

Legal Aspects in the Implementation of CDM Afforestation and Reforestation Projects: The Chilean Experience

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Executive Summary

The Chilean DNA is located within the Board of Ministers of the National Commission for the Environment, CONAMA (Comisión Nacional del Medio Ambiente), hierarchically its highest body. Within the Board, the DNA is assigned to a specific Steering Committee presided over by the Executive Director of CONAMA and includes representatives from 13 relevant ministries.

Most afforestation and reforestation (AR) projects go through the voluntary incentive program established by Law Decree (DL or Decreto Ley) 701 (Statute of Forestry Promotion), which together with its complementary regulations, acts as a central permitting system for this activity in Chile. AR activities undertaken on fragile soils or degraded lands, and AR activities carried out by subsistence farmers on lands preferentially suited for forestry or on degraded lands are the most important activities that benefit from this system.

AR projects are regarded as intrinsically good for the development of Chile. Thus, only projects for which this intrinsic goodness is questioned have to go through the environmental impact assessment system (EIAS). If a CDM AR project has to go through the EIAS, all the sectoral permits that have an environmental content will be assessed. If the project obtains a favourable environmental qualification, it will be presumed as assisting in achieving sustainable development, and vice versa.

When the project is not required to submit to the EIAS, it will have to comply with all applicable sectoral permits to be considered as assisting in achieving sustainable development. AR projects that do not go through the EIAS process can obtain their favourable environmental qualification resolution by showing that the National Forestry Corporation, CONAF (Corporación Nacional Forestal) has approved the corresponding forestry management plan if they have registered for the benefits of the DL 701, or by just submitting the project to CONAMA in case they have not applied under DL 701. In the latter case, using the EIA guidelines for CDM AR projects should be a widely acceptable way of reporting environmental impacts.

There are no major governmental plans to engage in CDM, as most of government's efforts are channelled to the forest subsidy established by DL 701. The effect of the carbon market on forestry rates in Chile is not likely to be considerable and will not modify the structure of the activity in a significant way. Most CDM AR projects in Chile will be implemented unilaterally and most of them will be performed by traditional big firms planting mostly pine or eucalyptus on land of small and medium-scale farmers under different types of lease agreements. Title to land in case of small and medium-sized parcels may, however, be a problem in some cases. Moreover, since enforcement of environmental and forestry regulations and private sector compliance appear to be more efficient in Chile than in some other countries in the region, CDM AR projects will not necessarily increase compliance and enforcement in the Chilean forestry sector. Since Chile has been foresting and reforesting approximately 100,000 hectares annually for the last fifteen years, it might be difficult to prove that CDM AR projects would not have happened in the absence of certified emission reductions (CERs).

While the CDM is not expected to have a very big impact in AR practices in Chile, it could have a positive impact on areas where the national incentive has not been enough for forestry projects to develop, such as reforestation of forestland in the Chilean Patagonia. The CDM may also act as a pivot for the establishment of native forest plantations and plantations based on forestry systems other than monocultures.

The right to a CER is not defined in Chilean law and there are no plans to define this special right through national legislation. However, there are two important precedents in Chilean legislation regarding this kind of right. One is the offset program based on the 1992 emission standard for particulate matter.

The second is a pending Bill of Law on tradable emission permits which establishes a system of tradable emission permits that is very similar to the concept of CERs. Theoretically, greenhouse gases could be covered by this system if regulation to that effect is adopted. In the meantime, the right to a CER can be defined sufficiently between parties to a project, even in the absence of a clear legal definition, as some non-CDM AR projects show in Chile. For instance, one of the first projects to have their emissions reductions validated and afterwards sold to an international project participant was the Chacabuquito hydroelectric project in central Chile in 2003.

The right to a CER can be characterized as a private property right which is enforceable by its holder against all parties and which is exercised over an intangible and movable good (the CER). Therefore, the right to a CER is a “real right” (it can be exercised against all parties) over an incorporate and movable good (the credit) which gives its holder the rights to use it, receive its benefits and sell it. A contract over the right to CER would be classified as a contract over a movable right as it is exercised over a movable thing, the credit over the emission reduction.

The owner of the land is the owner, through accession, of CERs that might be established as a consequence of the emission reductions produced in its land. They would be considered “civil fruits” as opposed to “natural fruits”, which are the ones given by nature. Nevertheless, when the landowner has transferred the right of usufruct over a thing which might generate the emission reduction (as in the case of forests), then the CER will be owned by the usufruct holder.

Chilean legislation has a system of pre-existing rights over the land represented mainly by the rights of indigenous peoples, long-time occupants, and mining property. Potential conflicts with such interests may thus arise, unless due diligence identifies these entitlements in good time. Other persons occupying or using the land on which an AR project will be implemented usually do not hold any rights over the land. Users or occupants of adjacent parcels of land do not have any special legal rights.

AR activity in Chile is dynamic and has a long history. Thus, only minor adjustments are necessary for the regulations to conform to CDM AR requirements for public comment and socio-economic assessment and analysis. The DNA may be in a position to establish a specific procedure for addressing the public comment requirement, where some of its elements might come from the procedure established for Environmental Impact Studies. In similar terms, the requirement for socio-economic impact assessment might be bridged by a special requirement by the DNA which could follow the national certification scheme CERTFOR in its principles dealing with social issues. Finally, to simplify monitoring procedures, CDM AR projects that are not carried out under DL 701 should also develop management plans that would include a monitoring plan, based on CONAF guidelines.

Acronyms and Abbreviations (in Spanish)

CNE	Comisión Nacional de Energía – National Energy Commission
CONAF	Corporación Nacional Forestal – National Forestry Corporation
CONAMA	Comisión Nacional del Medio Ambiente – National Commission for the Environment
CORFO	Corporación de Fomento de la Producción – Production Promotion Corporation
CORMA	Corporación Chilena de la Madera – Chilean Wood Corporation
CPL	Consejo Nacional de Producción Limpia – National Council for Clean Production
DL 701	Decreto Ley N° 701 de Fomento Forestal – Law Decree N° 701 for Forestry Promotion
EFL	Environmental Framework Law
EIAS	Environmental Impact Assessment System
INFOR	Instituto Forestal – Forestry Institute
INDAP	Instituto de Desarrollo Agropecuario –Institute for Agriculture and Livestock Development
MIDEPLAN	Ministerio de Desarrollo y Planificación – Ministry of Development and Planning
MINAGRI	Ministerio de Agricultura – Ministry of Agriculture
MINREL	Ministerio de Relaciones Exteriores – Ministry of Foreign Affairs
MINVU	Ministerio de Vivienda y Urbanismo – Ministry of Housing and Urban Development
SAG	Servicio Agrícola y Ganadero – Agricultural and Livestock Service

Responses to Questionnaire

A. General Questions

1. Administrative and regulatory set-up

- a. Which government institutions are responsible for:
 - i. forestry;
 - ii. land; and
 - iii. the environment?

Which law(s) is/are the source(s) of the mandates of these institutions? Are these institutions national or local institutions? In the case of local institutions, please indicate which local level (e.g., state, provincial or district) they refer to and describe their relationship with related national institutions (i.e., institutions with related or similar mandates).

i. Forestry

The main government institutions involved directly with the forestry sector are the National Forestry Corporation and the Forestry Institute.

The National Forestry Corporation or CONAF (Corporación Nacional Forestal) is currently a private legal entity regulated by its own bylaws,¹ and in the absence thereof, by the Civil Code. It is subordinate to the Ministry of Agriculture. The Corporation's mission is to contribute to the conservation, enhancement, management and good use of the country's forestry resources, and especially in participating and collaborating with the administration and development of the state protected wildlife areas (SPWA), consisting of national parks, forest reserves and State-owned forests. Despite the private law nature of CONAF, the exercise of many public tasks have been assigned to it by various laws,² and these include the functions of promoting and controlling legislation and administration of these areas, and the prevention, as well as the fighting, of forest fires. Therefore, its features are basically those of an enforcement agency. CONAF is a national institution that also operates at the regional level through 13 Regional Directorates which are subordinated to the central level.³

Since November 1998 the National Congress has been discussing a draft law which aims to create a Forestry Undersecretary within the Ministry of Agriculture. This institution would have powers regarding the establishment of forestry policies and regulations and in their coordination and monitoring, powers which are now being exercised generally by the Ministry. CONAF is supposed to become a public service in charge only of the administration of the SPWA and fire management where forests are involved. Nevertheless, there is no consensus to date regarding this legislation.

¹ On February 2, 1970, the bylaws that created the National Forestry Corporation were approved. The Agriculture and Livestock Service (SAG), the Institute for Agriculture and Livestock Development (INDAP), the Production Promotion Corporation (CORFO), and the Agrarian Reform Corporation (CORA) participated in this initiative. Currently, the former institutions with the exception of CORA, constitute the main members of this Corporation.

² Such as the modifications done to the 1931 Forestry Law (Ley de Bosques) and the 1974 Law Decree for Forestry Promotion (DL 701, Decreto Ley de Fomento Forestal).

³ It should be noted that Law N° 18.348, promulgated in 1984, established CONAF as a public organization, that is, as an autonomous State organization, of indefinite duration, with separate legal status and capital of its own, and reporting to the Government through the Ministry of Agriculture. However, this law is still not in force, since it is subject to the publication of a Supreme Decree which dissolves CONAF with its current private status as a corporation, and this has not yet occurred.

The Forestry Institute or INFOR (Instituto Forestal) has its origins in a technical assistance agreement entered into by the Government of Chile with a Special Fund of the United Nations and the Food and Agriculture Organization (FAO) in 1961 for the purpose of “providing the country with an entity with technical personnel specialised in forestry matters to collaborate with the development of the sector in every aspect”. In 1965 INFOR was officially created by the Government of Chile by means of Supreme Decree N° 1416 of the Ministry of Justice, as a private corporation administered by a Board of Directors and an Executive Director. Its founding members are CORFO (Production Promotion Corporation) and INDAP (Agricultural and Livestock Development Institute). Its central quarters are in Concepción, and it has five other regional offices throughout the country. INFOR is a technological institute of CORFO, therefore it is subordinate to the Ministry of Economy. Nevertheless, part of its budget comes from the Ministry of Agriculture.

INFOR’s mission is to:

“research and generate information about sustainable use of forestry resources and ecosystems, their derived products and services, and transfer it to public and private entities, contributing in this manner to the economic, social and environmental development of the country”.⁴

There is no legal or official relationship between INFOR and CONAF. Nevertheless they have cooperation agreements for specific topics. For example, since 1996 CONAF participates in the Permanent Working Group for the Sustainable Management of Forests in Chile headed by INFOR. Its objectives are the establishment of a discussion forum for the design and implementation of mechanisms for the sustainable management of forests in Chile. Other institutions involved are CONAMA, CORMA, and the Ministry of Foreign Relations.

ii. Land

The following governmental institutions deal with land: The Ministry for Housing and Urban Development (MINVU), the Ministry of Agriculture (MINAGRI), the Ministry of National Goods, 13 regional governments and the town governments or municipalities (*municipalidades*).

MINVU is in charge, together with the regional and local governments, of the planning and regulation of land use. It mainly has to do with urban zones. The corresponding powers in these matters are granted by the Construction and Urbanism Law (*Ley General de Urbanismo y Construcciones*, LGUC) and its complementary Regulation (*Ordenanza de Urbanismo y Construcciones*, OGUC). MINVU is a national authority which acts at the central and regional level. At the central level it deals with the national policy for urban development and regionally, through 13 Regional Ministerial Secretaries which act, together with the corresponding regional and local governments, in the elaboration of Zoning Plans.

Regarding non urban land, including agricultural land and land suitable for forestry activities, the powers are vested in MINAGRI together with MINVU. The regulations that establish these powers are article 55 of the LGUC and Law-Decree N° 3516, from 1980, which regulates the division of rural lands. MINAGRI is a national authority which, for these issues, acts through the Agricultural and Livestock Service (both at the central and regional levels). This Service is a functionally decentralized public service whose objective is mainly to contribute to the development of the agriculture and livestock in the country, through the protection, maintenance and improvement of animal and plant health; protection and conservation of renewable natural resources that have an impact on the agricultural production of the country, and on the control of agricultural supplies and products subject to regulations by legal standards and rules.⁵

⁴ www.infor.cl/

⁵ Law N°18.755 of 1989, as modified by Law N°19.283 of 1994.

Finally, the Ministry of National Assets administers all of the public lands of the country. The corresponding legislation is Law-Decree N° 1939, which establishes rules for the acquisition, administration and disposal of public (government) assets and property (Establece Normas sobre Adquisición, Administración y Disposición de Bienes del Estado). It is a national authority which acts in a central and regional level, through 13 Regional Ministerial Secretaries.

iii. The environment

The environmental authority is the National Commission for the Environment (Comisión Nacional del Medio Ambiente or CONAMA) created by 1994 Law N° 19.300 or the Environmental Framework Law, EFL (Ley de Bases Generales del Medio Ambiente). It is a functionally decentralized public authority and answers directly to the office of the President of the Republic, through the Ministry of the Presidential General Secretariat (Ministerio Secretaría General de la Presidencia). Among other functions, the Commission proposes environmental policies to the President of the Republic, reports periodically on the compliance and enforcement of the current legislation with regard to environmental issues, and acts as the body for consultation, analysis, communication and co-ordination on issues related to the environment.

CONAMA is a national institution which has the following bodies: Board of Ministers (Consejo Directivo), Executive Directorate (Dirección Ejecutiva), Advisory Council (Consejo Consultivo), and the Regional Commissions for the Environment (Comisiones Regionales del Medio Ambiente, COREMAs). The highest ranking body is the Board of Ministers, constituted by the following Ministries: Secretary General of the Presidency, Economy, Public Works and Transport, Agriculture, National Goods, Health, Mining, Housing and Urban Development, Education, Defence, and Foreign Affairs.

The administration of CONAMA lies with the Executive Director. The Executive Director is appointed by the President of the Republic and is supported by several Departments. CONAMA has a Regional Director in each region of the country who provides the technical support for the corresponding regional political entities: the COREMAs.

The environmental legislation in Chile recognises existing legal and technical competencies in other public bodies and services. The EFL gives CONAMA the power to coordinate and integrate the environmental management of the Government. Therefore, CONAF, the main institution in the forestry sector, maintains its environmental powers.

b. Is there a central permitting system for afforestation and reforestation (AR) projects? Otherwise, how would an AR project implementer go about obtaining the necessary permits?

The general rule in Chile is to allow the development of AR activities without requiring any permit or management plan. Nevertheless, in practice most AR projects go through the voluntary incentive program established by DL 701 (Statute of Forestry Promotion), which together with its complementary regulations, acts as a central permitting system for this activity in Chile. It regulates some of the most important forestry activities: management, cutting, exploitation and afforestation/reforestation. More specifically, this statute seeks to: a) regulate forest activity on “lands preferentially suitable for forestry” and on “degraded lands”⁶, promoting these activities, especially for small land owners; and b) preventing the degradation of and protecting and recovering lands within the national territory. AR activities executed in conformity with DL 701 and its complementary regulations receive important subsidies.

⁶ Article 2: “Degraded Lands”: Those dry lands, and those lands classified as Irrigation Class IV by the Tax Authority (Servicio de Impuestos Internos) when determining their agricultural value, ranging from moderate to severe erosion and that are susceptible of being repaired through soil conservation practices or activities.

In order for AR activities to be in conformity with Law Decree (DL or Decreto Ley) 701 and its complementary regulations, a CONAF-approved management plan is required. The qualification of a certain land as “lands preferentially suitable for forestry” is the basic condition to obtain the benefits of this legislation. This qualification must be requested by the owner of the land from CONAF, who approves this submission in order to be considered under the Statute for Forestry Promotion. This authorization creates rights and duties for the owner. The rights have to do with tax exemptions and the possibility of obtaining a benefit for the development of afforestation/reforestation activities in certain grounds. This benefit consists in the payment by the Government of a percentage of the total costs of these activities. The corresponding duties are to submit a management plan to CONAF and comply with it. Non-compliance may give rise to several sanctions.

c. Is there a designated national authority (DNA) in the host country? Is the DNA part of any of the institutions described above, or any other institution? What is the scope of the powers of the DNA (e.g. Is it empowered to look into the terms of the contractual arrangements between or among the project participants and other contracts relating to the project, such as contracts with other occupants of the land?)?

Yes there is. The DNA is located in CONAMA. More precisely, the DNA is located at the Board of Ministers, hierarchically the highest body within CONAMA. This Board includes the 13 ministers and the Executive Director of CONAMA. Within it, the DNA is commissioned to a specific Steering Committee presided over by the Executive Director of CONAMA and includes a representative of the Ministry of Foreign Affairs, the Ministry of Agriculture, the National Energy Commission, the National Council for Clean Production and, if needed, a representative of a Ministry with specific powers over a particular project. The DNA is only concerned with the sustainability and the voluntary character of projects. It does not create additional political institutions or attributions.

The DNA was formally created through an agreement of the Board of Ministers (Acuerdo N°216/2003 from May 27, 2003). This agreement has the legal status of an Administrative Act and does not contemplate the establishment of additional technical staff. The Steering Committee will count on the technical staff of each Ministry to review the projects submitted to the DNA. This submission must be addressed to the DNA and include the following information:

- Full description of the project, including a schedule for its operation.
- Statement submitted under oath about its voluntary participation in the CDM.
- A copy of the Environmental Qualification Resolution (Resolución de Calificación Ambiental, RCA) or the environmental sectoral permits issued, as appropriate.
- A letter from the Regional Director of CONAMA establishing that there are no claims pending against the RCA.

d. If there is no DNA, are there plans to establish a DNA in the next 12 months?

See above.

e. How would you describe the relationship of the DNA with the institutions described in 1.a, as well as other agencies charged with the regulation of a CDM AR project?

As expressed before, the DNA includes CONAMA, the Ministry of Foreign Affairs (MINREL), the National Energy Commission (CNE), the Ministry of Agriculture (MINAGRI) and the National Council for Clean Production (CPL). The institution responsible for forestry, CONAF, is part of the Ministry of Agriculture, and the Ministry is part of the DNA. The same happens with CONAMA, the institution in charge of setting environmental policy in Chile. The Ministry of Agriculture is responsible for rural land. Of the institutions described in 1.a, only the Ministry of Housing, responsible for urban land, is not part of the DNA. However, as there has not been an AR project proposed for urban lands, their relationship thus far has been almost inexistent. Apart from CONAF and CONAMA, there are no other agencies which would potentially regulate CDM AR projects.

2. Overview of the forestry sector

a. How is the term “forest land” defined in the country of study?

The term “forest land” is not explicitly used in Chile. Instead, the closest expression corresponds to “lands preferentially suitable for forestry”. These are defined as “all those grounds that due to climate and soil conditions should not be plowed permanently, independently of whether they are covered by vegetation or not, excluding those grounds that might be used for intensive agriculture, fruit growing, or cattle ranching without suffering degradation”. The legal body that provides this definition is the Forest Law of 1931.

A special decree passed in 1974 (DL 701), promoting forestry activity in Chile, and modified in 1979 defines forest as “a piece of land with vegetable formations in which trees predominate and that extend for at least 5,000m², with a minimum width of 40m, with a tree top greater than 10% in arid and semiarid areas, or greater than 25% in more favourable conditions”. This definition is being slightly challenged by the proposed Native Forest Law, currently being studied by Congress. In it, instead of speaking about the predominance of “trees”, this proposed law talks about the predominance of “arboreal species at any development stage”. This intended change has been the source of much debate where ecologists support this modification and business, industry and governmental officials reject it.

Apart from these legal definitions, the forestry sector commonly distinguishes between native and plantation forests, and uses as definitions the ones provided by the forestry cadastre funded by the World Bank and done by CONAF and CONAMA between 1994 and 1997. In it, native forest is defined as an ecosystem in which the arboreal stratum is constituted by non planted native species with a height taller than 2m and a top cover greater than 25%. In the same study plantation forest is defined as follows: “it corresponds to a forest whose arboreal stratum is dominated by exotic or native planted species.”

b. In general terms, how are forest land, forest-related activities and forest products regulated in the country of study (e.g., Is there a separate law governing the sector, or are forestry provisions found in a more general law, such as an environment or natural resources code)? How does this system compare with the way the sector is regulated in other countries in the region?

Forestry legislation in Chile includes several pieces of legislation which regulate different aspects of the forest sector, such as conservation and preservation of forests, promotion and development of forestry activities, and environmental requirements. Nevertheless, only two of them are of major practical significance: The forest law of 1931 (D.S. N° 4363) that establishes regulations for forest use and protection and DL 701 from 1974 (modified by Law N° 19.561) with its various regulatory by-laws that laid the bases for large-scale private investment in exotic plantation forestry and regulates management of native forests (technical by-law N° 259 from 1980). Due to pressures on the native forest coming from plantations, substitution, and other activities, in 1992 a Native Forest Bill was first presented for discussion. Since then, a series of attempts have been made to pass a law whose aim would be to encourage the conservation and sustainable use of native forests, but none has been successful to date. The absence of this law is seen by many as one of the major deficits of Chile in terms of environmental management.

The regulatory framework for forestry in Chile is broadly similar to that of other countries in the region, although there are obvious differences with the federal regimes of Brazil or Argentina, in that decisions over natural resources in these federal states are often devolved to provincial authorities or shared to a certain extent between different jurisdictions.⁷ As stated in the previous paragraph, Chile has not yet enacted separate legislation dealing with native forests, as is the case in Argentina, where there is a clear

⁷ A full comparative analysis with the forestry legislation of other countries in the region clearly exceeds the scope of the present project. Even the classic distinction between federal and unitary systems of government may become somewhat blurred when considering that unitary systems, such as Chile's, have tended to devolve more powers to the regions and local authorities.

distinction between planted or cultivated forests and native forests, and each regime tends to stress different aspects. Thus, commercial or planted forestry regulations mostly deal with promotion aspects of the industry, while native forest legislation stresses conservation and sustainable use of forestry resources.

In Brazil, local, state and federal authorities exercise powers under Brazil's federal constitution over forestry activities. The Federal Forestry Code of Brazil was originally enacted in 1965, and with successive amendments, covers a number of issues such as the establishment of restrictions on the exercise of private property rights in the interests of conservation, the definition of areas subject to conservation requirements, and categories of protected parks or forests which may be administered by local, state or the federal governments. The Forest Code also establishes mandatory minimum requirements as regards forest to be left standing on private land, where this may be subject to forest clearance or extractive activities.⁸

In Colombia, forestry has been regulated since 1974 under the Renewable Natural Resource Code, a comprehensive legal instrument which covers all natural resources in an interdependent fashion. Title III of Part VIII (articles 202 to 205) distinguishes between forests whose primary purpose is for the extraction of timber and associated forestry products, and forests whose primary purpose is to serve as protection for other natural resources and productive forests. The case of Colombia is however an exception in that few other countries in Latin America have opted for a comprehensive, all-inclusive legal regulation of natural resources.

In Paraguay, forestry is regulated under legislation dating from the early 70s, with recent amendments establishing strong restrictions on deforestation.⁹ The forestry law deals with extraction of timber and other forest products and requires reforestation in order to maintain the resource base, as well as preservation of 25% of existing native forests on private lands.

It should be stressed however, that the situation as regards enforcement of forestry legislation and the institutional capacity to manage forests and the forestry sector, may vary considerably from one country to another. Although comparative data regarding enforcement is not readily obtainable, information obtained on an "off the record" basis would indicate that enforcement of environmental and forestry regulations and private sector compliance is more efficient in Chile than in some other countries in the region.¹⁰

Passing on to environmental legislation, the Environmental Framework Law (EFL, Law N° 19.300, from 1994) includes several provisions which have to do with the forestry sector:

- a) Environmental Impact Assessment: together with its 2002 by-law DS N° 95, they establish the obligation of an environmental impact assessment for certain projects, such as:
 - Forestry development or exploitation projects on fragile soils, in native forest areas, cellulose, paper and paper paste industries, chipping plants, wood products manufacturing plants, and sawmills, all of industrial size (article 10 m), EFL). The 2002 by-law determines what should be understood by "forestry development or exploitation projects" and "industrial size".
 - Execution of work, programs or activities in national parks, national reserves, natural monuments, wildlife reserves, nature sanctuaries, marine parks, marine reserves or in any other area under official protection, in the cases allowed by the respective legislation (article 10 p), EFL).

⁸ Código Forestal (Law 4771 of 15/09/65). See Gusmão Câmara, Ibsen, Planop de Ação para a Mata Atlântica, Fundação Mata Atlântica, Sao Paulo, 1991.

⁹ Forestry Law 422 of 1973, as amended by Law 2524 of 2004.

¹⁰ Interviews with Forest Certification experts at IRAM, the National Standards Institute of Argentina.

- b) Management Plans: the EFL requires management plans for the use and profit of natural resources, which must establish certain environmental conditions: maintenance of water currents and ground conservation; maintenance of landscape value; and protection of vulnerable species (articles 41 and 42).
- c) Wildlife Protected Areas: the EFL establishes the obligation for the State to manage a National System for Wildlife Protected Areas and permits the creation of private protected areas (articles 34 and 35).¹²
- d) Classification of Vulnerable Species: the EFL establishes the obligation for the Government to define a procedure to classify fauna and flora species according to their conservation status, and to keep an up to date inventory.¹³

In relation to other drivers of the forestry sector in Chile, forest certification is an important reference. In recent years, forest certification as a private, market-driven governance instrument has been established in the Chilean forest sector. Both system-oriented (ISO 14001) and performance-oriented (FSC) certification schemes are applied. By the end of 2002, 60% of plantation forests were certified under ISO 14001 (CORMA 2003), whilst 13% were FSC-certified (ICEFI 2003). A third, national forest certification system (CERTFOR), was developed and has recently been implemented. These certification standards are neither mandatory nor binding, but market-driven, i.e., aimed at gaining access to export markets worldwide and also at obtaining a more environmentally responsible image within and without Chile.¹⁴

- c. If the majority of forest land is owned by the government (national or local), does the law allow afforestation or reforestation projects to be undertaken by private persons, including individuals, corporations and communities on government-owned forest land? What would the terms of such an arrangement be?**

In Chile, most land corresponding to “lands preferentially suitable for forestry” is in the hands of the private sector. Nevertheless, the possibility of State land being used by the private sector for AR projects through concessions and leasing goes back to the Forest Law of 1931. Nowadays, it is the Ministry of National Goods that is responsible for granting concessions over State land with the potential of being forested. Concessions must be granted to Chilean legal entities and have a pre-established land use objective.¹⁵ The conditions of these concessions are determined case by case. Concessions can be granted through public or private, national or international, bids. Under special circumstances, the granting can be done directly. For this to happen, the corresponding administrative procedure might be initiated by any natural or legal person, Chilean or otherwise, wishing to apply for a concession.¹⁶

¹¹ Forestry development or exploitation projects are understood as those that involve any form of utilization or final harvest of the wood products of the forest, its extraction, transport and deposit in gathering or transformation centres, as well as the transformation of such products in the land. Industrial size forestry development or exploitation projects are understood as those that extend continuously over more than twenty hectares on an annual basis for regions I to IV, over more than two hundred hectares on an annual basis for regions V to VII, including the Metropolitan Region, over more than five hundred hectares on an annual basis for regions VIII to XI, over more than one thousand hectares on an annual basis for region XII, and that are executed on: a) fragile soils, these being understood as those susceptible to severe erosion due to limiting intrinsic factors, such as slope, texture, structure, depth, drainage, or others, in accordance with the variables and decision criteria stated in article 22 of D.S. N° 193 of the Ministry of Agriculture; or b) land covered by native forests, these being understood in accordance with the pertinent regulation.

¹² The necessary regulation for the establishment of a private protected areas system has not yet been adopted.

¹³ As in the previous case, the necessary regulation has not been adopted yet.

¹⁴ For instance, it is in Chile’s interest to prevent negative media campaigns from ecological pressure groups, especially in countries that import wood products from Chile (e.g., USA, the EU and Japan).

¹⁵ There are no official guidelines on establishing these land use objectives.

¹⁶ It is to be noted, however, that the State owns lands only up to the north of the country (desert) and in the extreme south (Patagonia, fireland), where conditions for AR are quite extreme and unlikely to be considered as suitable for CDM projects (i.e., the growth rate of the trees would be too slow to permit carbon capitalization).

When foreign, a person adjudicated a concession will be obliged to constitute a company under Chilean Law, with whom the contract will be executed. The adjudication of the concession in no way exempts the concession holder from the obligation of obtaining all permits or authorizations needed for the project under current law. Concessions are given in exchange for some kind of payment. In the case of direct concessions, the payment is determined by the Minister of National Goods after being advised by the Alienation Special Commission who has previously done a commercial evaluation of the good. In the case of bids, this commission will include in the bidding bases the minimum rent that the concessionaire will have to pay. Only in special cases may they be given for free: when the adjudicated concessionaire is part of the State or when the other juridical persons are non-profit initiatives. Concessions can last up to 50 years and they can only be transferred wholly, but not in part. Currently the Production Promotion Corporation (CORFO), an entity subordinate to the Ministry of Economics, is promoting the use of the CDM for reforesting land previously destroyed by fire in the Aysen Region, in the Chilean Patagonia.¹⁷

d. In an AR project, how are benefits (such as harvesting, recreational or hunting rights) required by law to be shared with other parties who are not project participants, i.e.:

- i. with the landowner (if the landowner is not the one implementing the AR project);**
- ii. with other persons occupying or using the land; and**
- iii. with users or occupants of adjacent parcels of land?**

Are existing laws sufficient to protect the interests of these other parties?

The right to private property is very strong in Chile and therefore landowners usually have the right to all benefits of the land they own. Therefore, they will generally have the right to harvest and to obtain all the fruits from their land. Nevertheless, hunting rights are granted by a licence from the Agriculture and Livestock Service when it is required. The owner of a piece of land is not exempted from this requirement.

Regarding other persons occupying or using the land, usually they will not hold any rights over the land. Indeed, the Civil Code establishes that “tolerance of certain acts that do not constitute a right does not grant possession or any title to acquire by prescription” (article 2499). As such, in Chile there is no general provision that establishes this situation in a standardized way and therefore benefit sharing will depend on the terms of agreement as expressed in the contract.

Finally, users or occupants of adjacent parcels of land do not have any special legal rights. As expressed by one of the interviewees, adjacent people have no right whatsoever over their land.

Under these conditions, CDM AR investors will have to negotiate with forest owners, who might or might not be the land owners, the terms for benefit sharing, including CERs. This does not mean that there are no problems in this area. For example, friction between indigenous communities, living within and close by forested areas owned by large forestry firms, has been a worrisome issue for the last ten years or more.

e. Based on official records, are there major plans to host afforestation and reforestation projects in the country in the next 12 months?

There are no major governmental forestry plans in view, as most of this effort is channelled through the forestation subsidy established by DL 701. According to data provided by INFOR (Forestry Institute),

¹⁷ This project is one among many that the TodoChile Aysén agency is promoting to increase private investment in the Aysén Region, with the objective of generating a Region that is seen as safe, attractive and sustainable. According to written information, preliminary research has determined that one hectare of plantation in this zone could sequester between 203 and 244 tons of CO₂ in the total rotation period: 35 to 44 years. Other projects include tourism development, fishing lodges, aquaculture developments, and others. For more information see www.inviertaenaysen.cl

during 2003 approximately 57,000 hectares were forested during 2003, mainly with *pinus radiata* and eucalyptus, and 63,000 were reforested with the same species, giving a total of about 120,000 hectares. Data since 1994 shows that the average annual AR figure is 96,000 hectares, varying yearly from 80,000 to 120,000. Thus, it can be expected that during 2004 and 2005 AR projects will result in the planting of approximately 100,000 hectares annually, mostly in terms of *pinus radiata* and eucalyptus.

3. Overview of land-related legislation

- a. **In rough terms and only to the extent they pertain to lands that, based on their legal classification¹⁸, are permitted to have afforestation and reforestation projects:**
 - i. **Please describe the system of land ownership and the rights that attach to land ownership (e.g., right to exclude others from entering the land, right to sell the fruits of the land, including certified emission reductions (CERs), and rights of succession to land), including the system of respecting pre-existing rights over the land (e.g., rights of indigenous peoples, rights of long-time occupants that could ripen into ownership).**

The system of land ownership and the rights that attach to land ownership

The legal basis for the system of land ownership in Chile is established by the Political Constitution (CPE) in its article 19 N° 24, which includes “the right to property” as one of the fundamental rights of every person. The Constitution establishes few limitations to this right, one of them being the conservation of environmental heritage. Nevertheless, these limitations cannot constitute a deprivation of the right as this can only happen as part of an expropriatory legislation in the public or national interest.

Besides the Constitution, the Civil Code regulates property rights in its different variations. It is defined as a “real right” (as opposed to a “personal right”)¹⁸ over a corporate thing, to use and dispose arbitrarily, as long as it is not against the law or the right of any other person. There are three inherent attributions to this right: to use, benefit from and dispose of property.

The owner of the land also has the right to own its fruits through “accession”. In this sense, the owner of the land is also the owner of the forests inside the land. Therefore, forests have the category of “immovable goods” or real property as they can not be moved from one place to another. Nevertheless, they can become “movable goods” with anticipation in order to facilitate the legal traffic of these species. In this sense, the owner of the land can separate it from its forests and can therefore sell the right to the forest independently.¹⁹ Another important issue is that the owner of the land is also the owner of its subsoil, regardless of the exception introduced by the mining statute, as described below.²⁰

Finally, the owner of the land is also the owner, through accession, of CERs that might be established as a consequence of the emission reductions produced in its land. They would be considered “civil fruits” as opposed to “natural fruits”, which are those fruits given by nature (articles 643 to 648 of the Civil Code). Nevertheless, when the landowner has transferred the right of usufruct over a thing which might generate

¹⁸ The advantages of a real right against a personal right come from its absolute character, which means that it can be exercised erga omnes, against all third parties or “the whole world”. In contrast, a personal right can only be exercised against the debtor.

¹⁹ A legal problem might arise if the land owner wishes to sell independently from the land, the forests inside it, for a different purpose than harvesting. The Civil Code considers that the forest is adhered to the land, and therefore are both considered as one unity. It only considers the possibility of separating them into two different goods when selling the wood of the forest. A legal option for the landowner who wants to transfer the rights over the forest but not the property of the land would be to constitute the right of usufruct over the forest, as explained in our answer 3.a.ii. Nevertheless, this option would not transfer the property over the forest and would have the limitations described in the previous answer.

²⁰ The legal basis for this exception is the Political Constitution, as described below under Mining Property.

the emission reduction (as in the case of forests), then the CER will be owned by the usufruct holder (see answer 3.a.ii).

Lands can be private or public property. Public lands are owned by the State. State property can be divided into two categories: fiscal property or national goods for public use.²¹ Public lands belong to the first category which are part of the State's own heritage and are subject to private law rules unless specifically established by special legislation. The management of fiscal property is under the charge of the President of the Republic through the Ministry of National Goods. In Chile there are no lands without an owner as the Civil Code establishes that any land without another owner is State property, in accordance with the doctrine of eminent domain. Private lands can be owned either by natural or legal entities. Legal entities can be either for profit (companies) or non-profit (corporations and foundations) organizations.

Finally, the Chilean legal system considers inheritance as one of the legal forms to acquire property. There are two systems to inherit: either through will (statement of the owner determining who the heir of his property is) or through law, in case there is no will. In both cases there are certain persons (family members) that must inherit part of the property.

System of pre-existing rights over the land

Chilean legislation has a system of pre-existing rights over the land represented mainly by the rights of indigenous peoples, long-time occupants, and mining property.

■ Rights of indigenous peoples.

The 1993 Law N° 19.253 regulates indigenous peoples' rights, including the legal status of indigenous lands. These lands cover both historically occupied lands and those currently owned by indigenous peoples. Indigenous lands are protected by legislation and cannot be sold, seized, be the subject of mortgage nor to acquisition by prescription unless the transaction is between indigenous communities or persons of a same ethnic group. Moreover, indigenous lands owned by communities can not be rented nor given to third parties for their use or administration. Lands owned by indigenous individuals can be rented or given to third parties for their use and administration, but only for a maximum period of 5 years, and with the authorization of the National Corporation for Indigenous Development, CONADI. Indigenous land can be exchanged for other non-indigenous lands of the same commercial value, also with the authorization of CONADI.

Indigenous people's rights include their right to develop community activities in sacred lands or other historical territories for cultural or recreational use in case they are fiscal property. Also, they have the right to participate in the management of wild protected areas which are inside of Indigenous Development Areas (areas created by the Government to focus public initiatives for the development of indigenous peoples).

■ Rights of long-time occupants

Chilean legislation considers the possibility to acquire property rights by small possessors of land. This is a special statute that aims to regularize the possession of small land property when there is no legal title allowing acquisition of property through prescription.

This Statute allows the Authority to register these lands in favour of its irregular possessors, giving them the required quality to acquire land through a short prescription of one year.

²¹ National goods for public use are those whose use belongs to every person of the Republic, such as streets, plazas, bridges, roads, the adjacent sea and its beaches (article 589, Civil Code).

This system is not an exception to Article 2499 of the Civil Code as it only gives the status of regular possessor to those that already have the status of irregular possessors.²²

■ Mining Property

In Chile, mining activities have their own legal Statute that is based upon the principle of freedom and protection of such activities. The Political Constitution and also the Mining Code, in its article 1, establish that the State has absolute, exclusive, inalienable and imprescriptible ownership of all mines, including natural guano deposits, metal bearing sands, salt deposits, coal and hydrocarbon deposits and fields and other fossil substances except surface clays, regardless of property rights of natural or legal individuals over lands wherein they may be found. Any person is, however, entitled, under Paragraph 2 of this Title, to dig test pits and to remove samples in the search for mineral substances, as well as to seek a concession for the search for, or mining of, substances over which, under the law, concessions may be granted, with the sole exception of individuals mentioned in Article 22.²³

Article 2 of the Mining Code defines a mining concession as a real and immovable right, distinct and independent from property rights over the surface tenements, although owned by the same individual. Said rights may be claimed against the State and any other person and may be mortgaged or subject to other real rights and, in general, all acts and contracts. A concession is subject to the same civil laws as all other immovable properties, except insofar as contrary to the provisions of the organic constitutional law on mining concessions of this Code. A mining concession may be granted for exploring or exploiting and extracting minerals.

The Mining Concessions Law (Ley Orgánica Constitucional de Concesiones Mineras) gives the mining concessionaire wide authority for exploration and/or exploitation among which is the right to occupy surface land or land to develop necessary activities, such as mining works, centres for mineral storage, extraction plants, electric stations and lines, constructions and rooms for workers.

Nevertheless, the Mining Code limits the concessionaire's rights in order to prevent damage to the owner of the land or for public interest. It is in this context that authorizations, reports and licenses are required. Regarding forests, the relevant licenses are those required to develop mining activities in protected areas, such as national parks, national reserves or national monuments. When giving this permit, conditions for the conservation of these areas will be established.

- ii. Short of ownership over land on which CDM AR projects can be implemented, what other rights can be granted over such land (e.g., in the case of government-owned land, licenses, concessions, and in the case of privately-owned lands, servitudes, leases)? Please describe each right briefly (e.g. duration of the right, entitlements and obligations that come with the right, fees, if any, paid for the enjoyment of the right, documentation of the right). Which of these rights can co-exist with other land-based rights (e.g., license with an easement)?**

Chilean legislation allows someone else than the owner of the land to undertake AR activities. We should distinguish between:

■ the case of state-owned land

Chilean legislation allows the use of public lands by private persons. Law N° 19.039 establishes the applicable rules for the management of the State's property and considers, besides the free transfer of the

²² The difference between irregular possessors from those who occupy land merely by tolerance is that the first ones occupy land with the "animus" of an owner (ánimo de señor y dueño), but lack a "fair title" (justo título) or good faith, which are the two basic requirements for regular possession. Instead, those who occupy land merely by tolerance recognise the property right of a different person over the land.

²³ This article refers mainly to public officers.

property for value, the following legal concepts that can be relevant for AR projects: concessions, rents and destinations.

Concessions. The Ministry of National Assets can grant concessions over public properties to Chilean legal persons for a pre-determined objective. The concessions are allocated either through a national or international, public or private bid or, in certain cases, directly.²⁴

Concessions are generally granted for valuable consideration, but exceptionally they can be granted for free in favour of municipalities (local towns), public institutions or non-profit private entities. Concessions last during the agreed period of time but in any case, for not more than 50 years. They can be transferred but only to Chilean legal persons and the new concessionaire will have to comply with all conditions established for the first concessionary. Also, the Ministry of National Assets must authorize the transfer. The concession ends when the term expires, when mutually agreed upon between the Ministry and the concessionaire, when it is impossible to use the concession for the object it was granted for, and for other reasons established in the corresponding agreement.

Rents. State property can be used and benefited from by private persons through a lease agreement. The minimum annuity is 8% of the valuation established for land tax, which is generally lower than the market value of the land. Only in certain and exceptional cases can the annuity be lower. The maximum term to rent state property is 5 years for urban and 10 years for rural property, except in the case of educational institutions or other legal persons that assign the property to national or regional interest objectives, where it can last up to 20 years. Nevertheless, the Ministry of National Assets can end the contract with advance notice of a year. Rents can be transferred or modified only with the authorization of the Ministry.²⁵

Destinations. This figure is used when a public institution requires the use of State property for the development of its functions. The Ministry of National Assets assigns the property to that institution which must use it for the specified purpose. In the case of AR projects this figure could be applicable if the head of the project is a public institution and the development of the project is part of its functions.

Alienation. State property that is not considered essential for the fulfilment of the State's objectives can be subject to alienation. They can only be transferred for value, except when they are in favour of municipalities (local towns), public institutions or non-profit private entities.

■ the case of privately-owned lands

Chilean civil law considers several legal rights, different from property, which can be applied in order to develop AR projects. These are: usufruct (or "enjoyment"), leasing or renting.

Usufruct. This is a real right or entitlement to enjoy a thing with the obligation to conserve its original form and substance, and to return it to the owner at the end. This right allows one to enjoy natural and civil fruits of the thing; its maximum term is the death of the person who is entitled to enjoy the right or 30 years if the rights holder is a legal person. Therefore, this right is not subject to succession. It can be created by contract or will. If it relies on real property (land) it includes the right to enjoy forests with the only obligation to conserve its substance. Concerning what practice counts as "conserving the substance of the forest", it is important to note that in Chile there is a strong division between plantation forests and native ones. This is reflected by forestry legislation. The Native Forest Bill, still unofficial but used in practice to

²⁴ The general rule is the public nature of the bid, as the Chilean administrative legal system is now strongly based on several principles such as publicity, transparency and access to information. Exceptionally, its nature will be private. When the concession is allocated directly, the Ministry will have to justify this decision.

²⁵ The main difference between concessions and rents is that through the first one the Ministry of National Goods grants the concessionary the right to use, benefit from, and dispose of, certain public properties. Instead, rents are more limited as they only give the right to use the property.

serve as a reference point for forestry discussions, does not deal with plantation forests. These are regulated mostly by DL 701. Whereas under plantation forest the essence of the forest is almost always linked to industrial agriculture, the Law of Native Forest distinguishes between three different kinds of native forest: conservation, protection, and multiple-use. Following current plantation practice in Chile, intensive cultivation of a single species can be expected in the case of AR projects. Therefore, it is expected that they will be able to conserve its substance under more invasive harvesting regimes than if they were native forests.

Rent. Contract in which one person is obliged to grant the use of a thing and the other is obliged to pay a price for this use. Chilean legislation distinguishes between the rent of urban or rural land. Regarding rural land there are special requirements such as the obligation to protect and conserve natural resources existing on the corresponding land.²⁶

Therefore, we can conclude that Chilean legislation regarding land property allows the implementation of AR projects by the owner of the land and by third parties through other rights over the land to be planted, different from ownership, for both private and public lands.

iii. Does this system of rights described above accurately represent what exists on the ground, or are certain forms of entitlement not given legal recognition?

In Chile, the claims of indigenous peoples have been expressed mainly in the context of forestry projects when these have been developed in or near ancestral land over which they do not have any property rights or possession. These claims might not be founded on legal rights, even though the Indigenous Law includes as indigenous lands those lands that have been occupied and possessed historically by indigenous people.

Another claim of the indigenous peoples is the stronger application of article 19 of the Indigenous Law, that recognises the rights to commonly practiced activities in sacred and cultural places of public property. The Indigenous Communities have required the transfer of these lands for free, and their claim is to accelerate the process and to put these places under the protection of the National Monuments Law.

iv. If there is a gap in the law, how could this complicate CDM AR projects in the country of study?

Not applicable.

b. Will land need to be reclassified and land use plans need to be changed in order to accommodate CDM AR projects?

In Chile, the land use plans refer to urban lands and the norms regarding land use change are established to subdivide and develop rural land. Therefore, land will not need to be reclassified and the land use plans will not need to be changed in order to accommodate CDM AR projects.

²⁶ The main difference between usufruct and rent is that the first one is a real right (therefore enforceable against all parties or *erga omnes*) and the second one generates a personal right (enforceable only against the debtor). Furthermore, usufruct allows the use and enjoyment of the thing and renting only allows a limited use of the thing that is rented.

4. Review of carbon sequestration projects in the country (or in a country in the same region applying a similar legal system)

- a. Please describe past (if any) and present carbon sequestration projects in the country (or in the region applying a similar legal system, in case there were no such projects in the country of study), including which stakeholders participated in their development and implementation. Please focus on AIJ or PCF projects, if there are any in the country of study. If the projects are too numerous to describe, please select those that are, in your best judgment, most relevant to this study.

There has been no CDM AR project implemented in Chile so far. Nevertheless, there was one project that tried to obtain CERs but failed due to timing problems. More specifically, the project was implemented before COP 9 and therefore did not adjust to the rules and procedures adopted on that occasion. There are several potential projects that have been presented as suitable for obtaining CERs under the CDM scheme. The table that follows summarizes this information.

Project name	Project type	Project status	Stakeholders	Surface	Species	Expected CO ₂ e	Information
FAS (Forestación Asociativa Sustentable)	Afforestation	To be planted from 2003–2008	- Forestal Terranova - Small landowners	6,000ha			www.terranova.com/Terranova/tecr0001.nsf/Noticias/noticia01?OpenDocument
Green Patagonia	Afforestation	To start in 2005	- CMPC Forestry - Fundación Chile	10,000ha	Ponderosa Pine	5 million in 35 years	www.sofofa.cl/ambiente/Bonos%20carbono/Cartera%20de%20Proyectos%20Nacionales.doc
SIF I	Afforestation	Planted in June 2003	- Sociedad Inversora Forestal S.A. - Fundación Chile	2,562ha	Radiata Pine and Eucalyptus Globulus	1,6 million up to 2014	www.fundacionchile.cl/fc/conferencia_V/docs/presentacion_02.pdf
SIF II	Afforestation	To start in 2005	- Sociedad Inversora Forestal S.A. - Fundación Chile	30,000ha	Radiata Pine and Eucalyptus Globulus	10 million in 25 years	www.fundacionchile.cl/fc/conferencia_V/docs/presentacion_02.pdf
Chilean Patagonia	Reforestation	Uncertain	CORFO	330,000ha with potential	Probably Ponderosa Pine	Between 203 and 244 per hectare in 40 years	www.inviertaenaysen.cl
Proyecto de Forestación y Captura de Carbono en el MDL para Pequeños Propietarios de la Región de Los Lagos	Afforestation	Not yet formalized	INFOR, INDAP and small landowners	6,000ha	Not clear	Not clear	www.prochile.cl/servicios/medioambiente/noticia_destacada.php

- b. What are the most important lessons that can be learned, if any, from these carbon sequestration projects, which can be applied to CDM AR projects, especially as they relate to the issues set out in this list?**

None of these projects have received the approval of the Designated National Authority or celebrated a contract for the sale of CERs. Project SIF I intended to obtain CERs but could not be registered because it was implemented too early, before clear guidelines were in place. Thus, this provides us with at least one clear lesson: correct timing. Besides this lesson, according to Aldo Cerda, Sustainable Forestry, Industry and Tourism Manager, Fundación Chile (www.fundacionchile.cl), there are three obstacles to the development of CDM AR projects in Chile. In first place, there is uncertainty concerning plantation dynamics, including growth rate, environmental effects, fire risks, etc. Then there is the issue of additionality. As Chile has been foresting and reforesting for the last fifteen years approximately 100,000 hectares annually, it might become difficult to prove that CDM AR projects would not have happened in the absence of CERs. Thirdly, it appears as if CDM AR projects are only possible for big companies, as projects involving small-scale farmers who have organized themselves have had difficulty in articulating their proposals.²⁷

- c. If no carbon sequestration projects have been implemented in the country, which countries' experience could the country of study benefit from the most?**

As in the case of Argentina, the experience in Bolivia may be of interest, from a legal and institutional perspective.

- d. In your opinion and based on your research, what types of projects will be implemented under the CDM? Are unilateral CDM projects planned? Which stakeholders (e.g., government, private sector, communities, NGOs) will have an active role in the planning, design and implementation of CDM projects (both unilateral and bilateral)?**

As expressed before, there is a strong AR tradition in Chile. Moreover, the incentive for forestation backed by the legal instrument DL 701 is very strong. Under these conditions, it is probable that the effect of the carbon market on forestry rates in Chile will not be considerable and will not modify the structure of the activity in a significant way. Today, all big forestry companies are aware of the carbon market in terms of both sequestration and abatement. We think that most CDM AR projects in Chile will be implemented unilaterally and that most of them will be performed by traditional big firms planting mostly pine or eucalyptus.²⁸ This does not mean that big firms will be planting on land of their own, as recent experience shows that they are planting on land of small and medium-scale farmers under different types of lease agreements. There are two reasons for this: a) tenure of large areas of land might produce political and image problems due to potential conflict with indigenous groups, and b) after changes in DL 701 during 1998, intended to focus assistance towards small and medium landowners, the only way big companies can obtain the corresponding benefits is by planting through schemes that involve these actors.²⁹

²⁷ See Aldo Cerda's interview on 25/10/2004 at www.sustentable.cl/portada/noticias/4348.asp

²⁸ Nevertheless, it is worth mentioning that the Ministry of Agriculture, through CONAF, INDAP and INFOR, is promoting the forestation of 6,000 hectares in the south of Chile that would benefit approximately 2,000 families. They expect the initiative, "Forestación y Captura de Carbono en el Mecanismo de Desarrollo Limpio para Pequeños Propietarios de la Región de Los Lagos", to promote peasant forestation, to produce high quality wood, to protect and conserve degraded lands, and to produce CERs. For further information, see www.indap.cl/Noticias/2004/10/25/20041025_ministro.htm

²⁹ We are grateful to Dr. Stepan Uncovsky, GTZ Chile, for alerting us to these issues.

Important actors in CDM AR projects in Chile are the following:

- National Commission of the Environment (CONAMA): Designated National Authority and institution in charge of environmental governance in Chile;
- National Forestry Corporation (CONAF): institution in charge of approving forestry projects and of administering the forestation incentive under the DL 701;
- Fundación Chile: important research and development institution with potential CDM AR projects presented at CarbonExpo 2004 in Cologne; and
- Big forestry companies.

B. The CDM Project Cycle

5. CDM AR project design and formulation

- a. **What substantive standards (e.g., species of trees to be used, types of land on which projects can be implemented), if any, are used for AR project activities:**

- i. **as required by law?**

AR projects that involve the execution of activities in national parks, national reserves, natural monuments, wildlife reserves, nature sanctuaries, marine parks, marine reserves or in any other area under official protection³⁰ must submit their project proposal to the Environmental Impact Assessment System (EIAS) and wait for the corresponding positive Environmental Qualification Resolution before they can proceed with it.³¹ If AR projects do not fall into the above categories, they can be executed without further requirements. If an AR project wished to receive the benefits of registering for the DL 701, it can only be implemented on land classified as “lands preferentially suitable for forestry” and “forestable lands”, as defined before. In order for CONAF to classify the land, the owner has to present a request detailing the surface to be forested and containing a technical study of the forestation project developed by a qualified Forestry Engineer or an Agricultural Engineer. CONAF has to give an answer within 60 days of the submission being presented. If there is no reply, the request is deemed to be approved. Although there are no restrictions on tree species, native forest AR projects can receive higher subsidies than those using alien species.

- ii. **used in practice although not required by law (e. g., in development agency funded projects)?**

As most AR projects make use of the financial benefits of the DL 701, the projects usually have to comply with the corresponding requirements, which are directed at recovering degraded land and helping small farmers. More specifically, in order for AR projects to qualify for the DL 701 incentives the land must meet one of the following conditions: be fragile, be in the process of desertification, be degraded, with the potential of being eroded by wind forces, or any kind of “lands preferentially suitable for forestry” in the hands of small farmers.

³⁰ An “area under official protection” for the purpose of the EIA System is defined by article 2 a) of the EFL by-law SD N° 95. This definition determines that these areas are those that are geographically delimited, established by a formal act of the corresponding authority and whose objectives are the conservation of biodiversity and the environmental heritage or the preservation of nature. Therefore, indigenous lands are not included in this concept as they have not been established for these purposes.

³¹ As required by article 10 p) of the EFL.

- b. Under existing laws, what kind of study, at the minimum, must a proponent of an AR project undertake? Do the requirements for such study provide guidelines for an environmental impact analysis? A socio-economic impact analysis?**

All AR projects in Chile, as long as they submit to the system of DL 701, require the preparation of a “Forestry Management Plan” and its approval by CONAF. They are aimed at maximizing the benefits of using the natural resources provided by a specific piece of land, making sure that these resources and their ecosystems are protected. These plans basically consist of detailed information about the management of the AR project plus a basic and limited description of how the environment will be protected. There are no guidelines for an environmental impact analysis and there are no social elements in a “Forestry Management Plan”.

- c. If there are guidelines:**

- i. Are the guidelines for an environmental impact analysis different from those that are required by law for an environmental impact assessment?**
- ii. Are the guidelines for a socio-economic impact analysis different from those that are required by law for a socio-economic impact assessment?**

See above and following answers.

- d. If there are no guidelines, what default technical guidelines could the project participants follow, which, in your opinion, would be acceptable to the host country?**

Since 1997, in Chile there has been a well established Environmental Impact Assessment System (SEIA) that regulates the environmental impacts of new projects. AR projects do not have to go through this system, but we think that using the guidelines for this process should be a widely acceptable way of reporting environmental impacts when associated with CDM projects. In relation to social impacts of projects, as there is no established methodology in Chile, we think there is more flexibility in their reporting. Nevertheless, the certification initiative CERTFOR (see 2.b) incorporates nine principles in its sustainability standard that are verified before the certification is granted. Of these, three deal with social issues. Principle 5 states that forest management responsibility includes respecting traditions and rights of nearby communities, and contributing to capacity development that increases their quality of life. Principle 6 states that ethnic traditional knowledge should be considered in the use and management of land and resources. Finally, Principle 7 establishes that forest management responsibility includes respecting the rights of direct and indirect forestry workers, compensating them appropriately and justly, and safeguarding their health and security.³² Additionally, MIDEPLAN has a standardized procedure for assessing social impacts in public projects and investments that can be used for this purpose.

- e. How is the term “significant impact” defined by the host country’s law? Is this the criterion that triggers the need for an environmental and/or socio-economic impact assessment, or does some other criterion trigger this requirement? Is there a list of projects that require an environmental and/or socio-economic impact assessment? If there is such a list, are afforestation and/or reforestation projects included in such list?**

The EFL and its 2002 by-law DS N° 95 do not define the term “significant impact”, but establish the obligation for any project that causes “environmental impact” and that is included in the list of its article 10³³ to submit an environmental impact assessment. Article 2 k) of the EFL defines “environmental impact” as any alteration to the environment caused directly or indirectly by a project or activity in a particular area.

³² Indirect forestry workers include those working in the associated industries, such as transport, professional services, hotels, etc.

The EIA system is, therefore, the procedure used to determine whether the environmental impact of a given activity or project is consistent with the applicable legislation. It is implemented by the National Environmental Commission (CONAMA) when more than one region is involved or by the respective regional Commission (COREMA) when only a single region is involved.

The projects listed in article 10 can only be executed if they have been previously environmentally assessed, either by the submission of an Environmental Impact Study (EIS) or an Environmental Impact Declaration (EID). The general rule is to submit an EID, which is defined in article 2 f) as a descriptive document of an activity or project intended to be carried out, or the modifications that will be introduced to it, submitted under oath by the corresponding Head, whose content allows the competent organ to assess whether its environmental impacts adjust to the current environmental legislation.

An EIS is defined in article 2 i) as the document that describes in detail the characteristics of a project or activity intended to be performed or its modification. It shall give reasoned background for the prediction, identification and interpretation of its environmental impact and describe the action or actions to be executed to prevent or reduce its adverse negative effects. It is reserved for projects of greater magnitude or that have more potential to adversely affect the environment or any of its components. Article 11 of the EFL requires that any project which generates or presents the following effects, characteristics or circumstances must submit an EIS:

³³ Article 10: The following are the projects or activities susceptible to causing environmental impact, at any of their phases, that shall be subject to the environmental impact assessment system:

- a) Aqueducts, dams or reservoirs, and siphons that are subject to the authorization established in article 294 of the Water Code, significant dams, drainage, desiccation, dredging, defence or alteration of water bodies or natural watercourses;
- b) High voltage power transmission lines and their substations;
- c) Electric power generating plants with a capacity of over 3 MW.
- d) Nuclear reactors and facilities, and appurtenant installations;
- e) Airports, bus, truck and railway terminals, railroads, service stations, highways and public roads that may affect protected areas;
- f) Ports, navigation routes, shipyards and maritime terminals;
- g) Urban or tourist development projects in areas not included in any of the plans mentioned in the following letter;
- h) Regional plans for urban development, inter-district plans, district zoning plans, sectional plans, industrial and real state projects modifying the same or carried out in areas deemed latent or saturated;
- i) Mining development plans, including coal, oil and gas projects, including exploration, prospecting, exploitation, processing plants and debris and waste disposal, as well as industrial extraction of aggregate, peat or clay;
- j) Oil, gas, mining pipelines and other similar projects;
- k) Manufacturing installations, such as metallurgical, chemical, textile, building materials, equipment and metal product manufacturers, tanneries, all of industrial size;
- l) Agroindustries, slaughterhouses, husbandry, dairy and animal breeding plants and stables of industrial size;
- m) Forestry development or exploitation projects on fragile soils, in native forest areas, cellulose, paper and paper paste industries, chipping plants, wood products manufacturing plants, and sawmills, all of industrial size;
- n) Hydro-biological resources intensive development projects, culture, and processing plants;
- o) Production, storage, transportation, disposal of, or habitual reutilization of toxic, explosive, radioactive, flammable, corrosive or reactive substances;
- p) Environmental sanitation projects, such as sewage and drinking water systems, water or solid waste of domestic origin treatment plants, sanitary fills, underwater carriers, liquid or solid industrial waste treatment or disposal systems;
- q) Execution of work, programs or activities in national parks, national reserves, natural monuments, wildlife reserves, nature sanctuaries, marine parks, marine reserves or in any other area under official protection, in the cases allowed by the respective legislation; and
- r) Massive application of chemical products in urban areas or rural zones contiguous to inhabited centres or watercourses or masses that might be affected.

- a) Risk to human health. The Regulation uses various parameters to determine whether such a risk exists. The parameters generally refer to compliance with liquid effluent and air emission standards.
- b) Significant adverse effects on the quantity and quality of renewable natural resources, including soil, water and air.
- c) Relocation of human communities or significant alteration of living systems and customs of population groups.
- d) Proximity to inhabited or protected areas or resources or to an area defined as being of environmental value.
- e) Significant alteration of the tourist or scenic value of an area.
- f) Alteration of monuments and sites with anthropological, archaeological or historical value and, in general, those monuments and sites which form part of the cultural heritage of the country.

Therefore, all activities or projects which are not included in article 10 are not subject to the EIA system. The only forestry related projects included in this list are those identified by letters m) and q):

- **Forestry development or exploitation projects** on fragile soils, in native forest areas, cellulose, paper and paper paste industries, chipping plants, wood products manufacturing plants, and sawmills, all of industrial size. As “**Forestry development or exploitation projects**” are defined as “those that involve any form of utilization or final harvest of the wood products of the forest, its extraction, transport and deposit in gathering or transformation centres, as well as the transformation of such products in the land”, we can conclude that AR projects are not usually included in the list of projects that have to submit to the EIA system.
- Execution of **work, programs or activities** in national parks, national reserves, natural monuments, wildlife reserves, nature sanctuaries, marine parks, marine reserves or in any other area under official protection, in the cases allowed by the respective legislation. In the case an AR project plans to be developed in any of these areas it will have to submit to the EIA system. And, if any of the circumstances included in article 11 exist, then the AR will require an EIS.

Regarding socio-economic impacts, as we already mentioned, there is no established system in Chilean legislation that includes it for forestry projects. Nevertheless, Chilean environmental legislation is based on a wide concept of the environment (global system constituted by natural and artificial elements of physical, chemical or biological nature, socio-cultural and its interactions, in permanent modification by human or natural action and that rules and conditions the existence and development of life in its different manifestations), which includes socio-economic elements. Thus, many environmental impact reports include sections regarding socio-economic impacts. Moreover, important projects have been deeply questioned about these impacts and their resolution has been an active ingredient in negotiations, including the private sector, local communities, local governments and central government. Examples include sanitary landfills, hydroelectric dams, an aluminium smelter, and others. The function of CONAMA and COREMAs in these negotiations has been more political than technical and has focused more on being an arbiter or mediator than on providing or requiring methodological precision in the evaluation of social-economic impacts.

f. Which government institution approves the environmental impact assessment? The socio-economic assessment? The mitigation plan to address projected negative impacts?

The EFL gives CONAMA the function to implement the EIA system. Under this scheme CONAMA and COREMAs are in charge of the coordination of the process of assessment of the EIS and EID. Every institution of the Government that has an environmental function participates in this process. All the sectoral permits that have an environmental content should be assessed and given through the EIA system. That means that every EIS and EID includes a section where it demonstrates that the project fulfils the environmental requirements of all the sectoral permits legally applicable to the project.

Regarding the requirement of a mitigation plan to address potential negative impacts, the project proponent that must submit to an EIA must include in the EIS or EID a plan of mitigation, reparation and/or compensation, designed to minimize the adverse effects of the project. It must also include a description of risk prevention and accident control measures.

The purpose of mitigation measures is to avoid or diminish the adverse effects of a project or activity. The goal of the reparation and/or restoration measures is to repair one or more of the environmental components or elements to a quality similar to the one existing prior to the occurrence of the environmental damage, or if this is not possible, to re-establish its basic characteristics. Finally, the purpose of compensation measures is to produce or generate an alternative positive effect which offsets environmental damage.

- g. What types of AR projects are recognized by the host country's law (e.g., agroforestry, monocultures or mixed industrial plantations, forest landscape restoration projects, for instance, on degraded or protected lands, community forest projects, other AR projects with focus on timber production, biomass energy, watershed management etc.)?**

Under Chilean legislation, there is no limit to the type of AR projects that can be implemented. Nevertheless, in practice AR projects are included in what is called "plantation forests". Plantations correspond to forests (both exotic or native) planted in any of the following kinds of land: "lands preferentially suitable for forestry" (defined in question 2.a); and "forestable lands", which are those that not having the quality of "grounds preferentially suitable for forestry" can be the object of plantations, and therefore benefited by the bonus system established under DL 701 (degraded lands are included in this category).

- h. Are these AR project types treated differently under the law, e.g., in terms of incentives, requirements? Do the regulations make certain project categories easier/more difficult, cheaper/more expensive to implement?**

The general rule in Chile is to make no difference between AR projects. Nevertheless, if AR projects intend to receive the DL 701 benefits, this incentive mechanism establishes a differentiated system of bonuses and tax exemptions to forestry activities developed on certain lands. The differentiation depends on the activity that is being developed. The most important activities which benefit from the subsidy or bonus are:

- AR on fragile soils, in "ñadis" or in areas in the process of desertification;
- AR on degraded lands and activities to recover those lands; and
- AR done by small farmers on lands preferentially suitable for forestry or on degraded lands.

This bonus consists in the payment of a percentage of the total costs (75% to 90%) of these activities by the Government. Regarding tax exemptions, DL 701 establishes the following benefits:

- that incomes generated by the sale of forestry products can be excluded from income tax;³⁴ and
- the exclusion from land tax applicable to lands with plantations benefiting from this subsidy.

³⁴ We are of the opinion that the sale of CERs can be considered as a sale of forestry products. Therefore, we think that incomes generated by the sale of CERs can also be excluded from the income tax. This is coherent with the interpretation followed throughout the document that considers CERs as part of the fruits forest owners can benefit from.

6. Negotiations of the CDM AR contract

- a. Is the right to a CER defined in national law? If so, please describe how it is defined and how the law seeks to protect the right (E.g., Under which type of property, if any, does the right to a CER fall? What form of registration within the country is required, if any, to protect the right (e.g., annotation on the title to the land, recording in a special registry)?).**

No, it is not. Nevertheless, there are two important precedents in Chilean legislation regarding this kind of right. The first one is 1992 Supreme Decree N° 4 from the Ministry of Health which establishes emission standards for particulate material (PM), applicable to stationary sources in the Metropolitan Region. This regulation created an offset program which is based on agreements between the sources where one of them obliges itself to reduce its level of emissions in the same amount that the other is increasing it. This system is managed by the regional health authority (Servicio de Salud Metropolitano del Ambiente) which is in charge of authorizing the agreements and keeps a registry of the sources and its emissions.

The second case, which is a system of tradable emission permits, is not yet in force but is a bill currently under discussion in the National Congress. Although it has major priority from an environmental policy perspective, in broader political circles it is not high on the agenda. The project, called Ley de Bonos de Descontaminación, creates a legal framework for the development of a new market where the reduction of emissions of certain pollutants can be traded. The mechanism is as follows. The authority will be able to allocate obligatory annual emission quotas to different sources of a determinate basin. These sources will be able to generate emission credits if at the end of the year their emissions fall below their allocated quotas and sell them to sources whose emissions have surpassed their quotas. The system recognises the right to these reductions over which private property rights are constituted. In this respect, these credits are very similar to CERs, the major difference being the scale of application: whereas for CERs the scope of application corresponds to the global atmosphere, for Chilean credits the scope is locally demarcated.

The project details the needed characteristics for the management of transactions: security, transparency, liquidity, and price continuity. These should be present irrespective of whether the transactions occur directly between sources, electronically, or through bids. The project also details that the transfer of credits has to be registered in Public Registries that will be kept by CONAMA, who is going to be the national authority in charge of the management of this system. More specifically, CONAMA will have to keep the following registries: a) sources, sinks and non active participants registry, b) emission quotas registry, c) emission credits registry (including their prohibitions and expiration), and d) emission certifying bodies registry. A specific rule will determine the duties and functions of CONAMA regarding these registries and other necessary matters for the operation of them.

b. If the right is not defined by law:

- i. Are there plans to define the right through legislation in the near future (i.e., in the next 12 months)?**

There are no plans to define this special right to CER through national legislation, although as we have just mentioned, there is now a pending Bill of Law on tradable emission permits being discussed in the National Congress. It is supposed to be in force by 2005. This bill is a framework law that does not stipulate which pollutants will be traded. It only provides the elements needed for the functioning of the system. For a specific pollutant to be included under this law, a specific regulation needs to be created. In this respect, we think that local Chilean environmental problems will have priority over global problems such as GHGs. Nevertheless, we are of the opinion that legal definitions contained in this Bill of Law are antecedents that permit interpreting the legal status of CERs in Chile.

- ii. Based on existing property and contractual law, what would be the best way to characterize the right? Is there only one way, or are there several possibilities?**

The right to a CER under existing law can only be characterized as a private property right which is enforceable by its holder against all parties and which is exercised over an intangible and movable good³⁵ that is, the credit for the emission reduction. Therefore, the right to a CER is a “real right” (it can be exercised erga omnes, i.e., against all parties) over an incorporate and movable good (the credit) which gives its holder the rights to use it, enjoy it (receive its benefits) and dispose of it (sell it).

c. In the absence of a clear legal definition of the right to a CER, can the concept be defined sufficiently between parties to a project through their contractual agreement?

Yes it can, as some non CDM AR projects show in Chile. For example, it is well known in the CDM world that one of the first projects to have their emissions reductions validated and afterwards sold to an international project participant was the Chacabuquito hydroelectric project in central Chile in 2003. In this deal, Hidroeléctrica Guardia Vieja, S.A. entered into an emissions reductions purchase agreement contract with the Prototype Carbon Fund (PCF) of the World Bank for one million tons of CO₂e. The project was validated by “Det Norske Veritas” (DNV) from Norway. A recent and different example corresponds to Agrosuper’s August 2004 contract with Tokyo Electric Power Company (Tepco) from Japan and TransAlta Corporation from Canada. In this case the pork production firm agreed to reduce 400,000 tons of CO₂e annually for a period of seven years. The project reduces methane (CH₄) emissions by treating pork manure in an anaerobic treatment plant instead of treating them in the traditional manner by means of aerobic open aeration ponds.

d. Would defining the right to a CER by contract still be an available option even if the right were sufficiently defined by law?

The right to a CER is a property right as it entitles the rights holder to use it, benefit from or dispose of the right. If this right were sufficiently and precisely defined by law, then contracts would have to respect the requirements established by the corresponding law. Under private law, parties can agree on concepts different from legal ones if, and only if, they do not oppose the law, the public order and/or good traditions. Therefore, it would be possible for the parties to revise or modify this right as long as they do not oppose these concepts.

e. Does the country’s law on contracts set the venue and jurisdiction for dispute settlement? Can this requirement be waived?

Chilean legislation establishes rules that define the jurisdiction for dispute settlement. In the case of contracts, jurisdiction relies on the tribunal determined by the agreement of the parties (parties can even agree to give jurisdiction to foreign tribunals). In case parties do not say anything, then there is a distinction between contracts over movable or immovable things or rights (a contract over the right to CER would be classified as a contract over a movable right as it is exercised over a movable thing, the credit over the emission reduction). This requirement can be waived, as stated, by the agreement of the parties.

f. Under the law, is there any class of persons who are recognized as requiring the special protection of the law when entering into contracts (e.g., indigenous peoples, unorganized communities)? What special protection does the law grant this class of persons (e.g., higher burden of proof in demonstrating that the party entered into the agreement voluntarily, entitlement to special assistance from the DNA in the negotiation of CDM AR contracts)?

³⁵ Intangible or incorporate goods are the ones that consist of mere rights, like credits or active easements (article 565, Civil Code). Movable goods are the ones that can be transported from one place to another, either by themselves, like animals, or by an external force, as inanimate things (article 567, Civil Code).

Yes there are. Indigenous peoples are subject to a special protection regarding their land, when it is considered “indigenous land” by the law.³⁶ In that case, to enter into contracts which have to do with this land, legislation establishes certain prohibitions and authorizations as mentioned in our answer 3.a.i.2.

7. National approval

- a. Under present laws, are there special requirements that CDM AR project participants need to comply with to become CDM AR project participants (apart from the general capacity to enter into contracts, e.g., financial capacity, track record in the implementation of CDM AR projects, proven commitment to environmental protection)?**

Under present laws there are no special requirements that CDM AR projects need to comply with beyond the fulfilment of the procedure established by the Board of Ministers of CONAMA, that is, to submit relevant background information and antecedents regarding the project to the Steering Committee in charge of determining if the project assists in achieving sustainable development.

- b. What legally mandated criteria are used for determining whether a CDM AR project assists in achieving sustainable development?**

The criteria used in Chile in order to determine whether a CDM project assists in achieving sustainable development are not complex. If the project has to go through the environmental impact assessment system (EIAS) and it obtains a favourable environmental qualification, it will be presumed as assisting in achieving sustainable development, and vice versa. When the project is not required, under national legislation, to submit to the EIAS, it will have to comply with all sectoral permits legally required for it to be presumed as assisting in achieving sustainable development. As AR projects in Chile do not generally have to go through the EIAS process, they can obtain their favourable environmental qualification resolution by showing that CONAF has approved the corresponding “Forestry Management Plan” if they have registered for the benefits of the DL 701, or by just submitting the project to CONAMA in case they have not applied to the DL 701.³⁷

- c. Is there a legally specified mechanism for determining that a CDM AR project assists the host Party in achieving sustainable development (e.g., sustainable development indicators, if any, for CDM projects, and for CDM AR projects in particular)? If so, please describe this process. Who is authorized to issue this certification? Can this certification be issued even in light of objection from other agencies and from stakeholders?**

No there is not. The only mechanisms for determining whether a CDM AR project assists Chile in achieving sustainable development were detailed in 7.b.

- d. If there are no substantive and procedural guidelines on determining that a CDM AR project assists in achieving sustainable development, in your opinion and based on your knowledge of the related law and policy in the country of study, what basis would the DNA use to determine that this requirement has been met? For instance, are there voluntary criteria that have been used in past (not necessarily CDM) projects (e.g., donor-funded afforestation and/reforestation projects?) which could be acceptable to the DNA?**

³⁶ “Indigenous lands” are defined by article 12 of Law N° 19.253 as those: a) currently occupied by indigenous persons and communities, in property or possession (based in certain acts and laws identified in this article); b) historically occupied and possessed by persons and communities from the following ethnicities: mapuche, aimara, rapa nui, atacameña, quechua, colla, kawashkar and yamana; c) declared as such by the Tribunals; d) received by indigenous persons and communities from the State.

³⁷ In Chile there is a strong tradition regarding AR projects as intrinsically good for the development of Chile. This is shown by the fact that since 1931 there are financial incentives promoting this activity. Projects for which this intrinsic goodness is questioned, detailed in 5.e, have to go through the EIAS.

The certification initiative CERTFOR (see 2.b) incorporates nine principles in its sustainability standard that are verified before the certification is granted. Of these, three deal with social issues, as seen in 5.d. The others deal with: a) the need to ensure continuity over time of products and services from forest resources, b) the environmental value of native forest ecosystems in protecting biodiversity, c) the need to ensure the health, vitality and productivity of forest resources, d) the environmental value of forest resources in conserving the soil and protecting water resources, e) the need to comply with Chilean laws and international treaties, and f) the monitoring mechanism needed for making sure the above requirements are complied with.

8. Project validation

a. Under existing law, how is the requirement for public comment under the Kyoto Protocol likely to be complied with in the host country?

If a project will have to submit to the EIA procedure, it will have to comply with the public participation requirements under the EIA system. There are two different kinds of requirements for public participation in the EIA system. Those projects that submit an Environmental Impact Study (EIS) allow citizen organizations and natural persons to submit observations to the EIS, for which they shall have 60 days. Regarding projects that submit an Environmental Impact Declaration (EID), the EFL requires the publication of a list of the projects or activities subject to an EID in a periodical of regional or nationwide circulation, and in the corresponding municipalities to keep the public duly informed. In this case, there is no opportunity for public comments. Therefore, only for projects that submit an EIS is there no doubt about compliance with public comment requirements.

If a project does not require compliance with the EIA system, the project will only need to comply with the sectoral permits legally required. In these cases there is usually no public participation involved. If an AR project registers for the DL 701 benefits, it will need the corresponding “Forestry Management Plan” which is given by CONAF and whose procedure does not include public comments. Therefore, the requirement for public comment is not complied with in this case. This means that those projects that are interested in participating in the CDM mechanism and do not have to submit an EIS will have to comply with the Kyoto Protocol public comment requirements through procedures that will have to be identified by the DNA.

b. What weight would stakeholder opinion have on the issuance of permits?

The weight stakeholder opinion has on the issuance of national permits mentioned above, depends on which permit we are referring to. Regarding the EIA system, the EFL establishes that CONAMA shall assess and take into consideration public comments in the reasons given by the authority in its environmental qualification resolution. Citizens organizations and natural persons whose observations have not been duly considered, may file a claim before a higher authority than the one who resolved, within 15 days after notification and this authority shall make a resolution on this request within 30 days. The claim shall not suspend the effects of the challenged resolution. With respect to EID, there is no legal obligation to consider any public comment. Finally, in relation to sectoral permits as we mentioned, there is no obligation to consider public comments. Regarding the issuance of certificates under the CDM mechanism, CONAMA’s interviewee considers that the weight of stakeholder opinion will be determined by the Designated Operational Entity.

9. Project monitoring

a. In monitoring a CDM AR project, can project participants use monitoring processes put in place for other purposes (e.g., EIA law, forestry laws, CBD) as a guide?

As mentioned before, the general rule in Chile is to allow the development of AR activities without requiring any permit or management plan. Nevertheless, if they register for the DL 701 benefits, they will be requested to have a Management Plan. This is monitored by CONAF through different means, including field visits, geo-referential devices and others. Thus, if a CDM AR project registers within the DL 701 mechanism, project monitoring will follow established practices and should not present problems. However, if a CDM AR project does not go through this incentive program, a special monitoring mechanism will have to be developed. Due to this, it seems reasonable to motivate CDM AR projects in Chile to make use of and present Management Plans in line with CONAF's format because it will simplify monitoring procedures.

b. What happens if monitoring indicates that there has been a violation of national law governing the project? How would that affect the project's implementation? Can the certification that a project assists in achieving sustainable development be subsequently withdrawn?

If a violation of national law exists we have to distinguish between projects that are subject to the EIA system and those that are not.

With respect to projects that are subject to EIA, the EFL establishes in its article 64, the following rules:

"It shall be the responsibility of the State agencies that using their legal faculties participate in the Environmental Impact Assessment System, to control the permanent compliance of the standards and conditions on which the Environmental Impact Study was based or the Environmental Impact Statement accepted. In case of failure to comply, such authorities shall request from the Regional or National Commission on the Environment, as appropriate, to admonish, to impose fines up to five-hundred monthly tax units,³⁸ and, even to revoke the respective approval or acceptance, notwithstanding its right to file the proper civil or criminal actions."

Regarding projects that do not submit to EIA, non-compliance should be sanctioned in accordance with the corresponding legislation applicable to the sectoral permit. In the case of AR projects, non compliance with the Forestry Management Plan is sanctioned by the imposition of fines of up to 15 monthly tax units per hectare.

Furthermore, general rules of public law consider the possibility to revoke permits or authorizations in the case of non compliance. Therefore, we can say that in the case an AR project does not comply with its legal obligations and the corresponding permit is revoked, the DNA (CONAMA's Board of Ministers) has the power to withdraw the favourable environmental qualification given to the said project.

C. Conclusions and Recommendations

1. Will the introduction of CDM AR projects in the host country significantly alter the afforestation and reforestation objectives of the country, as stated in law, and the nature of afforestation and reforestation projects that are currently being implemented in the country of study (as registered with the pertinent national/local agency), if any?

³⁸ According to Article 8 of the Tax Code D.L. No 830/74, one monthly tax unit corresponds to the sum of money that serves as reference for tax purposes. The amount is determined by law and permanently updated.

We do not think that the CDM mechanism will have a very big impact in AR practices in Chile. As expressed before, since 1974 there is a forestation subsidy that can cover up to 90% of forestation costs and eliminates territorial taxes. As expressed by one respondent, “in Chile the real incentive is the DL 701”, not the carbon credits. Nevertheless, in areas where the national incentive has not been enough for forestry projects to develop, the CDM could have a positive impact. For example, people from the public sector in Chile think that the CDM can provide an incentive for the reforestation of vast areas of forestland in Chilean Patagonia burned during the early 20th century by colonizers and that have not been reforested up to now.³⁹ If well guided by Chilean forestry authorities, it might also be the case that the CDM may act as pivot for the establishment of native forest plantations and also of plantations based on forestry systems other than monocultures.

We do not think that the incentive system will impede project participants from demonstrating additionality. Referring to the “tools for additionality” text that the Executive Board presented in its 16th meeting and further amended at its 17th meeting, the additionality test covers both financial additionality and barriers analysis. This seems to imply that although in some cases there might be economic incentives in place pushing for the materialization of CDM AR projects this does not imply that there is no presence of barriers. Moreover, we are of the opinion that the statement of the Executive Board regarding “national circumstances” permits the inclusion of this kind of policy in the baseline analysis in a positive spirit.

2. In case there is as yet no clear legal definition of the right to a CER in the country of study, if participants to different CDM AR projects use varying contractual characterizations of that right within the same country, will this situation result in any particular legal and related difficulties in the host country?

Chilean contract legislation allows parties to determine freely the characteristics of the rights created by their autonomous will. Therefore, as there is no legal definition of the right to a CER, there are no limits to the will of the parties except for what the Civil Code calls “the respect of the law, public order and good customs”. As expressed in point 6.c, this has permitted the materialization of CDM contracts in the areas of energy and waste. In this way, we think that the absence of a legal definition in Chilean law does not pose a problem for the materialization of CDM contracts in the area of AR projects. In any case, the eventual contractual conflicts would be similar to conflicts with other types of contracts, without additional complications. In this regard, we think that there is no major problem with the lack of a formal definition for CERs under Chilean legislation. Even if different contracts determine a variety of characterizations for the right to a CER, the main concept of the right is, as we already said, that it is a property right over an intangible and movable good, and therefore participates in and follows the consequences of such a right. In case these characteristics are not respected by a particular contract then certain legal and related problems might arise which should be dealt with on a case by case basis.

3. Based on the issues that were revealed by the analysis you have undertaken, how would you describe the nature of the legal issues identified? Are they avoidable or unavoidable? (For instance, could land tenure issues be resolved simply by choosing a different project site, or are the problems so prevalent that they would emerge, regardless of the project’s location?) Are policies and legal provisions on CDM AR projects clear enough to prevent most disputes from arising in the future?

As expressed in 3.a.i, in Chile the owner of the land is the owner of its produce, including forests. He or she can separate forests and its products and services from the land and sell them independently. Thus, an AR project proponent in Chile that intends to produce CERs will have to own the forest where the project takes place or negotiate CERs with forest owners. In cases where land titles are not always regularized,

³⁹ See on this issue, www.inviertaenaysen.com

especially in the case of small and medium sized land owners, it seems appropriate to recommend potential AR investors in Chile, as a matter of standard due diligence practice, to look for land with its property documentation in order and updated. At the same time, it seems reasonable not to locate CDM AR projects on indigenous lands, as these cannot be sold to persons of a different ethnic group nor can they be used or administered by third parties (see point 3.a.i). It is also possible that CDM AR projects in Chile will have to resolve problems related to people using or living in the land of the project who are not the owners. These issues will have to be resolved on a case by case fashion.

With the exception of AR projects involving the replacement of native forest or being established on areas under official protection (see point 5.e), which are rare, and in which case they have to submit the project to the Environmental Impact Assessment System (EIAS) administered by CONAMA, AR practices face no environmental legal barriers or restrictions in Chile. Thus, in order to simplify legal requirements, we would recommend avoiding the implementation of AR projects with the above characteristics.

As expressed in point 3.a.i, Chilean mining law allows granting mining concessions for exploration or development on any land regardless of property rights over surface tenements. Nevertheless, it limits the concessionaire's rights in order to prevent damage to the owner of the land. In the case of forests, these requirements would imply authorizations, reports and licenses analogous to those required to develop mining activities in protected areas, such as national parks, national reserves or national monuments. In this sense, there is no way for a CDM AR project to avoid the possibility of a mining activity being established on the land destined for the AR project. Again due diligence would aim at identifying potential conflicts between mining interests and potential forestry lands, at an early stage.

Chilean law tacitly assumes that AR projects are good. Thus, AR regulation is framed basically as an incentive to promote the activity. In fact, AR activity in Chile is reinforced by the incentives contained in DL 701 that can compensate up to 90% of AR costs and exempt both land and income taxes (see point 5.h). Although in 1998 this piece of legislation was modified so as to focus on small and medium property owners, big projects can still benefit from it if they are developed on degraded land. If a CDM AR project wants to register for the DL 701 benefits, it will have to submit a Management Plan to CONAF and have it approved before developing the AR activities.

4. How would you characterize the level of compliance and enforcement with the legal standards and regulations you have described above? Do you think the CDM AR framework can and will act as a trigger for improved compliance and enforcement for these standards and regulations?

Since the implementation of DL 701 in 1974 till the early 1990s, it is assumed that approximately 200,000 hectares of native forests have been substituted by plantation forests. Since then, due to the introduction of environmental laws and institutions, replacing native forests with pine or eucalyptus plantations has been reduced to a minimum. At the same time, as expressed in point 9.a, AR projects that register for the benefits of DL 701 have to develop a Management Plan that is thoroughly monitored by CONAF. Thus, we can argue that in Chile current levels of compliance of AR projects with legal environmental standards are high and that CDM AR projects will not necessarily increase compliance and enforcement in the Chilean forestry sector.

5. What recommendations for adjustments in legislation, if any, can you make, to address the issues set out above? In your best judgment, how likely is it that these adjustments will be made? Is it possible to estimate how long these adjustments would take, and how much they would cost? Please relate your response to any major legal reforms relating to forestry, land or the environment currently taking place in the county of study/region.

We think that AR activity in Chile is dynamic and has a long history. This is evidenced by legislation being very straightforward and by a regulatory framework that subsidises AR practices. Thus, we do not think that there is much space or opportunities for facilitating the implementation of new legal instruments. The

only major piece of forestry legislation currently being discussed is the Native Forest Law (see point 2.b) that will address the management and conservation of native forests but will not interfere with AR activities. With regard to the “Ley de Bonos de Descontaminación”, explained in 6a and 6b, in order for it to include CERs, a specific regulation needs to be implemented. However, as this Bill of Law is not yet passed and there are local environmental problems that are higher in the national agenda, it will take some time before this regulation is passed.

There are two issues that might bring some kind of conflict between the required CDM process and current AR procedures in Chile. The first has to do with the requirement for public comment under the Kyoto Protocol and its probable absence for most AR projects in Chile. In this respect, it might be a possibility for the DNA to establish a specific procedure for addressing this requirement, where some of its elements might come from the procedure established for Environmental Impact Studies that go through the environmental impact assessment system (see 8.a). In similar terms, the second issue is related to the requirement for socio-economic impact assessment under the Kyoto Protocol and its potential non existence for most AR projects in Chile. Again, this might be bridged by a special requirement by the DNA. In this respect, it might follow the national certification scheme CERTFOR (see 5.d) in its principles dealing with social issues.

References

- 1980 Political Constitution of the Republic of Chile
- Civil Code
- Mining Code
- 1931 Forestry Law
- 1974 Decree Law N°701 of Forestry Promotion
- 1984 Law N°18.348 that creates the National Forestry Corporation
- 1989 Law N°18.755, the Agricultural and Livestock Service Law
- 1975 Construction and Urban Law and its 1992 complementary regulation
- 1980 Decree-Law N°3516 that regulates the division of rural land.
- 1977 Decree-Law N°1939 which establishes rules for the Acquisition, Administration and Disposition of National Goods
- 1994 Law N°19.300, Environmental Framework Law and its complementary regulation regarding the EIA System (2001 Supreme Decree N°95)
- 1993 Law N°19.253, Indigenous Law
- 1982 Law N°18.097, the Mining Concessions Law
- 1970 Law N°17.288, the National Monuments Law
- 1992 Supreme Decree N°4, establishes emission standards for particulate matter (PM)
- Legislative Project “Ley de Bonos de Descontaminación” (Emission Permits Law)
- Legislative Project “Ley de Bosques Nativos” (Native Forest Law)