISKITO PEOPLE

The right to free, prior and informed consent in our Honduran Miskito territory

This document was developed by:
MASTA (Mosquitia Asla Takanka-Unidad de la Mosquitia)

With the technical assistance of:
Janina Heim, intern with the International Union for the Conservation of Nature (IUCN)
Olman Varela and Ronald McCarthy, Regional Office for Mesoamerica and the Caribbean Initiative (IUCN).
Environmental Law Centre, IUCN, Bonn, Germany.
Johanna Von Braun, Natural Justice.

With support from:
The Federal Ministry of Economic Co-operation and Development (BMZ).

Design and layout:
Mónica Schultz

Photographs:
Steve & Judith Collins
IUCN

October, 2012
Contents

Presentation .......................................................................................................................... 5
Introduction .......................................................................................................................... 7

1. La Mosquitia and the Miskito People ......................................................................... 9
   1.1 Historical review of the territory of La Mosquitia and of the Miskito People ................. 9
   1.2 The Miskito Society: development and actual environment ........................................ 12
   1.3 Political Organisation ............................................................................................... 13

2. Cultural values in relation to the ecosystems and the use of natural resources ......... 17
   2.1 The territory and the natural resources in the Miskito world view ......................... 17
   2.2 Use of natural resources ......................................................................................... 19

3. Problems and local challenges .................................................................................. 23

4. Aspirations for the future ........................................................................................... 27

5. Our rights in accordance with international and national legislation ......................... 29
   5.1 The right to self-determination ............................................................................. 30
   5.2 Rights relating to lands, territories and resources ................................................ 31
   5.3 Traditional institutions and customary laws .......................................................... 32
   5.4 Rights to consultation and free, prior and informed consent ................................. 35

6. The process of free, prior and informed consent for the Miskito People ..................... 39
   6.1 The different elements of the consent .................................................................... 41
   6.2 The 7 steps of free, prior and informed consent in La Mosquitia ............................. 43

7. Call to respect the process with regard to free, prior and informed consent ............... 55

8. Contact information ..................................................................................................... 57

Annex 1. Analysis of the international and national legislation with regard to the rights of Indigenous Peoples, consultation and free, prior and informed consent .................................................................................................................. 59

Annex 2. Map of the indigenous lands of La Mosquitia ................................................ 111
The indigenous population of La Mosquitia lacks instruments that enable it to negotiate and to defend its rights recognised in the national and international legal frameworks, particularly when it comes to conserving the natural resources of the indigenous environment.

Accordingly, by means of a participative and inclusive process, MASTA (Mosquitia Asla Takanka-Unidad de la Mosquitia) was given the task of developing the Bio-Cultural Protocol of the Indigenous Miskito People: the right to free, prior and informed consent. It is a methodological tool that helps with the facilitation of negotiations in La Mosquitia with regard to the projects and decisions that affect the indigenous communities and their natural resources.

The first part of the document corresponds to the body of the Protocol describing in detail the process that should be implemented for the achievement of free, prior and informed consent in La Mosquitia.

Annex 1 presents a detailed analysis of the Honduran national legislation and the international legislation connected with the rights of indigenous peoples. This analysis highlights those articles of law that have a direct relationship with the approaches that are presented in the Bio-Cultural Protocol. Annex 2 corresponds to the map of the indigenous lands of La Mosquitia.

This Bio-Cultural Protocol was produced with the technical help and support of the International Union for the Conservation of Nature through its Regional Office for Mesoamerica and the Caribbean, as well as with the support of the Centre for Environmental Rights. Technical assistance was also received from the Natural Justice organisation, which has extensive experience in the topic of Bio-Cultural Protocols in other areas of the world.

The support received on the part of the Federal Ministry of Economic Cooperation and Development (BMZ) in Germany is also much appreciated, as well as the participation of all of the people that attended the various workshops that were held in La Mosquitia, to make the development of this Bio-Cultural Protocol possible.
In March 1995 the Government of Honduras ratified Convention 169 of the International Labour Organisation (ILO) regarding the Indigenous and Tribal Peoples in Independent Countries (henceforth: Convention 169 of the ILO). However, until now the State has not complied with the application of the scope and content of this judicial instrument in favour of the indigenous peoples, which as a result of its hierarchical order, takes precedence over the national laws.

Therefore, we have agreed for the leaders of the Miskito People to develop a Bio-Cultural Protocol on our ancestral rights in the territory of the Honduran Mosquitia\(^1\), which due to its natural wealth is the area in the country predestined for the extraction and exploitation of natural resources. In particular the lack of respect of the State of Honduras with regard to our right to free, prior and informed consent over activities that affect our people, gave rise to an internal process of reflection on how the consultation should be carried out in La Mosquitia, and how one could guarantee that our collective right to free, prior and informed consent is respected in the future. We hope to end the bad practice of the past, when government officials or private companies held a meeting with a group of people previously selected by themselves, where their work was explained to them and then this meeting was represented as a consultation with the Miskito People. By using this protocol we want to create respect for the latter and for all of the stakeholders who plan activities that have an impact in the territory of La Mosquitia.

In the different chapters of the protocol we want to give our vision regarding the history of the Mosquitia and of the Miskito People, the form of social and political organisation, our world view and the use of natural resources, the major problems that we see in the territory today and our aspirations for the future. We look at our ancestral rights that pave the way for us to develop our process of how we should

---

1. Four peoples live in the Honduran Mosquitia, the Pechs, the Tawahkas, the Garifunas and the Miskitos.
carry out the consultation with the purpose of achieving free, prior and informed consent in La Mosquitia, according to our own institutions.

It is necessary to point that this protocol, as well as the process it contains, is considered to be a work in progress and not the final step in our aspirations to guarantee our right to free, prior and informed consent. We will maintain a process of constant evaluation in order to guarantee that the protocol responds to the necessities of our communities.
1. La Mosquitia and the Miskito People

1.1 Historical review of La Mosquitia and the Miskito People

The history of the Miskito people has been distorted by foreigners who observed the natives and wrote without adequately reflecting the actual situation. Therefore, we want to clarify some key points with respect to the Miskito people and their territory, La Mosquitia.

Much of the Miskito nation’s pre-Columbian and current population, belongs to the Chibchan language branch, whose nations (amongst them the Ulwa, Tuahka, Lempas, Paya, Albastwinas, Rah, Patukas, Panamankas, and Tawira) entered the current Republics of Nicaragua and Honduras respectively, in successive migrations via the isthmus of Panama and settled in Costa Rica, before entering TahusWalpa (tunnel in the rock) and TuluWalpa (oval stones like the Oriole’s nest).³

At the present time the native people are composed of four distinct groupings: the Mam in Honduras; the Wanky of the Rio Coco, the Tawira from Sandy Bay to Wauhta; and finally the Baldam of Laguna de Perlas, TasbaPauni, etc. Each group with its own particular characteristics founded other peoples and communities that still remain today ever since time began, surviving for millenia.

The Miskito People has had a long history of resistance and survival especially in the last centuries. The conquest and colonisation of the American continent brought Spaniards and English to the north coast of Honduras, which over several centuries became the stage for rivalry over their control of this territory. At the end of 1859, after the signing of the "Wyke-Cruz Treaty" with England, the Republic of Honduras exercised its national sovereignty over La Mosquitia, without respecting the provision of the treaty guaranteeing the Miskito people possession of La Mosquitia.

The republican legislation of the 19th century had the specific objectives of "nationalising", educating and subduing the "wild tribes" of La Mosquitia, mainly through establishing the use of Castilian Spanish and evangelism, and with the creation of the Department of La Mosquitia and its government by the State. The above-mentioned evidence of a process of continuity with regard to the objectives pursued in La Mosquitia by the Spanish colonial State and the independent republican State, lead to similar negative results.

The exploitation of the natural resources of the region was also undertaken by the State, by means of a regime of concessions to private parties, or the public sale of La Mosquitia to the highest foreign bidder. These projects

---

5 Ruta/Banco Mundial (2002). Perfil de los Pueblos Indígenas y Negros de Honduras. Tegucigalpa, pp. 20-21; Treaty celebrated between His Britanic Majesty and the Government of Honduras (1859), Art. 3. During the presence of the English in La Mosquitia, the territory was governed by the famous "King Mosco".

6 Decree of the 26th of November 1861 ordering the construction of schools in La Mosquitia; With respect to the legislation on "mission schools" see: Agreement of the 28th of April 1915 (a mission school is organised in the department of Olancho and the people who serve in it are named); Agreement of the 28th of June 1915 (Professor Toribio López V. is appointed in order to provide his services for the education of the indigenous peoples of Pao); Agreement of the 17th of February 1928 (establishes mission schools in the eastern part of La Mosquitia), in: E. Alvarado Reina (1958). Legislación Indigenista de Honduras. pp. 54-56,82-83 (documents relating to the missionary Works of Father Subirana, of the 7th of June 1864).
were favoured by the Liberal Reform and its "liberal progressive" ideology of the year 1876.

Much later, the State nominated this region as an area of internal colonisation, a proposal that would have extended the Honduran agricultural frontier beyond the banana plantations of the north and the cattle ranches of the east.

The presence of the State in La Mosquitia, at the beginning of the 20th century, was facilitated by means of the so-called "mission schools", and later with the creation of a "cultural mission", both intended to assimilate the natives and to incorporate them into the national State.7

In 1957, the territorial dispute which took place between Honduras and Nicaragua in the course of exercising their respective national sovereignty, resulted in a territorial realignment of the Honduran Mosquitia. The conflict was reflected in the creation of the Department of Gracias a Dios; and in the sending of military contingents to various areas of La Mosquitia. From then on, the Honduran military forces permanently represented the State in La Mosquitia.

Illustration 1. The Honduran Departments

---

Another consequence of the territorial realignment of the Honduran Mosquitia was the organisation of two municipalities, Puerto Lempira and Brus Lagoon whose political jurisdictions covered the entirety of the territory that the State allocated to the Department of Gracias a Dios. One of the main implications of this fact was that the centre of the political power passed from the native communities to the national State, represented by the civil and military authorities of the department and of the above-mentioned municipalities. Today, a total of 6 municipalities exist in La Mosquitia, as parallel structures to the Miskitos’ own institutions: Puerto Lempira, Brus Lagoon, Ahuas, Villeda Morales, Wampusirpe and Juan Francisco Bulnes.

Another historically important force has been the Moravian Church that ended up being the predominant one for the Miskito People in the first decades after its foundation in Honduras in 1930. With the growing importance of the Catholic Church, the restructuring of the Moravian Church in the year 1997, and the proliferation of the Protestant denominations, this unifying force feels much diminished. Although religion is very important for Miskito society, the most direct association between religious belief and cultural identity is vastly less significant.

From the time of the colonisation by the Europeans, La Mosquitia, its towns and natural resources have been very desirable objects of exploitation for foreigners, be it the State of Honduras or other countries, transnational companies or the Church. However, as a people we survive and we are continually fighting to preserve our culture and our natural resources.

1.2 Miskito Society : development and current environment
The basic unit inside Miskito society is the community. For the purposes of defining the scope of the Miskito communities, we made use of several sources that record the name of the community, its geographical location, its population and ethnic composition. It is worth noting that a definitive source does not exist for the entire Mosquitia, and differences exist, sometimes very large, between different sources. However, it is considered that there is a total population of around 72,000 inhabitants in La Mosquitia.

---

8 MASTA (2010). 2011-2023 Lifeplan. The uncertainty with regard to the total number of people in the population dates back to the questionable methodologies used in past censuses. In the future a census is required using the methodology developed by the indigenous peoples themselves, and not by the central Government.
The Miskito communities vary enormously in terms of size and character. Nevertheless, there are elements that all of the communities have in common. In the first place, with the partial exception of the Miskito communities already transformed by the influence of agricultural land, there is a high retention and use of the native Miskito language. Equally, the organisation of relationships based around post-marital residence in the bride's house, and close relationships with the enlarged family of female in-laws is a common characteristic in all of the communities.

There are also certain common features in the physical organisation of the communities, such as the dispersed location of the building plots and the style of construction of the houses, etc., whether it be due to the demands of the environment, the influence of key external influences, or simply due to tradition.

The recent common history in the main economic activities (agriculture and fishing), also exercises a consistent influence on the Miskito communities, even if there are certain important variations depending upon the main orientation: towards the sea or the mountains.

Lastly, in all of the communities common elements exist that correspond to values, premises, beliefs, collective memories of history and cosmology that have ended up taking a special place in the Miskito culture. Although it is certain that some of these elements have been transformed by external influences (mainly by the Moravian Church), the important thing is that they are considered, by the same people, as part of the "Miskito culture."

1.3 Political organisation

The organisation for the political representation of the Miskito People in Honduras, MASTA "Miskitu AslaTakanka" (Unidad Miskita), was founded in the community of Awas on the 26th of June 1976. Since its foundation the organisation has had 17 board meetings and the same number of congresses. The current Board of Trustees was sworn in on the 3rd of October 2010 and the first organised activity that it carried out was the development of an operational plan for the three years of government in which the immediate necessities to be solved were defined together with the management methodology. In this Lifeplan, MASTA’s mission and vision are also outlined:
To be the supreme authority of territorial political representation, demanding, defender of the individual, collective, ancestral rights and identity of the Indigenous Miskito People striving for the strengthening of the autonomy and indigenous government of the territory of La Mosquitia, revitalising the culture and guaranteeing the legalisation, management and collective control of their lands, territories and natural resources.

MASTA’s statutes and regulations were prepared and approved prior to the obtaining of legal entity status No. 52-87 granted by the Republic of Honduras through the Ministry of the Interior and Justice in the year 1987. Today these documents are undergoing a process of amendment.

Because La Mosquitia is a huge territory with an area of 16,997 square kilometres and a population of around 72,000 inhabitants divided into six municipalities with 386 communities (villages and hamlets), it is very difficult for a sole central entity to manage. Therefore, an analysis in the MASTA congress that took place in 1997 suggested the possibility of dividing the territory into zones and then arranging for the handling of each of the zones by means of the Territorial Councils. Between 1998 and 2011 a total of 12 Territorial Councils were set up with their respective Communal Councils, based on the MASTA structure. The organisation’s criteria were the same as those based on the similar features between communities and the population, or on some common interest between them.

---

9 The ancestral territory of La Mosquitia was much much bigger than it actually is now.
The 12 Territorial Councils are:

1. Rayaka (means “life” in Miskito, formerly CVT – Committee for the Monitoring of the Biosphere Reserves of the Río Plátano). Belén
2. Diunat (Drapap Tarara IwiUplikaNaniAslaTakanka, which means: “Organisation for the people who live in Drapap Tara”). Brus Laguna
3. Finzmos (Federation of indigenous Peoples of the Mocorón Area – Segovia). Mocorón, Segovia
4. Katainasta (KatskiLakunkaTa AiskaIndiankaAslaTakanka, which means: “Organisation of the indigenous peoples who live in all of the confines of the Laguna de Caratasca”). Laguna Caratasca
5. Auhya Yari (ancestral name of Puerto Lempira, organisation of the indigenous peoples who live in Auhya Yari). Puerto Lempira
6. Lainasta (LakalIndiankaAslaTakanka, which means: “Organisation of the indigenous peoples of the Laka area”). Laka
9. Bamiasta (ButukaAwalaya Mayara IwiIndiankaAslaTakan- ka, which means “Organisation of the indigenous peoples of Patuca Medio”). Ahuas, Río Patuca, Río Plátano Biosphere Zone
10. Bakinasta (ButukaKlauraIwiIndiankaAslaTakanka, which means “Organisation of the indigenous peoples of Patuca Alto”). Wampusirpi, Río Patuca, Reserva TawahkaAsagni zones
11. Batiasta (ButukaawalaTauraiwiIndiankaAslaTakanka, which means “Organisation of the indigenous peoples who live in the mouth of the Río Patuca”). Barra Patuca
12. Truksinasta (TruksuluKiamka Tipi SaltralwiNaniAslaTakan- ka, which means: “Organisation of the Truksulu descendants who live in the Tipi area”). Tipi
Illustration 2. The 12 Territorial Councils and the territories of Pech and Tawahka

These twelve Territorial Councils with their respective Communal Councils constitute the base that makes up the assembly and the MASTA congress and which in turn, is the supreme authority of the Organisation. Each Territorial Council has a Board of Trustees.

The advice of the elders completes MASTA’s political structure and it is an especially important entity in the resolution of conflicts and spiritual orientation.
2. Cultural values in relation to the ecosystems and the use of the natural resources

2.1 The territory and the natural resources in the Miskito world view

The Honduran Mosquitia consists of one of the last vast wild areas of Central America that contains both terrestrial and marine ecosystems that are of national, regional and global importance. Also, La Mosquitia forms the longest remaining corridor of tropical forest in the isthmus, under the well-known name of the Meso-American Biological Corridor, in which the protected areas of the Man and Biosphere Reserve of the Rio Plátano, the Tawahka Asagni Anthropological Reservation and the Patuca National Park are found.

The Miskito People have always maintained a very harmonious relationship with the environment. Part of this special relationship is derived from the Miskito legends,
that permit knowledge to be conveyed via the connection between the physical and the spiritual world. In the Miskito world view nature and natural resources are understood to be part of a greater macrocosm, as spiritual beings. For this reason, traditionally the Miskitos have treated nature with respect and have not over-exploited their natural resources, as they did not wish to risk an imbalance in this relationship.

This concept is also visible when it comes to matters of health and illness. The individuals who practise traditional medical are the prapits, the sukias, the sikakakaira, the smayakakaira and yapikakaira, who associate illnesses with mythological beings and spirits such as the swimin or duhindu (owners of the hills and the large plains or savannas, a short deity with a big hat); untadukia (owner of the mountains who is very tall); liwamairin (owner of the rivers, lagoons, lakes, seas and all the creatures that are in them); prahaku (it travels in the swirling winds and it is small); wakumbai (it looks like a horse, has a single paw in the centre of its chest and a single eye in its forehead); and waihwan (it assumes different forms and sizes, and initially it appears in the form of a small animal like a weasel or a small dog).

Although the spirits are the cause of almost all illnesses, they can also provide the remedy to them; this can be a special song, always accompanied by gestures and physical movements together with the anointing of oil, the act of passing plants over the patient's body or ceremonial bathing. This circular relationship is presented more vividly in the yumu, that is the part of the Miskito medicinal culture which is the most difficult to understand. Yumu is the cause, the symptoms and at the same time, the cure of different illnesses and ailments of everyday life. Several yumus exists, each one with its own name, with a list of symptoms and a way of curing it. Most have the names of animals, like the limiyumuhka (jaguar), waulayumuhka (boa constrictor), imyulayumuhka (lightning), liyumuhka (spirit of the river), unta isignika (spirit of the forest), and other names of ancestral spirits. As can be observed, the links with the world of the spirits are very evident and they have contributed to the special relationship that the Miskito People share with their environment.

It is necessary to emphasise that the reason why the Miskitos conserve their natural resources and territories is that ambition or greed did not
exist in the ancestral culture, that is to say nature’s bounty was considered to be of divine origin and one was only allowed to take what was necessary and any misuse would result in a punishment.

Likewise mother earth had to be managed appropriately and to be able to share the productivity of the latter one had to consider the plants, animals and life that exists on the face of the earth as part of mother nature and the balance had to be maintained in order to be able to live side by side with all of those things which are necessary in life.

For generations the Miskitos, cultivated the earth taking only what was necessary to feed their families and in that way mother earth’s resources were not wasted. Once harvested, the land was returned to nature for its regeneration and it took between 15 to 20 years before the same plot of land was used again, and in that way, according to the Miskito world view, mother earth was not mistreated.

2.2 Use of natural resources

The traditional way of using natural resources in La Mosquitia has followed the basic principle of Miskito culture that is “pana panakulkankanaka” (mutual respect). This value is the mainstay of the Miskito culture, where individualism does not exist but the collective good underpinned by mutual respect is all that matters. This understanding is also found in several beliefs predominant throughout La Mosquitia, for example:

1. In the Kujunta lagoon people who try to cross alone disappear with everything and their canoe.
2. There are many sprites that confuse a person who goes into the forest alone.
3. There is a devil in the mountain that takes farmers who work alone and makes them disappear; for this reason one should never work alone on the mountain, and one should be accompanied by friends and neighbours.

Due to these beliefs the spirit of the group as a whole still prevails in La Mosquitia as is witnessed by the traditional use of the natural resources. However, little by little this traditional use in La Mosquitia is disappearing and being replaced by manual
labour and the exploitation of the natural resources by foreigners and by some natives who have copied this form of life from other cultures. Nevertheless, the most common uses of the natural resources in La Mosquitia are fishing, agriculture, sawmilling and planing of wood. Agriculture in La Mosquitia takes the traditional form of subsistence farming on small parcels of land, without any commercial use of the products. The Miskitos do not cut down large areas of forests to make way for cultivation, but they use small fields that are allowed to lie fallow for a time to ensure the fertility of the soil after it has been cultivated for some years.

Most of the families in La Mosquitia are involved with fishing, either for their own consumption or commercially. The fishermen of La Mosquitia use gill nets and cast nets and skindiving, capturing mainly snapper, sea bass, snook, mullet and mackerel. The only organisational experiences are those of the Kaisa Aisa Pawaia (KAP) cooperative that has its meeting place in Prumnitara with a total of 29 current members and PAMUPEL that is the La Mosquitia Association of Artesanal Fishermen.

Fishing by means of diving constitutes a threat not only to the coral reefs and its associated species, like the thorny lobster (Panulirus sargus) and shrimps (Penaeussp.), but also to the health of the fishermen who suffer paralysis due to the accumulation of nitrogen in the blood as a result of coming to the surface too quickly. It is the main reason why nearly four thousand citizens from the Miskito People see their useful life reduced to just thirty or forty years, with an annual rate of 350 to 400 cases of death or paralysis, with the consequent economic burden for their families and for the country. This dramatic situation has been criticised by the Association of Honduran Miskito Injured Divers, AMHBLI, without the Government or any non-governmental institution having paid any attention at all so far to such unjust and inhuman exploitation.

11 Ibid.
12 Palacios, Carlos Mauricio (2001). Estudio sobre la Problemática de los Buzos de La Mosquitia Hondureña. (Study regarding the problems faced by the Honduran Mosquitia Divers)
The activity involving sawmilling and planing of wood has changed a lot over the last decades and it has become a lucrative sector, where on many occasions corruption has facilitated the illegal extraction of precious woods. Most of the activity is being carried out in the southern and western areas of the nature reserves where the precious wood being extracted is mahogany (Swietenia macrophylla). Likewise other over-exploited species exist mainly in the peripheral areas, those that are used for the extraction of oil or for construction, like for instance satin walnut (Liquidámbar styraciflua) and the palm (Roystonea donlapiana), respectively.

It is estimated that the illegal exploitation of precious woods in La Mosquitia will exceed the 700 thousand cubic feet permitted by the State of Honduras for the extraction from the different forests controlled by the National Institute of Conservation and Forestry development, Protected Areas and Wildlife, ICF. According to the comparison outlined by the manager of this institution, this sector would be extracting some five million six hundred thousand feet of precious woods, especially cedar and mahogany\textsuperscript{13} and the economic benefits that are produced are enjoyed by big business.

The problem originates because now the Miskitos are not owners of their own lands. Today with the natives being dispossessed of their lands, it is not uncommon to find dozens of non-native settlements that are only devoted to pillaging and the irrational use of the forest.

These problems are also noticeable in the hunting activities, traditionally carried out by the Miskitos. The common animals, like peccary (Tayas supecari), the paca (Cuniculus paca) and the green iguana (Iguana iguana), are dwindling due to the destruction of their habitat and the over-exploitation, in most cases due to the illegal trafficking. It is also necessary to mention that the hunting of animals on the brink of extinction is prohibited, and there are restrictions on the protected areas, a fact that complicates this traditional Miskito activity.

The inhabitants of the Honduran Mosquitia have a long art & crafts tradition in the manufacture of a sort of cream or white cloth roughly hewn from the internal bark of the following trees: the tuno or tikán (Kastilla Falax),

\textsuperscript{13} Diario La Prensa, 3rd of March 2003.
the higüero tree or ani (ficus sp.) and the rubber tree or tasa (Castilla Elástica). The extracted canvases are known as amattakna, amatani and tas buana or tas amat, respectively and they are used as covers for sleeping and as clothes, and also to sell as crafts. There are now tuno craftsmen who have formed themselves into four regional, ethnic and homogeneous arts & crafts cooperatives, in the area of Wampusirpe.

The Honduran Mosquitia is the area with the best potential for ecotourism in Honduras, due to the great existing cultural, ethnic and ecological diversity in the area. However the hotel and tourist infrastructure is not developed in the area, and another aspect to highlight is the isolation caused by the lack of any means of transportation. However, this aspect has perhaps allowed it to have the highest degree of ethnicity in the country.

The governmental institutions created for the protection and conservation of the natural resources, such as the State Forestry Administration and the Honduran Forestry Development Corporation previously AFE - COHDEFOR, and now ICF, the General Directorate of Fishing and Agriculture (DIGEPESCA), and the Ministry for Natural Resources and the Environment (SERNA) do not have any mandate in La Mosquitia. They have also taken away powers from the indigenous population, which has resulted in an increase in the use and illegal marketing of the natural resources, a situation in which the above-mentioned institutions have been involved.
3. Problems and local challenges

As has been mentioned previously, the Miskito People of Honduras have faced many difficulties over the last decades as the threats have become increasingly more serious and different. Already in 1988, the investigator Peter Herlihy observed:

"The wave of colonisation penetrates La Mosquitia from the west like a plough, pushing towards the east and leaving felled forests in its wake. In a moving tide below the main tributaries of the upper and middle Patuca, this front has penetrated the area along the rivers Guayambre, Guayape, Patuca, Cuyamel and Waumpú and it now threatens the ancestral lands of the Tawahkas and Miskitos. The prospectors for gold, cattle ranchers and farmers are in competition for the forests and the resources, which have been under the aegis of the indigenous peoples for centuries."14

Unless the State intervenes this situation will get worse day by day. One of the most concerning problems is the tenancy of the lands and territories. The indigenous territories do not legally belong to the native peoples, therefore the national lands are considered to belong to the State. The Miskito People, through the Territorial Councils have been fighting against this decision for more than 30 years, but until now they have not achieved their objective; for its part the State offers them neither individual or collective ownership as required by the people and as stipulated in Property Law15. It is only from this year that through PATH II and PROTEP16 seven Territorial Councils have initiated a process of intercommunity ownership in La Mosquitia.

The result of the problem of the lack of land ownership is the advance of the wave of agricultural colonisation - ranching that is destroying our natural habitat, all of which is happening without the Government taking any action, finding anyone guilty, or penalising those who are breaking the environmental laws.

Another of the problems is the big concessions that the State of Honduras makes with the indigenous peoples in order to exploit the resources of La Mosquitia on a non-consultatory basis. In the year 2010 as part of its foreign investment policy the State made available to investors the fluvial resources for hydroelectric dams. The construction of these mega-projects in the Miskito territory, as in the case of Patuca III, II and I, would affect the aquatic biodiversity and would destroy our only means of traditional fluvial communication as well as our agro-productive systems located in the river meadows.

Other concessions were granted in the plains for the planting of African palm for the production of biodiesel, forests for extracting wood and over recent months there is talk of establishing big concessions covering entire territories, including whole communities of private entrepreneurs for the construction of "model cities". All of these investment policies are focussed on La Mosquitia.

As a result of climate change the United Nations has initiated a new policy of payment for the capture and reduction of carbon emissions, better known

15 Ley de Propiedad (2004), Art. 94. (Property Law [2004], Art. 94)
16 Proyecto de Administración de Tierras de Honduras (PATH) y Proyecto de Ordenamiento Territorial Comunal y Protección del Medio Ambiente Río Plátano (PROTEP), (Honduran Land Administration Project [PATH] and Río Plátano Territorial Community Zoning and Environmental Protection Project [PROTEP]
as REDD\(^\text{17}\). In Honduras broadleaf forests do not exist except in the Miskito territories, and this is the reason why it has been the centre of attention of a whole host of looters and monopolistic enterprises who want to appropriate the indigenous forests for their sole benefit.

With reference to fishing, the Government grants environmental licences to companies for the \textit{exploitation of the coastal marine resources} without any control and without generating any benefit for the Indigenous communities. We note serious violations in labour rights from the point of view of the Miskito divers in the submarine fishing industry, already mentioned in the previous chapter.

Due to its geographical location, the Miskito Territory has become a \textit{drug trafficking corridor}, an activity carried out by third parties in our territory that threatens our ancestral culture with catastrophe and destruction and which represents a great security problem for all of our population.

The systematic violation of the indigenous ancestral rights of the Miskito People is also shown in the \textit{creation of national decrees} which affect the Indigenous peoples and exclude them from any consultation in contravention of Convention 169 of the ILO and the United Nations Declaration on the Rights of Indigenous peoples. These decrees include the creation of protected areas in the territories of the Indigenous Miskito People, with the intention of depriving them of their rights over their territory.

Due to the lack of any education where the cultural identity of the indigenous peoples is highlighted, the \textit{acculturation and loss of our population's identity} accelerates, especially amongst the young. In the Spanish system of monolingual education, there is no recognition of an educational policy in our own language and culture which generates social, economic and cultural expectations. The indigenous peoples have developed a model of Bilingual Intercultural Education (BIE), adapted to the Basic National Curriculum (BNC) that includes the intercultural pedagogical specificities, however, it is not going ahead because Miskito has not been declared as the official language. Also, the National

\(^{17}\) Programme of Reduction of Carbon Emissions caused by the Deforestation and Degradation of the Forests,
Programme of Education for the Indigenous Peoples of Honduras (NPEIPH) does not guarantee the full development of the Bilingual Intercultural Education in all of the educational communities of the indigenous and Afro-descendant peoples, because there is no public educational policy under this model.

The lack of any indigenous governance and territorial autonomy in those territories of La Mosquitia do not enable our culture to be revitalised nor guarantee the legalisation, administration and collective control of our lands, territories and natural resources. The proliferation of religious sects, promoting credos that are opposed to our ancestral culture, promotes this effect, as does the party political vernacular which prevents the visualisation of our priorities as an indigenous people with our own cultural values. The final lack of respect of the State with regard to the self-government of our territory is manifested in the creation of the Ministry of Indigenous Peoples and Afro-Hondurans (SEDINAFROH) by the Government, as a parallel structure to the indigenous organisations of the country and the Miskito organisation MASTA.

All of these threats are accompanied by bribes from the authorities together with state investment policies, so that the Miskito People are encouraged to resist the need to make use of their ancestral knowledge and to attract international attention.
4. Aspirations for the future

As a result of the major challenges in the territory of La Mosquitia described in the previous chapters, the main aspirations for the future of the Miskito People have been identified in MASTA’s different assemblies and ordinary congresses18, as being amongst others:

1. To procure the unity of the People on all levels, communal, territorial and political.

2. To achieve territorial autonomy and self-government in the Miskito nation in such a way that we can search for the best way to live as a community in accordance with our own world view.

3. To create a land commission, prohibit the sale of land, and ensure that the Government respects the rights of ownership of the indigenous peoples of La Mosquitia.

---

18 See MASTA (2010). 2011-2023 Lifeplan
4. Ensure that all of the territories of La Mosquitia are owned jointly by and for the benefit of the communities so that the latter are preserved for future generations.
5. Demand a government policy to ensure the respect of the ancestral rights.
6. Delimit La Mosquitia’s offshore platform in favour of the Miskitos to ensure the invigoration of the local economy.
7. Create the Indigenous University in La Mosquitia, in order to educate the Miskito leaders.
8. Declare the native Miskito language as the mother tongue of La Mosquitia.
9. Respect the life and the integrity of the indigenous Miskito leaders.
10. Protect the patents of all of the products and ancestral wisdom of La Mosquitia, in order to conserve them for future generations, especially when it comes to Batana.
11. Resolve the situation of the Jamaican invaders in La Mosquitia since they have been plundering and destroying the resources in the different keys and islands.
12. Do not create more protected areas in the territories of the La Mosquitia, unless it is a proposal from our own administration.

As we are threatened every day by domestic and foreign activities in our territory, we have agreed to demand relentlessly and without exception all of the rights which we have in accordance with the different international legal instruments, such as Convention 169 of the ILO and the United Nations Declaration on the Rights of Indigenous Peoples.
5. Our rights according to the international and national legislation

In the recent decades, the rights of indigenous peoples have received a lot of attention in the international legal instruments, promoting their recognition inside the countries with indigenous populations. As the leaders of the Miskito People are well aware, it is our obligation to ensure compliance with the rights that we have at the international and national level. As part of the development of this Protocol and with the technical support of the International Union for the Conservation of Nature (IUCN) and Natural Justice, we have analysed international and national legislation on the major issues regarding the rights of indigenous peoples with regard to self-determination, their territories and natural resources, own institutions and customary laws and above all, consultation and free, prior and informed consent (and henceforth: consent).
In this chapter we want to give a resume of the complete analysis that is in Annex 1 of this protocol, to create the basis for our own process regarding consent in La Mosquitia.

It is necessary to highlight that in the legislation hierarchy of Honduras, the international treaties ratified by Honduras undoubtedly have the force of law and they also prevail over the national laws. This is very important in the case where there are conflicts between the national legislation and the international treaties signed by Honduras that affect our rights.

5.1 The right to self-determination

The right to self-determination is one of the most significant rights that have been granted to indigenous peoples. It is a basic right, from which all of the other rights are derived. When admitting the right to self-determination, governments must recognise collective identities like groups and communities of different languages.

This right has been recognised in a series of documents regarding human rights such as the Charter of The United Nations, the International Covenant on Civil and Political Rights, the International Pact on Economic, Social and Cultural Rights and the Declaration of the United Nations on the Rights of Indigenous Peoples. This right is also recognised in the Constitution of the Republic of Honduras.

In practice, self-determination is not the right to succession, but it means that the Miskitos are entitled to their own local self-government, which means our people have the right to choose to be governed by leaders from their own community, either inside the framework of the existing State or outside of it.

20 Art.1(2).
21 Art.1(1).
22 Art.1(1).
23 Arts.3, 4.
24 Art.15.
It also means choosing how the traditional lands will be developed, the legal recognition of the Miskito People and the participation in the decisions that affect our own lives.27

5.2 Rights relating to lands, territories and resources

The rights over the land and the natural resources of the indigenous peoples of the world, do not only recognise the traditional ownership of the lands and resources of the Miskitos, but also the complex relationship that they share with the lands that they have by tradition and the necessity of protecting and preserving this relationship. In regional and international legal frameworks these rights have been recognised as in the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights28. In Convention 169 of the ILO and in the Declaration of the United Nations on the Rights of Indigenous Peoples there are a series of provisions regarding the lands, territories and natural resources of indigenous peoples29.

It is the obligation of the State to give legal recognition to the right of indigenous peoples30 to own and possess the lands and resources that they have occupied historically31. At a national level, this right is


30 See CIDH, Report No. 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), 12th of October, 2004, paragraph 115.
covered in the Constitution of the Republic\textsuperscript{32}, and in the Property Law\textsuperscript{33}, and in the Law on Forestry, Protected Areas and Wildlife\textsuperscript{34}.

It is important to mention that article 15 of Convention 169 of the ILO specifies the rights of indigenous peoples when the State has reserved the rights of ownership over specific natural resources. In this case, the communities have the special right to be consulted, to participate in the benefits that are produced, and the right to compensation. The Inter-American Commission on Human Rights agrees with the above-mentioned and even goes a step further, incorporating the right to free, prior and informed consent\textsuperscript{36}.

In the past the State of Honduras has violated our people’s rights in this regard by citing “national interest” as a reason and it is still necessary in the national legislation to establish the right of indigenous peoples to be consulted in good faith and to be granted free, prior and informed consent. This is applicable especially in the case of renewable energy\textsuperscript{37}, underground resources\textsuperscript{38}, forests and protected areas\textsuperscript{39}, and archaeological sites\textsuperscript{40}, where the national legislation violates the right to consultation and the consent of the indigenous peoples.

5.3 Traditional institutions and customary laws

The communities are entitled to the right of self-government, the right to their own political, legal, economic, social and cultural institutions and to the respect

\textsuperscript{32} Constitution of the Republic (1982), Art.346.

\textsuperscript{33} Property Law (2004), Art. 93.

\textsuperscript{34} Forestry, Protected Areas and Wildlife Law (2007), Art.2.1.

\textsuperscript{35} Forestry, Protected Areas and Wildlife Law (2007), Art.45; see also Forestry, Protected Areas and Wildlife Regulation, Art.317.


\textsuperscript{37} Visión de País (2010-2038) and 2010-2022 National Plan, Guideline 8. Infraestructura Productiva Como Motor de la Actividad Económica (Productive Infrastructure as a Driver for Economic Activity), objective 3 and goals 3.3, 3.5, 3.6 and 3.7; Law for the Promotion of Electrical Energy Generation with Renewable Resources (2007), Arts. 17, 18; Special law Governing Public Renewable Energy Projects (2011), Arts.3.4, 5, 6, 11.


\textsuperscript{39} Forestry, Protected Areas and Wildlife Law (2007), Arts.3.16, 18.5, 18.14, 51, 52, 72, 126, 127, 133, 155; National System of Protected Areas Regulation (SINAPH) (2009), Art.41, 46.

\textsuperscript{40} Law for the Protection of the Cultural Heritage of the Nation (1984), Art.14, 17.
towards these institutions.\textsuperscript{41} This is an extension of the right to self-determination described earlier. Under this right the following is recognised in international legal instruments:

1. The right to participate in the taking of decisions in matters that can affect indigenous peoples, through their representatives, recognising the indigenous decision-making procedures.\textsuperscript{42}
2. The right to consultation and cooperation in good faith with indigenous peoples through their own representative institutions\textsuperscript{43} with a view to obtaining free, prior and informed consent with regard to legal or administrative decisions that can affect them;\textsuperscript{44}
3. The right of indigenous peoples to maintain and to develop their systems or political, economic and social institutions\textsuperscript{45} and to safeguard these institutions;\textsuperscript{46}
4. The right to determine the structures and to choose members of their institutions, by means of their own procedures.\textsuperscript{47}

The national legislation of Honduras is ambiguous when it comes to dealing with the institutions run by the indigenous peoples. In the majority of cases, the laws impose external structures on La Mosquitia - such as the creation of the department of Gracias a Dios, the municipalities\textsuperscript{48} and the numerous consultative bodies.\textsuperscript{49}

\begin{itemize}
\item Convention 169 of the ILO, Arts. 2(2)(b), 5(b): Declaration of the Rights of Indigenous Peoples, Arts. 4, 5.
\item Declaration of the Rights of Indigenous Peoples, Art. 18.
\item The Guide for the application of Convention 169 of the ILO, establishes that, relating to “representativity”. Supervisory bodies of the ILO have stressed that the “the important thing is that they should be the result of a process carried out by the indigenous peoples themselves”. Additionally, “if an appropriate consultation process is not developed with the indigenous and tribal institutions or organisations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention”. See \url{http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_113014.pdf}, p.61.
\item Declaration of the Rights of Indigenous Peoples, Art. 19 and Convention 169 of the ILO, Art.6(1)(a).
\item Declaration of the Rights of Indigenous Peoples, Art.20(1) and Convention 169 of the ILO, Art.6(1)(c).
\item Convention 169 of the ILO, Art.4(1).
\item Declaration of the Rights of Indigenous Peoples, Art. 33(2).
\item Municipalities Law (1991), Arts.13, 14, 25, 44.
\end{itemize}
committees, but some establish standards to respect traditional institutions, for example the General Environmental Law, the Regulation of the Forest Law, the Implementing Regulations of the General Environmental Law and the Property Law.

With regard to the right of indigenous peoples and their customary laws, the following rights are recognised in several international legal frameworks:

1. To promote, to develop and to maintain institutional frameworks, including customs, procedures, traditions and systems or legal traditions, in accordance with international standards for the human rights of indigenous peoples.
2. To determine individual people’s responsibilities within their communities.
3. To take into account the customs and customary laws when applying laws and national regulations to indigenous peoples.

Independently of this, the national legislation is generally applied in a similar way for all Hondurans. An Indigenous Law does not exist and neither are there many provisions that respect the customary laws of indigenous peoples when the law is applied, with the exception of the protected areas. With this protocol, we want to manifest our right to free, prior and informed consent as a

50 General Environmental law (1993), Art. 71.
51 Regulations governing the Forestry, Protected Areas and Wildlife Law (2010), Art. 373.
53 Property law (2004), Art. 94.
54 Declaration of the Rights of Indigenous Peoples, Art.34 and Convention 169 of the ILO, Art.8(2).
55 Declaration of the Rights of Indigenous Peoples, Art.35.
56 Convention 169 of the ILO, Art.8(1).
common right that should be respected by the State of Honduras and other players with an interest in La Mosquitia.

5.4 Rights of consultation and free, prior and informed consent

As an indigenous people, we are entitled to participate and be consulted in advance by means of our representative institutions every time that legislative or administrative measures are proposed (e.g., policies, plans, standards, authorisations, licences, concessions, developments or projects) that will impact in a direct way on our people, whether they be positive or negative. The right to the consultation should respect certain minimum procedural requirements that are presented in the following chapter.

As a subsequent consequence of the right to consultation, the right to free, prior and informed consent is a legal principle that is in a series of such international legal instruments as Convention 169 of the ILO and the Declaration on the Rights of Indigenous Peoples. It can be defined as:

A consent that is offered in a voluntary way, without any manipulation or intimidation, by people who are well informed of the consequences of their decision prior to any decision that has to be taken, in accordance with their own decision-making processes.

If a native people affected by a project or development plan decide to abstain from giving their consent to enter into negotiations, then the Government, development agency or company cannot continue with the project without violating the basic rights to their lands and the future control of the affected people. However, the right to free, prior and informed consent is still not being implemented in Honduras. Although some laws and national policies mention civic participation, even the participation of indigenous peoples, no law specifically mentions consent as a presupposition at the beginning of development projects, public works and other projects that affect the

58 Convention 169 of the ILO, Art.6(1)(a) and Declaration of the Rights of Indigenous Peoples, Arts.18,19.
59 Amazon Watch (2011).The Right to Decide. The Importance of Respecting Free, Prior and Informed Consent, p. 5. Please take into consideration that there is no formally or universally recognised definition of free, prior and informed consent.
Miskito Territory. Therefore, we demand that our right to free, prior and informed consent and for the process established in this protocol be respected, especially when the following cases are being dealt with:

1. **Before the adoption and implementation of legislative or administrative measures** on the part of the Government that can affect indigenous peoples.60

2. **Any development, investment, exploration or extraction plans** that impact the right of the community in a significant way to use and to enjoy their territories and ancestral resources, in particular, projects related to the development, use or exploitation of underground, forestry or water resources.61

3. Projects or actions that are scheduled to be carried out in **areas considered as sacred of biological, intellectual, religious or cultural importance** especially by the communities or that can affect them.62

4. Actions that include plans or development or investment projects that require the **displacement** (that is to say, temporary or permanent relocation) of communities from their territories.63

5. Actions that include development or projects that in all probability imply **confiscation, occupation, use or damage** of lands, territories and traditionally owned resources.64

6. The depositing or storage of dangerous materials in lands or community territories, as stipulated in article 29 of the Declaration of the United Nations on the Rights of Indigenous Peoples.

---


61 Declaration of the Rights of Indigenous Peoples, Art.32(2).

62 Ibid., Art.11(2).

63 Ibid., Art.10 and Convention 169 of the ILO, Art.16(2).

64 Declaration of the Rights of Indigenous Peoples, Art.28.
7. Forest Certification Schemes.  
8. Pilot REDD+ Activities.  
9. Access to or use of the knowledge and traditional genetic resources of the community.  
10. Distribution of profits, when the profits are derived from the territories and natural resources of the indigenous peoples.

Schemes involving REDD especially require the consent of the Miskito People. The second draft of the proposal for the preparation of initiatives for REDD Readiness in Honduras (R-PP) contains a special chapter on the consultation process to obtain the consent of the indigenous communities, although it is not always very clear what is meant by consultation and when it will be carried out. Therefore, this protocol serves to establish the appropriate process, as we will describe in the following chapter.

---

67 CBD, Art.15(5) and Nagoya Protocol, Arts.6 y 7.
6. The process of free, prior and informed consent for the Miskito People

Although there are many international legal provisions that affirm the right to free, prior and informed consent, there are several challenges in the application of this right in practice. There is still not an internationally accepted definition of free, prior and informed consent or a standardised mechanism for its implementation, but some international organisations, like the United Nations (UN)\(^69\), Oxfam\(^70\), The Forest

---


Dialogue (TFD)\textsuperscript{71}, The Centre for Peoples and Forests\textsuperscript{72} and the International Union for the Conservation of Nature (UICN)\textsuperscript{73}, have developed some principles for the procedures that should be taken into account with regard to consent. However, on the whole these guidelines, manuals and operating notes deal with the issue of consent on the part of governments, development agencies or private companies, and not from the point of view of communities who need to understand clearly what is meant by consultation and consent. Therefore, together with the political representatives of the Miskitos, we have agreed to develop a process for consultation and consent in the territory of La Mosquitia that respects the political structure of the Miskitos and our decision-making mechanisms.

The process to guarantee an effective implementation of free, prior and informed consent in La Mosquitia involves a lot of work for the communities, with regard to meetings and consultations with the different communities, with advisors and independent experts and with project developers and the Government. Due to their geographical remoteness and limited access to the means, the process of guaranteeing the right to free, prior and informed consent involves a high economic cost and a lot of time. However, this is no excuse for not applying the appropriate process stipulated in this protocol.

It is necessary to point out that national legislation is often an obstacle to guaranteeing the rights stipulated in the international instruments. In the case of Honduras, the discrimination against the customary laws, the replacement of our own institutions by a uniform model of State administration, the ultimate power of the State over the country’s natural resources, and the lack of respect for the rule of law in various parts of Honduran life hampers the process of carrying out the consent and guaranteeing the execution of the obtained agreements.


\textsuperscript{73} Costenbader, J. (2011). UICN Serie de Política y Derecho Ambiental No.77. Legal frameworks with regard to REDD. Design and implementation at the national level. UICN, Geneva, Suiza.
However, any project developer should be guided by the pertinent international guidelines on the subject and the process established in this protocol.

6.1 The different elements of consent

Before entering into the specific features of consent in La Mosquitia, it is necessary to clarify the meaning of the different component parts of free, prior and informed consent. For this, the United Nations Permanent Forum on Indigenous Issues74 and other instruments have established a consent that applies universally to the consent processes:

Free

The process should be carried out:
- Without coercion (mental or physical), manipulation, conditions, expectations, time frames
- In the appropriate place and time
- With institutions and our own representatives
- With our own decision-making structure
- With external neutral facilitators
- With an independent monitoring process
- With the possibility of consulting third parties

Prior

The consent should be sought:
- Before commencing the project
- Before requesting any licences and government permits
- With enough time to understand, to access, and to analyse all of the information and to respect the decision-making processes of the indigenous peoples

Informed

The affected communities are entitled to:
- The dissemination of all of the necessary information on the project and the decision-making process

---

• Receive information in a clear and accessible way for all of the members of the affected communities
• Consult external experts, like lawyers or technicians to understand all of the information and to receive independent advice
• The use of the language and format chosen by the indigenous peoples
• Receive at least the following information on:
  - The affected geographical area
  - The purpose of the project
  - The size of the project
  - The time required to carry out the project
  - The stakeholders involved, such as local government officers, development agencies, institutions, donors, independent observers, etc.
  - The positive and negative implications of the planned activities
  - The legal implications
  - The permanent and temporary effects on the lands and natural resources
  - The costs (even the direct costs and opportunity costs) and economic, social and environmental benefits
  - Any other infrastructure that will be built for the project
  - The evaluation of any environmental, social, cultural and economic impacts
  - Any mitigation plans and compensation schemes
  - Mechanisms for the equal distribution of profits
  - Complaints mechanisms
  - Alternatives to the project

Consent

Consent:
• Is an exclusive collective right of the indigenous peoples
• Is a decision taken freely by the indigenous peoples
  - by means of their own decision-making structures
  - respecting their customary laws
• Can be granted ("yes") or denied ("no") at any stage of the project\textsuperscript{75}

\textsuperscript{75} Once consent is given, it can only be withdrawn if the conditions agreed in the consent are not fulfilled by one of the parties.
• Is the result of a process of consultation, participation, negotiation, etc.
• Includes the option to reconsider the above-mentioned decision if the activities or the information change.

It is worth stressing that the independent verification of the process for granting consent is a very important component, the purpose of which is to ensure that all of the above component parts are described in full. This monitoring process must not violate the right of Miskitos to have access to our own institutions and forms of decision-making. The monitoring should be carried out by a person or organisation with a broad knowledge of the rights of the indigenous peoples and who is familiar with the Miskito institutions.

6.2 The 7 steps to free, prior and informed consent in La Mosquitia

The right to consent is not only a decision taken at a specific moment. It is a right that should be applied throughout the lifetime of a project, that is to say:76

• being able to talk about the idea for a project that affects the indigenous communities;
• being able to participate in the development of a detailed plan;
• being able to implement and monitor it; and
• being able to evaluate it.

In principle in order to guarantee the right to free, prior and informed consent, different phases of the consultation can be established, which start from the first contact with the project developers and the Miskito People and end, in the case where the consent is given, with the implementation of a proposed project. These phases are:

Illustration 3. The 7 steps of the process

1. First contact
2. Agreement over the process
3. Discussion of the relevant information
4. Decision-making
5. Negotiation between the communities and the relevant stakeholders
6. Agreement over consent
7. Implementation and monitoring
In order to respect the elected structures for the representation of the Miskitos, MASTA, and their Territorial and Communal Councils, a specific mechanism was developed for the Miskito People incorporating different phases, resulting in what is presented below.

1. First contact

Any project that takes place in the territory of La Mosquitia has to be first addressed by the Miskito population. The first step of the process is then to contact the MASTA Board of Trustees either in writing or by any other available means and to explain the idea of the project intended for La Mosquitia. If the project developer goes directly to the communities, the structure envisaged for the process of the consent is not being respected.

The Board of Trustees later informs the Territorial Councils affected by the proposed project and takes the joint decision as to whether more information over the project is required or not. The municipalities will also be informed, but one has to respect the indigenous people’s own structure and decisions, as Convention 169 of the ILO prevails over the National Municipalities Law. It is important to highlight that consenting to receive information and to consider a project does not mean consenting to the implementation of this project.

In order to know who the affected communities are, the project developer has to know that the right of the indigenous peoples to their territories, lands and natural resources is derived from their habitual use and traditions and it is not necessary for the members of the Miskito communities to have title or claim to the land granted by the State. The geographical area that belongs to the indigenous territories is generally determined by means of participatory mapping, using Global Positioning System (GPS) and Geographical Information System (GIS) technologies. In the case of La Mosquitia, this process was carried out in the 1990s and it provides a precise demarcation of the indigenous territories of La Mosquitia (see Annex 2 for the

---

map of the indigenous territories of La Mosquitia). This defined area has to be taken into account for the process of consent in La Mosquitia and to know which of the communities are affected by the proposed project. Although this map serves as a benchmark, new developments in territorial demarcation have taken place in La Mosquitia and in the case of a dispute over rights in an area selected for a project, this dispute will have to be solved before beginning the process of consent with the communities.

2. Agreement over the process

If MASTA and the communities agree to receive more information on a project and to enter into a process of consent, a detailed working path would have to be developed to show how such a process should be carried out. Because of its geographical remoteness, the river and air transportation and the special means of communication arranging for the process of consultation in La Mosquitia is an expensive procedure. For this reason, the process of consultation in La Mosquitia should be well planned. This work plan that will be developed by MASTA’s Board of Trustees and the Territorial Councils will have to be expressed in the form of an accompanying agreement between all of the interested parties and it will have to include all of the steps for the process of consent, including:

- the information that is required;
- the stakeholders and their responsibilities;
- the composition of the Technical Advisory Committee
- the communities where the consultation will take place and the consent may be given;
- the temporary framework and the necessary budget for each step, including the payment of the fees for the Technical Advisory Committee;
- the training for the communities and their leaders;
- the mechanism for the transfer of funds; and
- the facilitators and external and independent verification.

It is especially important to take into account the special features of each community for the agreed process. Although all of the components are different from one project to another, the time required in particular varies considerably from project to project.

---

In this phase it is also important to develop an effective communication plan as part of the agreement which guarantees that all of the parties involved know about the subsequent steps and agreements reached. It is necessary to define how the information reaches the community and how the consultation with the communities is organised. The communication has to take place using the means favoured by the communities, such as community radio, announcements in community centres, churches, etc. and be easily accessible. It is very important that the communities know from the beginning that without their consent, no activity can begin and any activity that does so is a violation of their rights.

MASTA, the leaders of the Territorial Councils and the Technical Advisory Committee, once the information to be discussed is revised (see the following step) and knowing how to communicate with the communities inside La Mosquitia, prepare the communication plan that must later be approved and understood by the project developers.

The agreement will be signed by all of the parties concerned. The president of MASTA acting on behalf of the Miskito People and the representatives of the affected Territorial Councils will sign the agreement. The Territorial Councils will be responsible for distributing the contents of the agreement amongst the communities concerned.

3. Discussion of the relevant information

After having signed the agreement, the project developer must give all of the outstanding information (mentioned above and agreed in the agreement) to the Miskito communities in appropriate and easily understandable formats. It is also important for the communities to have access to other sources of information that do not come directly from the project developer.

The information is analysed in the communities, in the Miskito language, with the support of the Miskito’s own Technical Advisory Committee that is composed of members of the MASTA Technical Unit and experts with experience of the subject under discussion\(^\text{80}\).

\(^{80}\) The members of the Committee are elected prior to the process. The payment of the fees for this Committee to carry out the consultation in the communities must be established in the agreement over the process. In addition, according to the size and the complexity of the project, more technical support may be sought outside of the Committee.
This committee guarantees that the information is analysed from the perspective of the Miskito’s world view and that all of the real benefits and costs are considered. The committee develops its working path to comply with what is established in the agreement regarding the process, and is responsible for ensuring that the information reaches all of the affected population, so that no-one can claim that they did not know about the consultation process. In any event, the committee has to communicate on a regular basis with MASTA’s Board of Trustees and the Territorial Councils. The process of discussing the information with the communities can also be supported by an external facilitator, if the community wants it, who will be paid for by the project developer.

In general, the places in which the information is discussed will be the community assemblies. The municipalities should also support the distribution of information and for this reason they could provide venues for the consultation meetings. To discuss the information, organised groups in La Mosquitia should be especially included, such as the Indigenous Misquito Women in the Atlantic Coast (MIMAT) and AMHBLI, indigenous unions, women, young people, elders, shepherds and indigenous professionals with technical knowledge in the areas affected by the project.

The project developer must ensure the appropriate understanding of the information that is being discussed and to this end, it must communicate on a regular basis with MASTA. In a similar manner, the developers must learn about the rights and indigenous matters, the structures of indigenous land ownership, and the customary laws and decision-making institutions of the indigenous people, to facilitate a process of mutual understanding.

The time for the discussion and the analysis of the information varies according to the size and the complexity of the project and the number of affected communities. In any event, the necessary time stipulated in the agreement regarding the process must be respected, because any consent that results from a rushed consultation, can be accused of not being genuine.81 However, we commit ourselves to take the process forward as efficiently as possible.

4. Decision-making

After having obtained, analysed and discussed all of the necessary information for making a decision, the decision will be taken by means of the internal Miskito mechanisms, according to the statutes in the communal assemblies of the affected communities.

MASTA and the Territorial Councils, with the support of the Technical Advisory Committee, plan, direct and chair the consultation and control the decision-making process. It is important that members of the communities are made aware of how decisions are made before entering into the decision-making process.

In general, the appropriate form of decision-making is by means of consensus, which is the customary way in which the Miskito People do things. The decision is taken by the Miskito People, and not only by a few representatives. If a consensus is not achieved, more time is required to analyse the information and to understand the reasons why the person or the group does not agree with the opinion of the other people or groups. If all of the information is sufficiently clear and the reasons to deny giving consent are justified, consent will not be given.

If only one community is affected by a project, it is sufficient for just that one community to grant its consent. If several communities are affected by a project, a consensus has to be established between the different communities in an assembly at the level of the Territorial Council. If communities of different Territorial Councils are affected, all of the Territorial Councils involved have to reach a consensus. Therefore a consensus is achieved in the Territorial Councils who in turn inform MASTA’s Board of Trustees.

**Illustration 4. The 3 different levels of consensus**
In communities where there is a non-indigenous population, its members should be invited to the discussions, with a right to a voice, but not a vote. The right to free, prior and informed consent is a right exclusively reserved for the indigenous peoples.

The decision taken will have to take into account the conditions and the content of the consent:
• for exactly what reason the consent is given;
• under what conditions;
• with which changes in the design of the project;
• with the benefits requested by the communities, etc.

The project developers will be informed of the decision taken so that they can begin with the organisation of the negotiations in the event that the consent has been given.

5. Negotiation between the communities and the project developers

Once the decision is taken internally (in favour of approval or consent for the project), the project developers and the elected representatives can enter into negotiations on behalf of the communities. In any event, MASTA’s Board of Trustees and the representatives of the Territorial Councils will always be present at the negotiations with the external stakeholders.

The project developer must help the indigenous representatives by providing independent advice and any necessary training to enter into the negotiations. During the negotiations, it can be especially important to have a person or organisation monitoring the negotiation process to ensure that it is fair.

During the negotiations, the results of the consultations are presented to the members of the affected communities together with the conditions for the development of the approved consent. During the entire time of the negotiations, the representatives of the communities have to maintain continual communication with their members.

---

As it is very difficult and expensive for the communal and territorial leaders to leave La Mosquitia, in all cases the location of the negotiations will be inside La Mosquitia, and preferably in the affected communities.

6. Agreement over consent

As an end to the negotiations between the indigenous representatives and the project developers, an agreement is drawn up regarding the consent for the project. This agreement will be signed by the indigenous representatives, such as those from the affected Communal and Territorial Councils and MASTA’s Board of Trustees and the other parties involved in the project (project developer, Government of Honduras, international or financial cooperation etc.). The mayoral offices will always be invited to find out about the decision taken, but they will not necessarily have to sign the agreement. In any event, the people who sign the contract have to respect and to defend the interests of the community.

To be binding, the final agreement between the Miskitos and the project developer takes place in a formal ceremony. Normally, the agreement is also signed in front of witnesses or notaries. The internal processes of the communities, like certain rites, also represent a legitimate way of approving the agreement and they should be respected. The most appropriate place to sign the agreement is in the communal assemblies or if more communities are affected, the venue will be the assemblies of the Territorial Councils.

In order for the consent to have been given, it is necessary to appropriately document, the necessary conditions and indicators to monitor the compliance with the agreement, as well as a complaints and claims mechanism when the agreement is violated and the working path for the execution and evaluation of the proposed project. It is also important to formulate the conditions under which a refused project could be reconsidered.

At the very least, the information should contain the following data:

• The signatories

---

• The consent in agreement with the parties
• Description of the location, the rights holders, natural resources, ecosystem services, etc.
• Details of the agreement
  - Costs for the community
  - Benefits for the community
  - Requirements (data collection, evaluation, reports, …)
• Rules and restrictions for the community (for example, limited use of forest products)
  - Duration/term
  - Arrangements to ensure that the agreements are binding (Supervisory Committee)
  - Arrangements over independent monitoring
  - Complaints mechanisms, claims procedures
  - Monitoring plan
  - Withdrawal of the terms of consent
  - Annexes (Management plans, details of activities for the economic development, detailed implementation process)

A copy of the signed agreement must be delivered to each affected community and its content has to be easily accessible.

7. Implementation and monitoring

Free, prior and informed consent is a right and not a process that ends with the signature of an agreement between project developers and communities.85 Therefore, for each agreement over a consent, a Supervisory Committee is established that follows its own rules and stipulates and monitors and evaluates compliance with the obligations in the agreement and which regulates the complaints mechanisms. This committee meets at intervals stipulated in the agreement over the consent and it convenes assemblies to inform the communities regarding the compliance or non-compliance of the agreement. It also monitors all of the decisions of the company or of the State, and the requests of the institutions and organisations. A logbook must be created

(register) of the consents that have been granted and the responses given that will be available for the public in MASTA's main office.

A mechanism for handling complaints and disputes especially developed for a consent process can save costs and the time of formal mechanisms. The mediators and "referees" should be chosen by agreement between the parties involved and be independent of the project developer and of the Government. However, the established complaints mechanism does not infringe the right of the communities to look for legal advice externally and the project developer should put funds aside for this in the case of any non-compliance or violation of the agreements.
7. Call to respect the process for free, prior and informed consent

The ancestral rights of the Miskito People have not been respected by the State of Honduras, in spite of the ratification of Convention 169 of the ILO 17 years ago. Our right to consultation in good faith and to free, prior and informed consent has been especially affected. Previous Governments have insisted in granting concessions over the natural resources, amongst them the Rio Patuca, the Miskito keys, the Biosphere of the Rio Plátano and the forests. In all of these processes, the right to free, prior and informed consent has not been properly interpreted according to the interests of the representatives of the institutions and external stakeholders in La Mosquitia.
The Indigenous Miskito People, through their representative organisation, MASTA, has been taking measures, with the different jurisdictions that protect human rights, to safeguard the right to consultation and free, prior and informed consent. This is a process which has developed in a consensual manner between the communal leaders and the technical advisers, so that, at the request of the People, every time that legislative or administrative measures must be implemented that affect the Miskito People, a consultation should take place in accordance with the procedure stipulated by the same people in this protocol.

This protocol is a legal obligation and requirement for the sons and daughters of La Mosquitia, so that any activity, project, concession, declaration or issuing of laws that in some way affects the Indigenous territories of La Mosquitia, will have to be subject to the right to consultation or rather to free, prior and informed consent. By means of this protocol an energetic appeal is made to all of the sons and daughters of La Mosquitia to demand and at the same time to respect this decision, since it is a struggle for the people to claim their ancestral rights which for centuries have been violated by the politicians, the army, entrepreneurs and successive governments.

Any son or daughter of La Mosquitia who does not comply with this mandate and lends him or herself to the different government agencies, non-governmental bodies, private and co-operating companies once again violating the right to free, prior and informed consent of the People will be punished based on the age-old rights and customs imposed on him or her by the elders.

We also call upon the external players that have an interest in the territories and the natural resources of La Mosquitia, to respect this protocol as a legitimate mechanism before beginning any activity in the territory. It is the obligation of the Government to ensure that the ancestral rights of our territories, lands and natural resources are recognised. Although no formal title of ownership exists for our lands, we are the legitimate owners of them.

MASTA will do everything possible to guarantee an efficient and effective process, duly respecting the established process.

We, as the Miskito People will fight for the legal recognition of our rights and we expect the same from the project developers who wish to invest in La Mosquitia.
8. Contact information

In this process the president of MASTA is defined as the primary contact. Any application will be in writing using the following email addresses, including a copy to the MASTA Technical Unit:

mastamiskitu@yahoo.com
ocalderonm@yahoo.com

The requests for consent should have the basic information of the project or activity to be carried out, and the request for an appointment to discuss your project or activity with the leaders. MASTA will respond to your request within a maximum period of 15 days from the moment the request is received.

On no account are applicants permitted to go directly to the presidents of the Territorial Councils. Any request made directly to the Territorial Councils will be void.
It is not permitted to make requests directly to the Territorial Councils, and as a result any such requests will be declared null and void, for not having followed the procedure stipulated in this protocol. A regulation will be prepared to impose sanctions on unauthorised executives who negotiate any consent without following the correct procedure.

In the main MASTA office, barrio El Centro, adjacent to the Renacer Clinic, Puerto Lempira, Honduras a publicly available logbook will be kept of the requests for consent, the replies, and the follow-up to the process. This logbook is necessary so that we can exercise our right to free, prior and informed consent.
Annex 1

Analysis of the international and national legislation regarding the rights of Indigenous Peoples, consultation and free, prior and informed consent

Introduction: The Miskito People– Legal basis as an indigenous people

This legal review concerns the Miskito People who live in Honduras. They identify themselves as indigenous people and traditionally live in the Mosquitia area of Honduras and Nicaragua. There are 72,000 members of this indigenous population living in an area of around 16,997 km² in Honduras.

Compiled by the International Union for the Conservation of Nature (IUCN) and Natural Justice in May 2012
This population's rights are based on the land and in their traditional tenure of the latter. Traditionally the Miskitos practise migratory agriculture, the majority of which being in areas outside of the communities, with some cultivated areas and others that are not cultivated to allow for the regeneration of the soil. Traditionally the Miskitos do not participate in the commercial exploitation of the natural resources and in most of the communities they are subsistence farmers. They live, hunt, fish and practise their culture in harmony with their environment. This community has been established in the current territory for several generations and it has conserved its indigenous language known as 'Miskito.'

1. Legal hierarchy

Before beginning with the analysis of the international and national legal provisions regarding the rights of the indigenous peoples, it is important to note the position that the international treaties have in the Honduran statutory hierarchy. International law is very clear that international treaties prevail over internal legislation. The Vienna Convention on the Law of Treaties of 1969, which was ratified by Honduras, indicates87: 

"Pacta sunt servanda". Any treaty in force binds the parties and must be complied with in good faith by them”.88

"Internal legislation and the observance of treaties. A party will not be able to invoke the provisions of its internal legislation as a justification for the non-fulfilment of a treaty. This rule is without prejudice to the provisions in article 46.”89

Inside the country, the Constitution and the national laws have provisions that govern statutory hierarchy. In the Latin American countries different forms of statutory hierarchy exist with reference to the national and international laws. In most countries, international treaties are part of national legislation and they can be invoked directly in the courts90.

---

89 Ibid., Art.27.
Although a “constitutional corpus” does not exist, as for example in Colombia, Argentina and Bolivia, where the conventions regarding human rights have the same statutory hierarchy as the Constitution, in 1982 the Constitution of Honduras in its articles 16 and 18 stipulated that international treaties, starting from their ratification, have the force of law and also prevail over national laws:

“All of the International treaties must be approved by the National Congress before their ratification by the Executive Branch. The International treaties celebrated by Honduras with other states, once they come into effect, are part of the internal legislation.”

“"In the event of a conflict between the treaty or convention and the Law the first prevails""

In a similar manner, other national laws recognise the supremacy of international treaties over national laws, and they establish the country’s following statutory hierarchy:

1. Constitutional norms
2. Treaties and international conventions
3. General laws
4. Special laws
5. Regulations or legislative agreements
6. Technical standards, resolutions and provisions of an administrative nature

In the environmental laws, it is also obligatory to comply with international treaties, for example in the General Law on the Environment that stipulates:

“to monitor the strict compliance of the national legislation on the environment and of the treaties and international conventions entered into by Honduras in relation to the natural resources and the environment” and “to ensure compliance of the provisions, resolutions, or agreements issued by the Central American Commission for Environment and Development (CCAD)”

91 Constitution of the Republic (1982), Art.16.
92 Ibid., Art.18.
93 See, for example Municipalities Law, Art. 66; Visión de País (2010-2038), p.95; Implementing Regulations of the General Law on the Environment, Art.9.
94 The General Law on the Environment (1993), Art.11.3.
95 Ibid., Art.11.7, see also Art.107.
With regard to Protected Areas, the Forestry Law also mentions that:

"the National Institute of Conservation and Forestry Development, Protected Areas and Wildlife (ICF) will be responsible for administering the Protected Areas and the Wildlife, according to the provisions of this Law and to the special ones contained in the Decrees of each one of the quoted areas; as well as the Regional and International Conventions approved and ratified by the State (...)"

These provisions are very important in the case where there are conflicts between the national legislation and the international treaties signed by Honduras. In the following analysis of the different rights of the indigenous peoples associated with the right to free, prior and informed consent, this established hierarchy has been taken into account.

2. Self-determination

The right to self-determination is one of the most significant rights that has been granted to the indigenous peoples. It is a basic right, from which all of the others are derived. When admitting the right to self-determination, governments must recognise collective identities such as groups and communities of different languages. It also means that the indigenous peoples have the control and the option over how they are governed, as well as over the definition of the economic, social and cultural development and the decision-making that can affect their lives.

This right has been recognised in a series of documents concerning human rights such as the Charter of the United Nations, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Declaration on the Rights of Indigenous peoples.

The Charter of the United Nations states, in article 1(2) that the purpose of the United Nations is:

"To develop friendly relations among nations based on respect for the principle of equality of rights and to the self-determination of peoples (...)"

---

96 Forestry, Protected Areas and Wildlife Law (2007), Art.111.
97 Art. 1(1).
98 Art. 1(1).
99 Arts. 3, 4.
The articles 1(1) of the International Covenant on Civil and Political rights and of the International Covenant on Economic, Social and Cultural Rights state:

"All peoples are entitled to the right to self-determination. By virtue of this right they freely establish their political status and also provide for their economic, social and cultural development".

Almost identically, Article 3 of the Declaration on the Rights of Indigenous Peoples states:

"Indigenous peoples are entitled to the right to self-determination. By virtue of this right, they can freely establish their political status and also provide for their economic, social and cultural development".

The Committee of the Convention on the Elimination of All Forms of Racial Discrimination also recognised the right to self-determination in its general recommendation XXI of the 23rd of August 1996:

"The right to the self-determination of peoples is a fundamental principle of international law."

In practice, self-determination is not the right to succession, but it implies that the Miskitos are entitled to their own local government, which means the right of this community to choose to be governed by the leaders of its own community, either inside the existing framework of the state or outside of the latter100. It also means choosing how they will develop the traditional lands, the legal recognition of the indigenous group and the participation of the indigenous peoples in the decisions that affect their own lives101.

In the national legislation of Honduras, there are also provisions on self-determination. For example article 15 of the Constitution of the Republic, stipulates:

"Honduras endorses the principles and practices of international law which promotes human solidarity, with regard to the self-determination of peoples,


non-intervention and the strengthening of universal peace and democracy". 102

Although the Constitution does not specifically recognise the multiculturalism of the Nation, it appears to recognise Honduras as a multicultural and multilingual country, for the first time in 1994, in the Agreement on Intercultural Bilingual Education. 103 On the other hand, in the “Visión de País” and National Plan it is also recognised that:

“Honduras is a multicultural and multilingual country. In this regard, its objectives, goals, programmes and policies shall not only comply with this condition, but rather will boost and promote its development.”104

Also the necessity is recognised of taking into account the:

“social, demographic, cultural, anthropological, ethnic, economic, biophysical and environmental features of each region (...)”105

With regard to the language and the Miskito culture, the Law for the Protection of the Cultural Heritage of the Nation:

“strictly prohibits the municipalities of the Republic from changing the traditional native names of the peoples, the same applies to individuals making nominal changes in certain places”106 and “for organisations of any kind whether these are religious or not, undermining the traditional culture of the indigenous communities, hindering or moving in any way the celebration of their periodic festivities and native rituals”.107

Together with the international right to self-determination, these provisions guarantee the right of the Miskito People to be recognised as such.

---

103 Agreement number 0719-EP-94: Recognition of Honduras as a multicultural and multi-ethnic country which requires the institutionalisation of an Intercultural Bilingual Education system.
107 Ibid., Art. 38.
3. Rights relating to lands, territories and resources

In regional and international law it is necessary to have a series of rights associated with the land and the natural resources which can be classified as "the rights over the land and the natural resources" of the indigenous peoples of the world, including the Miskitos. These rights not only recognise the traditional ownership of the Miskitos' lands and resources, but also the complex relationship that they share with the lands that they possess by tradition and the necessity of protecting and preserving this relationship.

These rights have been recognised in regional and international legal frameworks as well as by the Inter-American Commission of Human Rights and the Inter-American Court on Human rights. It is necessary to mention that Honduras has recognised the jurisdiction of the Inter-American Court on Human rights, although not that of the Inter-American Commission on Human rights.

In the national environmental legislation of Honduras, several laws and regulations exist on the use of the lands and natural resources, and some articles refer specifically to the indigenous peoples.

According to the Visión de Pais, there are at least 19 constitutional articles in connection with the administration of natural resources and the regulation of the human environment. However, the only constitutional article that directly mentions the rights of the indigenous peoples is 346, declaring that:

108 The Visión de Pais (2010-2038), p.95, makes reference to the constitutional articles 106, 107, 341 and 349 (relating to restrictions of use to the property regime), 128, 132 and 145 (linked to poor human environments associated with employee-employer relationships), 146 and 147 (that regulates foodstuffs and chemical, pharmaceutical and biological products), 172 and 354 (that declares the jurisdiction of the State over sites of natural beauty, monuments and nature reserves and declares that the State reserves the right to establish or to modify the demarcation of the controlled and protected areas of the natural resources in the national territory), 179 (which defines the responsibilities of the State in relation to housing problems), 274 (that indicates the function of the Armed forces in environments associated with domestic life; among them, the conservation of the natural resources), 301 and 306 (relating to the payment of tax and the development of investments for the use of the natural resources), 340 (declares of use and public necessity the technical and rational exploitation of the natural resources of the nation), 345 (recognises that land reform is an essential part of the development strategy of the nation), 346 (establishes the duty of the State for the protection of the interests of the indigenous peoples), 347 (defines that the use of agricultural land must preferably be used for food safety).
“It is the duty of the State to dictate measures for the protection of the rights and interests of the existing indigenous communities in the country, especially in the lands and forests where they are settled.”\(^{109}\)

This article requires the State to provide the effective protection of the rights of the indigenous peoples on their lands and forests, either in the national laws or in compliance with the international legislation.

3.1 The special relationship between the indigenous peoples and their lands and territories

The particular bio-cultural relationship between the indigenous peoples and their territories has been recognised in the legislation regarding human rights, as well as in the jurisprudence of the Inter-American Commission of Human Rights and of the Inter-American Court on Human rights. For example, in the case of the Mayagna (Sumo) Awas Tingni Community against Nicaragua, the Inter-American Court stated:

"Given the characteristics of the present case, some clarifications are required regarding the concept of ownership in indigenous communities. Amongst the indigenous peoples there is a community tradition with regard to a communal method for the collective ownership of the land, in the sense that the ownership of the land is not centred around a particular individual but rather around the group and its community. The indigenous groups, by virtue of their very existence, are entitled to live freely in their own territory; the close links of the indigenous peoples with the land must be recognised and understood as the fundamental basis of their cultures, their spiritual life, their integrity and their economic survival. For the indigenous communities, the relationships with the land are not only a question of possession and production but also involve a physical and spiritual element that should be enjoyed to the full, whilst preserving their cultural legacy and passing it on to future generations.”\(^{110}\)

The right to ownership is protected in article 21 of the American Convention of Human Rights and in article XXIII of the American Declaration on the Rights and Duties of Man. These articles are used in various decisions of the Inter-American Court and Commission to sustain and protect the relationship between the indigenous peoples and their territories, and also with

rights related to lands and resources\textsuperscript{111} as well as for the introduction of “special measures” for the protection of this relationship.\textsuperscript{112}

The Inter-American Court on Human rights states that:

“States should respect the special relationship that members of their indigenous and tribal peoples have with their territory in a form that guarantees their social, cultural and economic survival.”\textsuperscript{113}

Article 13 of Convention 169 of the International Labour Organization (ILO) states that:

“When applying the stipulations of this Part of the Convention governments will respect the special importance for the cultures and spiritual values of the peoples in question of their relationship with the lands and territories, or both if applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship.”

As for the term “lands” it refers to the concept of “territories” which is “the total area of the regions that the peoples in question occupy or otherwise use.”\textsuperscript{114}

This is also sustained in article 25 of the United Nations Declaration on the Rights of Indigenous peoples that states:

“The indigenous peoples are entitled to maintain and to strengthen their own spiritual relationship with the lands, territories, waters, seas, coasts and other resources that they have traditionally owned or occupied and utilised and to assume their responsibilities in that regard concerning them for generations to come.”

The Constitution of Honduras also recognises the anthropological, historical and artistic riches of Honduras and of the native cultures. It is also established that their protection is the State’s responsibility.\textsuperscript{115}

\textsuperscript{111} See the document of the Inter-American Commission of Human Rights entitled “Rights of the Indigenous and Tribal peoples over their Ancestral Lands and Natural Resources. Norms and jurisprudence of the Inter-American System of Human Rights”, in particular paragraphs 55 to 57.

\textsuperscript{112} Ibid.

\textsuperscript{113} Inter-American Court on Human Rights. Case of the Saramaka people v. Surinam and Case of the Mayagna (Sumo) Awas Tingni Community v. Nicaragua.

\textsuperscript{114} Convention 169 of the ILO, Art. 13(1).

\textsuperscript{115} Constitution of the Republic (1982), Arts.172, 173.
In the Property Law, article 93 recognises the right of the indigenous peoples over their lands and the importance that these have for them:

"Because of the special importance for the cultures and spiritual values of their relationship with the lands, the State recognises the right of ownership of the indigenous and Afro-Honduran peoples on the grounds that they traditionally possess them and that the law does not prohibit this. The process established in this Chapter will be applied by the Property Institute (PI) to guarantee these peoples full recognition of the communal ownership rights, administrational use, management of the lands and sustainable exploitation of the natural resources, by means of the demarcation and ownership and complete control of the latter." 116

3.2. The rights to the ownership of property and possession of natural resources

The right to property is a basic human right that has its roots in various international legal frameworks. For example, the Universal Declaration of Human Rights states, in article 17 that:

"(1) All persons are entitled to own property, singular and collective. (2) Nobody will be deprived arbitrarily of their property."

The right to property is also endorsed in the International Covenant on Civil and Political rights, in its recognition of self-determination in article 1 and in article 27. The article 1(2) states:

"For the achievement of their ends, all peoples can freely dispose of their wealth and natural resources, without prejudice to the obligations arising out of international economic cooperation based on the principle of mutual benefit and international law. Under no circumstances can a people be deprived of its own means of subsistence".

Article 27 states:

"In the States where ethnic, religious or linguistic minorities exist, persons belonging to minorities will not be denied the right that is entitled to them, in common with other members of their group, to have their own cultural life, to profess and practise their own religion and to use their own language."

General comment N° 23 of the Human Rights Committee in 1994 stipulates:

“For that which refers to the exercising of the cultural rights protected by article 27, the Committee observes that the culture is manifested in many ways, inclusive of a particular way of life relating to the use of terrestrial resources, especially in the case of indigenous peoples. That right can include such traditional activities as fishing or hunting and the right to live in reservations protected by the law. The enjoyment of those rights can require the adoption of positive legal protective measures and measures to ensure the effective participation of the members of minority communities in the decisions that affect them”.

Also, the Committee for the Elimination of Racial Discrimination, in their general recommendation N° 23 on indigenous peoples, urges:

“the States Parties that recognise and protect the rights of indigenous peoples to possess, exploit, control and use their lands, territories and communal resources, and in the cases where they have been deprived of their lands and territories, for which traditionally they were the owners, or they occupied or used those lands and territories without the free and informed consent of those peoples, measures be adopted so that they are returned to them”.

At the regional level, article 21 of the American Convention of Human rights and article XXIII of the American Declaration on the Rights and Duties of Man protect the right of indigenous peoples to own and possess lands and resources that historically they have occupied.

The Inter-American Commission of Human rights has stated that:


120 See CIDH, Report N° 40/04, Case 12.053, Maya Indigenous Communities of the Toledo District (Belize), 12th of October, 2004, paragraph 115.
"the recovery, recognition, demarcation and registration of lands represent essential rights for the cultural survival and the maintenance of the integrity of the community."\textsuperscript{121}

This endorses Convention 169 of the ILO, which states that:

"The right to ownership and possession of the interested peoples over the lands that they traditionally occupy must be recognised."\textsuperscript{122}

Governments have a positive obligation to take the necessary measures to identify lands that the interested peoples traditionally occupy, as well as to guarantee the effective protection of their ownership and possession rights.\textsuperscript{123}

In connection with the above-mentioned:

"Appropriate procedures must be instigated within the framework of the national legal system to settle the land claims submitted by the interested peoples".

Article 26 of the Declaration on the Rights of Indigenous Peoples confirms this when defining the following rights:

1. Indigenous peoples are entitled to the lands, territories and resources that they have possessed, occupied or used or acquired traditionally.

2. Indigenous peoples are entitled to possess, use, develop and control the lands, territories and resources that they have by virtue of traditional ownership or another traditional type of occupation or use, as well as those that have been acquired in another way.

3. The States will ensure the recognition and legal protection of these lands, territories and resources. This recognition will properly respect the customs, traditions and the land-tenure systems of the land of the indigenous peoples concerned.*

The Inter-American Commission on Human Rights states that:


\textsuperscript{122} Convention 169 of the ILO, Art. 14(1).

\textsuperscript{123} Convention 169 of the ILO, Art. 14(2).

\textsuperscript{124} Ibid., Art. 14(3).
"The rights of indigenous and tribal peoples to own property embrace the natural resources that are in their territories, resources that they traditionally use and that are necessary for their survival, development and continuation of their way of life. For the Inter-American system of human rights, the rights to the resources are a necessary consequence of the right to territorial ownership." 125

The Inter-American Court bases this right on the fact that:
"the members of tribal and native communities are entitled to the right to own the natural resources that have used traditionally inside their territory for the same reasons that they are entitled to possess the land that they have used traditionally and occupied for centuries." 126

With regard to the use of natural resources, article 15 of Convention 169 of the ILO states that:
"The rights of the interested peoples to the natural resources existing on their lands will be especially protected. These rights consist of the right of these peoples to participate in the use, management and conservation of these resources."

The Inter-American Court on Human Rights goes a step further than the simple right to participation in the management, by referring rather to real management and control that, although still subject to the authority of the State, determines the control over the resources:
"The indigenous peoples are entitled to the right to the legal recognition of their various and specific modalities of control, possession, employment and enjoyment of their territories 'arising from the culture, uses, customs and beliefs of each people' ." 127

The Inter-American Court has also recognised that the rights of the indigenous peoples to manage, distribute and control their ancestral territory in an effective way, in accordance with their customary laws and systems of communal ownership, form part of the scope of the right of ownership that is embraced in article 21 of the American Convention. 128

125  See CIDH. Document OEA/SER.L/VII.Doc 56/09, 30th of December 2009, paragraph 182.
126  Ibid., paragraph 182.
127  Ibid., paragraph 72.
128  Ibid., paragraph 76.
Although the national laws do not completely recognise the right to self-administration of the territory of La Mosquitia for the indigenous peoples, some laws make reference to the right of indigenous peoples over lands that they possess traditionally. In a general way, the Visión de Pais imagines a future in which:

"the system of ownership rights will have been consolidated and all of the occupants of lands will have a title deed that credits them as owners.*

In the National Plan, it is also recognised that the use of natural resources has not been efficient in recent years:

"The use of bad practices in the exploitation of the country’s natural resources, the approaches relating to this exploitation being too narrowly focussed on extraction, the deficiencies in the licensing procedures, supervision and environmental audit, as well as the limited social and community participation, make the possibilities of the country’s natural heritage being of service to the economic and social development less likely and increasingly more often leads to a process of progressive loss of quality and value that must be reversed. The social conflict surrounding the exploitation, the protection and the conservation of the natural resources has been accentuated during the last decade, it being especially evident in the water & energy sector, the forestry sector and in mining. The land tenure problems and rights of ownership also constitute a cause of conflicts when it comes to the exploitation of the natural resources. The forests on public lands are subject to auction but without any participation of the communities and without all of the benefits of this exploitation reverting to the communities and the municipalities."§

The basic principle of the Forestry, Protected Areas and Wildlife Law is the safeguarding of the ownership rights of the ethnic groups. In this Law, Convention 169 of the ILO is also specifically mentioned:

"The ownership rights of the forested areas are recognised in favour of the indigenous and Afro-Honduran peoples, located in the lands that they traditionally possess, in accordance with the National Laws and Convention 169

---

*Visión de País (2010-2038), p.25.
§Forestry, Protected Areas and Wildlife Law (2007), Art.2.1.
of the International Labour Organisation (ILO)."  

In the creation of the Protected Areas, the participation of the affected communities is allowed, but the State has the ultimate power over them, to impose restrictions with regard to the use of the natural resources and to ask for management plans. However, the natives are part of the special features in the Protected Areas. Although the indigenous administration is not specifically mentioned, the State can delegate the administration of the protected areas to public institutions, "municipalities or other key regional stakeholders or regional representatives".

As an imposed structure that inhibits the self-administration of the Miskitos, it is necessary to mention the structure of the municipalities, which is a factor that complicates the indigenous peoples’ ownership of their territories. For example:

"The urban ejidal (cooperative) property that is not legally owned by private individuals, becomes the freehold property of the Municipality within the demarcated urban perimeter with the entry into force of this Law. Without prejudice to the provisions of this Article, private individuals who own urban ejidal property but do not have freehold possession, can apply to the municipality, which upon request, can grant the freehold possession upon the payment of an agreed amount to the Municipal Corporation (...)"

No person will be able to acquire more than a lot of 500 square metres in the marginalised areas. With the exception of the previous provisions, the urban ejidal lands that have been acquired by natural or legal persons through concessions granted by the State or the Municipality, will once again belong to the Municipality when the term of the concession expires."

132 Ibid., Art.45; See also the Implementing Regulations of the Forestry, Protected Areas and Wildlife Law, Art.317.
134 Forestry, Protected Areas and Wildlife Law (2007), Art.5.
135 Implementing Regulations of the National System of Protected Areas (SINAPH) (2009), Art.53.
136 Municipalities Law (1991), Art.70.
The Constitution of the Republic only mentions ejidal lands, but not the communal lands of the indigenous peoples:

"Every municipality will have sufficient ejidal lands to ensure its existence and normal development." 137

3.3 Cases in which the State reserves the right of ownership over certain natural resources

It is important to mention that article 15 of Convention 169 of the ILO specifies the rights of the indigenous peoples when the State has reserved the rights of ownership over specific natural resources. It states that:

"In the case where the ownership of minerals or underground resources belongs to the State, or it has rights over other existing land-based resources" the communities are entitled to the following rights:

1. The right to consultation:
   "Governments will have to establish and maintain procedures with a view to consulting the interested peoples, in order to determine if the interests of those peoples would be harmed, and to what degree, before undertaking or authorising any prospecting activities or exploitation of the existing resources on their lands."

2. Right to participate in the benefits that are produced:
   "Whenever it is possible the interested peoples will participate in the benefits that such activities generate."

3. Right to compensation: in such cases, the communities are also entitled to:
   "Receive fair compensation for any damage that they can suffer as a result of these activities."

The Inter-American Commission of Human rights agrees with the above and even goes a step further (because it incorporates the right to prior and informed consent), when stating that:

"In several countries of the region, constitutional or legal provisions exist that assign the ownership of the underground natural resources and the water resources to the State. The Inter-American system of Human Rights

does not exclude these types of measures; in principle it is legitimate that the ownership of the underground and water resources are formally reserved for the States. However, this does not imply, that the indigenous or tribal peoples are not entitled to be respected in connection with the process of exploration and mineral extraction, neither does it imply that the state authorities have free reign to do what they like with these resources. On the contrary, Inter-American jurisprudence has identified the rights of the indigenous and tribal peoples that the States must respect and protect when they seek to extract the underground resources or to exploit the water resources; such rights include the right to a safe and healthy environment, the right to prior consultation and, in certain cases, to informed consent, the right to participation in the benefits of the project, and the right of access to legal redress and compensation.\textsuperscript{138}

It must be mentioned that the Inter-American Court and the Inter-American Commission of Human Rights constitutes an important source of orientation with regard to how to interpret what is specified in the pertinent legal instruments.

In the case of Honduras, the State reserves the ultimate right over various resources, but it does not always fulfill the rights of the indigenous peoples mentioned above. For example, article 354 of the Constitution of Honduras stipulates that the State reserves the power to establish and modify the demarcation of the controlled and protected areas of the natural resources in the national territory, but in this case it does not establish a consultation mechanism with the indigenous peoples.

On the other hand, the General Environmental Law respects that the renewable natural resources must be taken advantage of in accordance with their social functions, not only with their economic and ecological functions.\textsuperscript{139} Also, the:

"public and private projects that impact on the environment, will be designed and will be executed keeping in mind the interrelation of all of the natural resources and man's interdependence on his environment".\textsuperscript{140}


\textsuperscript{139} General Law on the Environment (1993), Art.3.

\textsuperscript{140} Ibid., Art.4.
Also, the right to be compensated in the event of the exploitation of the natural resources, resettlement or environmental damages appears in various national laws.\textsuperscript{141}

However, not all of the laws consider these provisions. In Honduras, the traditional use of the indigenous peoples is respected as long as it does not interfere with the "national interest" or "public interest" of the Nation. This phenomenon is especially evident for renewable energy, underground resources, forests and protected areas and archaeological sites.

Renewable energy
One of the most serious cases of the violation of the right to consultation is in the renewable energy sector, where several laws and regulations prepare the road for the development of such a class of energy.\textsuperscript{142} Amongst these laws is the Visión de País of Honduras that states:

"(...) the lead Central American country with regard to (...) the sustainable use of natural resources, energy generation, foodstuffs, minerals and products derived from the forestry sector, like any other country of the region (...)".\textsuperscript{143}

The construction of dams for the generation of electric power will directly affect the indigenous peoples in the settlement areas and indirectly by means of the influence that the dams will have on the rivers and, therefore, also on their territories. However, in the case of the use of renewable energy, the national interest allows the former expropriation of property in the project areas, even inside La Mosquitia. For example the Special Transitory Law on Public Renewable Energy Projects stipulates:

"The property located within areas of the following projects is subject to expropriation by reason of a Declaration of Public Interest: Patuca III (Yellow Stones), Patuca II (Valencia) and Patuca IIA (La Tarrosa) (...) Once the


\textsuperscript{142} See, for example, Visión de País (2010-2038) and National Plan 2010-2022, Guideline 8. Productive Infrastructure As a Driver of Economic Activity, Objective 3 and goals 3.3, 3.5, 3.6 and 3.7; Law for the Promotion of the Generation of Electrical Energy with Renewable Resources (2007).

\textsuperscript{143} Visión de País (2010-2038) and National Plan 2010-2022, p.25.
expropriation declaration is issued, the areas will pass into the
ownership of the State, it being understood that the declared fair
value is for the owner to decide. The areas for resettlement and
the properties to be affected through the expropriation will
comprise all of those that are necessary for the execution of the
projects, including but not limited to: the area of the reservoir,
area of the buffer zone, area of the dam and the machinery room,
banks of materials and quarries, access roads, areas for the
depositing of materials or construction waste, camps,
transmission lines and substations, flood-diversion works and any
other works that in the opinion of the state-run National Electrical
Energy Enterprise (ENEE) are necessary”.

"The process of acquisition and expropriation of the properties
will exclude the administrative and legal procedures envisaged
under the Law of Mandatory Expropriation for these assets. This
way the issuing of an Executive Agreement or any other legal
formalism is excluded. Neither will a public interest declaration
contemplated under the Law of Mandatory Expropriation be
necessary, because the present Decree constitutes for all the
legal assets, such a declaration (...).”

"The populations surrounding the dams whose heirs were affected
by the reservoirs, will enjoy the preferential right to the
exploitation of the waters, to carry out in an organised way new
activities substituting for their traditional activities in agriculture,
ranching and the like. For such an effect the state-run National
Electrical Energy Enterprise (ENEE), by means of the Special
Unit for Renewable Energy projects (UE - PER), will issue the
respective Regulation so that it normalises and regulates the
substitute activities that will be carried out in the reservoirs”.

Article 17 of the Law on the Promotion of Electrical Energy
Generation with Renewable Resources even establishes the
possibility of carrying out works for renewable energy projects in
protected areas, reserves or buffer zones:

145 Ibid., Art.4; see also Arts.5, 6.
146 Ibid., Art.11.
"The works that are part of the projects covered under this Law, such as: water offtakes, reservoirs, machine rooms, transmission lines, conduction lines, access roads, substations and whatever other infrastructure works are found inside a national reserve, adjacent or protected area will have to respect the creation decree, and a Hydrological Management Plan will have to be considered together with an environmental impact assessment as part of the Management Plan for this area".

Although all of the hydroelectric projects require an environmental evaluation\textsuperscript{147}, no express reference is made to any public participation, and even less with regard to any consultation of the indigenous peoples affected by them. Many of these articles represent a violation of the rights of the indigenous peoples. As a consequence, the Lenca people, through the Civic Council of Popular and Indigenous Organisations (CO - PINH), presented a complaint before the Public Ministry in October of 2010, pointing out the violation of Agreement 169 of the ILO, for the delivery without consultation of the domestic rivers for the construction of hydroelectric dams for the purposes of selling their energy to the United States through the Central American Electrical Interconnection System (SIEPAC).\textsuperscript{148} Also, the COPINH lodged a complaint before the Special Prosecutor’s Office for Ethnic Affairs and the Cultural Heritage of the Nation, in January 2012, to the Head of the Ministry of Natural Resources and the Environment (SERNA), Rigoberto Cuéllar, for abuse of authority and failure to comply with the duties of public servants.\textsuperscript{149}

**Underground resources**

Similar to the renewable energy sector, the national laws that regulate the use of the underground resources usually establish the sovereignty of the State over these and they do not respect the right to consultation of the indigenous peoples:

"The State of Honduras exercises its inalienable and imprescriptible eminent domain, over all of the mines and quarries that are in the national territory, continental marine shelf, exclusive economic area and adjacent area (...)"\textsuperscript{150}

\textsuperscript{147} Law for the Promotion of the Generation of Electrical Energy with Renewable Resources (2007), Art.18.

\textsuperscript{148} www.redlar.org.

\textsuperscript{149} http://conexihon.info/noticia/derechos-humanos/etnias/copinh-denuncia-al-ministro-de-la-serna-por-abuso-de-autoridad.

\textsuperscript{150} General Mining Law (1998), Art.2.
Prospecting is free in the whole national territory, except in private territories, where it is necessary to obtain the proprietor's permission. The Mining Law also establishes the conditions in which expropriation is possible:

"The holders of mining rights, for which there is a proven impracticability of deriving any profits from the concession or of using an agreed easement or due to actions imposed directly or indirectly by the owner of the site, will be able to apply to the competent authority for the mandatory expropriation for reasons of use and public interest, which will be decided in accordance with the terms and procedures indicated under the Law".152

It is necessary to point out that at the present time, a Mining Environmental Policy Handbook does not exist (although the Law requires it in its article 114) which should better regulate this sector. Although the mining authority, the Executive Directorate of Mining Development (DEFOMIN), does not specifically mention the exploitation in the Department of Gracias a Dios, their web page states that:

"in the 18 Departments mineral deposits exist that can be investigated and possibly exploited."153

In 2006, the President issued a decree which prohibits the granting of new:

"Precious Metal Mining concessions and ensuing benefits for a period of one year or until such times as the current reforms of the General Mining Law come into effect that will be adopted by the Sovereign National Congress of the Republic."154

It is assumed that the new Mining Law that still lacks approval by the National Congress, contains more provisions for public participation.

In the case of hydrocarbons, the following is also declared necessary in the public interest:

"the execution of the works that are necessary, as well as the temporary acquisition or occupation of lands, their improvements, and other assets, or the creation of the

151  Ibid., Art.6.
152  Ibid., Art.32.
154  Decree for the Suspension of Precious Metal Mining (PCM-09-2006), Art.1.
easements that are necessary for their development.\textsuperscript{155}

The indigenous peoples are not mentioned when geophysical and geological investigations are carried out with a view to locating areas of interest containing hydrocarbons.\textsuperscript{156}

"The locations of petroleum, natural gas and other hydrocarbons are the inalienable and imprescriptible dominion of the State, regardless of whether their location is on the surface or beneath the Republic’s territory including its territorial waters, its adjacent areas, the exclusive economic area and the continental shelf."\textsuperscript{157}

Also in relation to biofuels:

"The investigation, production and use of biofuels to generate employment, increase energy self-sufficiency and to help reduce environmental, local and global pollution is declared to be in the national interest."\textsuperscript{158}

**Forests and protected areas**

The Forestry Law states that the ICF has exclusive regulatory powers over the national forest areas. The indigenous peoples have the possibility to participate in the use of the forest’s resources by means of the Social Forestry System (also see part 5 of this document).\textsuperscript{160}

In the case of protected areas:

"the declaration of a protected area, will enable the State to establish all of the owners, usufructuaries, administrators and limitations and obligations that are indispensable for the purposes of utility and the national interest which may arise from the Power of the Legislative Decree approving the agreement of the declaration and which results from the development or management plans that are approved. The State, through the AFECOHDEFOR or another government entity, will preferably be able to acquire by means of sale or exchange, the

\textsuperscript{155} Hydrocarbons Law (1965), Art. 4.
\textsuperscript{156} Ibid., Art. 16-20.
\textsuperscript{157} Ibid., Art. 2.
\textsuperscript{158} Biofuels Law (2007), Art. 1.
\textsuperscript{159} Forestry, Protected Areas and Wildlife Law (2007), Art. 52.
\textsuperscript{160} Ibid., Arts. 3.16, 18.5, 18.14, 51, 72, 126, 127, 155.
lands under private ownership that can better contribute to the fulfilment of the special needs of these areas; if no agreement is reached with the owner the expropriation will be able to proceed on the grounds of necessity and the national interest.\footnote{Implementing Regulations for the National System of Protected Areas (SINAPH) (2009), Art.41; see also article 46.}

"Registration in the Catalogue will have the following effects:

a) The imprescriptibility of the state or municipal possession on the catalogued protected areas;

b) The inalienability of the catalogued protected areas that can only be disposed of by means of a special authority from the National Congress; and

c) The immunity from seizure of the land of the catalogued protected areas."\footnote{Ibid., Art.46.}

This provision makes it difficult to grant full control to the indigenous peoples over their ancestrally owned territories. The traditional use and the settlement in the core area of the protected areas, is also restricted although the forestry law establishes an exception for the indigenous peoples living within these areas:

"New settlements are prohibited in the protected areas. Settlers in the core areas, ten (10) years before this Law came into effect or of the declaration of the latter will be resettled in the adjacent area or in another area of similar or better conditions. The resettlements will be carried out prior to any scientific technical study corresponding to the limits of the core area or adjacent area in accordance with the actual situation of the latter. Afro-Hondurans and indigenous peoples living in the protected areas are exempt from the previous provision."\footnote{Forestry, Protected Areas and Wildlife Law (2007), Art.133.}

**Archeological sites**

With regard to the archaeological sites, the Honduran Institute of Anthropology and History (IHAH) has the sole authority for issuing excavation permits, which is interesting in the case of the famous Ciudad Blanca, located inside La Mosquitia:

\footnote{Implementing Regulations for the National System of Protected Areas (SINAPH) (2009), Art.41; see also article 46.}
“Any natural or legal person, national or foreign, is prohibited from carrying out exploration, excavation and restoration works, in places of archaeological or historical interest and extracting from them any object that they contain, unless an authorisation is issued by the Honduran Institute of Anthropology and History, in which case any material that is extracted will belong to them.”

“The owners of lands, in which cultural artefacts exist, will not be able to oppose the execution of any exploration, excavation or reconstruction works or an authorised study, in accordance with this Law. Nevertheless, they will be entitled to the respective compensation.”

Also in the Municipalities Law there is no doubt that expropriation is legalised when the national interest is at stake:

“The reasons for decreeing the expropriation of urban properties are utility or national interest, apart from specific ones in the current Laws such as ornamental works, embellishment, safety, repairs, construction, reconstruction or modernisation of neighbourhoods, access or widening of roads, buildings for markets, squares, parks, public gardens for recreation and sports. For the purposes of this Article, municipalities will be able to order the expropriation of the property that they require for the works indicated in the previous paragraph, it being understood that due to public or national interest the expropriation of the entire general area may be necessary including that part where the respective work must be carried out.”

3.4. The basis of the ownership rights

The Inter-American jurisprudence characterises the ownership of indigenous and tribal peoples as:

"a modality of ownership whose foundation is not officially recognised by the state, but is in use in the traditional possession of lands and resources."

The territories of the indigenous and tribal peoples:

---

165 Ibid., Art.17.
166 Municipalities Law (1991), Art.117.
“they are theirs by right of use or ancestral occupation”.

“The indigenous communal right of ownership is also based on indigenous legal cultures, and on their ancestral systems of possession, independent of any state recognition”.

It is important to notice that these provisions:

"exist without interventions from the State that formalise them" or any formal title. Also the ownership rights of indigenous or tribal peoples over their territories are legally equivalent to the ownership rights of non-indigenous land and property owners, in such a way that "the states must establish the legal mechanisms that are necessary to clarify and to protect the communal ownership rights of indigenous and tribal peoples, in the same way that ownership rights are usually protected in the domestic legal system".

When the States do not grant to the indigenous peoples the same power with regard to the exercising of ownership rights, this is a form of discrimination.

3.5 The right to self-development

Several provisions in the international instruments on human rights recognise the right of indigenous peoples to self-development. These include:

Article 7 of Convention 169 of the ILO states that:

"The interested peoples will be entitled to have the right to decide the extent to which they have their own priorities with regard to the development process, insofar as this affects their lives, beliefs, institutions and spiritual well-being and the lands that they occupy or use in some way, and to control, insofar as possible, their own economic, social and cultural development".

---


170 See CIDH. Document OEA/SER.L/II.Doc 56/09, 30th of December 2009, paragraph 69; see also Guidelines for the UN-REDD Programme over free, prior and informed consent Draft for comments - December 2011, p.11


172 Ibid., paragraph 61.

173 Ibid., paragraph 61.
Article 32 of the Declaration on the Rights of Indigenous Peoples states:

1. The indigenous peoples are entitled to determine and formulate strategies for the development or the use of their lands or territories and other resources.

2. The States will conduct consultations and will cooperate in good faith with the interested indigenous peoples through their own representative institutions in order to obtain their free and informed consent before approving any project that affects their lands or territories and other resources, particularly in connection with the development, use or exploitation of mineral or water resources or those of another type.

3. The States will provide effective mechanisms for the fair and equitable compensation for any of these activities, and appropriate means will be adopted to mitigate the damaging consequences of an environmental, economic, social, cultural or spiritual nature.

Also in the national legislation, the General Law on the Environment stipulates:

"The indigenous peoples will receive special state support in connection with their traditional systems of integral use of the renewable natural resources, which will be studied in order to establish their viability as a model of sustainable development. The future development of these groups will already incorporate the norms and criteria of existing sustainable development".

3.6 Obligations of the State

It is important to highlight that, apart from the rights over their lands, territories and traditionally owned natural resources, the Government of Honduras has an obligation under international law to protect the territories in the region of La Mosquitia. The Rio Plátano Biosphere Reserve located in the Honduran Mosquitia, was recently included in the list of endangered World Heritage Sites by UNESCO. With regard to the Reserve, it is necessary to clarify that one of the functions of these reserves and also of the Anthropological Reserves is

---

to protect the indigenous peoples and not just the environment.\footnote{Implementing Regulation of the National System of Protected Areas (SINAPH) (2009), Art.32 a), f).}

Also, the famous Ciudad Blanca is located inside the Reserve, one of the most important archaeological sites in the Mayan civilization. In this case, the UNESCO Convention for the protection of World Heritage Sites is relevant.\footnote{See, in particular, Convention concerning the Protection of the World’s Cultural and Natural Heritage, Arts. 1 – 6.}

The Property Law establishes the protection of the indigenous territories from invasions by third parties, by declaring that:

"the ownership and tenancy rights of these peoples prevails over the property titles issued in favour of third parties that have never owned them".\footnote{Property Law (2004), Art.96, see also Art.102.}

However, the same Law also establishes conditions where third parties can remain in the indigenous territories.\footnote{Property Law (2004), Art.97-100.}

4. Traditional institutions and customary laws

4.1 Traditional institutions

The communities are entitled to the right to self-government, the right to their own political, legal, economic, social and cultural institutions, and to the respect for these institutions.\footnote{Agreement 169 of the ILO, Art.5(b).} This is a continuation of the right to self-determination mentioned before.

This is recognised in article 4 of the Declaration on the Rights of Indigenous peoples that states:

"The indigenous peoples, by exercising their right to self-determination are entitled to autonomy or self-government in relation to the questions concerning their internal and local matters, as well as to have the means of financing their autonomous functions."\footnote{Also recognised in Convention 169 of the ILO, Art.2(2)(b).}

Also, article 5 of this Declaration states:

\begin{itemize}
\item Implementing Regulation of the National System of Protected Areas (SINAPH) (2009), Art.32 a), f).
\item See, in particular, Convention concerning the Protection of the World’s Cultural and Natural Heritage, Arts. 1 – 6.
\item Property Law (2004), Art.96, see also Art.102.
\item Property Law (2004), Art.97-100.
\item Agreement 169 of the ILO, Art.5(b).
\item Also recognised in Convention 169 of the ILO, Art.2(2)(b).
\end{itemize}
“The indigenous peoples are entitled to conserve and to reinforce their own political, legal, economic, social and cultural institutions, whilst maintaining their right to participate fully, if they wish, in the political, economic, social and cultural life of the State.”

The following rights referring to the traditional institutions are also recognised in the international legal instruments:

1. The right to participate in the taking of decisions in matters that can affect the indigenous peoples, through their representatives, recognising the indigenous decision-making procedures.  
182

2. The right to consultation and cooperation in good faith with the indigenous peoples through their own representative institutions 183 to secure their free, prior and informed consent regarding the legal or administrative decisions that can affect them. 184

3. The right of the indigenous peoples to maintain and to develop their own systems or political, economic and social institutions 185 and to safeguard these institutions. 186

4. The right to determine the structures and to choose members of their institutions, using their own procedures. 187

The National legislation of Honduras is ambiguous when comes to dealing with the specific institutions of the indigenous peoples. Some laws impose external structures on La Mosquitia, others establish standards to respect the traditional institutions.

182 Declaration on the Rights of Indigenous Peoples, Art. 18.
183 The Guide for the application of Convention Number 169 of the ILO, establishes that, in relation to “representativity”, monitoring bodies of the ILO have emphasised that “the important thing is that they should be the result of a process carried out by the indigenous peoples themselves”. Additionally, “if an appropriate consultation process is not developed with the indigenous and tribal institutions or organisations that are truly representative of the communities affected, the resulting consultations will not comply with the requirements of the Convention”. See http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_113014.pdf, p.61.
184 Declaration on the Rights of Indigenous Peoples, Art.19 and Convention 169 of the ILO, Art.6(1)(a).
185 Declaration on the Rights of Indigenous Peoples, Art.20(1) and Convention 169 of the ILO, Art.6(1)(c).
186 Convention 169 of the ILO, Art.4(1).
187 Declaration on the Rights of Indigenous Peoples, Art.33(2).
One of the imposed structures that has a lot of influence in the indigenous territories is that of the departments and the municipalities. La Mosquitia is not only located in the Department of Gracias a Dios, but also partially in the Departments of Olancho and Colón. The administration of the area by the different departments does not respect the traditional structures of the indigenous peoples in La Mosquitia. At the municipal level, the Municipalities Law defines all of the functions of the Municipalities, including the protection of the environment and exploitation of natural resources, neither mentioning the coexistence of indigenous structures, like the Territorial and Communal Councils and the MASTA Board of Trustees.188

"The Municipality is the government's body for the management and administration of the community and it exists to look after the well-being of the inhabitants and to promote their integral development and the preservation of the environment... "and has as an objective, amongst others "to preserve the historical heritage and the civic-cultural traditions of the Municipality; to support them and to disseminate them in collaboration with other public or private entities".189

The Municipal Corporation is the supreme authority at the municipal level, and is responsible for:

"staging assemblies of an advisory nature", and "holding a plebiscite for all of the surrounding citizens of the municipal district, to take decisions over matters of vital importance".190

The mayor is the supreme executive authority in a municipality and presides over the activities of the municipal corporation.191

In the participation at the political level, especially with regard to the use of natural resources, there is little recognition of the specific institutions of the indigenous peoples, on the contrary, external institutions are promoted, like the National, Departmental, Municipal and Local Consultative Councils192, Regional Development Councils193, the Municipal Development Council194, the Basin Councils195.

188 Municipalities Law, Art.13.
189 Ibid., Art.14.
190 Ibid., Art.25.
191 Ibid., Art.44
192 Forestry, Protected Areas and Wildlife Law (2007), Arts.21-28; Implementing Regulation of the Forestry, Protected Areas and Wildlife Law (2010), Arts.23, 28.
193 Visión de País (2010-2038), p.54.
195 Water law (2009), Art.19, 22.
the National and Departmental Territorial Planning Councils (CONOT)\textsuperscript{196}, the National Council of Education and Environmental Communication (CONECA)\textsuperscript{197}, the Protected Areas National, Regional and Local Councils\textsuperscript{198} and the Environmental National Consultative Council\textsuperscript{199}, that sometimes do not even explicitly include representatives of the indigenous peoples.

In the case of the Forestry Law, the Social Forest System offers communities the opportunity of signing co-management contracts, so that they can be incorporated in the protection, afforestation, management and integral use of the forest.\textsuperscript{200} The form of participation is by means of Consultative Councils, agro-forestry groups, community companies and management and co-management contracts.\textsuperscript{201} The forest rangers look for collaboration with organisations with experience in the management of natural resources.\textsuperscript{202} However, the specific structures of the indigenous peoples are not mentioned.

One of the most important provisions for the protection of those specific institutions is in the General Environmental Law, which stipulates that the State should support the indigenous peoples in order to maintain its traditional forms of use:

"The indigenous peoples will have special state support in connection with their traditional systems of integral use of the renewable natural resources, which will be studied in order to establish their viability as a model for sustainable development. The future development of these groups will already incorporate the standards and criteria of existing sustainable development."\textsuperscript{203}

The Implementing Regulation of the Forestry Law mentions that the benefits of the knowledge and traditional practices should be shared equally:

\textsuperscript{196}Territorial Planning Law (2003), Arts.9, 16, 39.
\textsuperscript{197}Special Education and Environmental Communication Law, arts. 6, 7.
\textsuperscript{198}Implementing Regulation of the National System of Protected Areas (SINAPH) (2009), Art.7, 13-16.
\textsuperscript{200}Forestry, Protected Areas and Wildlife Law (2010), Arts.3.16., 18.5., 18.14., 51, 72., 126., 127., 155.
\textsuperscript{201}\textsuperscript{201}Ibid., Arts.2.2., 3.11., 21., 39.1a.), 39.2b.), 51., 70, 77.
\textsuperscript{202}\textsuperscript{202}Ibid., Art.157.8.
\textsuperscript{203}General Law on the Environment (1993), Art. 71.
“the knowledge, innovations and the practices of the indigenous peoples and the local communities that contain traditional life styles will be respected, preserved and maintained. The benefits derived from the research and subsequent use of such knowledge, innovations and practices will be shared equitably amongst the indigenous populations and local communities and the institutions that are active and operating in the protected areas.”

The Implementing Regulation of the General Law on the Environment also establishes the protection of the ethnic cultures, especially with regard to the traditional tenancy of the lands and the productive systems:

“in accordance with the wishes of the Secretary of Culture, through the Honduran Institute of Anthropology and History and other components, to carry out the necessary activities to maintain the identity and vitality of the ethnic cultures, especially the conservation of their productive systems, and respect for their relative cultural elements regarding the communal tenancy of the land and their harmonious behaviour with the environment.”

The Property Law recognises the right to communal ownership and to the traditional forms of tenancy associated with this communal ownership.

The National Plan values:

“the importance of perfecting the processes of building citizenship, not only improving legal frameworks but also the specific institutions associated with the environment in which citizens exercise their rights to search for and feel a sense of well-being whether individual or social (…)”

4.2 Customary laws

The right of the indigenous peoples to their customary laws is recognised in several international legal frameworks. In short, rights exist:

1. To promote, to develop and to maintain institutional structures, including customs, procedures, traditions and systems or legal customs, in accordance

---

204 Implementing Regulation of the Forestry, Protected Areas and Wildlife Law (2010), Art. 373.
206 Property Law (2004), Art. 94.
with international standards of human rights regarding indigenous peoples.208

2. To determine individual people’s responsibilities to their communities.209

3. To take into account the customs and customary laws in the application of the laws and national regulations regarding indigenous peoples.210

Independently of this, the national legislation is generally applied in a similar manner for all Hondurans. An Indigenous Law does not exist and neither are there many provisions that respect the customary laws of the indigenous peoples.

The National Plan recognises the challenge that:

*“Today the participation of the ethnic groups in the Legislature, is an ongoing subject that demands an urgent answer (“).”* 211

But on the other hand, the customary laws are not recognised as their own system of justice in the indigenous territories.

In the case of the use of natural resources, the traditional use of the peoples who live inside the protected areas is respected. The participation of the peoples who live in the protected areas is guaranteed in the definition of the standards for the use of the resources and the use of these in an individual way.212 However, it is not possible to use the resources in the core areas nor in the adjacent area, unless it is in accordance with the management and operating plans.213 Investigations on biodiversity inside these areas have to respect the traditional and cultural practices of the local communities.” 214

---

208 Declaration on the Rights of Indigenous Peoples, Art.34 and Convention 169 of the ILO, Art.8(2).
209 Declaration on the Rights of Indigenous Peoples, Art 35.
210 Convention 169 of the ILO, Art.8(1).
211 National Plan 2010-2022, p.45.
212 Implementing Regulation of the Forestry, Protected Areas and Wildlife Law (2010), Arts.382, 385, 393.
214 Implementing Regulation of the Forestry, Protected Areas and Wildlife Law (2010), Art.108.
At the time of establishing rules for fishing or hunting, reference is not made to the indigenous customs. However, according to the Forestry Law, communities can participate in the hunting regulations.

In order to control compliance with the Forestry Law, ICF technicians can carry out inspections (for example, taking pictures) without giving prior notice.

Although the Implementing Regulation of the Territorial Planning Law stipulates that:

"In the event of conflicts with regard to prioritising the use of the natural resources and the human settlements, priority will be given to those, according to the availability of water in quantity and quality and without impairing the sustainability of the natural resources", article 91 states that "the conflicts that arise due to the change of use from forestry to agriculture and cattle ranching, will only be solved by means of establishing permanent agro-forestry and silvopastoral systems adapted to the local conditions".

5. Consultation rights and free, prior and informed consent

5.1 Consultation

The communities are entitled to participate and to be consulted in advance by means of their representative institutions every time that legislative or administrative measures are proposed (for example, policies, plans, standards, authorisations, licences, concessions, developments or projects) that will impact them directly, either positively or negatively. The right to consultation should respect certain minimum procedural requirements, including:

1. States should establish means that enable the free participation of the peoples at all levels of decision-making with regard to policies and programmes that concern them.

---

215 For example, General Law on the Environment (1993), Arts. 41-44; Fisheries Law (1959), Art.20.
216 Forestry, Protected Areas and Wildlife Law (2010), Arts.117, 122.
217 Forest, Protected Areas and Wildlife Law (2010), Art.167.
218 Implementing Regulation of the Territorial Planning Law (2003), Art.90.
220 Convention 169 of the ILO, Art.6(1)(a) and Declaration of Rights on Indigenous Peoples, Art.18 and 19.
221 Convention 169 of the ILO, Art.6(1)(b).
2. The consultation must be made in good faith, using the appropriate procedures.222

3. The consultation process should be "culturally appropriate", that is to say, it must respect the practices, customs, traditions and laws of the community. This implies, amongst other things, bearing in mind the traditional methods of decision-making and the time that the community requires for this, together with instruments and internal regulatory tools, such as this Bio-Cultural Protocol.

4. The measures for the selection of representatives for consultations and decision-making are the exclusive right of the latter communities.223

It has to be emphasised that the right to participation is also included in the Regional Convention For the Management and Conservation of the Natural Forestry Ecosystems and the Development of Forestry Plantations whose article 5 stipulates:

"a) To promote the participation of all of the interested parties, including the local communities and the indigenous populations, the managers, the workers, the union associations, the non-governmental organisations and the individuals and the inhabitants of the forested areas, in the planning, execution and evaluation of the national policies that arise as a result of this Convention.

b) To duly recognise and support cultural diversity, respecting the rights, obligations and necessities of the indigenous populations, of their communities and other inhabitants of the forested areas."

According to Bartolomé Clavero, Vice-President of the United Nations Permanent Forum on Indigenous Questions, the right to consultation in particular prevails as a guarantee procedure for all of the other rights protecting against measures which could affect the indigenous peoples.224

In Honduras, national legislation has more to say about participation rather than consultation. Usually, it refers to the participation of the civil society or especially the municipalities, but not the indigenous peoples.225

222  Convention 169 of the ILO, Art.6(2).
223  Declaration on the Rights of Indigenous Peoples, Art.18.
225  See for example the General Law on the Environment (1993), Art.9d); 11.2; Water Law (2009), Art. 19; Territorial Planning Law (2003), Arts. 4,5,35; Implementing Regulation of the National System of Protected Areas (SINAPH) (2009), Art.25.
In the “Visión de País” and in the National Plan there are several principles and guidelines that recognise public participation. According to the Territorial Planning Law, the form of participation can be, apart from the previously mentioned advice, by means of open town councils, plebiscites, consultation assemblies, audiences, forums and sectorial meetings taking place at the initiative of public interest groups or by convening the representative Government institutions and other participation mechanisms and envisaged forms of civic expression, such as referred to in the Law. Article 69 of the Implementing Regulation of the Territorial Planning Law specifically recognises the participation of the ethnic groups:

"The territorial planning will be carried out with public participation under the criteria of social and gender equality, recognising the intrinsic value of all of the social groups, and particularly the ethnic groups."

The Municipalities Law, in its article 120, declares that:

"any public entity, executive or autonomous which is planning the execution of public works, shall obtain prior approval from the Municipality. In the event of a conflict, the Departmental Governor will make a final decision, so that the Executive Power resolves the issue."

Article 89 of the General Environmental Law stipulates that:

"The participation of the inhabitants of the Republic, individually or through organisations on the conservation of the environment and of the natural resources is declared to be of public interest. For these purposes the Secretary of the Environment will convene representatives from organisations of all kinds, from Honduran society so that they can express their opinions and proposals... ."

In the evaluation of the environmental impact of projects, the civil population has the right to receive information with regard to any work, project or activity. Also:

---


227 Territorial Planning Law, Art. 36; see also Arts.37, 38.

228 Implementing Regulation of the National System for the Evaluation of the Environmental Impact (SINEIA) (2009), Art.90.
“SERNA will support the public participation, of the general population, during the environmental evaluation process of all of the phases of those projects, works or activities considered as significant from the environmental point of view."²²⁹ The project developer “will involve the population of the area surrounding the project at the earliest stage possible regarding the drafting process for the environmental impact study” and “will involve and/or consult the population during the preparation of the environmental impact study and, also, propose the communication mechanisms, solution of conflicts and consultations that will be developed during the revision stage of the document.”²³⁰

The costs of the public consultation have to be assumed by the project developer.²³¹

The indigenous peoples who live in protected areas can participate in the drafting, upgrading and execution of the management and operating plans for the protected areas.²³² In a similar way, the public can participate in the drafting of the National Plan for the Protection against Fires, Control of Forest Pests and Diseases²³³. With regard to tourism in Protected Areas:

“the planning process will have the participation of the local communities, tourist operators and managers of the protected areas, as well as the state authority regulating the activity (IHT).”²³⁴

When one speaks directly of consultation, usually this is carried out with the municipality or by means of state institutions, like the Consultative Councils. For example, in the case of the declaration of protected areas:

“The declaration of the protected natural areas which includes buffer zones, will be made... in consultation with the municipalities of the corresponding jurisdiction, subject to public information.”²³⁵

²²⁹ Ibid., Art.87.
²³⁰ Ibid., Art.88.
²³¹ Ibid., Art.100.
²³² Forestry, Protected Areas and Wildlife Law (2007), Art.113; Implementing Regulation of the National System of Protected Areas (SINAPH) (2009), Art.54.
²³³ Forestry, Protected Areas and Wildlife Law (2007), Art.140; Implementing Regulation of the Forestry, Protected Areas and Wildlife Law (2010), Art.42.2.
²³⁴ Implementing Regulation of the National System of Protected Areas (SINAPH) (2009), Art.60.
The Territorial Planning takes into consideration the public consultation before diagnosis and in the development of municipal plans.\textsuperscript{236}

In the General Law on the Environment and its Implementing Regulations, certain articles establish the participation of the local communities and private organisations in the use and the protection of the natural resources, and also the right of the population to be informed of the activities that are carried out in this field.\textsuperscript{237} Also, any citizen is entitled to complain to the authorities\textsuperscript{238}, especially in the case of Environmental Impact Studies, when:

"important impacts have not been envisaged and/or no appropriate mitigation measures have been proposed".\textsuperscript{239}

Also refers to mining concessions, when the rights are refuted by these.\textsuperscript{240} In the case of protected areas:

"If the claims were based on questions of ownership that assume conflicts over the possession of public areas and if those claims were dismissed in administrative procedures, the individual who is considered to be affected will be able to resort to legal channels with due regard to this regulation."\textsuperscript{241}

It is interesting to mention that the Environmental Evaluation does not include a social evaluation\textsuperscript{242}, although the Implementing Regulation of the General Law on the Environment stipulates that the projects involving the development of tourism have to consider:

"in addition to the technical and economic dimension, the possible social impacts and the environment."\textsuperscript{243}

Although some articles of the Property Law establish recognition of the rights of the indigenous peoples on their lands, there are many uncertainties with regard to the

\textsuperscript{236} Implementing Regulation of the Territorial Planning Law (2003), Arts.70-73.
\textsuperscript{237} General Law on the Environment (1993), Arts.102, 103, 105; Implementing Regulation of the General Law on the Environment (2003), Arts.88, 89.
\textsuperscript{238} Implementing Regulation of the General Law on the Environment (1993), Arts.90, 128.
\textsuperscript{239} Implementing Regulation of the National System for the Evaluation of Environmental Impact (SINEIA) (2009), Art.54.
\textsuperscript{240} General Mining Law (1998), Art.60.
\textsuperscript{241} Implementing Regulation of the National System of Protected Areas (SINAPH) (2009), Art.37.
\textsuperscript{242} General Law on the Environment (1993), Arts.5, 34, 78; see also Decreé N\textdegree\ 181-2007 – Delegation of Licensing in the Municipalities and Implementing Regulation of the National System for the Evaluation of Environmental Impact (SINEIA) (2009); General Mining Law (1998), Art.79.
\textsuperscript{243} Implementing Regulation of the General Law on the Environment (1993), Art.70.
right to free, prior and informed consent. In article 95, the consultation with the peoples is obligatory before projects are carried out in their territory, but these consultations are not associated with any consent on the part of the indigenous peoples, given the finding that:

“in the case in which the State seeks to exploit the natural resources in the territories of these peoples it will have to inform them and consult with them about the benefits and disadvantages that can occur subject to the authorisation of any inspection, or exploitation. In the case in which it authorises any type of exploitation, the peoples must receive fair compensation for any damage that they suffered as a result of these activities.”

Apparently, the Property Law does not include all of the relevant aspects for the indigenous peoples. In this sense, the OFRANEH challenged the constitutionality in connection with Chapter III of the Property Law in January 2009. The Supreme Court issued an inadmissibility decision on the 2nd of February 2011. The judgment ignores the claim in connection with the right to consultation.244

5.2 Results of consultations

The results of the consultations (whether the opinions and decisions proposed by the community are considered by the State as mandatory or not) vary according to the level of the impact of the measure which is being studied. In general terms, the consultation should be undertaken with the purpose of getting consent or agreement with the communities.

However, there are matters and cases in which, due to the very high levels of potential impact on the community, the State is under an obligation to make a decision or to express a position. With this in mind, in recent decades, it has taken into account and consolidated the right of the community to give its free, prior and informed consent, and has made the latter a requirement within the framework of international law through the measures and legislative and administrative projects that can have a special impact on communities and their territories, for cases that are concerned with the fundamental rights of the community and with individual provisions (such as access to traditional knowledge and its use).

244 http://ofraneh.wordpress.com/, access 6/06/2012.
5.3 Free, prior and informed consent

The right to free, prior and informed consent is a legal principle that is found in a series of international legal instruments such as Convention 169 of the ILO and the Declaration on the Rights of Indigenous Peoples.\textsuperscript{245} It can be defined as a consent that is offered freely, without any manipulation or intimidation, by people who are properly informed in advance about the consequences of a decision that has to be made, in accordance with their own decision-making processes. Free, prior and informed consent is not a participative engagement, negotiations or consultations, these are just some of the ways by which free, prior and informed consent can be reached.

If affected peoples decide to abstain from consenting to enter into negotiations over a project or development, then the Government, development agency or project developer cannot continue with the project without violating the basic rights of those on their lands and the control of the future of the affected people. The Nations United Permanent Forum on Indigenous Questions recently supported this by stating that:

"Where the property rights are indirectly but significantly affected in the long term, for example, in the extraction of underground resources they are considered to be the property of the State, the consultations of the State with the indigenous peoples should at least have the achievement of consent as an objective. If not, one can very well presume that the project should not proceed. To do so, the State has a great deal of responsibility in justifying it and ensuring that the indigenous peoples will share in the benefits of the project, and it must take measures to mitigate their negative effects\textsuperscript{246}"

The judgment in the recent Case of the Indigenous People of Kichwa de Sarayaku vs. Ecuador before the Inter-American Court on Human rights establishes a very important precedent for free, prior and informed consent. Although in this case the

\textsuperscript{245} Amazon Watch (2011). \textit{The Right to Decide. The Importance of Respecting Free, Prior and Informed Consent}, p. 5. Please bear in mind that there is no formally and universally recognised definition of free, prior and informed consent.

\textsuperscript{246} See the document of the United Nations Permanent Forum E/C.19/2012/3 entitled “Analysis of the duty of the State to protect indigenous peoples affected by transnational corporations and other business enterprises”, dated the 23rd of February 2012, paragraph 14.
Court respects the right to prior consultation, the definition clarifies that the consultations have to be free, prior and informed and in accordance with Convention 169 of the ILO:

"carried out (...) in good faith and in a form appropriate to the circumstances, with the purpose of reaching an agreement or consent to the proposed measures."

In spite of its international recognition, the right to free, prior and informed consent still lacks implementation in Honduras. Although some laws and national policies mention public participation, including the indigenous peoples, no law specifically mentions free, prior and informed consent as a prerequisite for the commencement of development projects, public works and other projects that affect the Miskito territory.

The article that most resembles consent is article 35g) of the Territorial Planning Law that stipulates:

"In its actions participation will seek consensus, agreement, a fair deal, the right to be informed, and the prompt resolution of problems and conflicts according to the law's petition and request procedures."

5.3.1 Cases that require free, prior and informed consent

According to Article 32(2) of the Declaration on the Rights of Indigenous Peoples, the main responsibility of the relevant governments is to ensure that the decisions on policies, development plans and the development of resources and extraction infrastructure have the free, prior and informed consent of the indigenous peoples before being approved.

There is already international agreement on cases where the free, prior and informed consent must be obtained from the communities. With these kinds of matters, the communities have the power to make decisions on the measures or the project in question, or to veto it. These cases include:

---

247 Inter-American Court on Human Rights, Case of the Indigenous people known as the Kichwa de Sarayaku vs. Ecuador. Merits and Reparations. Judgment of the 27th of June 2012. p.57
1. Before the adoption and implementation of the legislative or administrative measures on the part of a State that can affect the indigenous peoples.  

2. All of the development, investment, exploration or extraction plans that impact the right of the community to use and enjoy their territories and ancestral resources in a significant way, in particular, projects relating to the development, use or exploitation of minerals, forest and water resources.

3. Projects or actions that are planned to be carried out in areas considered to be sacred or of special biological, intellectual, religious or cultural importance for communities or that can affect them.

4. Actions that include plans or development or investment projects that require the displacement (that is to say, temporary or permanent relocation) of communities from their territories.

5. Actions that include development or projects that in all probability imply the confiscation, occupation, use or damage of lands, territories and traditionally own resources.

6. The depositing or storage of dangerous materials in lands or community territories, as established in article 29 of that United Nations Declaration on the Rights of Indigenous peoples.

7. Forest Certification Schemes.

8. REDD+ Pilot Activities.

9. Access and/or use of the community’s knowledge and traditional genetic resources.

---


249 Ibid., Art.11(2).

250 Ibid., Art.10 and Convention 169 of the ILO, Art.16(2)

251 Declaration on the Rights of Indigenous Peoples, Art.28.


254 CBD, Art.15(5) and Nagoya Protocol, Arts.6 y 7.
10. Distribution of profits, when the profits are derived from the territories and natural resources of the indigenous peoples.⁵⁶

A series of these elements were cited in the Saramaka case, although this case offered more examples of state measures requiring prior consultation, including:

1. The process of defining, demarcating and granting collective title over the territory of the Saramaka people.

2. Environment and social impact assessments;

3. Granting of legal recognition of indigenous peoples with regard to their collective legal capacity.⁵⁷

5.3.2 Regulations and relevant legal doctrine

Apart from the legal instruments mentioned previously, the rights to be consulted and to free, prior and informed consent are also envisaged in the following:

International Authorities:

- The Convention on Biological Diversity (CBD) refers to the prior approval of indigenous knowledge and to the protection of cultures and indigenous peoples (article 8(j)).

- The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Participation in the Benefits Arising from their use for the Convention on Biological Diversity. Although it has not yet come into effect, Honduras has signed the Protocol, which indicates its intention to comply with what is specified in the latter. There are several articles relating to free, prior and informed consent with regard to access to genetic resources and related traditional knowledge that the indigenous groups have (see articles 6 and 7).

---


• The Akwé Guidelines: Kon. The CBD’s voluntary guidelines to carry out
cultural, environmental and social impact assessments relating to any
developments that are intended to be carried out, or that are likely to have an
impact on sacred sites and on lands and waterways that the indigenous
communities have traditionally occupied or used.
• The Rio Declaration: voluntary guidelines about the environment and
development.

Regional Authorities:
• Resolutions of the Inter-American Court on Human rights, including: Saramaka
vs. Surinam; Sawhoyamaxa vs. Paraguay, as previously discussed.
• The Inter-American Commission on Human Rights, document OEA/Ser. L/V/II.
Doc 56/2009 and others that govern the interpretation of the relevant
stipulations.

5.3.3 Free, prior and informed consent, consultation rights and REDD
Free, prior and informed consent is crucial for the credibility and effectiveness of
Reduction of Carbon Emission projects caused by the Deforestation and Degradation
of Forests (REDD).\textsuperscript{258} The dialogue about REDD has highlighted the importance of
safeguarding the rights of indigenous peoples and of fulfilling the principle of free,
prior and informed consent.\textsuperscript{259}

REDD processes are different from other projects involving the use of natural
resources, because the products (carbon reservoirs) are not tangible and very
complex.\textsuperscript{260}

Few governments have established standards which regulate who owns the carbon
in the forests and who can receive money for the reduction of the emissions from it
and sell certificates. This situation is even more complicated in the indigenous areas,
where no formal ownership exists over the lands under common control. There are

\textsuperscript{258} Acronyms for the United Nations Programme in English (UN-REDD). “REDD +” goes beyond
deforestation and forest degradation, and includes the role of conservation, sustainable
management of forests and enhancement of forest carbon stocks.
\textsuperscript{259} Colchester, M. (2010). Free, Prior and Informed Consent Making FPIC work for forests and
\textsuperscript{260} Anderson, P. (2011). Free, Prior and Informed Consent and REDD+. Principles and
Approaches for Policy and Project Development. RECOFTC and GIZ, p.8.
several risks for the communities who participate in REDD+ projects, ranging from the violation of customary rights over their indigenous lands and operating contracts to uncertainties in maintaining the production of foodstuffs.

The involvement of indigenous peoples in the REDD+ processes is not only prescribed by law, but also has a practical purpose, since the local communities will play a very important role in terms of ensuring the success of REDD+ projects and the reduction of emissions. The costs for the companies that do not comply with the appropriate processes for free, prior and informed consent can be very high.

It is important to mention that the identification of those who have ownership rights to the lands and resources is essential for the process of respecting the right of a community to give free, prior and informed consent (although it will not guarantee that these rights will be respected). The motivation to ensure compliance with free, prior and informed consent is that the rights holders have the power of veto over activities or REDD policies on the basis of 'unreasonable claims', although Governments may try to justify unjust policies by referring to the "national interest".

Consent should be given on three levels:

- Consent to discuss the possibility of a REDD+ project.
- Consent to participate in the development of a detailed plan for a project.
- Consent to carry out the project.

Consent is a permanent process that requires supervision, maintenance and constant reaffirmation throughout the various phases of a project.

When they are informed about REDD+ projects, the Miskito People are entitled to receive the following documentation on which they will base their decisions:

- Balanced consideration of the potential positive and negative impacts that may arise, according to what is identified by both parties, including the direct costs and opportunities.

261 Ibid., p.10.
- Alternatives to the project and probable results from different scenarios that are proposed.
- Updates that occur regarding their legal rights in relation to aspects of the proposed project.
- Participation in all of the development phases of the project, especially the Social and Environmental Impact Assessment.
- Participation in the monitoring aspects of the execution of the project in order to provide information in a permanent way (not just paid data collection).

Take into account that UN-REDD has prepared a series of guidelines with regard to REDD and to free, prior and informed consent. In these guidelines, an Operational Framework is defined for those seeking free, prior and informed consent, including a series of steps that the partner countries should take when seeking free, prior and informed consent in a community or territory.

This operational framework defines the components for a revision of the scope of free, prior and informed consent, the necessity for preparing a proposal on the latter and that of an independent assessment when faced with queries about the validity of the process of free, prior and informed consent. Parts of this operational framework have been taken into account in the development of the specific process for La Mosquitia.

**Other relevant legal instruments**

Apart from the international legal instruments mentioned earlier which support such rights, organisations that usually carry out this type of project, like the World Bank, have their own operational framework when it comes to dealing with indigenous peoples. The Operational Guidelines of the World Bank, especially the Operating Policy (OP) 4.10, establishes the obligation of free, prior and informed

---


consent with borrowers, and they state that projects will only be financed where:

"free, prior and informed consent indicates that there is general support from the community for the project on behalf of the affected indigenous peoples".  

In a similar way, the Inter-American Development Bank (IDB) has developed its "Operating policy on indigenous peoples and a Strategy for indigenous development". The Operating Policy on Indigenous Peoples emphasises its objectives, which are:

"to support any development identified with the indigenous peoples, including the strengthening of their management capacities" and "to safeguard the indigenous peoples and their rights from potential adverse impacts and from the exclusion of development projects financed by the Bank."  

When considering the financing of projects to support indigenous development, the Bank will bear in mind the projects which have taken place subject to culturally appropriate consultation processes with the interested indigenous peoples, in an appropriate manner, with the purpose of reaching an agreement or of obtaining consent.

The policies highlight the commitment to:

- "the recognition, articulation and implementation of the indigenous rights contemplated in the applicable legal standards";

- "the support for the culture, identity, language, traditional arts and techniques, cultural resources and intellectual ownership";

- "the strengthening of the legalisation processes and physical administration of the territories, lands and natural resources";

- "the promotion of appropriate consultation mechanisms, participation in the management of the natural resources and of the participation in the benefits of the projects on the part of the indigenous peoples in whose lands and territories the projects are developed, especially in the case of management or extraction projects involving natural resources or in the management of protected areas ";

265 See World Bank OP 4.10, paragraphs 1, 10 and 11.
267 Inter-American Development Bank, Operating policy on indigenous peoples, p.7.
"the support for the governance of the indigenous peoples by means of the strengthening of the capacities, the institutions and the management processes, decision-making and administration of the lands and territories at the local, regional and national level... and the institutionalisation of the consultation mechanisms and negotiation in good faith between the government and the indigenous peoples, particularly in the design and implementation of the public strategies and policies that affect them";

- "the strengthening of the institutional capacity of the indigenous peoples with special attention being given to the training of the indigenous leaders for the administration of projects and business management, as well as encouraging them to actually participate in good faith in the consultation and negotiation processes."

Also, the Inter-American Development Bank has expressed its intention to carry out its operations in such a way that any direct or indirect impacts on the indigenous peoples or their individual or collective rights are prevented or mitigated. A series of guarantees has been established relating to the adverse effects, the territories, the lands and natural resources (including the consultation mechanisms) and taking into consideration the indigenous rights.

The Inter-American Development Bank has also established an Indigenous Development Strategy. These strategies include IDB’s intention to strengthen the capacity of the indigenous peoples to administer and govern their lands and territories, to reinforce their economic governance, to strengthen and promote their institutional capacity (in particular, the ability of the communities to organise themselves), to strengthen the capacity of the indigenous peoples to enter into dialogue with and negotiate with States, private companies and other intermediaries, and to promote on behalf of the indigenous peoples the institutionalisation of the mechanisms for the gathering and dissemination of information, consultation, negotiation in good faith and participation, taking into account the principle of free, prior and informed consent.

The Indigenous Development Strategy also establishes the rights, regulations and the legal guarantees, and includes the satisfactorily and duly documented

268 Ibid., p. 7, paragraphs (c), (d), (e), (f), (g) and (i).
269 Ibid., 8.
270 Inter-American Development Bank, Strategy for Indigenous Development, p. 34.

Annex 1
agreements, or the consent granted by the affected peoples to the project developers of operations with potentially important adverse impacts. 271

There are also guarantees in this regard that include the application of consultation and negotiation in good faith, and of agreement or consent mechanisms. As far as the consultation mechanisms and participation are concerned, the Inter-American Development Bank has declared that:

"(a) It will require diagnostic tests, reviews by experts and, whenever it is possible, timely consultation processes and negotiation in good faith and culturally appropriate processes to identify the affected indigenous peoples and their genuine representatives, and to identify and to evaluate the benefits and potential impacts on the peoples or indigenous groups.

(b) In a form consistent with the new Strategy for the participation of the public in the Bank’s activities, which pays particular attention to the opportunities and requirements for the participation of the indigenous peoples, the Bank will promote the inclusion of indigenous representatives in consultations during the early stages of the project cycle, including the creation of councils or places for dialogue with representatives of the indigenous peoples where relevant...

(c) For independent operations, specifically directed at indigenous beneficiaries, it will require the obtainment of the agreement or consent from the peoples or affected indigenous groups.

(d) For the operations that incorporate specific measures for indigenous peoples (mainstreaming), it will require appropriate sociocultural processes of consultation and negotiation in good faith with the affected indigenous peoples.

(e) For the operations that affect the indigenous peoples in a particularly adverse way, it will require agreements that demonstrate the socio-cultural viability of the project.

(f) According to the nature and intensity of the impacts or potential benefits, it will apply the appropriate procedures for consultation, negotiation in good faith, agreement or consent, and participation in the subsequent stages of

271 Ibid., p. 39.
the development of a project, such as the design of the project and of alternatives, the incorporation of indigenous mitigation, compensation or development plans, and depending upon the case, the implementation, monitoring and evaluation in order to foster common criteria with the indigenous peoples on the projects and the appropriation for the latter of the processes and results that it is looking to promote.

(g) In a consistent manner with its policies and procedures, it will facilitate the financing so that the indigenous peoples can carry out their own consultation processes.272

It is necessary to point out that the community can have recourse to a complaints procedure through the Independent Consultation and Investigation Mechanism to deal with any complaints that the communities or individuals may have, when alleging that they can be negatively affected by the operations financed by the IDB.

Other legal instruments requiring that REDD+ supports the right to free, prior and informed consent include:

- **The United Nations Framework Convention on Climate Change** that refers to the Declaration on the Rights of Indigenous Peoples in Annex 1 of the so-called Cancún Agreements, and it details safeguards that the countries should promote when undertaking activities relating to REDD+. Free, prior and informed consent, as it is expressed in the Declaration on the Rights of Indigenous Peoples, is applied in the context of REDD+.

- **UN-REDD**: it is explicit in its commitment to the principles of the Declaration on the Rights of Indigenous Peoples and free, prior and informed consent.

- **REDD+ Social and Environmental Standards**, that are applied to the REDD+ programme at a national or sub-national level, requires the observance of free, prior and informed consent and in the case of indigenous peoples and local communities.

- **United Nations Development Group Guidelines on Indigenous Peoples’ Issues**: these guidelines serve to incorporate and integrate the issues affecting indigenous peoples and to establish policies and an operational framework applying an approach based on rights, whereby the development for and with the

272  Ibid., p. 47s.
indigenous peoples is also culturally sensitive. They also help in the planning, implementation and evaluation of programmes that involve indigenous peoples. The guidelines also highlight the right to free, prior and informed consent as an expression of the right to self-determination.273

With reference to the indigenous peoples in matters of REDD, it is very important to mention that it is not for the State to define a people as indigenous, neither is it necessary that the peoples hold a title to their lands or territories.274 Also, with reference to the tenancy of the land in REDD projects, it is very clear that:

"when these situations specifically include the lack of any demarcation of the indigenous lands, the REDD activities should not affect the existence, value, use or the enjoyment of the properties located in the indigenous lands."

According to the UN-REDD guidelines:

"the peoples likely to be impacted are entitled to the right to participate in and to grant or to deny consent for a proposed action (...) Free, prior and informed consent applies to the proposed actions (decisions, activities, projects, etc.) that have the potential of impacting the lands, territories, and resources on which the indigenous peoples depend for their cultural, spiritual and physical sustenance, well-being, and survival.276

274 UN REDD Programme (2011). Guidelines for the UN-REDD programme on Free, Prior and Informed Consent. Draft for Public Comments – December 2011, p.13; cf also Awas Tingni, paragraphs 140-155. ("The Mayagna Community has ownership rights over the lands and natural resources based on its traditional patterns of use and occupation of ancestral territories. Their rights "exist even without the State's actions that specify them. Traditional land tenure is associated with historical continuity, but not necessarily a single place and a single social structure through the centuries" in paragraph 140).
275 UICN Environmental Policy and Law Paper No.77. Legal Frameworks relating to REDD. Design and implementation at the national level; p.45.
There are even more grounds to implement free, prior and informed consent in REDD projects in the Cancún Agreements on REDD+, by stating that:

“(…) when the activities referred to in paragraph 70 of this decision are undertaken [in REDD+], the following safeguards must be promoted and supported:

2(c) Respect for the knowledge and the rights of the indigenous peoples and members of the local communities, taking into account the relevant international obligations, the circumstances and national laws, and considering that the General Assembly of the United Nations has adopted the Declaration of the United Nations on the Rights of Indigenous Peoples

2(d) The full and effective participation of the relevant stakeholders, in particular, of the indigenous peoples and of the local communities in actions that relate to paragraphs 70 and 72 of this decision…”

Whilst the international guidelines can only be fairly general, it is the duty of the State to develop mechanisms and legal instruments that ensure the free, prior and informed consent of the affected communities. If the processes, mechanisms and the legislation over REDD are not clear, potential investors cannot become involved with a project. For this reason, it is also of interest to the Government to establish clear mechanisms, which emphasise the rights that the affected communities have with regard to REDD projects.

The second draft of the REDD (R-PP) Readiness Preparation Proposal Initiatives for Honduras contains a special chapter on the consultation process in order to obtain the free, prior and informed consent of the indigenous communities, although sometimes it is not very clear what is meant by consultation and when it should be carried out. However, the Government is holding seminars with the indigenous federations in order to collaborate more in the future and to ensure their participation in the REDD projects.

Annex 2

Map of the indigenous lands of La Mosquitia.