CHAPTER 3

Mesoamerican advances in recognizing indigenous territorial rights and environmental policies

3.1 Advances in international law

As mentioned in Chapter 1, advances in the recognition of indigenous rights in Latin America have been shaped by the development of international bodies to define indigenous rights, as well as by movements set up by local actors.

At the end of the 1980s, under pressure from various national and international agencies and indigenous peoples themselves, major advances were made in setting up an international framework for the rights of indigenous peoples, with the approval of Convention 169 of the International Labour Organization (mentioned in Chapter 1). In 1993, the United Nations Permanent Forum on Indigenous Issues (UNPFII) was set up as an advisory body to the Economic and Social Council, with the mandate to examine indigenous issues relating to economic and social development, culture, education, health, environment and human rights. In 2007, under the coordination of UNPFII, the United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples (mentioned in Chapter 1). At the regional level, one of the most significant and active bodies is undoubtedly the Inter-American System for the Protection of Human Rights of the Organization of American States (OAS), which consists of two bodies: the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights. The aim of both bodies is to defend human rights in countries of the American continent through the application and interpretation of the American Convention on Human Rights, The American Declaration of the Rights and Duties of Man and other treaties on human rights to which the System is subject. Although the Declaration and the Convention do not explicitly mention indigenous peoples' rights, the Court uses other instruments such as the Vienna Convention on the Law of Treaties, human rights mechanisms and bodies of the United Nations,[33] Convention 169 of the ILO,[34] the Declaration on the Rights of Indigenous Peoples negotiated by UNPFII in 2007 and the Convention on Biological Diversity (particularly Article 8(j),[35] which states that Governments shall respect the knowledge, innovations and practices of communities for the use of biological diversity).

This important international framework that was formed during the 1980s and 1990s has restated States' obligations towards indigenous peoples by supporting the construction of concepts, standards and case law based around the key topics of collective property rights and rights over land, territories and natural resources, including the right to the restitution of ancestral territories and consultation rights. Interestingly, although Panama has not ratified the Convention, it is one of the most advanced countries in Central America in terms of recognizing the rights of indigenous peoples to land and territories, including their own autonomy and traditional forms of governance. The same is true of Nicaragua, which recognized the rights of indigenous peoples in the territory of the South Atlantic and North Atlantic through Laws 28 and 445, which were both adopted before Nicaragua ratified Convention 169 in August 2010. In contrast, countries such as Honduras have ratified the Convention but have not yet approved the draft legal framework recognizing traditional indigenous land rights that was formulated in 2007.

Notwithstanding the progress represented by having a regional body that protects indigenous rights, the recommendations of the Inter-American Commission on Human Rights are not always considered by Governments (as in Panama and Belize (CIDH/IACHR, 2010).

[33] The Universal Declaration on the Rights of Indigenous Peoples (approved in 2007), the United Nations Committee on the Elimination of Discrimination, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights and so on.

[34] For the Inter-American Commission on Human Rights, ILO Convention 169 is the most relevant international human rights instrument for indigenous rights. By June 2012, most States in the Mesoamerican region had adopted the Convention (except Belize, El Salvador and Panama).

[35] Article 8(j) calls on States to respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.

3.2 Advances achieved by local actors

As previously mentioned, advances achieved in consolidating recognition of indigenous peoples' land rights are definitely linked to the scale of social mobilizations undertaken by indigenous peoples themselves during the 1980s and 1990s. Although such movements have existed since colonial times, during the 1980s and 1990s partnerships with national and international NGOs were conducive to significant progress being made in terms of rights relating to identity and the use of territory in ancestral lands.

Some of the most emblematic struggles of the Mesoamerican region took place in the past 20 years over rights of access, management and exclusion:

- In Guatemala, the Peace Agreements signed in 1996 led to the creation of the Land Fund (FONTIERRA), which has enabled indigenous people, small-scale producers and communities to gain access to land under different arrangements.

- The movement involving many indigenous forest communities in Mexico (and particularly the state of Oaxaca) in the mid-1908s, leading to the removal of the forest concessions system whereby the State would award exploitation permits to private or parastatal enterprises, and the establishment of a Government Programme for community forests (Chapela, 2007).

- Another struggle for the right of exclusion was fought by the Mayangna indigenous people on the Atlantic Coast of Nicaragua, who submitted their case to the Inter-American Court of Human Rights in 2001 to oppose a forest concession awarded by the Government in their ancestral lands of Awas Tingni.

- 2011 saw the first trial in which indigenous people in Costa Rica sued the State for failure to expropriate all non-indigenous persons located on their territory, as stipulated in the 1977 Indigenous Law. The first trial found in favour of the plaintiffs, and sentenced the Institute of Agrarian Development (IDA) and the National Commission for Indigenous Affairs (CONAI) to carry out the necessary procedures and studies to expropriate all non-indigenous persons from the area.

3.3 Development of land tenure institutions and legislation[36]

Before the 1970s, only Mexico and Panama[37] had developed a legal framework specifically dealing with the recognition of the land rights of indigenous peoples. Forest or mining concessions, the creation of protected areas and the settlement of peasant populations in indigenous territories were common threats in those countries. In other Mesoamerican countries, until the end of the 1970s, there was practically no legal protection for indigenous territories. In Costa Rica, Law 6172 was introduced in 1977 to recognize the property of indigenous communities through reserves. In Nicaragua, the statute of autonomy of the RAAN and RAAS Atlantic regions was established in 1987. In Honduras, the 1992 Law on the Modernization and Development of the Agricultural Sector included the possibility of titling for indigenous lands. In Guatemala, the 1985 Constitution recognized the rights of communities and the need for State support for their development.

Of all the agrarian reforms implemented in Mesoamerican countries, only the Mexican one successfully repaired some of the land grabs suffered by indigenous communities in the post-colonial period, when indigenous territories were either transferred to municipalities as national land or sold to landowners. Agrarian reform in countries such as Costa Rica, Guatemala and Panama had limited impact on the formation of current national agrarian structures, and little influence on the recognition of ancestral lands of indigenous peoples, while also representing a threat by promoting the advance of the agricultural frontier into indigenous lands. Chapter 2 provides a detailed analysis of the influence of policies for agrarian reform and settlements in the formation of agrarian structures and the forms of land

[36] For more details on the development of land tenure institutions and legislation in Mesoamerican countries, please see annex 1.

[37] In Mexico, recognition was granted by the Constitution and the Agrarian Reform Law that preceded the 1917 revolution. In Panama, the Kuna Ayala Comarcas were created in 1870 (when Panamá was still a Department of Colombia), while in 1928 the Constitutional Reform established the creation of comarcas.

tenure that are now having an impact on indigenous forest territories in the Mesoamerican countries covered in this study. What should be highlighted here is the importance of this historical period in the formation of agrarian reform institutions that were tasked, *inter alia*, with establishing institutional links between the government and indigenous communities. In Mesoamerican countries, it was the agrarian reform agencies that set up the institutions responsible for the management of indigenous lands in the 1960s.

As a result of structural reforms to the economies of Latin American countries in the 1980s and early 1990s, agricultural policies were seeking to improve the efficiency of the agricultural sector through the privatization of resources and production services, open market participation, development of crops with comparative advantages in national and international markets, improved technology and increased production efficiency. This had a direct impact on land policies in the 1990s, as they prioritized efficient functioning of land markets ahead of agrarian reform programmes (which had lost their impetus by then). The amendment of legal frameworks for land in the 1990s in Honduras, Mexico and Nicaragua opened the door to the sale of agrarian reform land that had been previously inalienable, and placed the emphasis on the certainty of land ownership rights, rather than facilitating access to ownership (as agrarian reform laws did in their time). These amendments to the legal framework for land were used to establish new legal frameworks to facilitate land surveying processes, modernize property records and set up more efficient property information systems.

This process had a major impact on the recognition of the ancestral lands of indigenous communities, because this was subsumed into the privilege of secure tenure over land and forests, which became the new regional priority, given the lack of accurate physical information (land registry) and legal information (records), incomplete transfer processes from some agrarian reform and the surge in disputes affecting indigenous lands. This meant that the recognition and allocation of land rights for indigenous peoples in regulations and institutions became associated with secure tenure, and therefore with the physical delimitation of territory and the development of instruments that make up the land information systems that support that security (land registry, property records and land administration systems).

As a result, from 2000 specific laws were enacted, other laws were reformed and new regulations developed to guarantee secure tenure, including:

- The Property Law of Honduras (2004) and its regulations (2011), which govern the regularization of land for indigenous and Afro-Honduran peoples, and set up the Institute of Property, which is assigned the functions of land survey and registry, as well as the titling of indigenous territories.

- The Land Registry Law in Guatemala (2005) and its regulations (2009), include the Administrative Declaration of Communal Land and give the Land Registry the power to produce declarations of communal land and facilitate the titling thereof, under the Special Titling mechanism (where the lands have not been previous registered).

- Law 72 of Panama (2008), which provides for the physical delimitation of certain indigenous territories, as well as the award of a title to those communities that were not included in the *Comarcas* when the relevant laws were adopted. The Law also tasked the National Directorate for Agrarian Reform and the Ministry for Agricultural Development with awarding collective property titles.

All of these changes in the focus of legislative frameworks and land policies that were directly or indirectly related to the land tenure of the region's indigenous peoples were determining factors in the roles of the ministerial agencies responsible for this topic vis-à-vis the indigenous populations.

As stated in previous paragraphs, during the agrarian reform of the 1960s, the allocation and recognition of the land tenure rights of indigenous populations was one of the functions of the agrarian reform agencies. Later, with the legislative changes resulting from the streamlining of land markets in the 1990s, the region's governments made efforts to modernize land administration services by comprehensively linking land registry information to property records and increasing the coordination functions and scope of institutions responsible for land administration. Whereas agrarian reform institutions tend to come under or be linked to ministries of agriculture, land registry institutions are under the umbrella of various institutions, such as the supreme court, ministry of finance and, in some cases, special ministries that are directly answerable to the President. This complex institutional structure, along with serious bureaucratic and efficiency problems suffered by most of the region's agrarian reform institutes, and an overlap of functions and a lack of coordination among institutions, have all combined to create weak institutional situation that has a direct impact on work relating to land tenure (in terms of private property, the reformed sector and indigenous lands).

As for dispute settlement, the countries that have developed such bodies within government institutions are those that have carried out structural agrarian reforms, such as Mexico and Nicaragua, but also Guatemala, where the 1996 Peace Accords highlighted the need to move towards peace in the country. The governments of these countries have sought to develop mechanisms and human capacities to prioritize alternative dispute settlement methods, such as conciliation and arbitration or consultation and consensus mechanisms that do not involve taking cases to court.[38] Mexico has the Procuraduría Agraria (Agrarian Ombudsman),[39] which aims to settle cases through conciliation, using agrarian courts for those cases not solved by alternative methods. These bodies are currently suffering from the weakening of agrarian reform institutions, and their operational capacities are being reduced while new conflicts are appearing as part of the process to update the land registry or demarcate indigenous territories and communities.

One fundamental topical issue within indigenous affairs are the FPIC processes. According to international legislation, FPIC means the right of indigenous peoples not only to participation in decision making but also to reserve the right to consent in a free and informed manner to those actions and measures that may affect them, their cultures and their territories. In this regard, the United Nations Declaration on the Rights of Indigenous Peoples adopted by the General Assembly in 2007 not only links the concept to various kinds of rights, but also recognizes the basis of this right of peoples, their right to self-determination – which also applies to forest resources.[40]

In terms of FPIC, when it comes to natural resources and land tenure, some Mesoamerican countries are working on relevant legislation. In Guatemala, there is a bill under discussion on the matter, while in Honduras the regulations for the Property Law stipulate free, prior and informed consultation but not consent, for their titling processes on indigenous land. When Mexico incorporated the concept of PES into its environmental legislation framework, in 2012 it included the concept of social safeguarding and FPIC of ejidos and communities when the mechanism is applied to indigenous peoples.[41]

3.4 Development of environmental policies[42]

Environmental policies emerged in the 1990s before coming to the fore from 2000 onwards. One of their main missions was to halt the advance of the agricultural frontier. In this sense, they also contributed to the slowdown in land distribution processes. One important element of the region's environmental policy has been the creation of protected areas, which have risen considerably in number between 1997 and 2011 (see table 11). Protected areas were often set up on land considered as State property or land that resulted from agrarian reform processes. Most protected areas registered as State land[43] overlap with indigenous territories, except in Mexico (see Map 3). Such areas have been the subject of many disputes between the bodies running these reserves and indigenous peoples. With the exception of the participation of indigenous authorities in La Amistad reserve in Bri-Bri territory (Costa Rica) and in the Technical Advisory Committee of the Montes-Azules Biosphere Reserve (Chiapas, Mexico), efforts to develop co-management experiments with native populations in protected areas are at a very early stage in the region.

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[38] In Nicaragua, the Government has created the Alternative Dispute Settlement Directorate and the National Commission for Demarcation and Titling in the RAAS and RAAN regions with their dispute settlement bodies. In Guatemala, the Secretariat for Agrarian Affairs is responsible for such matters in many regions of the country, and sets up Dispute Settlement Roundtables.

[39] The Agrarian Ombudsman has a team trained in conflict resolution, and the Secretariat for Agrarian Reform implements social or productive investment programmes in agricultural units to contribute to conflict resolution by compensating one of the parties.

40 United Nations Declaration on the Rights of Indigenous Peoples.http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf.

[41] Article 134-Bis 2 of the Regulations for the Law on Sustainable Forestry Development reformed in 2012.

[42] For more details on the development of environmental policies in Mesoamerican countries, see annex 1.

[43] It is only in Mexico that Protected Natural Areas belong completely to *ejidos* and communities and not the State. The Government restricts use through Management Plans. In Panama, there has been experimentation with a conditional titles system within a Protected Area that recognizes the existence of private properties while also establishing restrictions on use and transfer.

Table 11. Number and area of Protected Areas and land Biosphere Reserves in the Mesoamerican region (categories I-IV from the IUCN)

Country	Protected Areas in 1997[a]	Percentage of national territory (1997)[b]	Protected Areas in 2011[c]	Percentage of national territory (2011)[d]	Percentage increase in area covered by Protected Areas between 1997 and 2011
Mexico	111	6	174	10.5	75%
Guatemala	32	28	88	31.04 (1)	11%
Honduras	50	14.3	87	17.8	24%
Nicaragua	59	6.9	72	16.1	57%
El Salvador	2	S.I	59	1.6	S.I
Costa Rica	37	25.1	168	26.5	6%
Panama	22	26.7	53	29.3	10%

Sources: International Union for Conservation of Nature (IUCN), 2011, *Biodiversidad y pueblos indios en México y Centroamérica* (1997).
[a] *Biodiversidad y pueblos indios en México y Centroamérica* (1997) and *Atlas Etnoecológico de México y Centroamérica*.
[b] Ibid.
[c] Las áreas protegidas de América Latina. Situación actual y perspectivas para el futuro, 2011 and updated information from Guatemala and Honduras on the following websites http://www.conap.gob.gt/Members/admin/documentos/documentos-centro-de-documentacion/areas-protegidas/LISTADO%20SIGAP_DUC_2012_05_Publico.xls/view and http://www.gisaffairs.com/icf/.
[d] Ibid.

Running a growing number of protected areas has forced the region's governments to set up environmental institutions, in the form of ministries of the environment. These tend to include bodies responsible for the management of protected areas, regulation and development of forest exploitation and the award of forest concessions. Ministries for the environment and their associated institutions (forestry commissions or institutes, commissions for protected areas and so on) are currently the main national counterpart in terms of preparation for REDD+.[44] Recently, the region's governments have begun to set up forestry incentive systems to reward conservation and good management. At the end of the 1990s, the Project for the Conservation and Sustainable Management of Forest Resources (PROCYMAF)[45] project in Mexico was a pioneer in community forest support in indigenous land. At the same time, Costa Rica was developing its PES system, which was later used by Mexico when it recently created the National Forestry Commission (CONAFOR). At the same time, Guatemala set up its Forestry Incentives Programme for Small Forest Landowners (PINFOR), and since 2007 has implemented an offshoot programme for small landowners including communal lands, known as the Forest Incentives Programme for Small Forest and Agroforestry Landholders (PINPEP). Despite the fact that these programmes have been funded by international cooperation, with support from the Global Environment Facility (GEF), the Netherlands, the World Bank and others, they have the full commitment of the governments in the three countries, which maintain them with a high proportion of their own resources.

Alongside the development of a new legal framework for land administration, the region's governments have also created and reformed environmental laws and regulations. All Mesoamerican countries and Mexico currently have forestry laws, environmental impact laws, wildlife management laws, water laws and rules on managing certain species. As a whole, these form a complex web of legal provisions governing the conservation, use and marketing of natural resources. Carbon is a new resource, but its link with land tenure and carbon ownership (and/or the right to benefit from its sale) remains unclear in many countries. Since 2010, Mexico and Costa Rica have developed reforms to incorporate PES into national legislation and clarify ownership rights.[46] According to Costa Rica, existing laws and the PES experience establish a precedent for allocating carbon rights based on land possession.[47]

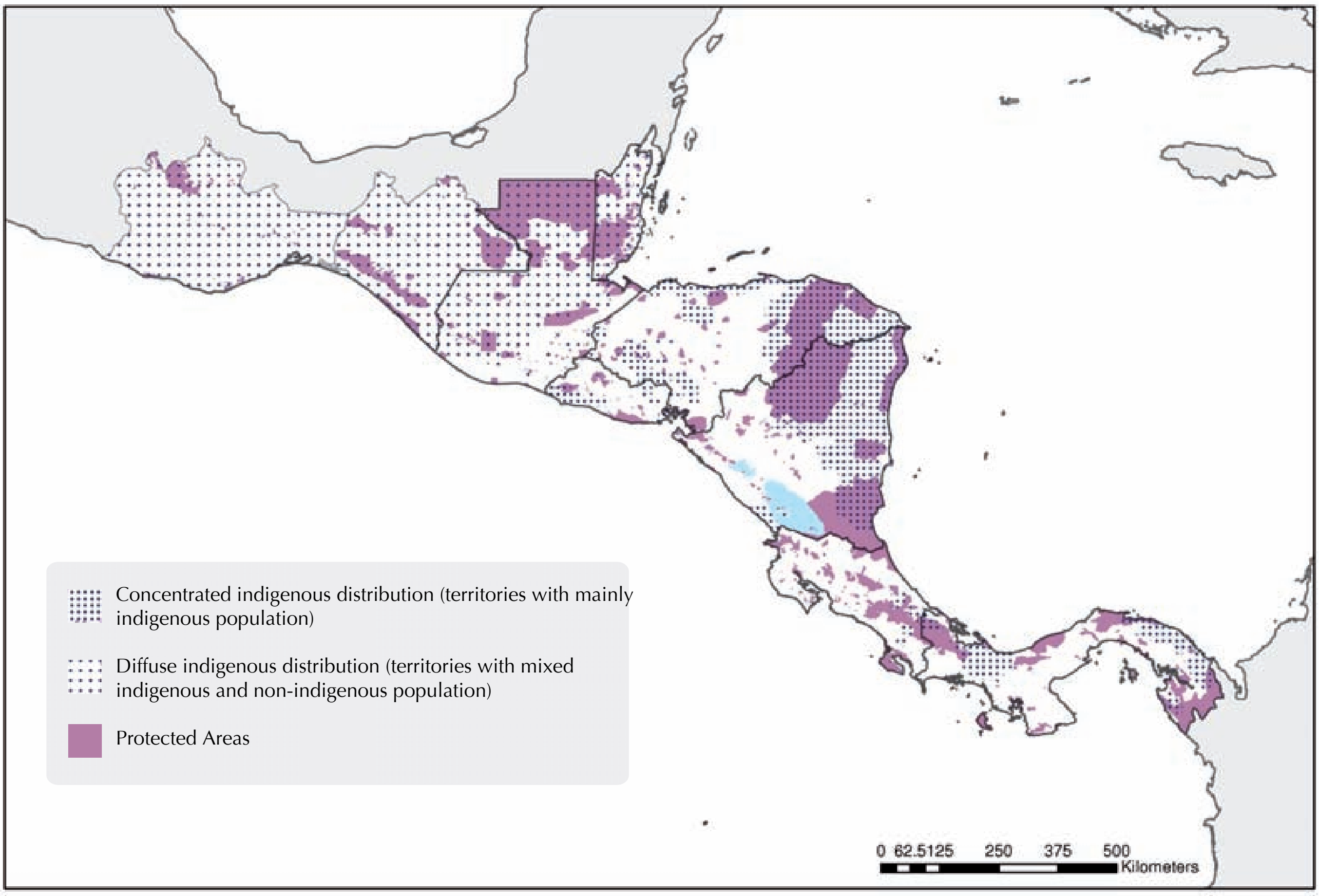
Another relevant aspect of environmental policies from the past decade has been the decentralization efforts carried out by some countries, particularly to ensure the participation of municipal actors and local producer organizations in discussions on the design and implementation of national forestry programmes. For instance, Nicaragua has decided to strengthen forest governance by facilitating forest management processes at the district level (including in the RAAN

[44] See http://www.forestcarbonpartnership.org/fcp/node/203 for the RPP and comments made by independent consultants.
[45] Project for the Conservation and Sustainable Management of Forest Resources funded by the World Bank and the Mexican Government since 1997.
[46] Only Panama has legislation that clearly states that the carbon capture rights are owned by the State (Law 41, Art. 79, 1998).
[47] R-PP of Costa Rica 2010, http://www.forestcarbonpartnership.org/fcp/node/203, revised in June 2012.

and RAAS regions), thereby involving local actors in discussions on strategies and standards for wood exploitation and the strengthening of community forestry. In Mexico, the creation of Regional Natural Resources Committees and forestry associations has facilitated the participation of indigenous communities in discussions on regional forestry strategies and access to support programmes. These efforts, if they are maintained and stepped up, may form relevant schemes for the preparation and implementation of REDD+ in indigenous territories.

Lastly, it should be stated that there remain certain restrictions on forest exploitation in the region's indigenous lands, such as in Costa Rica and Nicaragua. In Costa Rica, Decree 26.511 prohibits the sale of wood species within indigenous reserves. The Forestry Closed Season Law in Nicaragua limits forestry exploitation in the RAAS and RAAN regions, which has acted as a disincentive so that indigenous communities may participate in community forestry schemes.

MAP 3. Distribution of indigenous population in Protected Areas of the Mesoamerican region



Sources:
Protected Area data:

- Protected Area data from the World Database on Protected Areas (WDPA), 2010. The WDPA is a joint IUCN and UNEP publication prepared by UNEP-WCMC (United Nations Environment Programme and World Conservation Monitoring Centre) and IUCN-WCPA (International Union for Conservation of Nature and the World Commission on Protected Areas), in collaboration with governments, secretariats of multilateral environmental agreements, non-governmental and professional organizations and individual professionals.

For more information, see: www.wdpa.org o contact: protectedareas@unep-wcmc.org.

3.5 Formulation of REDD+ proposals in the region[48]

As stated in Chapter 1, the region's countries have formulated their proposals for the preparation and implementation of REDD+ through their R-PPs and NDPs, which were drafted according to the FCPF or UN-REDD guidelines. These documents provide a detailed status report on forests, deforestation processes, institutional aspects, the legal framework for tenure of land, natural resources and carbon rights. They also emphasize aspects relating to the participation of indigenous territories. The documents tend to present an up-to-date picture of the processes of recognition for indigenous territories and identify a few challenges for their incorporation into consultation processes and possible support from REDD+. However, most programmes for land regularization and the strengthening of local governance include no clear commitments to dealing with issues pending.

In terms of consultation in REDD+ processes, it is worth mentioning that cooperation agencies involved with REDD+ preparation processes have received many complaints from indigenous organizations about the obstacles encountered in the consultations (or lack thereof) about preparation for REDD+ processes. In this regard, REDD considers FPIC in its social safeguards, and the R-PPs and NPDs produced by countries for REDD+ processes emphasize aspects relating to the participation of indigenous territories. In practice, however, the formulation of national documents involves operational difficulties in terms of some countries' lack of mechanisms to facilitate discussion processes at the local, provincial and national levels about forms of social organization and the content of proposals (implementation of PES, land titling, national preparation for REDD+ and so on). In addition, not all countries have the support or political will to apply the type of safeguards required for FPIC.

Another aspect that all the region's countries identified in the R-PPs and NPDs is the lack of institutional coordination as an important element to be resolved in preparing and implementing REDD+. There is weak coordination between environment ministries and other institutions responsible for rural development, disaster protection or land administration.

[48] In annex 3, see summary of contents of REDD+ preparation documents in the Mesoamerican region, in terms of the participation of indigenous territories in the REDD+ initiative.