

REDD+ and the Promotion of the Human Rights of Indigenous Peoples: the Case of Chile

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ABSTRACT

Indigenous peoples are particularly vulnerable to the negative effects of climate change, as their livelihoods and ways of life depend heavily on natural resources impacted by climate variability and extremes. In addition, global climate governance and the implementation of climate projects often have damaging consequences on Indigenous peoples, including restricting their access to lands and resources. In this context, REDD+ as an international mechanism under the UNFCCC aimed at mitigating climate change through forest management, has raised concerns about its impact on the human rights of Indigenous peoples. To date, studies have shown that the implementation of REDD+ on a domestic level has had both negative and positive impacts in Indigenous peoples’ rights. Drawn from this tension, this article examines the relationship between the REDD+ mechanism and the rights of Indigenous peoples, focusing on its domestic operationalization in Chile.

Chile, with a vast forest network in indigenous territories, offers valuable insights. The article highlights that REDD+ in Chile has allowed Indigenous peoples to incorporate their concerns into national forest governance and has facilitated project development in collaboration with Indigenous communities. These efforts have resulted in both financial and non-financial benefits for these communities. However, the analysis reveals that progress in promoting Indigenous peoples' rights has been primarily in individual rights rather than their collective rights as peoples. While REDD+ in Chile has shown potential in promoting social and economic rights of Indigenous peoples, further attention is needed to address collective rights such as self-determination, land rights, and Free, Prior and Informed Consent (FPIC).

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I. INTRODUCTION

Indigenous peoples are especially vulnerable to the negative effects of climate change.¹ This is in part because Indigenous peoples' economic, social, and cultural activities depend heavily on natural resources that are severely impacted by climate variability and extremes.² In addition, global climate governance, and its domestic implementation, can have negative impacts on Indigenous peoples.³ Indeed, climate projects often have damaging effects for Indigenous peoples, such as restricting their access to the lands, food, and resources on which their livelihoods and ways of life depend.⁴

REDD+, which stands for "Reducing Emissions from Deforestation and Forest Degradation in Developing Countries and the Conservation, Sustainable Management of Forests and Enhancement of Forest Carbon Stock"; is a mechanism for mitigating and adapting to climate change through forest management.⁵

1. See Ben Powless, *The Indigenous Rights Framework and Climate Change*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 213 (Routledge 2018).

2. See Sébastien Duyck et al., *Integrating Human Rights in Global Climate Governance*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 3 (Routledge 2018).

3. See ADEMOLA OLUBORODE JEJEDÉ, *THE CLIMATE CHANGE REGULATORY FRAMEWORK AND INDIGENOUS PEOPLES' LANDS IN AFRICA: HUMAN RIGHTS IMPLICATIONS* (Pretoria University Law Press 2016).

4. See *Report of the Special Rapporteur of the Human Rights Council on the Rights of Indigenous Peoples*; Annalisa Savaresi, *Climate Change and Human Rights: Fragmentation, Interplay, and Institutional Linkages*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 31 (Routledge 2018).

5. See U.N. Framework Convention on Climate Change, *Report of the Conference of the*

Since its inception by participants in the U.N. Framework Convention on Climate Change (UNFCCC), REDD+ has been a concern for Indigenous peoples.⁶ Forests cover approximately twenty-six percent of the earth's surface (forty-five percent in Latin America and the Caribbean⁷) and are home to more than sixty million Indigenous people worldwide.⁸ Consequently, there are concerns that the protection of forests combined with the marginalization of Indigenous peoples allows governments, companies, and even conservation organizations to negatively affect Indigenous peoples' livelihoods and cultural subsistence through forest access restrictions and reversals of tenure reforms⁹ that end up expelling Indigenous peoples from their traditional lands.¹⁰

To date, some cases have been identified in which the implementation of REDD+ on a domestic level has negatively affected the human rights of Indigenous peoples, mainly in those countries where this mechanism was implemented more rapidly.¹¹ For example, in Tanzania, the national REDD+ strategy did not recognize the existence of Indigenous peoples, was developed without their participation, and excluded Indigenous peoples from the selection of local projects.¹² A similar exclusion occurred in Panama, where Indigenous peoples expressed their total opposition to the implementation of REDD+ projects in their

Parties: Decision 1/CP.13 "Bali Action Plan" ¶ 1.b.iii., FCCC/CP/2007/6/Add.1 (Mar. 14, 2008).

6. See Sébastien Jodoin, *The Human Rights of Indigenous Peoples and Forest-Dependent Communities in the Complex Legal Framework for REDD+*, in RESEARCH HANDBOOK ON REDD-PLUS AND INTERNATIONAL LAW 157 (Christina Voigt, ed., Edward Elgar Publishing 2016).

7. Devendra M. Amatya et al., *Forests, Land Use Change, and Water*, in IMPACT OF CLIMATE CHANGE ON WATER RESOURCES IN AGRICULTURE 116 (CRC Press 2015).

8. Lisa Ringhofer et al., *Climate Change Mitigation in Latin America: A Mapping of Current Policies, Plans and Programs*, 143 SOCIAL ECOLOGY WORKING PAPER 1 (2013).

9. See Jacob Phelps et al., *Does REDD+ Threaten to Recentralize Forest Governance?*, 328 SCIENCE 312 (2010).

10. See MARIANO COLINI CENAMO ET AL., CASEBOOK OF REDD PROJECTS IN LATIN AMERICA 9, 17 (The Nature Conservancy 1st Edition ed. Dec. 2009).

11. See Stephanie Baez, *The Right REDD Framework: National Laws That Best Protect Indigenous Rights in a Global REDD Regime*, 80 FORDHAM L REV 821, 824 (2011).

12. See Sébastien Jodoin, *Transnational Legal Process and Discourse in Environmental Governance: The Case of REDD+ in Tanzania*, 44 LAW & SOCIAL INQUIRY 1019, 1042 (2019).

territories.¹³ Negative impacts of domestic REDD+ implementation have also been identified in Colombia,¹⁴ Guyana,¹⁵ and Papua New Guinea.¹⁶

Despite these concerns and difficulties in initial implementation, scholars and researchers have also recognized that REDD+ has the potential to promote the rights of Indigenous peoples.¹⁷ Indeed, some experts have argued that the structure of REDD+ creates an opportunity for greater environmental, socio-cultural, and economic benefits for Indigenous peoples and local communities than other forest conservation and climate change initiatives.¹⁸ Cases have also been identified in Indonesia¹⁹ and the Philippines²⁰ where REDD+ has had positive impacts on Indigenous peoples. Thus, there is an ongoing debate as to whether REDD+ constitutes a risk or an opportunity for Indigenous peoples.²¹

This Article seeks to contribute to this debate through an analysis of the REDD+ regime and its domestic operationalization in Chile. Chile is a useful case study because it has a vast network of forests, which represent twenty-four percent of the national territory.²² Likewise, there are ten Indigenous peoples

13. See Deborah Delgado Pugley, *Rights, Justice, and REDD+: Lessons from Climate Advocacy and Early Implementation in the Amazon Basin*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 183, 193 (Routledge 2018); Catherine Potvin & Javier Mateo-Vega, *Curb Indigenous Fears of REDD+*, 500 NATURE 400 (2013).

14. Mariel Aguilar-Støen, *Better Safe Than Sorry? Indigenous Peoples, Carbon Cowboys and the Governance of REDD in the Amazon*, 44 FORUM FOR DEVELOPMENT STUDIES 91 (2017).

15. See Sophie Lemaitre, *Indigenous Peoples' Land Rights and REDD: A Case Study*, 20 REVIEW OF EUROPEAN COMMUNITY & INTERNATIONAL ENVIRONMENTAL LAW 150, 156-60 (2011).

16. See Stephanie Venuti, *REDD+ in Papua New Guinea and the Protection of the REDD+ Safeguard to Ensure the Full and Effective Participation of Indigenous Peoples and Local Communities*, 17 ASIA PAC J ENVTL L 131 (2014).

17. See SÉBASTIEN JODOIN, *FOREST PRESERVATION IN A CHANGING CLIMATE: REDD+ AND INDIGENOUS AND COMMUNITY RIGHTS IN INDONESIA AND TANZANIA* 177 (Cambridge University Press 2017).

18. See Neil M. Dawson et al., *The Role of Indigenous Peoples and Local Communities in Effective and Equitable Conservation*, 26 ECOLOGY & SOCIETY 1 (2021).

19. See JODOIN, *supra* note 17, at 184.

20. See Rodel D. Lasco et al., *Lessons From Early REDD+ Experiences in the Philippines*, 2013 INTERNATIONAL JOURNAL OF FORESTRY RESEARCH 1 (2013).

21. See Chris Van Dam, *Indigenous Territories and REDD in Latin America: Opportunity or Threat?*, 2 FORESTS 394 (2011); Kathleen Lawlor et al., *Community Participation and Benefits in REDD+: A Review of Initial Outcomes and Lessons*, 4 FORESTS 296 (2013); Mucahid Mustafa Bayrak & Lawal Mohammed Marafa, *Ten Years of REDD+: A Critical Review of the Impact of REDD+ on Forest-Dependent Communities*, 8 SUSTAINABILITY 1 (2016); Claudio de Sassi et al., *REDD+ On the Ground: Global Insights From Local Contexts*, in REDD+ ON THE GROUND: A CASE BOOK OF SUBNATIONAL INITIATIVES ACROSS THE GLOBE 420 (Erin O Sills et al. eds., CIFOR 2014).

22. Chilean Nat'l Forestry Corp., *Catastro Vegetacional [Vegetation Cadastre]*, <https://www.conaf.cl/nuestros-bosques/bosques-en-chile/catastro-vegetacional> [<https://perma.cc/G4EG-N8BC>] (last visited Nov. 1, 2022).

in Chile recognized by State law,²³ who all live in the forest or whose economic, social, and cultural life depends on them.²⁴ In addition, although Chile began its REDD+ domestic implementation at a slower rate than other developing countries,²⁵ it is currently moving from the implementation phase to the final stage of compliance.²⁶ This means that Chile has already developed domestic instruments at the national level and implemented several REDD+ projects.²⁷

Through the analysis of the case of Chile, this Article argues that the REDD+ mechanism, despite initial fears and implementation problems in some countries, can in fact operate as an important avenue for the promotion of the human rights of Indigenous peoples. In particular, the operation of REDD+ in Chile has allowed Indigenous peoples to incorporate their concerns and priorities into national forest governance. REDD+ has also facilitated the development of projects in conversation with Indigenous peoples. This, in turn, has generated financial and non-financial benefits for Indigenous communities. However, the analysis shows that progress for the human rights of Indigenous peoples has been mainly in individual rights (e.g. social and economic), rather than their rights as peoples (e.g. self-determination, land rights, and collective right to Free, Prior and Informed Consent (FPIC)).

This Article is structured as follows. In Part II, I briefly address the human rights of Indigenous peoples, mainly the distinction between their individual human rights and their collective rights as peoples. Next, in Part III, I describe how Indigenous peoples are being impacted by climate change events and policies. In Part IV, I review the REDD+ international regime, and how its structure incorporates various tools aimed at the respect for the human rights of Indigenous peoples. Specifically, I examine UNFCCC decisions on this matter, as well as multilateral programs such as the World Bank-FCPF, the UN-REDD program, and the Global Environment Facility (GEF). In Part V, I analyze the domestic operation of this regime in Chile in two dimensions: “Jurisdictional REDD+,” which refers to national instruments that implement the mechanism domestically, and “Project-based REDD+,” consisting of on-the-ground projects that reduce greenhouse gas emissions through forest management. Part V examines the impacts that both dimensions have had on the human rights of Indigenous peoples. Finally, in Part VI, I offer some concluding thoughts.

23. Law No. 19253 Septiembre, 28, 1993, Diario Oficial [D.O.] (Chile).

24. See Cecilia Smith R., *El Uso del Bosque Nativo por Comunidades Indígenas: Beneficios de Reservas Extractivas Abiertas al Turismo [Native Forest Use by Indigenous Communities: Benefits of Extractive Reserves Open to Tourism]*, Tomo II ACTAS DEL III CONGRESO CHILENO DE ANTROPOLOGÍA 1005 (1998).

25. Ringhofer et al., *supra* note 8, at 13.

26. See Chilean Nat'l Forestry Corp., *Estructura y Metas [Structure and Goals]*, <https://www.encrv.cl/estructura-y-metas> [<https://perma.cc/3CDR-5NQW>] (last visited Nov. 1, 2022).

27. See Chilean Nat'l Forestry Corp., *Fase de Implementación [Implementation Phase]*, <https://www.encrv.cl/fase-de-implementacion> [<https://perma.cc/PH9Q-YT69>] (last visited Nov. 1, 2022).

II. THE HUMAN RIGHTS OF INDIGENOUS PEOPLES

Through the recognition that Indigenous peoples²⁸ are among the most vulnerable groups in the world, the human rights of Indigenous peoples have gained greater public attention in recent decades, especially within the United Nations.²⁹ Among the achievements that stand out the most are ILO Convention No. 169,³⁰ ratified only by a few countries, such as Chile,³¹ and, more recently, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP),³² adopted in 2007 by the United Nations General Assembly.³³ These instruments directly address the specific circumstances of Indigenous peoples, with the aim of affirming their identities and priorities.³⁴

One of the most important features of ILO Convention No. 169 and UNDRIP is the enshrinement of the collective rights of Indigenous peoples.³⁵ Indeed, prior to these instruments “the international human rights system had been slow to endorse the concept of rights vested in groups.”³⁶ This was

28. There is no single definition of the term “Indigenous peoples.” This term includes thousands of cultures and worldviews that are unique. But the concept refers to a historically excluded group that has distinctive common elements, including a special connection to the land, a history of colonization and oppression, and the recognition of specific rights under public international law. On the term “Indigenous peoples” and the common characteristics see Randall S. Abate & Elizabeth Ann Kronk, *Commonality Among Unique Indigenous Communities: An Introduction to Climate Change and Its Impacts on Indigenous Peoples*, in CLIMATE CHANGE AND INDIGENOUS PEOPLES (Randall S. Abate & Elizabeth Ann Kronk eds., Edward Elgar 2013); Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO J INT’L ENVTL L & POL’Y 1 (1994).

29. See Jérémie Gilbert, *Indigenous Rights in the Making: The United Nations Declaration on the Rights of Indigenous Peoples*, 14 INT’L J ON MINORITY & GRP. RTS. 207 (2007).

30. Indigenous and Tribal Peoples Convention No. 169 art 2, adoption June 27, 1989, 1650 U.N.T.S 383 [hereinafter, ILO Convention 169].

31. Decree 236, Promulgating Convention No. 169 on Indigenous and Tribal Peoples in Independent Countries of the International Labor Organization, Octubre 2, 2008, DIARIO OFICIAL [D.O.] (Chile).

32. G.A. Res. 61/295, United Nations Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007) [hereinafter UNDRIP].

33. With the favorable vote of Chile. Consequently, the Chilean Supreme Court has considered UNDRIP as a source of law to resolve cases involving Indigenous peoples. See Press Release, U.N. General Assembly, *General Assembly Adopts Declaration on Rights of Indigenous Peoples*, U.N. Press Release GA/10612 (Sept. 13, 2007); Corte Suprema de Justicia [C.S.J.] [Supreme Court], 18 Diciembre 2018, “Comunidad Indígena Colla Pai-Ote v Icil-Icafal S.A.,” Rol de la causa: 19058–2018, Sistema de Evaluación de impacto ambiental (SEIA), Sup. Ct. Database, <https://juris.pjud.cl/busqueda/u?ej2h> [<https://perma.cc/5DXX-692M>] (Chile).

34. See U.N. Off. of the High Comm’r for Hum. Rts. (OHCHR), *Indigenous Peoples and the United Nations Human Rights System* 4 (Aug. 2013).

35. See generally ALEXANDRA XANTHAKI, INDIGENOUS RIGHTS AND UNITED NATIONS STANDARDS: SELF-DETERMINATION, CULTURE AND LAND 67–91; 102–21 (Cambridge University Press 2010) (summarizing the formation and content of both documents).

36. See U.N. OHCHR, *supra* note 34, at 7.

especially problematic, as it was widely recognized by Indigenous Peoples Organizations (IPOs), Non-Governmental Organizations (NGOs), and scholars that individual rights were not sufficient to ensure adequate protection and promotion of rights with a collective dimension.³⁷ Thus, the establishment of the collective rights of Indigenous peoples in ILO Convention No. 169 and UNDRIP represented an important transformation of the nature of human rights, overcoming the Western traditional conception based on individualism, for “collective claims of historically grounded human associations.”³⁸

Consequently, these instruments establish a distinctive set of rights for Indigenous peoples, different from individual human rights and other human rights categories. They are usually defined as a *sui generis* category of rights—arising from the historical condition of Indigenous peoples as distinctive societies with the aspiration to survive as such, free from forced assimilation.³⁹ This distinction is relevant, because although Indigenous peoples hold individual human rights, they alone do not have the capacity to respond to the specific needs of Indigenous peoples.⁴⁰ Thus, collective rights of Indigenous peoples are fundamental to their existence, well-being, and cultural identity as peoples.⁴¹

In other words, Indigenous peoples hold general individual civil and political rights, including the right to security of person, freedom of movement, freedom of expression, and freedom of religion.⁴² Individuals also hold conventional economic, social, and cultural rights, such as the right to health, food, and an adequate standard of living.⁴³ In attention to the fact that such individual rights do not provide an appropriate response to the unique situation of Indigenous peoples, ILO Convention No. 169 and UNDRIP have established a set of distinctive rights due to their status as peoples, comprehensively addressing their unique nature as collectivities and, even more, as societies.⁴⁴ It is important, therefore, to develop at least briefly some of these distinctive rights of indigenous peoples, both procedural and substantive.

37. See XANTHAKI, *supra* note 35, at 13–15.

38. See RHIANNON MORGAN, *TRANSFORMING LAW AND INSTITUTION: INDIGENOUS PEOPLES, THE UNITED NATIONS AND HUMAN RIGHTS 2* (2011).

39. See Howard Berman, *Are Indigenous Populations Entitled to International Juridical Personality?*, 79 AM. SOC'Y INT'L L. PROC. 189, 192-93 (1985).

40. U.N. Sub-Commission on Prevention of Discrimination and Protection of Minorities, *Discrimination Against Indigenous Peoples: Analytical Compilation of Observations and Comments Received Pursuant to Sub-Commission Resolution 1988/18*, 12, U.N. Doc. E/CN.4/Sub.2/1989/33/Add.1 (June 20, 1989).

41. See UNDRIP, *supra* note 32, pmbl.

42. See International Covenant on Civil and Political Rights, art. 9, 12, 18, 19, Dec. 19, 1966, 999 U.N.T.S. 171.

43. See International Covenant on Economic, Social and Cultural Rights, art. 11, 12, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter, U.N. ICESCR].

44. See Siegfried Wiessner, *The Cultural Rights of Indigenous Peoples: Achievements and Continuing Challenges*, 22 EUR. J. INT'L L. 121, 121, 129 (2011).

Undoubtedly, one of the most essential collective rights of Indigenous peoples is self-determination. The definition, scope, and modalities of the right to self-determination have posed serious challenges to interpretation since the right was first recognized in the UN Charter.⁴⁵ Nevertheless, it should be noted that, according to UNDRIP, by virtue of self-determination, Indigenous peoples have the right to: (i) freely determine their political status and freely pursue their economic, social, and cultural development;⁴⁶ and (ii) autonomy or self-government in matters relating to their internal and local affairs.⁴⁷ In this context, self-determination has usually been understood not strictly as secession, but more broadly as free control, choice, and way of life.⁴⁸ Therefore, this right implies the recognition of the legal capacity of Indigenous peoples to determine their own political and cultural destiny, even within the unity of the State.⁴⁹

Indigenous peoples also hold a *sui generis* right to land, including their territories and natural resources (which this Article will refer to as “territorial rights”). ILO Convention No. 169 and UNDRIP establish that Indigenous peoples have the right to the lands, territories, and resources that they have traditionally owned, occupied, or used.⁵⁰ In addition, these instruments establish Indigenous peoples’ right to own, use, develop, and control the lands, territories, and resources they possess by reason of traditional ownership or other traditional occupation or use.⁵¹ These uses include the realization of traditional practices and activities on which their cultural subsistence depends.⁵² Thus, in accordance with these provisions, Indigenous peoples have the right to “govern, access, and benefit from their traditional lands and resources.”⁵³

The basis of these territorial rights is the special relationship of Indigenous peoples with their lands, which are fundamental to their cultures, spiritual life, and their identity as peoples.⁵⁴ Indeed, as the Inter-American Court of Human Rights has pointed out, “for [I]ndigenous communities, relations to the land are not merely a matter of possession and production but a material and spiritual element, which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.”⁵⁵ Additionally, these rights

45. See XANTHAKI, *supra* note 35, at 131–76.

46. UNDRIP, *supra* note 32, art. 3.

47. *Id.* art. 4.

48. See Gilbert, *supra* note 29, at 220.

49. See XANTHAKI, *supra* note 35, at 132.

50. See UNDRIP, *supra* note 32, arts. 25–27.

51. *Id.*

52. For more details on nature and scope of this right see *Saramaka People v. Suriname, Indigenous Peoples’ Rights, Land, and Access to Legal Procedures*, Inter-Am. Ct. H.R. (ser. C) No. 172 (Nov. 28, 2007).

53. See Jodoin, *supra* note 6, at 162.

54. See U.N. Human Rights Committee (HRC), CCPR General Comment No. 23: Article 27 (Rights of Minorities), para. 7, CCPR/C/21/Rev.1/Add.5 (Apr. 8 1994).

55. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua, Merits, Reparations, and Costs, Judgment*, Inter-Am. Ct. H.R. (ser. C) No. 79, para. 149 (Aug. 31, 2001).

are grounded in the existence of Indigenous people on that land prior to the arrival of the European colonies and the formation of the States. Consequently, territorial rights are both the collective ownership of land and the exercise of sovereignty.⁵⁶ In other words, territorial rights are not related to Western individual possession and property rights, but to a communal right to facilitate their self-determination as peoples.⁵⁷

The right to participation, in the context of environmental governance, is recognized broadly in Principle 10 of the Rio Declaration⁵⁸ and, specifically for Indigenous peoples, in Principle 22. The latter Principle recognizes the vital role of Indigenous peoples in environmental management because of their ancestral knowledge and practices, stating that “States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development.”⁵⁹

Notwithstanding the above, ILO Convention No. 169 and UNDRIP recognize other procedural rights for Indigenous peoples, in attention to their status as peoples and their right to self-determination.⁶⁰ These are: (i) Consultation, established in Article 6.1.a. of ILO Convention No. 169; and (ii) Free, Prior and Informed Consent (FPIC), enshrined in various articles of UNDRIP.⁶¹ ILO Convention No. 169 states that governments must consult with Indigenous peoples regarding the legislative or administrative measures that may affect them. This consultation must be carried out in good faith, by means of appropriate procedures and through their representative institutions.⁶² Although this right has allowed progress in the respect of the substantive rights of Indigenous peoples, it also has considerable limitations.⁶³ Mainly, States have understood consultation as an obligation of means rather than results. In other words, if Indigenous peoples and the State do not reach an agreement during the consultation process, States can proceed without Indigenous people’s consent, without technically infringing upon their right of consultation.⁶⁴ That said, it should be noted that consultation considers relevant standards that must be

56. See XANTHAKI, *supra* note 35, at 239.

57. Andrew Huff, *Indigenous Land Rights and the New Self-Determination*, 16 *COLO. J. INT’L ENV’T L. & POL’Y* 295, 321 (2005).

58. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, princs. 10, 22, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1), annex I (Aug. 12, 1992).

59. *Id.*, princ. 22.

60. See Jodoin, *supra* note 6, at 160–61.

61. See UNDRIP, *supra* note 32, arts. 10, 11, 19, 28, 29 and 32.

62. ILO Convention 169, *supra* note 30, arts. 6.1(a), 6.2.

63. See José Bengoa, *Potencialidades y Limitaciones Del Derecho Internacional Sobre (o de) Los Pueblos Indígenas [Strengths and Limitations of International Law on (or of) Indigenous Peoples]*, 4 *ANTROPOLOGÍAS DEL SUR* 259, 262–63 (2017) (Chile).

64. See César Rodríguez, *ETNICIDAD.GOV: LOS RECURSOS NATURALES, LOS PUEBLOS INDÍGENAS Y EL DERECHO A LA CONSULTA PREVIA EN LOS CAMPOS SOCIALES MINADOS [ETHNICITY. GOV: NATURAL RESOURCES, INDIGENOUS PEOPLES AND THE RIGHT TO PRIOR CONSULTATION IN SOCIAL MINEFIELDS]* 59,62 (2012) (Colom.).

met in order to fully respect this right.⁶⁵ Some standards developed by international human rights law are that the consultation must be carried out in good faith, must be culturally appropriate, and must ensure that indigenous communities have the possibility to influence the process and its outcome.⁶⁶ Also, indigenous consultation requires that States make all reasonable efforts to reach an agreement.⁶⁷

FPIC, on the other hand, is a procedural right with a stricter standard than the right to consultation: it allows Indigenous peoples to give or withhold consent to measures, activities, or projects that may affect them, or their lands, territories, and resources.⁶⁸ “Free” means that this consent cannot be received through intimidation or manipulation; “Prior” implies that it must be sought and obtained prior to the execution of the measure, project or activity; and “Informed” means that all necessary information must be provided to Indigenous peoples in order to make an informed decision.⁶⁹ Accordingly, FPIC is important for Indigenous peoples’ right to self-determination, as an expression of their ability to control their own destiny.⁷⁰ FPIC does not imply a denial of State sovereignty, but rather it acts as a mechanism to provide a certain level of autonomy within the boundaries of the State that allows Indigenous peoples to establish relations with third parties on an equal footing and to make free (and informed) decisions about the development of their lands and resources.⁷¹ Therefore, there is a clear distinction between the right to consultation and FPIC.

Finally, Indigenous peoples also enjoy collective cultural rights. These rights respond to the historical cultural appropriation that Indigenous peoples have suffered, including appropriation of their cultural objects, archaeological sites, and ancestral knowledge.⁷² ILO Convention No. 169 establishes that governments must respect the cultural identity of Indigenous peoples⁷³ and that the cultural, religious, and spiritual values and practices of Indigenous peoples should be recognized and protected.⁷⁴ For its part, UNDRIP establishes that Indigenous peoples have the right not to be subjected to forced assimilation or

65. See Meghan Morris *et al.*, *La Consulta Previa a Pueblos Indígenas: Los Estándares Del Derecho Internacional [Prior Consultation with Indigenous Peoples: The Standards of International Law]*, 2 PROGRAMA DE JUSTICIA GLOBAL Y DERECHOS HUMANOS/DOCUMENTOS, 70-77 (2009).

66. *Id.*

67. *Id.*

68. See Philippe Hanna & Frank Vanclay, *Human Rights, Indigenous Peoples and the Concept of Free, Prior and Informed Consent*, 31 IMPACT ASSESSMENT AND PROJECT APPRAISAL 146, 146 (2013).

69. *Id.* at 150.

70. *Id.*

71. See Tara Ward, *The Right to Free, Prior, and Informed Consent: Indigenous Peoples’ Participation Rights within International Law*, 10 NW. UNIV. J. INT’L HUM. RTS. 54, 55 (2011).

72. See XANTHAKI, *supra* note 35, at 196–97.

73. ILO Convention 169, *supra* note 30, art. 2

74. *Id.* art. 5.

destruction of their culture.⁷⁵ UNDRIP also asserts Indigenous peoples' right to maintain and protect past, present, and future manifestations of their cultures, such as archaeological sites, designs, ceremonies, and literature.⁷⁶ These cultural rights also include the right to exercise cultural methods of teaching and learning,⁷⁷ language,⁷⁸ intellectual property,⁷⁹ and the right to be compensated for any act that results in the deprivation of their cultural integrity.⁸⁰ In this sense, these collective cultural rights are notably distinguishable from the individual cultural rights; for example, to take part in cultural life of the society.⁸¹ These collective rights aim to protect the cultural identity of Indigenous peoples.⁸² Consequently, these provisions consider cultural rights in a broader dimension, not as property, but as ways of life.⁸³

Indigenous people's individual and collective rights can be negatively or positively affected by climate governance (and environmental governance in general).⁸⁴ In this Article, the distinction between individual and collective rights is critical because, as will be discussed in the following Parts, the domestic implementation of REDD+ in Chile has been reasonably successful in promoting the individual rights of Indigenous peoples, but has fallen short in their collective rights as peoples.

III. INDIGENOUS PEOPLES AND CLIMATE CHANGE

Indigenous peoples globally are particularly vulnerable to the negative effects of climate change, despite the fact that they have contributed the least to the climate crisis.⁸⁵ While the effects of climate change—sea level rise, powerful storms, strong winds, droughts, wildfires, and heavy rainfall—can affect anyone and everyone, these effects have a disproportionate impact on Indigenous people, whose right to life, culture, and self-determination is directly tied to the land and natural resources on which they build their lives and develop their culture.⁸⁶

These impacts are not hypothetical. Multiple studies describe in detail how climate change is currently affecting Indigenous peoples around the world.⁸⁷

75. UNDRIP, *supra* note 32, art. 8.

76. *Id.* art. 11.

77. *Id.* art. 14.

78. *Id.*

79. *Id.* art. 31.

80. *Id.* art. 8.

81. See U.N. ICESCR, *supra* note 43, art. 15.

82. See ILO Convention 169, *supra* note 30, art. 2.

83. See XANTHAKI, *supra* note 35, at 207–09.

84. See Jodoin, *supra* note 6, at 162.

85. See Powless, *supra* note 1.

86. See U.N. Off. of the High Comm'r for Hum. Rts., *Report of the Office of the United Nations High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights*, paras. 40, 51–53, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

87. See, e.g., Climate Change and Indigenous Peoples in the United States: Impacts,

The most emblematic example is the forced displacement of insular Indigenous peoples due to rising sea levels.⁸⁸ This occurred in Kiribati. The inhabitants of this country, whose population is made up of ninety-six percent of indigenous I-Kiribati,⁸⁹ have already started to migrate to other countries.⁹⁰ In the case of Easter Island, an insular territory of Chile, the Rapa Nui people are also being affected by extreme sea level rise. The Rapa Nui have been forced to close ports and restrict their fishing, which is their main means of subsistence.⁹¹ Moreover, these climate events are seriously endangering the *Moais*, sacred millenarian stone sculptures located mainly in the coastal border of the island and considered by the Rapa Nui to be their ancestors.⁹² Their disappearance would constitute an irreversible affectation to their culture identity and ways of life.⁹³

There are many other climate change impacts of equal gravity that disproportionately affect Indigenous peoples, such as loss of biodiversity, water scarcity, desertification, and increases in the frequency of extreme wildfires.⁹⁴ For example, in Southern Chile, the wildfires of recent years have especially affected the Mapuche people.⁹⁵ Increasingly frequent and powerful wildfires

Experiences and Actions (Julie Koppel Maldonado, Benedict Colombi, and Rajul Pandya eds., 2014); Kathryn Norton-Smith et al., *Climate Change and Indigenous Peoples: A Synthesis of Current Impacts and Experiences* (U.S. Dep't of Ag., 2016).

88. See Victoria Tauli-Corpuz (U.N. Hum. Rts. Council Special Rapporteur on Rts. Of Indigenous Peoples), *Report of the Special Rapporteur on the Rights of Indigenous Peoples* (Nov. 1, 2017).

89. Minority Rts. Grp. Int'l, *World Directory of Minorities & Indigenous Peoples—Kiribati*, (April 2018), <https://minorityrights.org/country/kiribati/> [<https://perma.cc/CM9Q-LP5T>].

90. See Robert Oakes et al., *Kiribati: Climate Change and Migration-Relationships between Household Vulnerability, Human Mobility and Climate Change*, United Nations University Institute for Environment and Human Security Report No. 20 (2016), http://collections.unu.edu/eserv/UNU:5903/Online_No_20_Kiribati_Report_161207.pdf [<https://perma.cc/55X9-HHGZ>] (of a survey-generated sample of approximately 1,360 international movements between 2005-2015, environmental factors motivated approximately 1% or 13 movements).

91. See Matías Carvajal et al., *Extreme Sea Levels at Rapa Nui (Easter Island) during Intense Atmospheric Rivers*, 106 NAT. HAZARDS 1619, 1619–20 (2021).

92. See U.N. Environment Programme et. al., *World Heritage and Tourism in a Changing Climate*, 71 (May 25, 2016), <https://whc.unesco.org/document/139944> [<https://perma.cc/5B5S-JXNB>].

93. “We’re going to be left without our history,” said in 2019 Camilo Rapu, president of the *Mau Henua* community and recognized Rapa Nui leader. See Diario U. Chile, *Dirigente Alerta Sobre Efectos Del Cambio Climático En Rapa Nui: “Vamos a Quedar Sin Nuestra Historia” [Leader Warns about the Effects of Climate Change on Rapa Nui: “We Will be Left Without Our History”]*, DIARIO Y RADIO U. DE CHILE, at 3:45 (Dec. 5, 2019), <https://radio.uchile.cl/2019/12/05/dirigente-alerta-sobre-efectos-del-cambio-climatico-en-rapa-nui-vamos-a-queadar-sin-nuestra-historia> [<https://perma.cc/9QDD-RTEW>].

94. See Rebecca Tsosie, *Indigenous People and Environmental Justice: The Impact of Climate Change*, 78 U. COLO. L. REV. 1635, 1635–41, 1673 (2007).

95. See Noelia Figueroa Burdiles & Francisca Vergara-Pinto, *Reserva Nacional China Muerta: Consideraciones en Torno a la Conservación Biocultural de la Naturaleza, los*

have affected their access to food, income, and culture. Indeed, the fires have had a serious impact on the Araucaria (*Araucaria araucana*), a sacred tree of the Mapuche people, which is in danger of extinction and takes hundreds of years to grow.⁹⁶ The Araucaria is the cornerstone of the Andean Mapuche ways of life, to the point they call themselves *Mapuche-Pewenche*, which translates to “people of the Araucaria.”⁹⁷ Due to their spiritual relationship with the Araucaria, the destruction of this tree has a direct impact on the Mapuche worldviews and their identities as peoples.⁹⁸ In this way, Indigenous peoples experience climate change not only to a greater extent, but also in different dimensions than the rest of the population.

In addition to these direct impacts from climate change, global climate governance and its domestic implementation, such as policies, laws, and projects in response to climate change, can also have adverse effects on Indigenous peoples’ rights.⁹⁹ A highly discussed example is the Kyoto Protocol’s Clean Development Mechanism (CDM), which has been operating since 2006.¹⁰⁰ The CDM is an international policy that allows developed countries to meet their emissions reduction targets through mitigation projects in developing countries.¹⁰¹ But this mechanism was not designed with proper safeguards for the rights of Indigenous peoples.¹⁰² This has meant that some CDM mitigation projects, such as the construction of hydroelectric power plants and biofuel

Incendios Forestales y la Herida Colonial en Territorios Indígenas [China Muerta National Reserve: Reflections on the Biocultural Conservation of Nature, Forest Fires and the Colonial Wound in Indigenous Territories], 28 CULTURA-HOMBRE-SOCIEDAD [CUHSO] 102, 107 (2018) (Chile).

96. See Patricio Montaldo, *La Bio-Ecología de Araucaria Araucana [The Bio-Ecology of Araucaria Araucana]*, 46 BOLETÍN INSTITUTO FORESTAL LATINO-AMERICANO 3 (1974) (Venez.).

97. *Id.* at 4.

98. See Josefina Cortés et al., *Semillas de Montaña: Recolección, Usos y Comercialización del Piñón de la Araucaria (Araucaria Araucana) por Comunidades Mapuche-Pewenche del Sur de los Andes [Mountain Seeds: Gathering, Uses and Commercialization of Seeds of the Monkey Puzzle Tree (Araucaria Araucana) by Mapuche-Pewenche Communities of the Southern Andes]*, 174 PIRINEOS 1 (2019) (Spain).

99. Ademola Oluborode Jegede, *Protecting Indigenous Peoples’ Land Rights in Global Climate Governance*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE 199, 199 (Sébastien Duyuck, Sébastien Jodoin & Alyssa Johl eds., Routledge 2018); See Savaresi, *supra* note 4.

100. See, e.g. Jeanette Schade & Wolfgang Obergassel, *Human Rights and the Clean Development Mechanism*, 27 CAMBRIDGE REV. OF INT’L AFFS. 717, (2014); Ademola Oluborode Jegede et al., *The Need for a Rights-Based Approach to the Clean Development Mechanism*, U.N. Environment Programme Copenhagen Climate Ctr. Working Paper Series 1 (2015); Wolfgang Obergassel et al., *Human Rights and the Clean Development Mechanism: Lessons Learned from Three Case Studies*, 8 J. OF HUM. RTS. & THE ENV’T 51 (2017).

101. See UNFCCC, What is the CDM (last visited Nov. 1, 2022), <https://cdm.unfccc.int/about/index.html> [<https://perma.cc/6JLK-UK8B>].

102. See Report of the Special Rapporteur on the Rights of Indigenous Peoples, *supra* note 88, paras. 92–93.

production,¹⁰³ have severely affected the rights of Indigenous peoples and forced massive relocations.¹⁰⁴ The construction of dams have flooded Indigenous ancestral territories, and the conversion of land from native forest to monoculture crops have rendered Indigenous territory unrecognizable.¹⁰⁵

In Chile, several CDM projects have been implemented without due safeguards for the human rights of Indigenous peoples. For example, the “Ckani” project, validated and registered in the UNFCCC in 2012,¹⁰⁶ consists of a 240 MW wind farm located in the Antofagasta Region, in Licanantay territory. The project did not include meaningful participation of the Indigenous communities of the area at any stage.¹⁰⁷ For ten years, the Licanantay Indigenous communities protested that the construction of the project would destroy ancestral archaeological sites¹⁰⁸ With more than fifty percent of the project already built,¹⁰⁹ the Chilean National Monuments Council ordered the stoppage of the remaining works at the beginning of 2022. After an investigation, the council concluded that the company did not declare existing archaeological sites, and generated irreversible damage to the Licanantay cultural heritage.¹¹⁰ Consequently, the project infringed on the Licanantay Indigenous communities’ right to maintain the past manifestations of their culture, affecting their cultural identity as peoples.¹¹¹ In this sense, the climate change international

103. See *id.* paras. 14, 50.

104. See Naomi Roht-Arriaza, *First, Do No Harm: Human Rights and Efforts to Combat Climate Change*, 38 GA. J. INT’L & COMP. L. 593, 595 (2009).

105. *Id.* at 603–604.

106. See UNFCCC, *Ckani Wind Farm Project*, <https://cdm.unfccc.int/Projects/DB/RWTUV1345030950.79/view> [<https://perma.cc/4TBX-ZACD>] (last visited Nov. 1, 2022).

107. See Chilean National Environmental Assessment Service, *Sistema de Evaluación de Impacto Ambiental E-SEIA - Parque Eólico Ckani*, https://seia.sea.gob.cl/expediente/expedientesEvaluacion.php?modo=ficha&id_expediente=5586667 [<https://perma.cc/G9H3-RPP8>] (last visited Oct. 31, 2022).

108. See *Comunidades Indígenas Denuncian Irregularidades En Construcción de Parque Eólico Ckani [Indigenous Communities Denounce Irregularities in the Construction of Ckani Wind Farm]*, El América Diario Digital (Sept. 11, 2021) <https://elamerica.cl/2021/09/11/comunidades-indigenas-denuncian-irregularidades-en-construccion-de-parque-eolico-ckani> [<https://perma.cc/95KM-E4L6?type=standard>].

109. See *Id.*

110. See *Acta Sesión Ordinaria Del Consejo de Monumentos [Record of the Ordinary Session]*, CONSEJO DE MONUMENTOS NACIONALES [Chilean National Monuments Council] 18 (Dec. 1, 2021), <https://www.monumentos.gob.cl/servicios/actas/acta-sesion-ordinaria-miercoles-01-diciembre-2021> [<https://perma.cc/23TV-YYAJ>].

111. This is one of several examples. Particularly sensitive have been the validation and registration as CDM projects of hydroelectric power plants in the south of the country in Mapuche territory. For example, “Florín Small Hydro” registered on 2011, “Hydro electrical power plant Allipén”; registered on 2012, and “Dongo Hydroelectric Project” registered on 2012. For an in-depth analysis of the tension generated by the installation of hydroelectric power plants in Indigenous territories see Juan Jorge Faundes Peñafiel, *Consulta indígena y centrales de generación hidroeléctrica de menos de 3MW: desregulación riesgosa, a la luz del derecho fundamental a la identidad cultural de los pueblos indígenas [Indigenous Consultation and Hydropower Generation Plants of Less than 3MW: Risky Deregulation, in*

regime and its domestic application undoubtedly can, and has, violated the rights of Indigenous peoples.¹¹²

Recognizing this problem, as will be described in the following Part, the REDD+ international framework has established social safeguards to ensure the respect of the human rights of Indigenous peoples. These safeguards have had a direct influence on the implementation of REDD+ in Chile. This, in turn, as analyzed in Part V, has led to the domestic application of this mechanism in Chile not only respecting, but promoting the human rights of Indigenous peoples in a relatively successful manner. Nonetheless, this success has been mainly in the individual human rights of Indigenous peoples, rather than their rights as peoples.

IV. REDD+ INTERNATIONAL FRAMEWORK AND THE HUMAN RIGHTS OF INDIGENOUS PEOPLES

Forests are essential for the conservation of biodiversity. They contain eighty percent of the world's amphibian species, seventy-five percent of bird species, and sixty-eight percent of mammal species.¹¹³ Consequently, they are fundamental to maintain genetic diversity and resilience.¹¹⁴ Moreover, forests are critical for the provision of water, through the protection of soils and watersheds.¹¹⁵ In addition to these important contributions to climate change adaptation, forests play a key role in climate mitigation through carbon sequestration.¹¹⁶ Studies have shown that forests, globally, can capture over two-billion carbon tons per year.¹¹⁷ The Intergovernmental Panel on Climate Change (IPCC) has pointed out that deforestation and forest degradation contribute between 12 percent and 17 percent of global greenhouse gas (GHG) emissions.¹¹⁸ Accordingly, scientists have concluded that it is not

Light of the Fundamental Right to the Cultural Identity of Indigenous Peoples], in MEMORIAS III CONGRESO INTERNACIONAL DE REGULACIÓN Y CONSUMO 359 (RiL ed., 2020).

112. For those interested in reviewing documented cases see Sébastien Jodoin et al., *Displacement Due to Responses to Climate Change: The Role of a Rights-Based Approach*, in RESEARCH HANDBOOK ON CLIMATE CHANGE, MIGRATION AND THE LAW 250 (Benoît Mayer & François Crépeau, eds., 2017).

113. See *Earth's Biodiversity Depends on the World's Forests*, UNITED NATIONS ENV'T PROGRAMME WORLD CONSERVATION MONITORING CTR., <https://production-wordpress.unep-wcmc.org/earths-biodiversity-depends-on-the-worlds-forests> [<https://perma.cc/5NW7-QVXW>] (May 2020).

114. See David L. Spittlehouse & Robert B. Stewart, *Adaptation to Climate Change in Forest Management*, 4 BC J. ECOSYSTEMS & MGMT. 1 (2003).

115. See Ezio Costa Cordella, *REDD+ En Chile: Análisis de Las Políticas Públicas de Bosques y Cambio Climático y Crítica Al Mercado de Los Servicios Ecosistémicos [REDD+ in Chile: Analysis of Public Policies on Forests and Climate Change and Critique of the Ecosystem Services Market]*, 1 ANUARIO DE DERECHO PÚBLICO 83 (2017).

116. See *id.*

117. See Kenneth R. Richards & Carrie Stokes, *A Review of Forest Carbon Sequestration Cost Studies: A Dozen Years of Research*, 63 CLIMATIC CHANGE 1 (2004).

118. See Intergovernmental Panel on Climate Change, CLIMATE CHANGE 2007:

possible to achieve the objective of holding the increase in the global average temperature below 1.5°C¹¹⁹ without greater protection and better management of forests.¹²⁰ Thus, forests are essential for successful climate change adaptation and mitigation.¹²¹

It is in this context that the UNFCCC has developed the REDD+ mechanism. The objective of REDD+ is to “establish incentives for developing countries to protect and better manage their forest resources, by creating and recognizing a financial value for the additional carbon stored in trees or not emitted to the atmosphere.”¹²² This global environmental policy aims to make developing countries eligible for international financing for the protection and management of their forests. Additionally, since the Paris Agreement, REDD+ has become even more relevant because it helps developing countries meet the emission reduction targets committed in their Nationally Determined Contributions (NDC).¹²³

This mechanism was developed mainly between 2007¹²⁴ and 2013.¹²⁵ During this time, several issues were discussed and defined.¹²⁶ These matters include the type of activities it would cover,¹²⁷ the structure of market instruments, and

MITIGATION OF CLIMATE CHANGE: CONTRIBUTION OF WORKING GROUP III TO THE FOURTH ASSESSMENT REPORT OF THE INTERGOVERNMENTAL PANEL ON CLIMATE CHANGE (Bert Metz, et al. eds., 2007).

119. Formally recognized in The Paris Agreement to the United Nations Framework Convention on Climate Change art. 2.1(a), Dec. 12, 2015, 3165 U.N.T.S. 1.

120. See NICHOLAS STERN, *THE ECONOMICS OF CLIMATE CHANGE: THE STERN REVIEW* (2007).

121. For a more in-depth analysis see William Boyd, *Ways of Seeing in Environmental Law: How Deforestation Became an Object of Climate Governance*, 37 *ECOLOGY LQ* 843 (2010).

122. Esteve Corbera & Heike Schroeder, *Governing and Implementing REDD+*, 14 *ENV'T SCI. & POL'Y* 89, 89 (2011).

123. See Annalisa Savaresi, *A Glimpse into the Future of the Climate Regime: Lessons from the REDD+ Architecture*, 25 *R. OF EUROPEAN, COMPAR. & INT'L ENV'T L.* 186, 188 (2016).

124. Although concern about deforestation and its management was introduced in 2005 by Papua New Guinea and Costa Rica at COP 11 in Montreal, it was only in 2007 in Bali that it was formally adopted in a UNFCCC decision. See UNFCCC, *supra* note 5.

125. For a detailed description of the legal history of REDD+ see La Viña et al., *History and Future of REDD+ in the UNFCCC: Issues and Challenges*, in *RESEARCH HANDBOOK ON REDD-PLUS AND INTERNATIONAL LAW* (Edward Elgar Publishing 2016).

126. There are multiple studies on the construction of the REDD+ regime. On the evolution of this mechanism, see Arild Angelsen & Desmond McNeill, *The Evolution of REDD+, in ANALYSING REDD+: CHALLENGES AND CHOICES* (CIFOR 2017); Pistorius Till, *From RED to REDD+: The Evolution of a Forest-Based Mitigation Approach for Developing Countries*, 4 *ENV'T SUSTAINABILITY* 638 (2012).

127. Initially the scope of the regime was only to reduce emissions from deforestation and forest degradation. The conservation of forest carbon stocks, sustainable management of forest, and enhancement of forest carbon stock was incorporated later. For more details see Bibhu Prasad Nayak, *Evolution of REDD+: From Kyoto to Doha*, in *SUSTAINABLE FOREST MANAGEMENT AND REDD+ IN INDIA* (Teri Press 2013).

environmental and social safeguards.¹²⁸ For the purposes of this Article, it is relevant to review the latter point on social safeguards, which is meant to protect the human rights of Indigenous peoples and local communities. In order to understand the domestic operationalization of REDD+ in Chile and the impacts on the human rights of Indigenous peoples it is necessary to take into account the international regime on social safeguards. As will be discussed in the following Part, these safeguards have guided the preparation of the Chilean REDD+ national system and the development of local projects.¹²⁹

REDD+ and its potential social impacts have been a constant concern for IPOs.¹³⁰ For example, IPOs worried that REDD+ would encourage land grabs, evictions, forest access restrictions, and reversals of tenure reforms¹³¹ that could end up expelling Indigenous peoples from their traditional lands.¹³² These concerns were heightened by the increased awareness of the possible adverse effects of climate mitigation mechanisms on Indigenous peoples, mainly due to the negative experience with the Kyoto Protocol's CDM,¹³³ as described in Part III.

In view of the above, the 2007 UNFCCC COP in Bali, which invited parties to strengthen activities to reduce emissions from deforestation and forest degradation,¹³⁴ recognized that “the needs of local and [I]ndigenous communities should be addressed when action is taken [. . .].”¹³⁵ It is clear that this initial recognition of the importance of incorporating Indigenous perspectives in REDD+ was weak. Indeed, the acknowledgment is located in the preamble, its wording is broad, and it makes no reference to rights or to Indigenous peoples (insofar as it refers to the *needs* of Indigenous *communities*). But after two years of pressure from various IPOs and NGOs for greater recognition of Indigenous peoples' rights in REDD+,¹³⁶ including the famous slogan “No

128. See Jan Willem Den Besten et al., *The Evolution of REDD+: An Analysis of Discursive-Institutional Dynamics*, 35 ENV'T SCI. & POL'Y 40, 45 (2014).

129. See, e.g., PLAN DE ACCION NACIONAL DE CAMBIO CLIMATICO [NATIONAL ACTION PLAN ON CLIMATE CHANGE] (2017) (Citing UNFCCC Conference of Parties decisions on this matter, as well as guidelines issued by other bodies and agencies).

130. See Andrea Rodriguez & María José Veramendi Villa, *Integrating a Human Rights-Based Approach to Address Climate Change Impacts in Latin America: Case Studies from Bolivia and Peru*, in ROUTLEDGE HANDBOOK OF HUMAN RIGHTS AND CLIMATE GOVERNANCE (Routledge 2018).

131. See Phelps et al., *supra* note 9.

132. See COLINI CENAMO ET AL., *supra* note 10.

133. See Jodoin, *supra* note 6, at 157.

134. See UNFCCC, Decision 2/CP.13, para. 1.

135. *Id.* pmb1.

136. On the influence of Indigenous peoples' organizations in the development of REDD+ see Linda Walbott, *Indigenous Peoples in UN REDD+ Negotiations: “Importing Power” and Lobbying for Rights through Discursive Interplay Management*, 19 ECOLOGY AND SOCIETY 1 (2014); Heike Schroeder, *Agency in International Climate Negotiations: The Case of Indigenous Peoples and Avoided Deforestation*, 10 Int'l Env't Agreements: Pol., L. and Econ. 317 (2010).

Rights, no REDD” in Poznan,¹³⁷ the UNFCCC 2009 COP expressly acknowledged the need for “full and effective engagement of [I]ndigenous peoples”¹³⁸ in REDD+ activities.

In this context, in 2010, the UNFCCC COP adopted the “Cancun Agreement” where social safeguards were formally established to, among other objectives, protect the human rights of Indigenous peoples.¹³⁹ Specifically, Appendix I¹⁴⁰ of the agreement established that State parties, when undertaking REDD+ activities, should promote and support the following safeguards: “(c) Respect for the knowledge and rights of [I]ndigenous peoples and members of local communities, by taking into account relevant international obligations, national circumstances and laws, and noting that the United Nations General Assembly has adopted the United Nations Declaration on the Rights of Indigenous Peoples; (d) The full and effective participation of relevant stakeholders, in particular [I]ndigenous peoples and local communities.”¹⁴¹

In addition, the Cancun Agreement established the obligation of states to develop a system for providing information on how these safeguards are being addressed and respected throughout the implementation of REDD+ activities.¹⁴² Finally, the document “also requests [that] developing country Parties, when developing and implementing their [REDD+] national strategies or action plans, address, inter alia, the drivers of deforestation and forest degradation, land tenure issues, forest governance issues, gender considerations and the [social and environmental] safeguards [. . .] ensuring the full and effective participation of relevant stakeholders, inter alia [I]ndigenous peoples and local communities.”¹⁴³ As such, the Cancun Agreement required developing state parties implementing REDD+ activities to respect the human rights of indigenous peoples, expressly including the right to participation, as well as the obligation to address other issues such as land tenure and respect for traditional knowledge and practices.

Subsequently, at the 2011 COP 17 in Durban, the UNFCCC COP complemented the safeguards system in regard to the submission of information. Decision 12 enshrined the “guidance on systems for providing information on

137. See Tilman Santarius et al., *Pit Stop Poznan. An Analysis of Negotiations on the Bali Action Plan at the Stopover to Copenhagen*, 6 J. FOR EUR. ENV'T & PLAN. L. 75 (2009).

138. UNFCCC, *Decision 4/CP.15* (Dec. 7, 2009).

139. This agreement also established the three-staged implementation process for REDD+: Readiness, Implementation and Results-Based Finance. See UNFCCC, *Decision 1/CP.16*, (Nov. 29, 2010).

140. “Guidance and safeguards for policy approaches and positive incentives on issues relating to reducing emissions from deforestation and forest degradation in developing countries; and the role of conservation, sustainable management of forests and enhancement of forest carbon stocks in developing countries.”

141. UNFCCC, *supra* note 139 at 26.

142. *Id.* para. 71(d).

143. *Id.* para. 72.

how safeguards are addressed and respected.”¹⁴⁴ This guidance established that developing state parties that are executing REDD+ activities should provide transparent, consistent, and regularly updated information on how all safeguards are being fulfilled.¹⁴⁵ The guide also established that such information should be accessible to all relevant stakeholders.¹⁴⁶

Finally, in 2013, the UNFCCC COP adopted the Warsaw Framework (WFR). The WFR required that information summaries on safeguards must be submitted formally through national communications.¹⁴⁷ In addition, the WFR determined that in order for developing countries to receive payments for the results of their REDD+ activities, they must provide the most recent summary information on how the safeguards established in the Cancun Agreement have been addressed and respected.¹⁴⁸ These decisions in Durban and Warsaw, which regulate the provision of information with the objective of ensuring that it is complete, clear and timely, reflect the progressive relevance that safeguards compliance has gained in the REDD+ international framework.¹⁴⁹

These safeguards constitute a significant step forward in respecting and promoting the human rights of Indigenous peoples in global climate management.¹⁵⁰ For example, the UNFCCC COP has stated that all REDD+ activities must be consistent with the safeguards, regardless of the source of financing.¹⁵¹ Moreover, compliance must be reported to the UNFCCC COP in a clear and timely manner through national communications.¹⁵² Consequently, as pointed out by Sébastien Jodoin, Director of the Canada Research Chair in Human Rights, Health and Environment, “the final set of UNFCCC decisions [on REDD+] reflects the clear advancement of international legal norms relating to the status and rights of Indigenous Peoples and the participation of local communities.”¹⁵³

144. UNFCCC, Decision 12/CP.17, paras. 1–6.

145. *Id.* para. 2.

146. *Id.*

147. UNFCCC Conference of the Parties, *Report of the Conference of the Parties on its nineteenth session, held in Warsaw from 11 to 23 November 2013. Addendum. Part two: Action taken by the Conference of the Parties at its nineteenth session*, Decision 12/CP.19 para. 5, FCCC/CP/2013/10/Add.1.

148. *Id.* at Decision 9 para. 4.

149. See Annalisa Savaresi, *REDD+ and Human Rights: Addressing Synergies between International Regimes*, 18 *ECOLOGY & Soc’y* 4, 4 (2013).

150. See Deborah Murphy, *Safeguards and Multiple Benefits in a REDD+ Mechanism*, International Institute for Sustainable Development (May 2011), <https://perma.cc/LFE6-78BV>.

151. UNFCCC Conference of the Parties, *Report of the Conference of the Parties on its seventeenth session, held in Durban from 28 November to 11 December 2011. Addendum. Part two: Action taken by the Conference of the Parties at its seventeenth session*, Decision 2/CP.17 para. 63, FCCC/CP/2011/9/Add.1.

152. UNFCCC, *supra* note 147, at Decision 12/CP.19 para. 5.

153. Jodoin, *supra* note 6, at 172.

These safeguards also have limitations that must be kept in mind in order to understand the domestic implementation of REDD+ and why its operationalization in Chile has been relatively successful in promoting the individual human rights of Indigenous peoples, but has fallen short on their rights as peoples. In addition to the limitations and doubts about the safeguards' legal nature,¹⁵⁴ scope,¹⁵⁵ and enforceability,¹⁵⁶ there are some criticisms that relate directly to the way in which the rights of Indigenous peoples have been integrated into the REDD+ international framework.¹⁵⁷

First, the Cancun Agreement only "notes" the adoption of UNDRIP,¹⁵⁸ rather than establishing this instrument as the framework for the design, implementation, and monitoring of REDD+.¹⁵⁹ Thus, the incorporation of the UNDRIP into the safeguards has been weak, and its wording has not given greater legal force to this non-binding instrument (notwithstanding its high degree of legitimacy and political value).¹⁶⁰ Likewise, although the decisions of the UNFCCC promote the participation of Indigenous peoples, the decisions only recognize Indigenous peoples as *stakeholders*,¹⁶¹ rather than as peoples. Consequently, there is a notable absence of the procedural rights that they hold as peoples.

The social safeguards also include the need to address land tenure issues. But there is no definition of what is meant by land tenure and what it entails. This is especially problematic since land tenure is an open-ended notion that refers broadly to the way in which Indigenous peoples hold and occupy land. In this context, some scholars have argued that land tenure issues are mostly about demarcation and secure titles that aim to force Indigenous peoples into climate governance, rather than to recognize their territorial rights as peoples and, ultimately, their right to self-determination.¹⁶² Critics have raised concerns that land tenure has been related mostly to Western property rights, to ensure the success of the projects and minimize the risks for the projects

154. See Amy E. Duchelle et al., *Balancing Carrots and Sticks in REDD+ Implications for Social Safeguards*, 22 *ECOLOGY AND SOC'Y* 1 (2017).

155. See Albert Abraham Arhin, *Safeguards and Dangers: A Framework for Unpacking the Black Box of Safeguards for REDD+*, 45 *FOREST POL'Y AND ECON.* 24 (2014).

156. See Annalisa Savaresi, *The Legal Status and Role of Safeguards* (Ed.) VOIGT, C. RESEARCH HANDBOOK ON REDD+ AND INTERNATIONAL LAW (Edward Elgar Publishing 2016); Pamela Jagger et al., *REDD+ Safeguards in National Policy Discourse and Pilot Projects*, ANALYSING REDD+: CHALLENGES AND CHOICES 301, 311 (CIFOR 2017).

157. For a full discussion of the limitations of these safeguards in protecting the interests and rights of Indigenous peoples see Julia Dehm, *Indigenous Peoples and REDD+ Safeguards: Rights as Resistance or as Disciplinary Inclusion in the Green Economy*, 7 *J. HUM. RTS. & ENV'T* 170 (2016).

158. UNFCCC, *supra* note 139, at Appendix I para. 2(c).

159. See David J. Kelly, *The Case for Social Safeguards in a Post-2012 Agreement on REDD*, 6 *L. ENV'T & DEV. J.* 61, 75 (2010).

160. Megan Davis, *To Bind or Not to Bind: The United Nations Declaration on the Rights of Indigenous People Five Years On*, 19 *AUSTL. INT'L L. J.* 17, 36–40 (2012).

161. UNFCCC, *supra* note 139, at app. I, § 2(d).

162. Dehm, *supra* note 157, at 196–97.

developers, and not the recognition of Indigenous peoples' sovereignty over their territories.¹⁶³

Finally, it should be noted that the social safeguard to respect Indigenous peoples' knowledge in the REDD+ framework is considerably limited, and does not include all of the collective cultural rights recognized in UNDRIP. In particular, the social safeguard fails to protect the past, present, and future cultural manifestations of their culture, including objects, designs, ceremonies, technologies, visual and performing arts, and literatures.¹⁶⁴ This safeguard does not cover the protection of the cultural identity of Indigenous peoples and their ways of life. Thus, although the UNFCCC safeguards constitute a great step forward for the protection and promotion of the human rights of Indigenous peoples, they have not fully reflected the collective rights of Indigenous peoples recognized in the UNDRIP.

In addition to the decisions of the UNFCCC COP, the REDD+ international regime includes other types of norms that also establish social safeguards designed to protect and promote the human rights of Indigenous peoples.¹⁶⁵ In this regard, it is important to highlight three of the most renowned multilateral programs: (i) the Forest Carbon Partnership Facility (FCPF);¹⁶⁶ (ii) the UN-REDD;¹⁶⁷ and, (iii) the Global Environment Facility (GEF).¹⁶⁸ These three programs aim to provide technical and financial support to developing countries so that they can successfully implement the REDD+ mechanism. In fact, it has been mainly through these three programs that Chile has operationalized REDD+ at the domestic level.¹⁶⁹ Each of the three initiatives has created its own social safeguards.¹⁷⁰

For example, the FCPF in conjunction with the UN REDD Programme elaborated the "Guidelines on Stakeholder Engagement in REDD+ Readiness with a Focus on the Participation of Indigenous Peoples."¹⁷¹ This document

163. *Id.*

164. See G.A. Res. 61/295, UNDRIP, at Article 11 (Sep. 13, 2007).

165. For a detailed description of the different levels, sites and forms of law in REDD+, see JODOIN, *supra* note 17, at 39–46.

166. FOREST CARBON PARTNERSHIP FACILITY, <https://www.forestcarbonpartnership.org> [<https://perma.cc/R7G9-D7DD>] (last visited Nov. 1, 2022).

167. UN-REDD PROGRAMME, <https://www.un-redd.org> [<https://perma.cc/3PNP-KSDG>] (last visited Nov. 1, 2022).

168. GLOBAL ENVIRONMENT FACILITY, <https://www.thegef.org> [<https://perma.cc/9XL5-E9J5>] (last visited Nov. 1, 2022).

169. See CHILEAN NATIONAL FORESTRY CORPORATION, *Financiamiento ENCCRV [ENCCRV Funding]*, <https://www.enccrv.cl/financiamiento> [<https://perma.cc/56HW-YAGK>] (last visited Nov. 1, 2022).

170. Stephanie Roe et al., *Safeguards in REDD+ and Forest Carbon Standards: A Review of Social, Environmental and Procedural Concepts and Application 3* (2013), <https://climatefocus.com/wp-content/uploads/2022/06/safeguards-paper-3.pdf> [<https://perma.cc/ZK23-RFVF>].

171. See UN-REDD, *Guidelines on Stakeholder Engagement in REDD+ Readiness With a Focus on the Participation of Indigenous Peoples and Other Forest-Dependent Communities*

establishes, among other requirements, that REDD+ activities under these programs must follow a human rights-based approach.¹⁷² It also establishes that partner countries must create meaningful and effective forms of participation.¹⁷³ The guidelines also highlight the ability of REDD+ to establish co-benefits (also known as non-carbon benefits),¹⁷⁴ including equitable sharing of revenues generated from emissions reductions.¹⁷⁵ In addition, the UN REDD Programme prepared the “Guidelines on Free, Prior and Informed Consent”¹⁷⁶ and, regarding FCPF, activities operating under this fund must comply with the World Bank’s Operational Policy 4.10 on Indigenous Peoples.¹⁷⁷ These documents have different standards. For example, the first seeks to obtain FPIC and the second to develop Indigenous consultations processes.

The GEF, in turn, has issued the “Policy on environmental and social safeguards”¹⁷⁸ and the “Guidelines on GEF’s policy on environmental and social safeguards.”¹⁷⁹ The purpose of these documents is to prevent, minimize, and compensate for “any adverse impacts that GEF-financed projects and programs may have on people or the environment throughout the project or program cycle; thereby enhancing the environmental and social outcomes of such projects and programs.”¹⁸⁰ These documents apply to all GEF-financed projects and programs, and establish standards and obligations for the protection and promotion of the human rights of Indigenous peoples.¹⁸¹ For example, they establish the need to obtain FPIC not only when relocation of Indigenous people is being considered, but also in other cases, such as when there will be impacts on land or natural resources in territories traditionally occupied by them.¹⁸² The documents also establish the need to develop mechanisms of benefit-sharing, including financial benefits.¹⁸³ Moreover, these guidelines require that projects must establish grievance and conflict resolution systems that can be accessed by those Indigenous communities that are not satisfied with safeguards compliance.¹⁸⁴

Notwithstanding the limitations of these documents, it is important to note that they have become, in effect, opposable to project developers, given

(Apr. 20, 2021).

172. *Id.* at 2–3.

173. *Id.* at 4–6.

174. *Id.* at 9.

175. *Id.* at 1.

176. UN-REDD Programme, *Guidelines on Free, Prior and Informed Consent* (Apr. 20, 2012).

177. World Bank, *Operational Manual, OP 4.10 - Indigenous Peoples* (2013).

178. Global Environment Facility, *Policy on Environmental and Social Safeguards* (Dec. 20, 2018).

179. Global Environment Facility, *Guidelines on GEF’s Policy on Environmental and Social Safeguards* (Dec. 19, 2019).

180. Global Environment Facility, *supra* note 178, at 2.

181. *Id.*

182. *Id.* at 23–24.

183. *Id.* at 25.

184. *Id.* at 18.

the constant expansion of agreements within these programs. Indeed, to date the UN-REDD program has sixty-five partner countries.¹⁸⁵ In turn, forty-seven countries have signed partnerships and financial agreements with the FPCF.¹⁸⁶ Moreover, GEF, the oldest financial mechanism under the UNFCCC,¹⁸⁷ has 184 member countries.¹⁸⁸ Thus, in practice, these safeguards constitute actual obligations for countries that are developing REDD+ activities under these programs. This is mainly because financial and technical support is subject to their compliance.¹⁸⁹

These three multilateral programs have several tools and methodologies for the protection and promotion of the human rights of Indigenous peoples, and information systems to monitor and verify effective compliance. All these tools aim to protect and promote a variety of rights. Nonetheless, they focus mainly on individual human rights of Indigenous peoples: participatory, social, and economic rights. While there has been progress in the respect and promotion of FPIC, mainly in the UN-REDD program,¹⁹⁰ the primary objective of the social safeguards of these programs is that the domestic implementation of REDD+ in developing countries be carried out with the effective engagement of Indigenous peoples and that it improves their social and economic conditions through benefit-sharing. On the contrary, these safeguards do not address Indigenous rights such as self-determination (and self-government), and territorial rights (and sovereignty). As will be discussed in the following Part, all these safeguards have guided the operation of REDD+ in Chile. This has meant that the implementation of REDD+ in Chile has had a favorable impact on the human rights of Indigenous peoples, nonetheless mostly in their individual human rights.

V. THE OPERATIONALIZATION OF REDD+ IN CHILE

The domestic operationalization of REDD+ in developing countries is carried out in three phases: readiness, implementation, and payments for results.¹⁹¹ The readiness phase involves the development of action plans, policies and capacity building.¹⁹² It is in this phase where Jurisdictional REDD+

185. UN-REDD Programme, *Partner Countries*, <https://www.un-redd.org/our-work/partners-countries> [<https://perma.cc/C2Q7-664V>] (last visited Nov. 1, 2022).

186. Forest Carbon Partnership Facility, *Country Participants*, <https://www.forestcarbonpartnership.org/countries> [<https://perma.cc/R3BP-YJY2>] (last visited Nov. 1, 2022).

187. U.N. Hum. Rts. Council Special Rapporteur on Rts. Of Indigenous Peoples, *supra* note 88, para. 16.

188. Global Environment Facility, *Countries*, <https://www.thegef.org/partners/countries> [<https://perma.cc/U6J7-J2DZ>] (last visited Nov. 1, 2022).

189. See Savaresi, *supra* note 123, at 188.

190. See UN-REDD, *supra* note 176, at 24–28.

191. See UNFCCC, *supra* note 139, at 13, 17.

192. See Sheila Wertz-Kanounnikoff & Arild Angelsen, *Global and National REDD+ Architecture: Linking Institutions and Actions*, in REALISING REDD+, NATIONAL STRATEGY AND POLICY OPTIONS 14–15 (Arild Angelsen ed., Ctr. for Int'l Forestry Rsch. 2009).

is mainly developed.¹⁹³ The Jurisdictional REDD+ refers to the creation and modification of national forest policies and programs that prepare the country for on-the-ground implementation of REDD+.¹⁹⁴ These policies and programs include the preparation of a national strategy, a forestry and forest emissions baseline, a monitoring system, and an information system for reporting on the implementation of environmental and social safeguards.¹⁹⁵

In turn, the implementation phase (or piloting) and payment for results (PFR, also known as the compliance phase) are aimed primarily at developing REDD+ projects at the local level that effectively reduce carbon emissions from forests.¹⁹⁶ It is in these phases that Project-based REDD+ is mainly executed.¹⁹⁷ REDD+ projects in the implementation phase are intended to test the national technical mechanisms (such as the monitoring system and the safeguards information system), institutional arrangements, capacity building developed in the Jurisdictional REDD+, and to demonstrate the viability of the country to successfully develop REDD+ projects.¹⁹⁸ Projects in the PFR phase consider the measurement, verification, and reporting of projects under execution. PFR is especially focused on emission reductions and removals, with the objective that the project developer¹⁹⁹ generates carbon credits or receives payments for such environmental services.²⁰⁰ Likewise, the developing home country will be able to count this emission reduction in the targets established in their NDC.²⁰¹

This Part analyzes the domestic operationalization of REDD+ in Chile through this classification. The first Subpart addresses the instruments that comprise Chile's Jurisdictional REDD+, specifically: (i) the Chilean REDD+ national strategy,²⁰² (ii) the Environmental and Social Management Framework²⁰³, and

193. See Jodoin, *supra* note 6.

194. *Id.* at 158.

195. THE WOODS HOLE RESEARCH CENTER, AN OVERVIEW OF READINESS FOR REDD, 5 (Tracy Johns et al. eds., 2009).

196. See Jodoin, *supra* note 6, at 158.

197. *Id.*

198. Costa Cordella, *supra* note 115, at 89.

199. There is a wide spectrum of project developers, including governments, corporations, NGOs, and local communities. For a more in-depth discussion, see Sills et al., *supra* note 21.

200. Jodoin, *supra* note 6, at 158.

201. Savaresi, *supra* note 123, at 188.

202. CHILEAN NAT'L FORESTRY CORP., Estrategia Nacional de Cambio Climatico y Recursos Vegetacionales [Nat'l Strategy for Climate Change and Vegetation Resources] (2016).

203. Unidad de Cambio Climatico y Servicios Ambientales (UCCSA) and Unidad de Asuntos Indígenas y Sociales (UAIS) [Union of Climate and Environmental Services and Union of Indigenous and Soc. Affairs], Marco de Gestión Ambiental y Social de la Estrategia Nacional de Cambio Climatico y Recursos Vegetacionales (MGAS-ENCCRV) [Env'l and Soc. Mgmt. Framework of the Nat'l Strategy for Climate Change and Vegetation Resources] (2018).

(iii) the Benefit Sharing Plan.²⁰⁴ The second Subpart addresses Project-based REDD+ in Chile through the review of two projects at the local level: (i) the “Quinquén” project,²⁰⁵ and (ii) the “Carahue-Saavedra” project.²⁰⁶ Both Subparts analyze the impact of the operationalization of REDD+ in Chile on the human rights of Indigenous peoples. As will be discussed below, both dimensions of REDD+ in Chile have included, respected, and promoted the individual human rights of Indigenous peoples, but have fallen short in the collective rights of Indigenous peoples as set forth in UNDRIP²⁰⁷ and ILO Convention No. 169.²⁰⁸

A. *Jurisdictional REDD+ in Chile*

In Chile, forests represent twenty-four percent of the national territory, covering eighteen million hectares.²⁰⁹ Of this total, native forests represent eighty percent, that is, fourteen million hectares.²¹⁰ Of a total of four thousand native plant species identified in these forests to date, half are endemic.²¹¹ As a result, Chile was included among the thirty-five hotspots of global importance for biodiversity conservation.²¹² Consequently, in response to the threat of biodiversity loss from climate change, Chile has formally recognized the protection, restoration, and conservation of forests as a national priority.²¹³

It should also be noted that in Chile, to date, there are ten legally recognized Indigenous peoples: Mapuche, Kawésqar, Yagán, Rapa Nui, Aimara, Licanantay, Quechua, Colla, Diaguita, and Chango.²¹⁴ All of these Indigenous peoples are directly related to forests, either because is where they live or because their economic, social, and cultural life depends on them.²¹⁵ For example, as mentioned in Part III, the forests of Araucaria are essential for the Andean Mapuche people that inhabit southern Chile. The Araucaria is considered a sacred tree. Their presence and distribution in the territory define religious spaces and ancestral routes of great cultural value.²¹⁶ Furthermore, the Araucaria’s seed, the Ngülliw, is fundamental in the Mapuche culture. Its gathering is recognized by the Mapuche people as a practice of important

204. Nuvia Briceno et al., Sistema de Distribucion de Beneficios (SDB) de la Estrategia Nacional de Cambio Climatico y Recursos Vegetacionales (ENCCRV) de Chile [Benefit Sharing Plan of the Nat’l Strategy for Climate Change and Vegetation Resources] (2020).

205. CHILEAN NAT’L FORESTRY CORP., Proyectos [Projects], <https://www.enccrv.cl/proyectos> (last visited Nov. 1, 2022) [<https://perma.cc/9XSR-VXGZ>].

206. *Id.*

207. Adopted by the United Nations General Assembly with the favorable vote of Chile. See G.A. Res. 61/295, *supra* note 32.

208. Ratified by the Chilean Congress in 2008. See ILO Convention 169, *supra* note 30.

209. CHILEAN NAT’L FORESTRY CORP., *supra* note 22.

210. *Id.*

211. CHILEAN NAT’L FORESTRY CORP., *supra* note 202, at 16.

212. *Id.*

213. *Id.*

214. See Law No. 19253 art. 1, Octubre 5, 1993, DIARIO OFICIAL [D.O.] (Chile).

215. See Smith, *supra* note 24.

216. See Cortés et al., *supra* note 98.

cultural value in itself, regardless of the subsequent use and commercialization of the seed.²¹⁷ The Ngülliw is also a key cultural element since it is used to make ancestral dietary preparations, such as *Chuchoca*, *Locro* and *Muday*, among others.²¹⁸ Similarly, the Queñoa (*Polylepis tarapacana*) are key trees for the Aymara's ways of life: the foliage is used in religious ceremonies, the bark is used for medicine and clothing, and the wood is used to build shelters that serve as seasonal settlements for the traditional practice of transhumance, among other important cultural purposes.²¹⁹ Thus, forest management at the national and local levels is an acute concern of Indigenous peoples in Chile.²²⁰

In this context, in 2016, Chile enacted its REDD+ national strategy: the Climate Change and Vegetation Resources National Strategy²²¹ (ENCCR, for its Spanish name). The national strategy establishes an assessment of the condition of Chile's forests, and main causes of deforestation, de-vegetation, and degradation. The strategy also establishes the general and specific objectives of forest management, the action measures to address the causes that negatively affect forests, and the potential environmental and social risks and benefits of the action measures.²²²

The preparation of the ENCCR included an important Indigenous participation process, so that Indigenous peoples could incorporate their worldviews, knowledge, and proposals for each of the elements described above.²²³ The Chilean National Forestry Corporation (CONAF, for its Spanish name), which is Chile's National REDD+ Focal Point, and the agency in charge of preparing the Chilean REDD+ national strategy, developed this process nationwide, specifically with Indigenous communities that depend on, are linked to, or relate to forests.²²⁴ Based on Chile's census²²⁵ and the Native Forest Cadastre,²²⁶ CONAF identified all the areas with Indigenous communities that have forests in their territory.²²⁷

217. *Id* at 9.

218. *Id* at 6.

219. CHILEAN NAT'L FORESTRY CORP., *Los Bosques y Recursos Vegetacionales En La Vida de Los Pueblos Indígenas [Forests and Vegetation Resources in the Lives of Indigenous Peoples]* (July 1, 2020), <https://www.conaf.cl/los-bosques-y-recursos-vegetacionales-en-la-vida-de-los-pueblos-indigenas> [<https://perma.cc/PL5Y-BDQJ>] (last visited Nov. 1, 2022).

220. *See* Smith, *supra* note 24.

221. Chilean Nat'l Forestry Corp., *supra* note 202.

222. *See* Costa Cordella, *supra* note 115, at 94–98.

223. CHILEAN NAT'L FORESTRY CORP., INFORME NACIONAL DEL PROCESO DE DIALOGO Y PARTICIPACION DE LOS PUEBLOS INDIGENAS ENCCR [ENCCR - NAT'L REPT. OF THE PROCESS OF DIALOGUE AND PARTICIPATION OF INDIGENOUS PEOPLES] 13 (2016).

224. *Id*.

225. *See* CHILEAN NAT'L INST. OF STAT., CENSO [CENSUS] (2017) <http://www.ine.cl/ine-ciudadano/definiciones-estadisticas/censo> [<https://perma.cc/BB58-96BF>] (last visited Nov. 1, 2022).

226. Chilean Nat'l Forestry Corp., *supra* note 22.

227. CHILEAN NAT'L FORESTRY CORP., *supra* note 223, at 17.

This Indigenous participation process was based on a methodology specially designed by CONAF.²²⁸ This methodology was created as a guide for the development of the participation process, allowing the necessary flexibility to adapt to the different local realities.²²⁹ Likewise, this methodology, as stated both in the methodology guide and in the ENCCRV, was intended to ensure compliance with the standards established by the UNFCCC COP decisions and the Forest Carbon Partnership Facility (FCPF) guidelines, since the national strategy was developed under the Readiness Fund of this program.²³⁰

One-thousand one-hundred twenty-two Indigenous organizations participated in this process,²³¹ including not only those expressly recognized by Chilean law (that is, Indigenous communities and associations),²³² but also other forms of traditional organization, such as territorial roundtables and councils of traditional authorities.²³³ These organizations include national and local institutions.²³⁴ Of these institutions, one thousand eight hundred Indigenous representatives participated.²³⁵ The representatives were not only presidents and board members of the organizations, but also traditional authorities, spokespersons, and religious and cultural leaders.²³⁶

The process was fairly significant, as it is the only case in Chile in which the design of a climate management instrument at the national level has included a process for the differentiated participation of Indigenous peoples, as opposed to general participation mechanisms like citizen consultations.²³⁷ Indeed, instruments such as the recent Chilean Climate Change Law,²³⁸ Chile's NDC,^{239,240} and

228. *Id.* at 41.

229. *Id.* at 14.

230. Specifically, these standards are that Indigenous participation should be free, informed, transparent, in good faith, effective and representative. See *id.* at 5, 9–12.

231. See *id.* at 32.

232. See Law No. 19253, *supra* note 214, art. 9, at 36.

233. CHILEAN NAT'L FORESTRY CORP., *supra* note 223, at 17, 33 and 48.

234. *Id.* at 32.

235. *Id.*

236. *Id.* at 16, 32. It should also be noted that forty-eight percent of the total number of representatives who actively participated in the process were women, which is relevant to ensure gender equality and representativeness. This is particularly important considering the disproportionate impact of climate change on Indigenous women.

237. ROSARIO CARMONA ET AL., PUEBLOS INDIGENAS Y GOBERNANZA DEL CAMBIO CLIMATICO EN CHILE [INDIGENOUS PEOPLES AND CLIMATE CHANGE GOVERNANCE IN CHILE] 13, 14 (Center for Intercultural and Indigenous Studies 2021).

238. Law No. 21455 Mayo 30, 2022, DIARIO OFICIAL [D.O.] (Chile).

239. CHILEAN MINISTRY OF THE ENVIRONMENT, CONTRIBUCION DETERMINADA A NIVEL NACIONAL (NDC) DE CHILE: ACTUALIZACION 2020 [CHILEAN NATIONALLY DETERMINED CONTRIBUTION: 2020 UPDATE] (2020).

240. Chilean Ministry of the Environment, *Estrategia Climática de Largo Plazo de Chile: Camino a La Carbono Neutralidad y Resiliencia a Más Tardar Al 2050* [Long Term Climate Strategy 2050] (2021), https://unfccc.int/sites/default/files/resource/CHL_LTS_2021.pdf [<https://perma.cc/YS64-LA7H>].

the National Climate Change Adaptation Plan,²⁴¹ among other climate instruments, have not included meaningful Indigenous participation.²⁴² The lack of Indigenous participation in these instruments has meant that most of them do not recognize Indigenous peoples as a group especially vulnerable to the negative effects of climate change, nor their capacity to contribute to the solutions through their worldviews, ancestral knowledge, and traditional practices.²⁴³

The Indigenous participation process in the ENCCRV generated considerable results. It strengthened the strategic activities and action measures to address forest degradation, deforestation, and forest non-growth while incorporating the concerns and priorities of Indigenous peoples in forest management.²⁴⁴ For example, the process resulted in a broader concept of forests, expanding the ENCCRV definition to include semi-forest, xerophytic, and azonal formations.²⁴⁵ This extensive concept of forest resulted in the incorporation of important vegetation resources for climate management, broadened the scope of REDD+ actions, and integrated an important part of Chile's northern territory, indigenous and non-indigenous, into the national strategy.

Additionally, through the participatory process, the ENCCRV identified as a cause of forest degradation the low level of knowledge of society regarding Indigenous peoples' culture and their cultural appreciation of vegetation resources.²⁴⁶ Consequently, the Chilean REDD+ national strategy established

241. Chilean Ministry of the Environment, *Plan Nacional de Adaptación Al Cambio Climático [National Climate Change Adaptation Plan]* (2014), <https://mma.gob.cl/wp-content/uploads/2016/02/Plan-Nacional-Adaptacion-Cambio-Climatico-version-final.pdf> [<https://perma.cc/8YWY-KRQZ>].

242. For an analysis of the lack of Indigenous participation in climate change in Chile see Salvador Millaleo, *El Acuerdo de París sobre cambio climático y el proyecto de la ley marco en Chile: Entre el protagonismo y la denegación de los pueblos indígenas [The Paris Agreement on Climate Change and the Framework Law Draft in Chile: Between Protagonism and Denial of Indigenous Peoples]*, 1 ANUARIO DE DERECHOS HUMANOS 141, 149-52 (2020); Jéssica Cayupi Llancaleo, *Policy Brief N° 4 Pueblos Indígenas, Actores Claves En La Gobernanza Del Cambio Climático [Policy Brief No. 4 Indigenous Peoples, Key Actors in Climate Change Governance]* (Center for Climate and Resilience Research - [CR2] 2019) (Chile); Carmona et al., *supra* note 237.

243. See Millaleo, *supra* note 242; Cayupi Llancaleo, *supra* note 242; Carmona et al., *supra* note 237.

244. See Chilean National Forestry Corporation, *Informative Note 17 - Process of Dialogue and Participation with Indigenous Peoples in the Formulation of Chile's National Strategy on Climate Change and Vegetation Resources* 6 (2018).

245. CHILEAN NAT'L FORESTRY CORP., *supra* note 223, at 24, 65. Xerophytic and azonal formations consist of native vegetation species, predominantly shrubs and succulents, from arid or semi-arid zones. *See id.* These actions outlined in the national strategy are now being carried out with a broader perspective, which not only integrates forest ecosystems, but also clearly incorporates xerophytic and azonal formations, taking into account the areas most affected by climate change and desertification, while also taking into account the national population that inhabits these areas. See CHILEAN NAT'L FORESTRY CORP., *supra* note 223, at 24.

246. CHILEAN NAT'L FORESTRY CORP., *supra* note 202, at 81.

as an action measure an environmental education program aimed at promoting and strengthening the appreciation of Indigenous peoples' traditional knowledge. As stated in the ENCCRV, this environmental education program will include Indigenous knowledge regarding the environmental services provided by vegetation resources, "incorporating the [I]ndigenous worldview associated with the importance and protection of natural resources and the appreciation of native culture."²⁴⁷

The Indigenous participation process generated other positive results with respect to action measures and solutions. Following the concerns raised by Indigenous representatives, the ENCCRV decided to favor reforestation and afforestation measures with native species, thus excluding exotic species, such as pine and eucalyptus.²⁴⁸ This is especially relevant given that pine and eucalyptus plantations have been historically developed in southern Chile,²⁴⁹ and have been a constant issue for Indigenous peoples that inhabit said territory.²⁵⁰ For the Mapuche people, the expansion of these crops is considered a violation of their native forests and the destruction of the material and spiritual support of their existence.²⁵¹ This is aggravated by ongoing land conflicts with major forestry companies.²⁵²

Finally, the participants in the process requested to prioritize programs with Indigenous communities and require that programs consider the effective participation of Indigenous peoples in all stages.²⁵³ Accordingly, one of the objectives of the ENCCRV is to establish institutional, participatory, and financial mechanisms that will enable Indigenous peoples to be central actors and beneficiaries of the payment for results system.²⁵⁴ In this way, participation enabled Indigenous peoples to determine their priorities in the REDD+ framework and the way it will materialize in their territories.

In addition, it should be noted that for the preparation of the national strategy, CONAF developed an Environmental and Social Strategic Assessment (or "SESA"),²⁵⁵ with the objective of identifying and evaluating the

247. *Id.* at 112.

248. See CHILEAN NAT'L FORESTRY CORP., *supra* note 223, at 21.

249. There are nearly three million hectares of forest plantations, eighty-three percent consisting in pine and eucalyptus. See Chilean National Forestry Corporation, *supra* note 202, at 70.

250. See José Aylwin et al., *Pueblo Mapuche y Recursos Forestales En Chile: Devastación y Conservación En Un Contexto de Globalización Económica [Mapuche People and Forest Resources in Chile: Devastation and Conservation in a Context of Economic Globalization]* 20 (IWGIA 2013); Juan Pichun, *Chile: La Resistencia Mapuche Frente a Las Plantaciones Forestales [Chile: Mapuche Resistance to Forestry Plantations]*, 19 *ECOLOGÍA POLÍTICA* 161, 163 (2000).

251. See Aylwin et al., *supra* note 250; Pichun, *supra* note 250.

252. See Aylwin et al., *supra* note 250, at 27–28; Pichun, *supra* note 250.

253. See CHILEAN NAT'L FORESTRY CORP., *supra* note 223, at 23.

254. See CHILEAN NAT'L FORESTRY CORP., *supra* note 202, § Preface.

255. CHILEAN NAT'L FORESTRY CORP., *Evaluación Estratégica Ambiental y Social [Environmental and Social Strategic Assessment- ENCCRV]* 8 (2016).

risks, adverse impacts, and potential benefits for the environment and society, including Indigenous peoples, of the ENCCRV's action measures.²⁵⁶ Based on this assessment, the Chilean REDD+ national strategy recognized as a risk the potential exclusion of Indigenous peoples in the development and implementation of REDD+ policies,²⁵⁷ the vulnerability of Indigenous peoples to environmental degradation,²⁵⁸ and, in general terms, the possibility that such an instrument can negatively affect Indigenous peoples.²⁵⁹ As a result, the ENCCRV recognized the need to include Indigenous peoples in all stages of REDD+ operationalization in order to avoid exclusion, prevent negative impacts, and enhance benefits.²⁶⁰ Consequently, the Chilean REDD+ National Strategy acknowledges that the effective incorporation of Indigenous peoples in the design and implementation of REDD+ policies and projects is essential.²⁶¹ Both the ENCCRV and the SESA have promoted the participation of Indigenous peoples, and have recognized their importance as central beneficiaries of the payment for result system.

Based on this participatory process, CONAF developed two other REDD+ national instruments: the Environmental and Social Management Framework (MGAS)²⁶² and the Benefit Sharing Plan (BSP).²⁶³ The MGAS is a binding instrument of the national strategy with one objective being the safeguarding of the social dimension in the REDD+ implementation phase, in order to comply with the World Bank's Operational Policies (WB-OP).²⁶⁴ Among these policies is the WB-OP 4.10 on Indigenous peoples. Based on this WB-OP, the MGAS establishes protocols and procedures to avoid, mitigate, and compensate for negative socio-environmental risks and impacts, and maximize benefits, associated with the implementation of ENCCRV action measures.²⁶⁵

This document incorporates as an annex the "Planning Framework for Indigenous Peoples in the ENCCRV,"²⁶⁶ which lays out guidelines for the development of Indigenous participation processes and community support.²⁶⁷ Such participation is important for the evaluation, implementa-

256. *Id.*

257. See CHILEAN NAT'L FORESTRY CORP., *supra* note 202, at 204–9.

258. *See id.*

259. *See id.*

260. *See id.* at 177–78.

261. *See id.*

262. See CHILEAN NAT'L FORESTRY CORP., *supra* note 203, at 14.

263. See Briceno et al., *supra* note 204 at 8. It should be noted that the ENCCRV has also established the creation of a National Implementation Framework for Social and Environmental Safeguards. To date this has not yet been developed.

264. See CHILEAN NAT'L FORESTRY CORP., *supra* note 203, at 28.

265. See CHILEAN NAT'L FORESTRY CORP., *supra* note 202, at 177.

266. CHILEAN NAT'L FORESTRY CORP., *Anexo N°5: Marco de Planificación Para Pueblos Indígenas (MPPI) OP/BM 4.10 [Annex 5: Planning Framework for Indigenous Peoples in the ENCCRV]* 4–5 (2018).

267. *Id.*

tion, and monitoring of the negative and positive impacts generated by the REDD+ domestic operationalization.²⁶⁸ In this regard, the MGAS states that when REDD+ implementation activities refer to legislative or administrative measures that could affect Indigenous peoples, the right to consultation must be respected.²⁶⁹ While the incorporation of the right to consultation in the MGAS seems significant, it does not really represent progress in the promotion of the collective rights of Indigenous peoples, since this right is already incorporated in Chilean legislation. Indeed, Decree No. 236, which promulgates ILO Convention No. 169,²⁷⁰ and Decree No. 66, which specifically regulates the right to consultation, have fully incorporated the Indigenous right to consultation in Chile.²⁷¹ The latter decree states that “the bodies of the State Administration [. . .] shall consult with the [I]ndigenous peoples *whenever* administrative or legislative measures are planned that could directly affect them.”²⁷² Thus, the incorporation of the right to consultation in the MGAS only reproduces the existing Chilean legislation. In addition, the MGAS establishes that if the implementation activities do not refer to legislative or administrative measures that directly affect Indigenous people, a participatory process must be developed.²⁷³ It states that “for the implementation of the ENCCRV, Indigenous Peoples will be involved in all phases of those projects [executed] in their territories.”²⁷⁴ Consequently, the MGAS promotes the right to participation of Indigenous peoples.

The MGAS also states that in no case will the implementation of the action measures of the Chilean REDD+ national strategy consider involuntary displacement for Indigenous peoples.²⁷⁵ Consequently, following Article 16 of ILO Convention No. 169, Indigenous relocation can only take place on a voluntary basis under FPIC.²⁷⁶ In this case, the incorporation of FPIC in the Jurisdictional REDD+ has a relatively modest impact, since it is only required in the extreme case of displacement of Indigenous peoples. A notable advance in the promotion of Indigenous rights would have been for the Chilean Juris-

268. See CHILEAN NAT'L FORESTRY CORP., *supra* note 203, at 88.

269. See *id.* at 15.

270. See Decree promulgating Convention No. 169 on Indigenous and tribal peoples in independent countries of the International Labor Organization No. 236 Article 6 (Oct. 2, 2008).

271. See Decree approving the regulations governing the Indigenous consultation procedure No. 66 art. 6 (Nov. 15, 2013).

272. *Id.* at art. 7.

273. CHILEAN NAT'L FORESTRY CORP., *supra* note 266, at 49.

274. *Id.* at 17.

275. See CHILEAN NAT'L FORESTRY CORP., *supra* note 203, at 35.

276. ILO Convention 169, *supra* note 31, art. 16: “1. Subject to the following paragraphs of this Article, the [Indigenous] peoples concerned shall not be removed from the lands which they occupy. 2. Where the relocation of these peoples is considered necessary as an exceptional measure, such relocation shall take place only with their free and informed consent.” 18 (1999).

dictional REDD+ to establish the general application of FPIC to all projects or activities that could affect Indigenous peoples, or their lands and resources, in accordance with Articles 19 and 32 of UNDRIP. The general application of FPIC would, in turn, promote the right of self-determination of Indigenous peoples, advancing in their substantive collective rights.

Finally, Chile's Jurisdictional REDD+ is made up of the Benefit Sharing Plan (BSP).²⁷⁷ The objective of the BSP is to equitably and transparently distribute among stakeholders the benefits generated by the implementation of the action measures established in the ENCCRV. The BSP contemplates the allocation of monetary and non-monetary benefits. The former refers to the financial payment for the effective reduction of emissions (associated with the payment for results phase of REDD+). The second are those benefits that generate a positive impact at the local level through the implementation of the REDD+ national strategy, "where no financial incentive is delivered to individuals, but rather a benefit for the community."²⁷⁸

The BSP identifies Indigenous communities as the main beneficiary groups to be considered.²⁷⁹ Indigenous communities are recognized in the BSP as vulnerable groups linked to forests that require greater support to implement REDD+ activities and access to benefits.²⁸⁰ Consequently, the BSP prioritizes the implementation of REDD+ activities that address the vulnerability of Indigenous organizations and individuals, from economic as well as social and cultural perspectives.²⁸¹ To this end, the BSP defines important non-financial benefits of a sociocultural nature to be considered.²⁸² Specifically, these benefits are described as those that contribute to the sociocultural well-being of Indigenous peoples by strengthening cultural identity, revitalizing ancestral knowledge, supporting traditional ways of life, strengthening traditional medicine, and improving governance structures and territorial management.²⁸³ Thus, in the evaluation and prioritization of REDD+ activities in Chile, it must be considered if these generate benefits for Indigenous peoples, from an integral perspective, including the promotion of cultural rights.

The BSP provides three additional parameters for prioritizing REDD+ actions that benefit and promote the economic, social and cultural rights of Indigenous peoples. These parameters are: (i) complementarity of actions with both the productive and forest conservation initiatives of Indigenous peoples; (ii) involvement of the governance bodies and traditional authorities of the Indigenous communities; and (iii) enhancement of ecosystems, and sites of cultural or religious significance in Indigenous worldviews, as well as other spaces of ancestral

277. See Briceno et al., *supra* note 204, at 8.

278. CHILEAN NAT'L FORESTRY CORP., *supra* note 202, at 181.

279. See Briceno et al., *supra* note 204, at 9.

280. See *id.* at 34.

281. See *id.* at 17.

282. *Id.* at 14.

283. *Id.*

use.²⁸⁴ The parameters described above are intended to promote and support the incorporation of these human rights of Indigenous peoples in REDD+ activities.

While this is commendable, the absence of mechanisms and provisions to protect and advance the collective rights of Indigenous peoples, such as territorial rights, is of concern. Territorial rights are crucial for Indigenous peoples, given their close relationship with the land, and their long history of territorial dispossession.²⁸⁵ These rights are enshrined in Articles 25, 26, and 27 of UNDRIP and Articles 14 and 15 of ILO Convention No. 169. These articles establish, among other rights, that Indigenous peoples have the right to own, use, develop, and control the lands, territories, and resources they possess by reason of traditional ownership or other traditional occupation or use. In this context, one important issue that arose during the Indigenous participation process for the elaboration of the Chilean REDD+ national strategy was the recognition of customary land rights,²⁸⁶ or communitarian lands,²⁸⁷ and the “recovery of [I]ndigenous territories and [I]ndigenous land titles.”²⁸⁸ Despite these concerns, the ENCCRIV did not incorporate any provision regarding Indigenous people’s land rights. As with the UNFCCC decisions, the ENCCRIV restricted land issues to tenure and identified land tenure issues as a cause of deforestation and indirect degradation.²⁸⁹

In particular, the Chilean REDD+ national strategy establishes two action measures regarding land tenure issues. The first is the design of legislative modifications for the inclusion of irregular landowners in REDD+ programs.²⁹⁰ The second action is the development of a program for the regularization of land tenure that would allow irregular owners to obtain a property title deed.²⁹¹ Neither of these provisions aims to recognize Indigenous rights to land at any level. For its part, the SESA identifies land rights as an important issue raised by Indigenous peoples during the participation process of the Chilean REDD+ national strategy, especially the Mapuche people.²⁹² But the SESA states that Indigenous land rights is a “high level political problem”²⁹³ and, therefore, it “will be taken as a *reference* for the implementation stage.”²⁹⁴ This broad and ambiguous wording regarding how Indigenous land rights are going to be addressed (as a “reference”) has meant that, to date, there are no plans, programs, strategies, or mechanism developed within the framework of the national REDD+ strategy on this matter.

284. *Id.* at 17.

285. See generally MARC FERRO, *COLONIZATION: A GLOBAL HISTORY* (Routledge 1997).

286. CHILEAN NAT’L FORESTRY CORP., *supra* note 223, at 23.

287. *Id.* at 63.

288. *Id.* at 73.

289. CHILEAN NAT’L FORESTRY CORP., *supra* note 202, at 106.

290. *Id.*

291. See *id.*

292. CHILEAN NAT’L FORESTRY CORP., *supra* note 255, at 59.

293. *Id.*

294. *Id.*

Therefore, at present, the Chilean Jurisdictional REDD+ does not contain actions or safeguards that recognize, protect, and guarantee the territorial rights of Indigenous peoples, especially collective customary land rights. Given the relevance of this right for the existence and identity of Indigenous peoples, and the special concern expressed by Indigenous peoples in the participation process of the Chilean REDD+ national strategy, the absence of actions and safeguards on this right constitutes a significant shortcoming in the promotion of their collective rights as peoples, and a risk for the success of REDD+ projects to be developed in their territories. This is concerning, considering that Chile is currently transitioning from the implementation stage to the final compliance stage, where there is likely to be a significant increase in REDD+ projects.

TABLE I: THE HUMAN RIGHTS OF INDIGENOUS PEOPLES IN THE CHILEAN JURISDICTIONAL REDD+

<i>Instrument</i>	<i>Content</i>	<i>IP Rights</i>
Climate Change and Vegetation Resources National Strategy (ENCCRV)	- Incorporation of Indigenous peoples' priorities and concerns (extensive concept of forest, and forestation and reforestation activities with native species, among others). - Exclusion of Indigenous peoples in the design of environmental policies as a risk of forest degradation, and inclusion as a remedy.	Participation
	- Absence of traditional knowledge as a cause of forest degradation, and empowerment of traditional knowledge as a solution.	Cultural
	- Recognition of Indigenous peoples as central beneficiaries of the payment for result system, and to enhance monetary and non-monetary benefits.	Economic and social
Environmental and Social Management Framework (MGAS)	- Participatory processes for REDD+ activities involving restrictions on land use and/or productive activities of Indigenous peoples, and establishment of mitigation and compensation measures. - Participation processes for REDD+ implementation actions that could affect Indigenous peoples, other than legislative or administrative measures.	Participation
	- Express commitment that REDD+ implementation activities will not generate forced displacement.	FPIC
	- Indigenous consultation regarding REDD+ legislative or administrative measures that could affect Indigenous peoples.	Consultation
Benefit Sharing Plan (BSP)	- Prioritization of Indigenous communities as beneficiaries of REDD+ activities.	Economic and social
	- Sociocultural benefits as a parameter for prioritizing REDD+ activities (such as strengthening cultural identity and support for traditional ways of life).	Social and cultural
	- Other cultural aspects as a parameter for prioritizing REDD+ activities (as enhancing ecosystems, and/or sites of cultural or religious significance in the Indigenous worldviews).	Cultural

B. *Project-Based REDD+*

Chile is finalizing its implementation (or piloting) phase, which aims to test the national instruments and institutional arrangements developed in the Jurisdictional REDD+ and move towards the PFR phase.²⁹⁵ Consequently, it has been mainly the government that have implemented Project-based REDD+ in Chile, to demonstrate the good functioning of the jurisdictional dimension and the viability of the country to develop REDD+ projects.²⁹⁶ Government REDD+ implementation has been carried out by the National Forestry Corporation (CONAF), the agency in charge of forest management in the country, and REDD+ Focal Point. CONAF has developed five pilot projects with the help of the UN-REDD program, and five through the Global Environment Facility (GEF).²⁹⁷ Of these ten projects, two have been developed in Indigenous territories and in conjunction with the communities, ensuring the inclusion of Indigenous peoples and their representation in the portfolio of pilot projects.²⁹⁸

This Part analyzes both projects. As will be shown, both constitute promising examples, where CONAF, as project developer, deployed good practices and appropriate engagements with the Indigenous communities. Nonetheless, the two projects have had a positive impact mainly on the individual human rights of the Indigenous communities, rather than on their collective rights. Regarding participation, in both cases the Indigenous communities have been involved in the design and implementation of the projects; however, CONAF did not develop a consultation process, nor did it obtain FPIC. In addition, through access to benefits, including financial returns and capacity building, the projects have advanced the economic rights of these communities. But this has not meant recognition of collective land rights. Despite these shortcomings on the advance of collective rights, it should be noted that both projects have incorporated traditional knowledge and practices, and restored culturally significant natural areas, showing progress in the promotion of the cultural rights of these communities.

1. The “Quinquén” Project

The Quinquén project is a REDD+ project that has been developed through the UN-REDD program by CONAF in collaboration with the Mapuche Indigenous community of *Kmkeñ* (or *Quinquén* in a phonetic translation into Spanish). The project is being developed in the territory of this Indigenous community, located in the commune of Lonquimay, Araucanía Region, which is part of the “Araucarias” Biosphere Reserve.²⁹⁹ This 140-hectare territory is

295. See CHILEAN NAT'L FORESTRY CORP., *supra* note 205.

296. See *id.*

297. See *id.*

298. Bearing in mind that according to the last census conducted in Chile thirteen percent of the population is Indigenous, the portfolio of pilot projects is representative. See INSTITUTO NACIONAL DE ESTADÍSTICAS, CHILE, SÍNTESIS DE RESULTADOS CENSO 2017 [CHILEAN NAT'L INST. OF STATS., SUMMARY OF RESULTS CENSUS 2017] 16 (2018).

299. Biosphere reserves are learning places for sustainable development designated

almost entirely covered by forests; Araucarias, Lengas (*Nothofagus pumilio*), Robles (*Nothofagus obliqua*) and Raulies (*Nothofagus alpina*) cover approximately 90 percent of the land.³⁰⁰ All these are native species, with an important conservation value due to their endangered status (such as the Araucaria),³⁰¹ and because they are part of threatened ecosystems categorized as vulnerable.³⁰² Additionally, as explained below, these species provide important provisioning, regulation, and cultural ecosystem services.³⁰³

The *Kmkeñ* Indigenous community is a group of fifty-two Mapuche families who live in their ancestral territories located in the Andes Mountains in Lonquimay, the Andean zone of the Araucanía Region.³⁰⁴ This community subsists mainly on the gathering of the Araucaria seed.³⁰⁵ The Araucaria (or *Pewén* in Mapuzungun, the Mapuche language) is a natural monument,³⁰⁶ declared in danger of extinction in 2018³⁰⁷ and known as a living fossil, since it has existed on the planet since the Mesozoic era (about 251 million years ago). It only grows between thirty and fifty centimeters per year until it is

by the United Nations Educational, Scientific and Cultural Organization (UNESCO). They are sites for testing interdisciplinary approaches to understanding and managing changes and interactions between social and ecological systems. See UNESCO, *Biosphere Reserves in Latin America and the Caribbean*, <https://en.unesco.org/biosphere/lac> [<https://perma.cc/L6CB-QSJ8>] (last visited Nov. 1, 2022).

300. See CHILEAN NAT'L FORESTRY CORP., INFORME FINAL PROYECTO ACCIONES DE ADAPTACIÓN Y PROPUESTA PILOTO PAGO POR SERVICIOS AMBIENTALES COMUNIDAD INDÍGENA DE QUINQUÉN [FINAL REPORT OF THE QUINQUEN INDIGENOUS COMMUNITY IMPLEMENTATION PROJECT] 14 (2021).

301. See Decreto No. 79, Aprueba y Oficializa Clasificación de Especies Según Estado de Conservación, Decimocuarto Proceso, Agosto 2, 2018, MINISTERIO DEL MEDIO AMBIENTE [Decree No. 79, Approves and Officializes Classification of Species According to Conservation Status, Fourteenth Process, Aug. 2, 2018, MINISTRY OF THE ENVIRONMENT] (Chile).

302. For example, Andean temperate deciduous forest and Andean temperate resinous forest, both recognized as vulnerable by the Chilean Ministry of the Environment. See PATRICIO PLISCOFF, MINISTERIO DEL MEDIO AMBIENTE, APLICACIÓN DE LOS CRITERIOS DE LA UNIÓN INTERNACIONAL PARA LA CONSERVACIÓN DE LA NATURALEZA (IUCN) PARA LA EVALUACIÓN DE RIESGO DE LOS ECOSISTEMAS TERRESTRES DE CHILE [MINISTRY OF ENVIRONMENT, APPLICATION OF THE INTERNATIONAL UNION FOR CONSERVATION OF NATURE (IUCN) CRITERIA FOR RISK ASSESSMENT OF TERRESTRIAL ECOSYSTEMS IN CHILE] 29-30 (2015).

303. Such as food; water quality and flows; and religious and spiritual. On this classification, see Marion B. Potschin & Roy H. Haines-Young, *Ecosystem Services: Exploring a Geographical Perspective*, 35 PROGRESS IN PHYSICAL GEOGRAPHY 575, 581 (2011).

304. See JOSÉ AYLWIN & XIMENA CUADRA, LOS DESAFÍOS DE LA CONSERVACIÓN EN LOS TERRITORIOS INDÍGENAS EN CHILE [THE CHALLENGES OF CONSERVATION IN INDIGENOUS TERRITORIES IN CHILE] 93 (2011).

305. See *id.* at 94.

306. Formally declared by the State of Chile through Decree. Decreto No. 43, Declara Monumento Natural a la Araucaria Araucana, Marzo 19, 1990, MINISTERIO DE AGRICULTURA [Decree No. 43, Declares a Natural Monument to Araucaria Arauca, March 19, 1990, MINISTRY OF AGRICULTURE] (CHILE).

307. See Ministerio del Ambiente, *supra* note 301.

approximately fifty meters tall, and reaches reproductive maturity between 100 and 300 years of life. Its seed, the Ngülliw, is essential in the ways of life of this community. It has not only food and economic uses, but also cultural and spiritual purposes.³⁰⁸ Consequently, the Araucaria is a key tree for this community and for the Andean Mapuche people.³⁰⁹

The *Kmkeñ* Indigenous community and its territory are exposed to serious climate risks and have been already severely impacted.³¹⁰ For example, given the extreme heat waves that have occurred in Chile in recent years, the community and its forests are constantly exposed to wildfires.³¹¹ In fact, this was one of the areas directly affected by the severe forest fires of 2015 in Chile.³¹² This was one of the reasons why CONAF prioritized the implementation of a REDD+ pilot project with this community—to mitigate emissions from forest degradation caused by fires and promote the adaptation of this community to these extreme events.³¹³ Accordingly, this REDD+ project is divided into two dimensions: (i) ecological restoration of the forest;³¹⁴ and (ii) adaptation to reduce the socio-environmental vulnerability of the Indigenous community of *Kmkeñ*.³¹⁵

a. Ecological Restoration

The ecological restoration in this REDD+ project consists in carrying out restoration activities through reforestation with Araucaria, Lenga, and Coihue (*Nothofagus dombeyi*), all native species, in degraded and fragmented forests in the territory of the *Kmkeñ* Indigenous community affected by the 2015 forest fire.³¹⁶ This is done through seed gathering, germination, and planting of a percentage of the collection, and subsequent re-vegetation to increase carbon sequestration.³¹⁷ Specifically, the project considered the initial planting of one thousand three hundred specimens in an area of 140 hectares.³¹⁸ In addition,

308. See AYLWIN & CUADRA, *supra* note 304, at 93–94.

309. *See id.*

310. See Mauro González & Thomas Veblen, *Incendios en bosques de Araucaria araucana y consideraciones ecológicas al madereo de aprovechamiento en áreas recién quemadas [Wildfire in Araucaria Araucana Forests and Ecological Considerations about Salvage Logging in Areas Recently Burned]*, 80 REVISTA CHILENA DE HISTORIA NATURAL 243 (2007); CONAF, *Incendios Forestales En Reserva de Biosfera Araucarias: Lecciones Aprendidas [Forest Fires in the Araucaria Biosphere Reserve: Lessons Learned]* <https://perma.cc/6AQG-K7LH> (last visited Apr. 15, 2023).

311. See González & Veblen, *supra* note 310; CHILEAN NAT'L FORESTRY CORP., *supra* note 310.

312. See Nivaldo Romero, *Es el Momento en que los mapuches debemos participar en CONAF [It is Time for the Mapuche to Participate in the National Forestry Corporation (CONAF)]*, 30 CULTURA-HOMBRE-SOCIEDAD [CUHSO] 503 (2020); Figueroa Burdiles & Vergara-Pinto, *supra* note 95.

313. See CHILEAN NAT'L FORESTRY CORP., *supra* note 300, at 18–19.

314. *See id.* at 49–63.

315. *See id.* at 26–34.

316. *See id.* at 74.

317. *See id.* at 46.

318. *See id.* at 74.

the project considered the design of a payment mechanism for environmental services to promote the sustainable management of the native forest of the Indigenous community's territory, with emphasis on slowing its degradation. The integration of native trees was intended not only to accelerate forest formation and increase carbon sequestration, but also to enhance the availability of food, water, and scenic beauty, among other services provided by this forest.³¹⁹ Thus, the project expressly considered the generation of ecosystem services, valuing not only the vegetation cover, but also the socio-environmental services (or co-benefits) related to the enhancement of the forest ecosystem.³²⁰

This project was developed with the participation of the Indigenous community in each of its stages. This was done through a specific tool developed by CONAF called "Mapuche Intercultural Forestry Model" (MOFIM, for its Spanish name).³²¹ In general terms, the objective of MOFIM is to:

"Contribute to the planning and management of the *Lof Mapu* (Mapuche territory) with an intercultural methodology, incorporating in a joint and complementary way, the worldviews, knowledge and cultural practices with technical knowledge, so that the actions that are developed in [Mapuche] lands and territories are culturally relevant to the local reality of the communities, and contribute to the *Küme mongen* (good living) and to a life in harmony and balance with the environment."³²²

Based on the MOFIM methodology, during the first stage of the project design, CONAF developed a participatory process with the Indigenous community to establish the priority sites to be restored (zoning),³²³ with the objective of incorporating into the reforestation plan not only a technical perspective, such as access to areas and land capacity, but also a cultural perspective.³²⁴ This intercultural approach to planning sought to ensure not only technical success, but also respect for natural cultural spaces highly valued by the community. In this sense, the community was able to prioritize places that were especially important to them and choose the tree species to restore each of these sites.³²⁵ As a result, the participatory planning of actions ensured the acceptance and commitment of the community to the project, as well as avoiding damaging effects, such as the impact on cultural and religious sites by reforestation with species that are not culturally appropriate.³²⁶

319. *See id.* at 57.

320. For this purpose, the CONAF applied the "Restoration Opportunities Assessment Methodology (ROAM)" developed by the International Union for Conservation of Nature (IUCN) and the World Resources Institute (WRI). *See* IUCN & WRI, A GUIDE TO THE RESTORATION OPPORTUNITIES ASSESSMENT METHODOLOGY (ROAM) (2014).

321. CHILEAN NAT'L FORESTRY CORP., MODELO INTERCULTURAL FORESTAL MAPUCHE (MOFIM) [MAPUCHE INTERCULTURAL FORESTRY MODEL] 1 (2018).

322. *Id.* at 5.

323. *See* CHILEAN NAT'L FORESTRY CORP., *supra* note 300, at 53.

324. *See id.*

325. *See id.*

326. *See id.*, at 53–54.

Additionally, the project identified the ancestral practice of seed gathering of the *Kmkeñ* Indigenous community as a relevant and sustainable activity.³²⁷ Based on this recognition, the reforestation process used seeds gathered by the community.³²⁸ This also brought an economic benefit to the community, which sold the seeds (400 kilos) to CONAF for the germination and production of plants for future reforestation activities.³²⁹

Finally, the project incorporated a “Conservation Easement Contract” as a mechanism for the Payment for Environmental Services (PES) for the *Kmkeñ* Indigenous community.³³⁰ This contract has been signed directly between the Indigenous community and the United Nations Development Program (UNDP), one of the agents supporting the implementation of REDD+ in Chile through UN-REDD. The contract recognizes the environmental goods and services produced by the community through the rescue and preservation of the *Araucaria* and the native forest of its territory.³³¹ All reforestation actions have been executed³³² and conservation actions are being developed. Consequently, the *Kmkeñ* Indigenous community is already receiving payments for these environmental services. This payment by UNDP to the community is not a one-time payment. Indeed, the parties agreed to a system of periodic payments.³³³ This is important because it allows for the steady improvement of the economic conditions of the community.

b. Adaptation to Reduce the Socio-Environmental Vulnerability of the *Kmkeñ* Indigenous Community to the Impacts of Climate Change

The second dimension of the REDD+ project consisted of the recovery of eleven hectares of areas of cultural significance and ancestral use of the community: a *Ngillatuwe* and *Palihue*.³³⁴ The first is a sacred space where the *Ngillatun* takes place. *Ngillatun* is an important Mapuche ceremony where the community prays for good weather, harvests, health and abundance, among other matters of collective importance.³³⁵ The second is an area where the community practices the traditional sport of *Palín*.³³⁶ Due to the forest fires, both areas were devoid of

327. See *id.* at 57.

328. See *id.*

329. See *id.* at 70.

330. See *id.* at 66.

331. See *id.* at 67.

332. Certified by CONAF on August 21, 2021. CHILEAN NAT'L FORESTRY CORP., 100% DE LAS OBRAS EJECUTADAS EN LA COMUNIDAD DEFINIDAS SEGÚN PLAN DE TRABAJO [100% Of The Works Executed in the Community Defined by the Work Plan] 1 (2021).

333. Low Value Grant Agreement between U.N. Dev. Program and the Indigenous Cmty. of Quinquen (Oct. 2019).

334. See CHILEAN NAT'L FORESTRY CORP., *supra* note 300, at 30.

335. For an in-depth description of this ceremony see Gilberto Sánchez C., *Oraciones Rituales en Pewenche Chileno Ritos Ngillatun y Püntevüin [Ritual Prayers in Chilean Pewenche Rites: Ngillatun and Püntevüin]*, 16 REVISTA CHILENA DE ANTROPOLOGÍA 131 (2001).

336. See Ignacio Garoz & Josetxu Linaza, *Juego, Deporte y Cultura En La Infancia: El*

vegetation and the soil had been degraded.³³⁷ Consequently, in response to the community's concerns, the project considered the recovery and enhancement of these spaces through reforestation and forest conservation actions.

The project also considered actions for adaptive management of vegetation resources based on community production of native forest species for their own use. The *Kmkeñ* Indigenous community had no infrastructure for the production of plants for self-sufficiency.³³⁸ Consequently, the number of areas devoid of vegetation and/or in the process of degradation was increasing over time.³³⁹ For this reason, CONAF held workshops and courses on the production of native forest species and developed the necessary infrastructure such as community greenhouses, warehouses, and water wells for the production of five thousand plants per year.³⁴⁰ In addition, CONAF provided training on plant-health protection of native forests.³⁴¹ These courses, workshops, and trainings enabled the community to generate technical knowledge and produce plants that will help prevent the degradation of their forests and improve their forest's quality over time. The improvement of community infrastructure, access to water, and training has undoubtedly improved the social conditions of the community.

Finally, due to the serious fires that have occurred in this territory, such as the severe fire of 2015, the *Kmkeñ* Indigenous community expressed the need to be trained to prevent and take action against such events.³⁴² For this reason, the project developed adaptation actions associated with forest fire prevention and firefighting through training, equipment and clothing for the Indigenous community.³⁴³ This set of measures led to the constitution of a brigade of forest firefighters: the *Kmkeñ* First Attack Volunteer Forestry Brigade (“*Brigada Forestal Voluntaria de primer ataque de Kmkeñ*”).³⁴⁴ The creation of this brigade within the Indigenous community has had a positive impact on the protection of their forest. During the 2020 fire season in Chile, the brigade performed very well in controlling these events.³⁴⁵

Thus, the project has enhanced several human rights of the *Kmkeñ* community. For example, the project has promoted participation rights through the direct involvement of the community in all stages: zoning (planning), implementation (restoration), and follow-up (monitoring). Additionally, the improvement of infrastructure (greenhouses, warehouses, and water wells) and

Significado Del Palín Para El Niño Mapuche [Game, Sport and Culture in Childhood: The Meaning of the Palín for the Mapuche Child], 17 REVISTA DE PSICOLOGÍA DEL DEPORTE 103 (2008).

337. See CHILEAN NAT'L FORESTRY CORP., *supra* note 300, at 31.

338. See *id.* at 27.

339. See *id.*

340. See *id.* at 33.

341. See *id.* at 38–39.

342. See *id.* at 27.

343. See *id.* at 5.

344. See *id.*

345. See *id.* at 40.

the development of training have undoubtedly enhanced their social rights. Moreover, through the payment for environmental services, important progress has been made in the economic conditions of the community. But these are all improvements on their individual rights, and not on their rights as peoples.

In this sense, the procedural right of participation has been promoted, which follows mainly from the Rio Declaration,³⁴⁶ and not consultation and FPIC, enshrined in ILO Convention No. 169 and UNDRIP, which are *sui generis* procedural rights that Indigenous peoples hold in their status as such. Regarding land rights, the weaknesses noted in the Chilean Jurisdictional REDD+ have not affected the success of the project, as territorial conflicts had already been fairly resolved prior to execution of the project.³⁴⁷ After thirteen years of land conflicts, in 2007, the State partially recognized the collective land rights of the *Kmkeñ* Indigenous community.³⁴⁸ Nonetheless, this recognition of land rights refers mostly to ownership, use, and benefit from the land and resources (regularization of ownership and formal land titles) rather than control, self-government and, ultimately, sovereignty.

2. The “Carahue-Saavedra” Project

The “Carahue-Saavedra” project is a REDD+ initiative that has been developed by CONAF from 2017 to date with the financial assistance of the Global Environment Facility (GEF), and with the technical support and oversight of the World Bank.³⁴⁹ This project, located in the Araucanía Region, was executed in two areas: (i) Carahue commune, inland area; and, (ii) Saavedra commune, coastal area.³⁵⁰ For the purposes of this Article, only this last area of the project will be analyzed, since it was carried out on Indigenous territory. This area of the project is located in an ancestral Mapuche territory declared by the State as an Indigenous Development Area (or “ADI,” for its Spanish name).³⁵¹ Recognizing the status of the area as Indigenous, CONAF developed

346. See U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, paras. 10, 22, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. I), annex I (Aug. 12, 1992).

347. See AYLWIN & CUADRA, *supra* note 304, at 93–100.

348. See *id.* at 116.

349. See CHILEAN NAT’L FORESTRY CORP., *Informe de Cierre Proyecto Manejo Sustentable de La Tierra [Final Report - Sustainable Land Management Project]* 7 (2021).

350. See CHILEAN NAT’L FORESTRY CORP., *Plan Estratégico Para El Manejo Sustentable de La Tierra Comunas de Carahue y Saavedra 2021 – 2026 [Strategic Plan for Sustainable Land Management: Carahue and Saavedra Communities 2021 – 2026]* 7 (2021).

351. Decreto No. 71, Declara Area de Desarrollo Indígena la Zona que Indica [Decree No. 71, Declares the Area It Indicates an Indigenous Development Area], Marzo 10, 1997 (Chile), <https://www.bcn.cl/leychile/navegar?idNorma=70827> [<https://perma.cc/2PM9-D3C5>]. Indigenous development areas are established in Law No. 19,253 and are defined as territorial spaces in which public services must focus their actions for the benefit and the harmonious development of Indigenous people and their communities. Law No. 19253, Establece Normas Sobre Protección, Fomento y Desarrollo de los Indígenas, y Crea la Corporación Nacional de Desarrollo Indígena [Establishes Standards on the Protection,

the project in collaboration with the Indigenous communities that inhabit this territory: the *Lof Mari Kiñe*, a traditional Mapuche organization composed of fifteen Indigenous communities, comprising 320 families.³⁵²

This territory has a high level of biodiversity and endemism.³⁵³ This means that in this territory it is possible to find an important number of unique species that only exist in Chile. The environmental relevance of this area is associated with the particular flora and fauna of Lake Budi, the only salt lake in Latin America, declared a Priority Conservation Site by the Chilean State.³⁵⁴ Additionally, there are large areas of native forest of Roble, Raulí, and Coihue, in addition to wetlands with abundant vegetation, which are home to a significant number and diversity of species, particularly birds.³⁵⁵ One of the main environmental problems in this territory has been the degradation of the land and forests.³⁵⁶ This territory is heavily deforested due to fires and high anthropic pressure from agriculture.³⁵⁷ According to studies developed by CONAF,³⁵⁸ sixty-nine percent of the Saavedra commune is at high risk of deforestation, desertification, land degradation, and drought and the remaining thirty-one percent is at very high risk.³⁵⁹

Accordingly, one of the objectives of the project was the reforestation of four hundred hectares of the territory with native species.³⁶⁰ By 2021, one hundred and seventy hectares had been reforested.³⁶¹ In addition, the project implemented a monitoring and verification system, through which it was verified that the project has absorbed twenty-nine thousand tons of CO₂ to 2021.³⁶² Given the successful results that have been reported to date, the project has been expanded and is considering the restoration of three hundred and fifty additional

Promotion and Development of the Indigenous People, and Creates the National Corporation for Indigenous Development], Septiembre 28, 1993 (Chile), <https://www.bcn.cl/leychile/navegar?idNorma=30620&idParte=8639851&idVersion=2008-05-09> [<https://perma.cc/DK9Q-QCQ6>].

352. See CHILEAN NAT'L FORESTRY CORP., *supra* note 350, at 7.

353. See *id.* at 12.

354. See *id.* at 30.

355. See *id.* at 12.

356. See CHILEAN NAT'L FORESTRY CORP., REPORTE NACIONAL DE DEGRADACIÓN DE LAS TIERRAS [NATIONAL REPORT ON LAND DEGRADATION] 10 (2020).

357. See CHILEAN NAT'L FORESTRY CORP., *supra* note 350, at 32.

358. See CHILEAN NAT'L FORESTRY CORP., INFORMATIVE NOTE No. 5 - UPDATE ON THE RISK OF DESERTIFICATION, LAND DEGRADATION AND DROUGHT IN CHILE, WITHIN THE FRAMEWORK OF THE 2016-2030 NATIONAL ACTION PROGRAM TO COMBAT DESERTIFICATION (PANCD- CHILE) AND THE 2017-2025 NATIONAL STRATEGY ON CLIMATE CHANGE AND VEGETATION RESOURCES (ENCCRV, 2016). https://redd.unfccc.int/uploads/4833_18_nota_informativa_5_pc_ingles.pdf [<https://perma.cc/AM9S-D2XF>].

359. See CHILEAN NAT'L FORESTRY CORP., *supra* note 349, at 31.

360. See *id.* at 45.

361. See *id.*

362. See *id.* at 46.

hectares of forest, including payment for results to the *Lof Mari Kiñe* Indigenous communities for a six-year period through the Green Climate Fund.³⁶³

This project has been developed with the participation of the Indigenous communities. As in the Quinquén Project, CONAF used the Mapuche Intercultural Forestry methodology (MOFIM).³⁶⁴ In addition, CONAF elaborated and applied an additional framework, the “Indigenous Peoples Planning Framework” (MPPI, for its Spanish name).³⁶⁵ In general terms, the MPPI aims to “guide the process of implementation and development of the project in the territory, providing guidelines for the process to be carried out with respect for the dignity, culture, ways of life, and rights of the Indigenous peoples living there.”³⁶⁶ Both instruments establish guidelines to identify possible adverse effects on Indigenous peoples and to avoid, mitigate, and/or compensate for any such effects. Also, both provide criteria to ensure that the Indigenous communities that inhabit the territory where the project is implemented receive social and economic benefits.

Within this methodological framework, the project created, with the direct participation of the *Lof Mari Kiñe*, a territorial planning instrument to determine the conservation activities to be developed in the territory over the next five years, including the prioritization of areas for reforestation and ecological restoration.³⁶⁷ The development of this planning instrument was conducted at two scales: communitarian and individual.³⁶⁸ The first refers to a larger scale, recognizing community spaces and uses of the territory, including natural sites of cultural significance. Through the participatory zoning process, the project identified important sites such as *menokos*,³⁶⁹ *nguillatues*, and other collective spaces of interest to the *Lof Mari Kiñe*.³⁷⁰ This, in turn, allowed for the prioritization of work to protect and restore these sites.³⁷¹ Thus, the planning of the project’s territorial interventions considered not only environmental aspects, but also social and cultural, which is fundamental for management of Indigenous territories.

363. See *id.* at 83.

364. See CHILEAN NAT’L FORESTRY CORP., *supra* note 321.

365. See CHILEAN NAT’L FORESTRY CORP., MARCO DE PARTICIPACIÓN DE PUEBLOS INDÍGENAS ÁREA CARAHUE – PUERTO SAAVEDRA [PARTICIPATION FRAMEWORK OF INDIGENOUS PEOPLES IN THE CARAHUE - PUERTO SAAVEDRA AREA] 63 (2012).

366. *Id.* at 5.

367. See CHILEAN NAT’L FORESTRY CORP., *supra* note 349, at 12–14.

368. See *id.*

369. *Menokos* are sacred Mapuche sites that correspond to small bodies of water that have abundant biodiversity and are home to a large number of medicinal herbs, commonly used in traditional Mapuche medicine. For a more detailed description see Santiago Felipe Peredo & Claudia Paz Barrera, *La Monoculturalización Del Espacio Natural y Sus Consecuencias Socioculturales En Una Comunidad Rural Indígena Del Sur de Chile [The Monoculturalization of the Natural Space and Its Sociocultural Consequences in a Rural Indigenous Community in Southern Chile]*, 5 REVISTA DE ANTROPOLOGÍA EXPERIMENTAL 1 (2005).

370. See CHILEAN NAT’L FORESTRY CORP., *supra* note 350, at 8.

371. See *id.*

The second planning instrument refers to property-level plans that CONAF worked directly with individual owners.³⁷² The purpose of these plans is to establish the concrete actions that will make it possible to achieve the objectives set out more generally in the project. In particular, these instruments are thought of as a way to identify and access the different national financing mechanisms that will allow implementing actions.³⁷³ Each action of the property-level plan (also called subproject) identifies the domestic financial mechanisms that can be made available. For example, forest conservation actions and environmental education are linked with the Environmental Protection Fund of the Chilean Ministry of the Environment.³⁷⁴ On the other hand, sustainable agricultural practices are connected to subsidies to agricultural and forest landowners through the Chilean Ministry of Agriculture.³⁷⁵ Additionally, CONAF developed a proposal to adjust different national financing mechanism in the forestry sector in order to fund more actions of the property-level plans. They promote the restoration and protection of forest ecosystems within the framework of the National REDD+ strategy.³⁷⁶

The project has already developed eighty-nine property-level plans, which have been incorporated by the Municipality as a territorial planning instrument for the commune.³⁷⁷ It should be noted that in this area the members of the Indigenous communities have secure land titles. Consequently, in this case this property level approach has been relatively effective. But considering that not many Indigenous people have secure land titles, it calls into question the feasibility of this approach in other Indigenous territories. Since Indigenous rights to land have not been recognized and address in the jurisdictional dimension of REDD+ in Chile, focusing projects on individual land-owners could compromise the feasibility and success of REDD+ activities in Indigenous areas. Although the “Carahue-Saavedra” project identifies communitarian spaces, through these property-level plans it strengthens individual land ownership. This is concerning, given that individual ownership and the Western concept of property has been historically problematic for Indigenous peoples, including the Mapuche people in Chile.³⁷⁸

Finally, it is worth mentioning that the project developed relevant adaptation measures related to dune management.³⁷⁹ These coastal Indigenous communities are affected by the advance of coastal dunes towards the interior,

372. See CHILEAN NAT'L FORESTRY CORP., *supra* note 349, at 14.

373. See *id.*

374. See CHILEAN NAT'L FORESTRY CORP., *supra* note 350, at 22–24.

375. See *id.*

376. See CHILEAN NAT'L FORESTRY CORP., *supra* note 349, at 41–44.

377. See *id.* at 80.

378. See Michel Romieux, *Estructura Social y Propiedad (El Caso Mapuche)* [Social Structure and Property: The Mapuche Case], 5 REVISTA CHILENA DE ANTROPOLOGÍA 67 (1986).

379. See CHILEAN NAT'L FORESTRY CORP., *supra* note 350, at 49.

generating a desertification process.³⁸⁰ Consequently, the project considered the execution of several control actions, including the reforestation of those lands adjacent to the coast. This provides stability and moisture to the soil and combats the advance of the dunes.³⁸¹ The project has also financed the development of water management systems, specifically rainwater harvesting, which is essential for the adaptation of these communities that are increasingly affected by drought.³⁸² Both adaptation actions included technical training of three hundred and seventeen community members.³⁸³

Through the MOFIM and the MPPI, the project has been developed with the direct involvement of the Indigenous communities in all stages. In addition, Indigenous communities will receive payments for a six-year period through the Green Climate Fund and community members will be able to access national financing mechanisms for the implementation of the activities established in the property-level plans. The project has also executed adaptation actions and capacity building in dune management through reforestation and development of water management systems, advancing the social conditions of the communities. Nonetheless, these are all positive impacts on the individual rights of the *Lof Mari Kiñe* Indigenous communities, and not their collective rights as peoples.

With respect to procedural rights, no consultation was carried out and FPIC has not been obtained, although participation rights are promoted. Additionally, the project has not recognized the territorial rights of the Indigenous communities. Although the project developed a community level plan, where collective spaces and uses of the territory were identified, the project was finally implemented mainly through property plans with individual Indigenous landowners. Not only does this imply a failure to recognize collective territorial rights, it even weakens them. This is because it strengthens individual ownership and Western property rights, which directly collide with the way in which Indigenous peoples relate to the land and on which their ways of life are grounded.

380. See Santiago Barros & Juan Orlando Gutiérrez, *Control y Forestación de Dunas Costeras En Chile [Control and Afforestation of Coastal Dunes in Chile]*, 17 CIENCIA & INVESTIGACIÓN FORESTAL 41.

381. See *id.*

382. See CHILEAN NAT'L FORESTRY CORP., *supra* note 349, at 14.

383. *Id.* at 46.

TABLE 2: THE RIGHTS OF INDIGENOUS PEOPLES IN THE CHILEAN PROJECT-BASED REDD+

<i>Project</i>	<i>Actions / Safeguards</i>	<i>IP Rights</i>
Quinquén	- Direct participation of the Indigenous community in all stages of the project, including design (zoning), implementation (restoration), and follow-up (monitoring).	Participation
	- Payment for environmental services for reforestation and conservation of native forest (“Conservation easement contract” with UNDP).	Economic
	- Improvement of infrastructure in the community for reforestation activities (greenhouses, warehouses, and water wells). - Technical training on native plant production, reforestation, protection, and monitoring. Capacity building. - Training community members to prevent and fight forest fires (creation of fire brigade).	Social
	- Reforestation with seeds obtained through traditional gathering. Promotion of ancestral knowledge and practices. - Identification and environmental recovery of eco-cultural spaces: <i>Ngillatuwe</i> and <i>Palihue</i> .	Cultural
Carahue-Saavedra	- Direct involvement in all stages of the project, including design and implementation.	Participation
	- Payment for results in the reforestation of three hundred and fifty hectares with native species for a six-year period through the Green Climate Fund. - Identification of national financing mechanisms for the implementation of the activities established in the property-level plans.	Economic
	- Adaptation actions and capacity building in dune management through reforestation and development of water management systems.	Social
	- Creation of a territorial planning instrument that identifies the community spaces and uses of the territory, including sites of cultural significance, such as <i>Menokos</i> and <i>Ngillatuwe</i> . Prioritization for restoration through reforestation with native species.	Cultural

VI. CONCLUSION

Climate change affects Indigenous peoples disproportionately, and in dimensions that other groups in society do not experience. Due to the close relationship of Indigenous peoples with the land, and given that their economic, social, and cultural activities depend heavily on natural resources most exposed to climate variability and extremes, climate change affects not only their livelihoods, but their ways of life and identities as peoples. Moreover, as actual experiences have shown, responses to climate change, such as policies, plans, and projects, can also have damaging effects on Indigenous peoples. Therefore, it is essential that climate change governance effectively protects and promotes the human rights of Indigenous peoples.

In this context, Indigenous Peoples' Organizations (IPOs), Non-governmental organizations (NGOs), and scholars expressed concern regarding REDD+ as a climate change mitigation and adaptation mechanism through forest governance. In attention to these concerns, during the development of this mechanism at the international level, the United Nations Framework Convention on Climate Change (UNFCCC) placed special emphasis in the elaboration of social safeguards in order to protect the human rights of Indigenous peoples. These safeguards have gained progressive relevance over the years, to the point that their compliance must be reported by developing countries implementing REDD+ activities to the UNFCCC in a clear, complete, and timely manner through national communications. These UNFCCC decisions have in turn been complemented by other types of norms that establish social safeguards designed to protect and promote the human rights of Indigenous peoples. For example, multilateral programs such as UN-REDD, the Forest Carbon Partnership Facility (FCPF), and the Global Environment Facility (GEF) aim to provide technical and financial support to developing countries so that they can successfully implement the REDD+ mechanism, while also establishing safeguards on the rights of Indigenous peoples.

These safeguards have been recognized as a clear advance of international environmental norms regarding the rights of Indigenous peoples. But these safeguards are far from being perfect and have significant limitations. Mainly, these safeguards have a weak engagement with UNDRIP (which has been only "noted", following the wording of the Cancun Agreement) and favor the protection of Indigenous peoples' individual human rights rather than their *sui generis* collective rights deriving from their status as peoples. The international REDD+ regime promotes: Indigenous peoples' participation as "stakeholders," rather than consultation and Free, Prior and Informed Consent (FPIC) as peoples; traditional knowledge rather than collective cultural rights; and land tenure security rather than Indigenous territorial rights (customary and collective).

Following the social safeguards established in the international REDD+ framework, Chile has placed special emphasis on respecting the human rights of Indigenous peoples in the domestic development of REDD+ activities and projects. As described and analyzed in Part V, both the jurisdictional and project-based dimensions of REDD+ in Chile have respected and promoted participatory, social, cultural, and economic rights of Indigenous peoples. In concrete terms, both projects analyzed in this study have been developed jointly with the Indigenous communities in all phases: design, implementation, and follow-up. Likewise, the projects, through climate adaptation actions (such as the control of fires and desertification), have enhanced the living conditions of the communities. In turn, both projects ensured payment to the Indigenous communities for forest protection, conservation, and reforestation, improving their economic conditions.

In contrast, the REDD+ projects in Chile largely failed to acknowledge the collective rights of Indigenous peoples, which are fundamental to their existence, well-being, and cultural identity as peoples. Indeed, the operationalization of REDD+ in Chile has not promoted important procedural rights such as FPIC, or certain substantive rights, such as land rights. For example, neither the Chilean Jurisdictional REDD+ nor the project-based dimension has recognized Indigenous peoples' territorial rights. At the jurisdictional level, land issues have been restricted to tenure. At the local level, the "Quinquén" project did not address land rights, and the "Carahue-Saavedra" project strengthened individual rights of ownership of Indigenous people over land, which collide directly with the ways of life of the Indigenous communities.

From 2021, the Chilean National Forestry Corporation (CONAF) in collaboration with the Food and Agriculture Organization of the United Nations (FAO) -and under the financing of the Green Climate Fund- is executing the "+Bosques" project.³⁸⁴ The objective of the project, which considers a six-year implementation and an investment of sixty million U.S. dollars, is to execute actions for the restoration and sustainable management of twenty-five thousand hectares of native forest in six regions of Chile and the reduction of two hundred and fifty thousand tons of CO₂ emissions by 2030.³⁸⁵ As stated in the +Bosques website, thirty percent of the project will be developed with Indigenous communities.³⁸⁶

In this sense, considering that the execution of the +Bosques project will implement forest management actions in various Indigenous territories across six regions, it is essential that the current Chilean REDD+ national framework addresses Indigenous peoples' territorial rights in a clear and timely manner. It is also important for Chile to move from general participation of Indigenous peoples as stakeholders, to FPIC. Both of these collective rights, land rights and FPIC, directly relate to Indigenous peoples' right to self-determination. Consequently, these rights are critical to ensure the cultural survival of Indigenous peoples and their identities as peoples.

If the Chilean REDD+ national framework were to recognize Indigenous land rights; establish strategies, programs, and plans to resolve land conflicts; provide Indigenous peoples control over their lands; and expand FPIC significantly, REDD+ in Chile would consolidate as a mechanism that is mutually supportive of the UNFCCC, UNDRIP, and ILO Convention No. 169. The domestic operationalization in Chile, in turn, would not only have a positive impact on the individual human rights of Indigenous peoples, but also their collective rights as peoples.

384. FOOD & AGRIC. ORG. OF THE UNITED NATIONS, *Proyecto +Bosques Inicia Sus Actividades En Chile Para La Gestión Forestal Contra El Cambio Climático [Project +Bosques Initiates Activities in Chile for Forest Management against Climate Change]*, <https://www.fao.org/redd/news/detail/es/c/1392562> [<https://perma.cc/7UYX-7BJH>] (last visited Nov. 1, 2022).

385. *Id.*

386. CHILEAN NAT'L FORESTRY CORP., *+Bosques Juntos Contra El Cambio Climático [+Forests - Together against Climate Change]*, <https://www.enccrv.cl/proyecto-mas-bosques> [<https://perma.cc/Y5MD-XMZP>] (last visited Nov. 1, 2022).