

From a Top-Down Perspective To Collaborative Management: The Kawésqar People's Role In Their National Park And Reserve

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Abstract: This article analyzes the case of the Kawésqar National Park and Reserve, both protected areas in Chile that also coincide with Indigenous territories of the last Kawésqar Indigenous communities. This Chilean case is relevant for community conservation analysis because of the collision of interests between administrative agencies, Indigenous communities, and aquaculture industries, from which broader lessons are distilled to enhance co-management approaches toward conservation. The article identifies the Chilean government's flawed administrative decisions on the protection mechanisms of the area, where interests range from aquaculture projects pushing for fewer environmental restrictions to the Indigenous communities and biodiversity that have been adversely affected by these projects. Indigenous communities are pushing back to assert effective participation in the co-management of the Kawésqar Reserve and its conservation, while the Chilean government has partially decided to grant them certain recognition over the management of the Kawésqar Park. This article argues that for an effective protection of the land and sea, Indigenous communities must have a stronger position in decision-making regarding land and marine use in protected areas. To accomplish this, the article offers a critical analysis of the public policies developed by the Chilean government about the management of the protected areas regarding Indigenous communities, and proposes moving from a top-down approach to a collaborative governance and management approach. This analysis builds upon the vast literature on community conservation approaches, and specifically on collaborative conservation through Indigenous governance. Through this lens I distill proposals for an effective community conservation approach, and specifically for a collaborative management with the Kawésqar people, such as their recognition and inclusion in the co-management of the protected areas and hybrid forms of environmental governance, among other recommendations.

Abstrait: Cet article analyse le cas du parc national et de la réserve de Kawésqar, deux aires protégées du Chili qui coïncident également avec les territoires autochtones des dernières communautés autochtones Kawésqar. Ce cas chilien est pertinent pour l'analyse de la conservation communautaire en raison de la collision des intérêts entre les agences administratives, les communautés autochtones et les industries de l'aquaculture. Des leçons plus larges sont distillées pour améliorer les approches de cogestion vers la conservation. L'article identifie les décisions administratives problématiques du gouvernement chilien concernant les mécanismes de protection de la zone, où les intérêts vont des projets d'aquaculture qui font pression pour obtenir moins de restrictions environnementales aux communautés autochtones et à la biodiversité qui ont été affectées par ces projets. Les communautés autochtones font pression pour affirmer leur participation effective à la cogestion de la réserve de Kawésqar et à sa conservation, alors que le gouvernement chilien a partiellement décidé de leur accorder une certaine reconnaissance sur la gestion du parc de Kawésqar. Cet article soutient que pour favoriser une protection efficace de la terre et de la mer, les communautés autochtones doivent avoir une position plus forte dans la prise des décisions concernant l'utilisation de la terre et de la mer dans les zones protégées. Pour ce faire, l'article propose une analyse critique des politiques publiques développées par le gouvernement chilien en matière de gestion des zones protégées concernant les communautés autochtones, et propose de passer d'une approche descendante à une approche de gouvernance et de gestion collaborative. Cette analyse s'appuie sur la vaste littérature sur les approches de conservation communautaire, et plus particulièrement sur la conservation collaborative à travers la gouvernance autochtone. À travers ce prisme, je distille des propositions pour une approche de conservation communautaire efficace, et spécifiquement pour une gestion collaborative avec le peuple Kawésqar, comme leur reconnaissance et leur inclusion dans la co-gestion des aires protégées et des formes hybrides de gouvernance environnementale, parmi d'autres recommandations.

Titre en français : D'une perspective verticale à une gestion collaborative : Le rôle du peuple Kawésqar dans son parc national et sa réserve.

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1. INTRODUCTION

We are at a critical point, with current biodiversity losses and the ones ahead.¹ Without broad actions there will be further acceleration in the global rate of species extinction, which is already at least tens to hundreds of times higher than the average rate over the past 10 million years.² Within the human role in this extinction, there are several pressure points that have been putting our biodiversity at risk, since human population growth is rapidly reaching the 8 billion mark.³ In fact, terrestrial and freshwater ecosystems are threatened especially by land-use change and overexploitation of animals, plants, and other organisms, via harvesting, logging, hunting and fishing.⁴

This situation demands different approaches to tackle the species loss. Therefore, conservation efforts must go beyond the traditional notion of national parks and official protected areas,⁵ challenging the conservation and preservation paradigm, by promoting

¹ According to the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES), an average of 25 per cent of species in assessed animal and plant groups are threatened, with “around 1 million species already fac[ing] extinction, many within decades.” See IPBES, “The Global Assessment Report on Biodiversity and Ecosystem services” (2019) at 12, online (pdf): *IPBES* <ipbes.net/sites/default/files/inline/files/ipbes_global_assessment_report_summary_for_policymakers.pdf>.

² *Ibid* at 24. See also Gerardo Ceballos et al, “Vertebrates on the brink as indicators of biological annihilation and the sixth mass extinction” (2020) 117:24 *Proceedings Nat’l Ac Sci USA* 13596 at 13597. This has even led environmental scientists to believe that we may even be on the verge of a sixth extinction. See Elizabeth Kolbert, *The Sixth Extinction: An Unnatural History* (New York: Henry Holt and Co, 2014); Paul B Wignall, *Extinction: A Very Short Introduction* (New York: Oxford University Press, 2019) at 40; David Sepkoski, *Catastrophic Thinking: Extinction and the Value of Diversity from Darwin to the Anthropocene* (Chicago: University of Chicago Press, 2020) at 229–93.

³ See UNDESA, Population Division, *World Population Prospects 2019: Highlights*, UN Doc ST/ESA/SER.A/423, 2019 at 1.

⁴ See IPBES, *supra* note 1 at 12; David Jenkins et al, “Global human “predation” on plant growth and biomass” (2020) 29 *Global Ecology & Geography* 1052 at 1052.

⁵ For the purposes of this article “protected area” should be understood as “a clearly defined geographical space, recognized, dedicated and managed, through legal or other effective means, to achieve the long-

a collaborative governance within these areas. In this context, there has been an increasing discussion since the 1980s over the adoption of a community approach towards conservation.⁶ This approach—as a counter-narrative of the state-designated parks and protected areas or fortress approach—can be broadly defined as a theory that argues that conservation “should be pursued by strategies that emphasize the role of local residents in decision-making about natural resources.”⁷

Within community conservation, there are different types or manifestations, such as collaborative management, community-based conservation, and integrated conservation, among other subcategories.⁸ One of the most interesting areas of community conservation is the work with Indigenous communities, as the original stewards of the territories they inhabit,⁹ and every day there are more countries and cases around the world that have included these communities into plans to protect specific areas of their territories, as a result of the fight from Indigenous communities for their governance rights.¹⁰ Indeed, “[t]he number of protected areas governed or cogoverned by Indigenous peoples has increased markedly over the past twenty years.”¹¹

term conservation of nature with associated ecosystem services and cultural values.” See IUCN, *Guidelines for Applying Protected Area Management Categories*, ed by Nigel Dudley (Gland, SZ: IUCN, 2008) at 8; Barbara Lausche under the direction of Françoise Burhenne, *Guidelines for Protected Areas Legislation* (Gland, SZ: IUCN, 2011) at 12.

⁶ See Krishna B Ghimire & Michel P Pimbert, “Social Change and Conservation: an Overview of Issues and Concepts” in Krishna B Ghimire & Michel P Pimbert, eds, *Social Change and Conservation: Environmental Politics and Impacts of National Parks and Protected Areas* (London, UK: Earthscan Publications Limited, 1997) at 2; Fikret Berkes, “Rethinking Community-Based Conservation” (2004) 18:3 *Conservation Biology* 621 at 621; Nathan J Bennett et al, “Environmental Stewardship: A Conceptual Review and Analytical Framework” (2018) *Envtl Mgmt* 597 at 597; Edmund Barrow & Marshall Murphree, “Community Conservation: From Concept to Practice” in David Hulme & Marshall Murphree, eds, *African Wildlife and Livelihoods: The Promise and Performance of Community Conservation* (New York: James Currey, 2001) 1 at 24-25.

⁷ William Adams & David Hulme, “Conservation and Community: Changing Narratives Policies and Practices in African Conservation” in David Hulme and Marshall Murphree, eds, *African Wildlife and Livelihoods: The Promise and Performance of Community Conservation* (New York: James Currey, 2001) at 13.

⁸ *Ibid.*

⁹ See Berkes, *supra* note 6 at 627.

¹⁰ See generally Mitzi Acevado, “Ecoturismo Comunitario en la Ecoregión Valdiviana” in *Bosque Nativo y Comunidades Locales del Sur de Chile* (Santiago de Chile: Editorial Universitaria, 2006); Torsten Krause, Wain Collen & Kimberly A Nicholas, “Evaluating Safeguards in a Conservation Incentive Program: Participation, Consent, and Benefit Sharing in Indigenous Communities of the Ecuadorian Amazon” (2013) 18:4 *Ecology & Soc’y* (1st) 1; Maria Costanza Torri & Thora Martina Herrmann, “Spiritual Beliefs and Ecological Traditions in Indigenous Communities in India: Enhancing Community-Based Biodiversity Conservation” (2011) 6:2 *Nature & Cult* 168 at 168; Ivan P Novotny et al, “Back to the people: The role of community-based responses in shaping landscape trajectories in Oaxaca, Mexico” (2021) 100 *Land Use Pol’y* 1.

¹¹ See Stan Stevens, “Indigenous Peoples, Biocultural Diversity, and Protected Areas” in Stan Stevens, ed, *Indigenous Peoples, National Parks and Protected Areas* (Tucson, AZ: University of Arizona Press, 2014) 15 at 31 [Stevens, “Indigenous Peoples”].

This article delves into community conservation, and specifically into collaborative management and Indigenous communities. To do this, it presents the details of a Chilean case about the Kawésqar people, who are caught in the middle of a conflict between protected areas establishment and the construction and operation of several intensive resource aquaculture projects within the limits of the Kawésqar National Park and Reserve.¹² Using this case, the article argues that for effective protection of the land and sea, Indigenous communities must have a stronger position in decision-making regarding land and marine use in protected areas. Consequently, the article analyzes if conservation, and the lives of Indigenous communities, could be improved with greater Indigenous community participation in the decision-making processes and administration of the protected areas in which they are involved.

To fulfill this purpose the article is structured as follows: First, it presents some references to the framework of biodiversity conservation and its contemporary challenges regarding community conservation approaches and the role of Indigenous communities. Second, it provides an overview of the Kawésqar people and the National Park and Reserve, within the context of the current conflicts between the community and the industries allocating their aquaculture plants. Finally, it analyzes the conflict through a collaborative management lens, formulating recommendations to improve the environmental protection of the area and the lives of the Kawésqar communities, by recognizing their vital role in the management of the protected areas.

2. COLLABORATIVE CONSERVATION APPROACHES

This section develops the framework from which I will analyze the case of Kawésqar people. To achieve this, the section focusses on an overview of conservation approaches, with special attention to the ideas and nuances behind community conservation and collaborative management, and the role of Indigenous communities within this purview.

2.1. AN OVERVIEW ON COMMUNITY CONSERVATION APPROACHES

As of 2022, only 15.7 percent of the total Earth surface, and 8 percent of its marine space, is under some type of official protection.¹³ This percentage is close to the goal set in the tenth meeting of the Conference of the Parties to the Convention on Biological Diversity (CBD), to reach 17 percent protection by 2020,¹⁴ but it is still not enough to achieve the goals of conservation that allow us to stop the exacerbation of an environmental catastrophe, because it is far from the ultimately established goal of 30 percent by 2030.¹⁵ To accomplish this goal,

¹² See “Organizaciones Alertan “Interpretaciones Legales Antojadizas” Para Permitir El Avance de Salmoneras En La Reserva Nacional Kawésqar” (18 July 2020), online: *El Desconcierto* <www.eldesconcierto.cl/bienes-comunes/2020/07/18/organizaciones-alertan-interpretaciones-legales-antojadizas-para-permitir-el-avance-de-salmoneras-en-la-reserva-nacional-kawesqar.html> [El Desconcierto].

¹³ See “Protected Planet” (last modified February 2022), online: *Protected planet* <www.protectedplanet.net/en>; Lausche, *supra* note 5.

¹⁴ See *The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets*, CBD Dec X/2, UNEP, 2010, UN Doc UNEP/CBD/COP/DEC/X/2 at 9.

¹⁵ See *Report of the Open-Ended Working Group on the Post-2020 Global Biodiversity Framework on its Second Meeting*, UNEP, 2020, UN Doc CBD/WG.2020/2/4; Enrico Di Minin & Tuuli Toivonen, “Global Protected Area Expansion: Creating More than Paper Parks” (2015) 65:7 *BioScience* 637; Lee Hannah

different initiatives are being adopted worldwide to develop flexible mechanisms of protection, beyond traditional protected areas, such as Indigenous and non-Indigenous community conserved areas, as well as their recognition—as key stakeholders—in the administration of traditional areas through partnership agreements.¹⁶ This protection mechanism flexibilization also includes other effective area-based conservation measures, such as “the creation of conservation corridors to connect key habitats, the creation of buffer zones to mitigate the impacts of various sectors . . . and the promotion of sectoral practices that reduce and mitigate impacts on biodiversity, such as organic agriculture and long-rotation forestry.”¹⁷ Therefore, conservation demands not only the creation of protected areas in the traditional sense, but also the inclusion of key stakeholders in their management, and of all society, to cover broader areas and meet these ambitious but attainable goals.

In this context a key definition to set a productive discussion about biodiversity conservation approaches refers to whether conservation requires establishing protected areas where no human population can interfere with nature, in what some call fortress conservation,¹⁸ or if conservation can—and must—be accomplished through a more flexible and inclusive approach.¹⁹ As developed below, this article’s analysis stands from a more inclusive approach. The fortress approach originates in the strategy pioneered in the United States for the preservation of scenic wilderness areas, and it was exported to other countries around the world.²⁰ Basically,

et al, “30 percent land conservation and climate action reduces tropical extinction risk by more than 50 %” (2020) 43 *Ecography* 943 at 949.

- ¹⁶ See Ice Anugraharsi et al, “Social Contracts: Pillars of Community Conservation Partnerships in Lore Lindu National Park, Indonesia” (2020) 4:1 *Forest & Soc’y* 115 at 115. See generally Bethlehem A Abebe et al, “Examining social equity in community-based conservation programs: A case study of controlled hunting programs in Bale Mountains, Ethiopia” (2020) 135 *World Dev* 105066; Emmanuel Mavhura & Sharon Mushure, “Forest and wildlife resource-conservation efforts based on indigenous knowledge: The case of Nharira community in Chikomba district, Zimbabwe” (2019) 105 *Forest Econ & Pol’y* 83; Mirjam de Koning et al, “Collaborative Governance of Protected Areas: Success Factors and Prospects for Hin Nam No National Protected Area, Central Laos” (2017) 15:1 *Conservation & Soc’y* 87.
- ¹⁷ See *Protected areas and other effective area-based conservation measures*, CBD Dec 14/8, UNEP, 2018, UN Doc CBD/COP/DEC/14/8 at 4.
- ¹⁸ See Adams & Hulme, *supra* note 7 at 10-14; Hanna Siurua, “Nature above People: Rolston and ‘Fortress’ Conservation in the South” (2006) 11:1 *Ethics & Environment* 71 at 73. See generally Dan Brockington, *Fortress Conservation: The Preservation of the Mkomazi Game Reserve, Tanzania* (Bloomington, IN: Indiana University Press, 2002).
- ¹⁹ See generally Claudia Sepúlveda, Andrés Moreira, & Pablo Villarroel, “Conservación Biológica Fuera de Las Áreas Silvestres Protegidas” (1997) 13:2 *Ambiente y Desarrollo* 48; Arthur Hoole & Fikret Berkes, “Breaking Down Fences: Recoupling Social-Ecological Systems for Biodiversity Conservation in Namibia” (2010) 41 *Geoforum* 304; Bin Xun, Deyong Yu, & Xue Wang, “Prioritizing Habitat Conservation Outside Protected Areas in Rapidly Urbanizing Landscapes: A Patch Network Approach” (2017) 157 *Landscape & Urban Planning* 532.
- ²⁰ See Stan Stevens, “The Legacy of Yellowstone” in Stan Stevens, ed, *Conservation through Cultural Survival: Indigenous Peoples and Protected Areas*, 1st ed (Washington, DC: Island Press, 1997) at 13–32 [Stevens, “Legacy of Yellowstone”]; David Anderson & Richard Grove, “The Scramble for Eden: Past, Present and Future in African Conservation” in David Anderson & Richard Grove, eds, *Conservation in Africa: Peoples, Policies, and Practice* (Cambridge, UK: Cambridge University Press, 1987) at 1; Adams & Hulme, *supra* note 7 at 10; Siurua, *supra* note 18 at 74; Roderick P Neumann, “Nature-State-Territory: Toward a Critical Theorization of Conservation Enclosures” in Richard Peet & Michael Watts, eds, *Liberation Ecologies: Environment, Development, Social Movements* (London, UK: Routledge, 2002) at 179.

this traditional approach promotes establishing protected areas where no human activities are allowed, neglecting the reliance of local communities on their access to natural resources in these areas.²¹ Indeed, the “‘fortress’ approach to conservation in national parks has excluded local and [I]ndigenous use of water, wildlife, forests, and grasslands.”²² Therefore, these “Fences and Fines” policy measures have devolved into numerous conflicts between local communities and protected areas,²³ which in turn have augmented biodiversity loss.²⁴ In short, this traditional approach toward conservation disregarded the people’s role in it.²⁵

Nevertheless, this hegemonic approach no longer holds around the world²⁶ since a “new paradigm”²⁷ comprised of community conservation approaches has arisen as a more inclusive option, arguing that “conservation goals should be pursued by strategies that emphasize the role of local residents in decision-making about natural resources.”²⁸ This approach comprises different types of conservation practices such as collaborative management, community-based conservation, community wildlife management, community-based natural resource management, and integrated conservation, among other subcategories.²⁹ Community conservation emphasizes “the need not to exclude local people, either physically from protected areas or politically from the conservation policy process, but to ensure their participation.”³⁰ In other words, community conservation reverses the top-down policies by focusing on the people who bear the costs of conservation, including “biodiversity protection by, for, and with the local community.”³¹ In summary, community conservation is now the dominant approach to conservation globally, possibly because it attends not only to science, but also to the social contours of the problem.³²

With community conservation as the mainstream trend since the late 1990s,³³ there are ongoing discussions on how to surpass the main challenges that arose with this approach.³⁴ First, among these hurdles there is a need to delve into a detailed comprehension of sociological

²¹ See Hoole & Berkes, *supra* note 19 at 306.

²² *Ibid.* See Adams & Hulme, *supra* note 7 at 12.

²³ See Hoole & Berkes, *supra* note 19 at 306.

²⁴ *Ibid.*

²⁵ See Adams & Hulme, *supra* note 7 at 12.

²⁶ *Ibid.*

²⁷ See Adrian Phillips, “Turning Ideas on Their Head: The New Paradigm for Protected Areas” (2003) 20:2 *George Wright Forum* 8.

²⁸ See Adams & Hulme, *supra* note 7 at 13.

²⁹ *Ibid.*

³⁰ See Adams & Hulme, *supra* note 7 at 12.

³¹ See David Western & R Michael Wright, “The Background to Community-based Conservation” in David Western & R Michael Wright, eds, *Natural Connections: Perspectives in Community-based Conservation* (Washington, DC: Island Press, 1994) 1 at 7.

³² *Ibid.*; Barrow & Murphree, *supra* note 6 at 24.

³³ See Berkes, *supra* note 6 at 622.

³⁴ See Joshua et al, “Collaborative Governance and Conflict Management: Lessons Learned and Good Practices from a Case Study in the Amazon Basin” (2020) 33:4 *Society & Natural Resources* 538 at 539.

interactions to develop interdisciplinary approaches toward conservation.³⁵ Second, there is a necessity to acknowledge “local people’s worldviews, power dynamics, and networks in the process of institution building.”³⁶ Third, better monitoring of ecological outcomes from community-based conservation is required to understand the multiple circumstances that surround the clash of interests between development and conservation.³⁷ Fourth, the need to design dynamic models of community conservation that emphasize partnerships among all relevant actors, such as local communities, NGOs and administrative agencies in charge of the protected areas.³⁸ In this regard, the article adds to the literature, by focusing its analysis on this last hurdle, and problematizing this issue with an example from two Chilean protected areas. Although, before getting into the case, the next sections delve into the theoretical framework of collaborative conservation and the role of Indigenous communities.

2.2. COLLABORATIVE CONSERVATION AND GOVERNANCE

As previously discussed, one of the greatest challenges for biodiversity conservation is to include Indigenous and non-Indigenous communities into protected areas and the conservation policy process.³⁹ To accomplish this, we need to design policies that acknowledge and promote the participation of Indigenous communities within protected areas, towards an Indigenous collaborative governance. Hence, in this section the article offers some comments on the notion of protected areas governance, as a complementary public policy look at the dominant collaborative conservation approach. Then it delves into collaborative governance and management, as the community conservation subcategory that seems most appropriate for the case analysis of the Kawęsqar people and their National Park and Reserve presented in section II.

2.2.1. PROTECTED AREAS GOVERNANCE

The International Union for Conservation of Nature (IUCN) and the CBD recognise that there are four major and equally legitimate protected area governance arrangement types.⁴⁰ These types are based on “who holds authority, responsibility and can be held accountable for the key decisions:”⁴¹

- Governance by government, in which a government body or an agency reporting to government holds authority, responsibility, and accountability;
- shared governance by institutional mechanisms in which authority, responsibility, and accountability are shared among two or more actors. This article focuses on this type, specifically through collaborative management;

³⁵ See Berkes, *supra* note 6 at 622.

³⁶ See Kathleen A Galvin et al, “African Community-Based Conservation,” (2018) 23:3 Ecology & Society at 13.

³⁷ *Ibid.*

³⁸ See Hoole & Berkes, *supra* note 19 at 315.

³⁹ See Adams & Hulme, *supra* note 7 at 12-13.

⁴⁰ See Stevens, “Indigenous Peoples,” *supra* note 11 at 30.

⁴¹ Grazia Borrini-Feyerabend et al, eds, *Governance of Protected Areas: From Understanding to Action*, 20th ed (Gland, SZ: The World Conservation Union, 2013) at 29 [Grazia Borrini-Feyerabend et al].

- private governance involving private landowners who hold authority and responsibility; accountability may be shared but it is usually limited; and,
- governance by Indigenous and non-Indigenous communities through customary rules and other means such as livelihood strategies, which often depends on cultural and institutional arrangements and sometimes is not even recognised.

Nonetheless, it should be noted that in a vertiginously evolving world, there are multiple subtypes and combinations for these categories, so they are not mutually exclusive and commonly overlap.⁴²

Generally, protected areas governance aims “to establish and gain recognition for community conservation areas, which are managed by Indigenous and traditional local [non-Indigenous] communities through customary law or other effective means.”⁴³ Particularly, protected areas governance involves a broad range of issues from policy to practice, influencing management effectiveness and equity, as well as the sustenance of community, political, and financial support.⁴⁴ Therefore, governance involves the authoritative allocation of resources and control, in which state actors are not necessarily the only or most significant participants.⁴⁵

2.2.2. COLLABORATIVE GOVERNANCE

Under a shared governance type of protected areas, described in the previous section, there are multiple customary institutions all over the world.⁴⁶ One of the most common forms can be described as collaborative governance,⁴⁷ which entails a “governing arrangement where . . . public agencies directly engage non-state stakeholders in a collective decision-making process that . . . aims to make or implement public policy or manage public programs or assets.”⁴⁸ Typically, in this model, an administrative agency is formally required to collaborate with stakeholders, such as Indigenous communities, withholding the decision-making authority and accountability.⁴⁹ For instance, in the Chilean case to be analyzed, there is a presidential

⁴² *Ibid* at 29; Grazia Borrini-Feyerabend & Rosemary Hill, “Governance for the Conservation of Nature” in Graeme L Worboys et al, eds, *Protected Area Governance and Management* (Canberra, AU: Australian National University Press, 2015) at 186; Stevens, “Indigenous Peoples,” *supra* note 11 at 30.

⁴³ See John Graham, Bruce Amos, & Tim Plumptre, “Governance Principles for Protected Areas in the 21st Century” (June 30 2003) at 4–5, online (pdf): *Institute on Governance* <www.files.ethz.ch/isn/122197/pa_governance2.pdf>.

⁴⁴ See Grazia Borrini-Feyerabend, “Governance of Protected Areas: Innovations in the Air” (2003) 12 *Poc’y Matters* 92.

⁴⁵ See Ludger Brenner, “Gobernanza Ambiental, Actores Sociales y Conflictos En Las Áreas Naturales Protegidas Mexicanas” (2010) 72:2 *Revista Mexicana de Sociología* 283 at 285. See also Graham, Amos & Plumptre, *supra* note 45 at 2 (on a more concise governance concept).

⁴⁶ See generally Grazia Borrini-Feyerabend et al, *Sharing Power: Learning-by-Doing in Co-Management of Natural Resources Throughout the World* (New York: Earthscan, 2007).

⁴⁷ See Borrini-Feyerabend & Hill, *supra* note 42 at 181.

⁴⁸ Chris Ansell & Alison Gash, “Collaborative Governance in Theory and Practice” (2007) 18 *J Public Administration Research & Theory* 543 at 544.

⁴⁹ See Borrini-Feyerabend & Hill, *supra* note 42 at 181.

government, Kawésqar Indigenous communities, and aquaculture industries, among other actors.⁵⁰

According to Borrini-Feyerabend, a weak version of collaborative governance means a mere informative and consultative process,⁵¹ whereas in a strong connotation, it could mean the creation of a cooperative body, integrated by multiple parties, that “develops and approves the technical proposals to be later decided upon.”⁵² A strong version of collaborative governance sets the framework for a specific community conservation category: collaborative management, which this article proposes as a solution in the Kawésqar case.

2.2.3. COLLABORATIVE MANAGEMENT

Collaborative management,⁵³ as an increasingly popular strategy in high-income countries, creates “a situation in which some or all of the relevant stakeholders in a protected area are involved in a substantial way in management activities.”⁵⁴ In a collaborative management process the administrative agency in charge of the protected area, works on a partnership agreement with the relevant stakeholders such as Indigenous communities.⁵⁵ This agreement details the specific functions, rights and responsibilities of each actor within the protected area.⁵⁶

Since this article problematizes through the Kawésqar case, and the tension between different conservation approaches within Indigenous communities and non-Indigenous communities, it is notable how collaborative management employs strategies for effectively managing conflicts that arise within protected areas, commonly between parties and stakeholders with different conservation and preservation views.⁵⁷ Even more importantly, collaborative management increases participation of Indigenous communities and relevant stakeholders, and adapts conservation laws and policies.⁵⁸ In this context, one of the key contemporary discussions

⁵⁰ See Grazia Borrini-Feyerabend, *Collaborative Management of Protected Areas: Tailoring the Approach to the Context* (Gland, Switzerland: IUCN, 1996) at 15–22 [Borrini-Feyerabend, “Collaborative Management”].

⁵¹ See Borrini-Feyerabend & Hill, *supra* note 42 at 181.

⁵² *Ibid.* See Lausche, *supra* note 5 at 89.

⁵³ See Naim Kapucu, Farhod Yuldashev & Erlan Bakiev, “Collaborative Public Management and Collaborative Governance: Conceptual Similarities and Differences” (2009) 2:1 *European J Economic & Political Studies* 39 at 41.

⁵⁴ Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 12.

⁵⁵ *Ibid.*

⁵⁶ Generally, this partnership involves: “a protected territory . . . and its boundaries; the range of functions . . . it can provide; the recognized stakeholders in the protected area; the functions and responsibilities assumed by each stakeholder; the specific benefits and rights granted to each stakeholder; . . . set of management priorities and a management plan;” conflict-resolution mechanisms; and rules for monitoring the partnership agreement, among others key elements, some of which are analyzed in section 2. (See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 12.)

⁵⁷ See Ophelia Soliku & Ulrich Schraml, “Making Sense of Protected Area Conflicts and Management Approaches: A Review of Causes, Contexts and Conflict Management Strategies” (2018) 222 *Biological Conservation* 136 at 139–141.

⁵⁸ *Ibid.*

within scholars lies on which factors contribute to implement collaborative dynamics or on “how to make collaborative governance regimes more successful beyond a ‘toolkit’ approach.”⁵⁹ This challenge transcends the limits of this article, although through its recommendations on the following sections, the article attempts to contribute to the discussion.

According to Borrini-Feyerabend, it is considered particularly appropriate to adopt partnership agreements when some of these conditions apply:⁶⁰

[t]he local stakeholders have historically enjoyed customary/legal rights over the territory at stake; local interests are strongly affected by the way in which the protected area is managed; the decisions to be taken are complex and highly controversial . . . ;the agency’s previous management has clearly failed to produce the expected results; the various stakeholders are ready to collaborate and request to do so; there is ample time to negotiate.⁶¹

This collaborative approach is not new and has been widely applied worldwide,⁶² also it is not an effective approach for every conservation problem.⁶³ In fact, collaborative partnerships should only be pursued when a proactive cooperation and compromise of Indigenous communities and stakeholders is essential to manage the protected area, and if the access to the resources comprised within the boundaries of the protected area relevant for their “local livelihood, security, and cultural survival.”⁶⁴ For example—as detailed in section II—by living on and using the resources of Kawésqar Park and Reserve, it can be suggested that the Kawésqar Indigenous communities must be included in management partnerships.

In summary, within this community conservation environment, collaborative management is one of the most innovative approaches to the environmental governance trend that pushes us to rethink and embrace new sorts of effective governance techniques. Certainly, collaborative governance and management must make us reconsider the traditional approach towards conservation, especially from our governments, and also must make us question if the employment of top-down policies to promote and ensure conservation are the most suitable solutions to problematic cases, especially when multiple stakeholders and Indigenous communities are involved and their exclusion from conservation planning has resulted in their impoverishment and the degradation of the protected areas and adjacent zones.

2.3. INDIGENOUS COMMUNITIES’ ROLE

In this section I analyze the role of Indigenous communities within protected areas in a collaborative conservation paradigm. First, for the purposes of this article, Indigenous people

⁵⁹ See Joshua Fisher et al, “Collaborative Governance and Conflict Management: Lessons Learned and Good Practices from a Case Study in the Amazon Basin,” (2020) 33:4 *Society & Natural Resources* 538 at 539, citing Mark S Reed, “Stakeholder Participation for Environmental Management: A Literature Review” (2008) 141 *Biological Conservation* 2417 at 2421.

⁶⁰ See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13–14.

⁶¹ *Ibid.*

⁶² *Ibid* at 13; Lausche, *supra* note 5 at 89.

⁶³ See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13; Soliku & Schraml, *supra* note 57 at 141.

⁶⁴ See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13.

or Indigenous communities are “tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations.”⁶⁵

Indigenous communities have inhabited their territories long before modern industrialized civilization, possessing ancient traditions with evidence of explicit knowledge on the uses of local biodiversity,⁶⁶ which also strengthens their role as key actors to consider in protection efforts. Conservation knowledge is not entirely evident, since it is a “Western idea” that seems extravagant as an independent activity to Indigenous cultures,⁶⁷ but has been identified by several authors.⁶⁸ This shows that Indigenous communities have learnt to coexist with nature and “demonstrate an interest for maintaining the ecological processes and the species that mediate those processes.”⁶⁹ Indeed, Indigenous communities’ beneficial contributions to protected areas conservation and management include their extensive knowledge of the ecology and geography of the area, locally adapted natural resources management practices conservation values, and monitoring of the baseline environmental conditions,⁷⁰ among many other contributions.⁷¹

In this sense, while it is evidently important to conserve biodiversity for sustainability, it is just as important to “conserve the diversity of local cultures and the Indigenous knowledge that they hold,”⁷² given that the benefits of establishing protected areas in collaboration with

⁶⁵ Grazia Borrini-Feyerabend et al, *Indigenous and Local Communities and Protected Areas: Towards Equity and Enhanced Conservation: Guidance on Policy and Practice for Co-Managed Protected Areas and Community Conserved Areas* (Gland, Switzerland: IUCN, 2004) at 8, citing *Indigenous and Tribal Peoples Convention*, 27 June 1989, ILO C169 art 1(a) (entered into force 5 September 1991); see also Stevens, “Indigenous Peoples”, *supra* note 11 at 15.

⁶⁶ See Madhav Gadgil, Fikret Berkes & Carl Folke, “Indigenous Knowledge for Biodiversity Conservation” (1993) 22:2/3 *Ambio: J Human Environment* 151 at 154; Marcia Langton, Zane Ma Rhea & Lisa Palmer, “Community-Oriented Protected Areas for Indigenous Peoples and Local Communities” (2005) 12 *J Political Ecology* 23 at 24–26; Kate A Berry et al, “Reconceptualising Water Quality Governance to Incorporate Knowledge and Values: Case Studies from Australian and Brazilian Indigenous Communities” (2018) 11:1 *Water Alternatives* 40; Suzanne von der Porten, Rob C de Loë & Deb McGregor, “Incorporating Indigenous Knowledge Systems into Collaborative Governance for Water: Challenges and Opportunities” (2016) 50:1 *J Can Studies* 214.

⁶⁷ See Janis B Alcorn, “Indigenous Peoples and Conservation” (1993) 7:2 *Conservation Biology* 424 at 425.

⁶⁸ See Gadgil, Berkes & Folke, *supra* note 66 at 154; J Peter Brosius & Sarah L Hitchner, “Cultural Diversity and Conservation” (2010) 61:199 *Intl Soc Science J* 141 at 150.

⁶⁹ Janis B Alcorn, *supra* note 67 at 425. See Gadgil, Berkes & Folke, *supra* note 66 at 155; Stevens, “Indigenous Peoples”, *supra* note 11 at 15 (stating that “collectively they [Indigenous people] constitute the primary repository of global cultural diversity”).

⁷⁰ See Stan Stevens, “Lessons and Directions” in Stan Stevens, ed, *Conservation through Cultural Survival: Indigenous Peoples and Protected Areas*, 1st ed (Washington, DC: Island Press, 1997) 265 at 265–66 [Stevens, “Lessons”].

⁷¹ See Julia E Fa et al, “Importance of Indigenous Peoples’ Lands for the Conservation of Intact Forest Landscapes” (2020) 18:3 *Frontiers in Ecology & Environment* 135 at 138.

⁷² Gadgil, Berkes & Folke, *supra* note 66 at 156. See also William M Adams & Jon Hutton, “People, Parks and Poverty: Political Ecology and Biodiversity Conservation” (2007) 5:2 *Conservation & Society* 147 at 163.

Indigenous communities are multiple, and valuable itself.⁷³ Furthermore, “[t]heir territories, which despite invasions and annexations still comprise at least 20 percent of the land area of the planet, are rich in natural resources and are estimated to hold 80 percent of the world’s biodiversity.”⁷⁴ Consequently, it is only natural that conservation efforts engage with Indigenous communities through multiple approaches.⁷⁵

Nevertheless, conservationists and Indigenous communities’ interests are not always aligned. Conservation advocates of the old-style fortress system,⁷⁶ allege that Indigenous communities may not always engage in environmentally sound practices,⁷⁷ that the state is solely entitled to protect biodiversity,⁷⁸ or other arguments based on simple prejudices against the effectiveness of Indigenous communities’ actions on conservation.⁷⁹ Despite these differences, currently there is consensus on the role and importance of Indigenous communities in enhancing biodiversity conservation, and a tendency to create partnerships with them.⁸⁰

On the other hand, it must be remarked that from the Indigenous community’s perspective, the traditional approach toward conservation, by establishing protected areas under the fortress-system, is considered another manifestation of colonialism. As Professor Stevens recounts “[p]rotected areas have become a vehicle of state territorialization in many countries ... and often have been used by repressive states as a means to seize greater control of Indigenous peoples’ territories and lives.”⁸¹ Accordingly, most of the protected areas developed under the traditional approach were imposed in violation of Indigenous communities’ rights,⁸² which comprised the

⁷³ See Stevens, “Lessons”, *supra* note 70 at 265–67. For a recount on Indigenous People and biodiversity and how literature acknowledges that “cultural and –biological diversity may be interlinked, often interdependent, and perhaps coevolved” see Stevens, “Legacy of Yellowstone”, *supra* note 20 at 22–26.

⁷⁴ Stevens, “Indigenous Peoples”, *supra* note 11 at 16.

⁷⁵ *Ibid*; Mac Chapin, “A Challenge to Conservationists”, *World Watch Magazine* (November/December 2004) 17 at 30 (asserting that “Indigenous peoples live in most of the ecosystems that conservationists are so anxious to preserve”).

⁷⁶ See Stevens, “Lessons”, *supra* note 70 at 285–86; Lara Domínguez & Colin Luoma, “Decolonizing Conservation Policy: How Colonial Land and Conservation Ideologies Persist and Perpetuate Indigenous Injustices at the Expense of the Environment” (2020) 9:65 *Land* at 6–8; Adams & Hutton, *supra* note 72 at 165–67.

⁷⁷ See Gadgil, Berkes & Folke, *supra* note 66 at 156; Marcia Langton, “The ‘wild’, the market and the native: Indigenous people face new forms of global colonization” in William M. Adams & Martin Mulligan, eds, *Decolonizing Nature: Strategies for Conservation in a Post-colonial Era* (London, UK: Earthscan Publications, 2003) 79 at 86–89.

⁷⁸ See Stevens, “Lessons”, *supra* note 70 at 286.

⁷⁹ *Ibid* at 286; Domínguez & Luoma, *supra* note 76 at 5.

⁸⁰ See Lausche, *supra* note 5 at 81–85.

⁸¹ Stevens, “Indigenous Peoples”, *supra* note 11 at 19. See also Bernard Nietschmann, “The Fourth World: Nation Versus States” in George J Demko & William B Wood, eds, *Reordering the World: Geopolitical Perspectives on the 21st Century*, 1st ed (Boulder, Colo: Westview Press, 1994) 225; Neumann, *supra* note 20 at 179–186; Chance Finegan, “Reflection, Acknowledgement, and Justice: A Framework for Indigenous-Protected Area Reconciliation” (2018) 9:3 *Intl Indigenous Policy J* at 9.

⁸² See Fergus MacKay, “Indigenous Peoples’ Rights and the Jurisprudence of the Inter-American Human Rights System” in Thomas Sikor & Johannes Stahl, eds, *Forests and People: Property, Governance, and Human Rights* (Abingdon, UK: Earthscan, 2011) 33 at 33.

displacement of these communities. This displacement can be physical, cultural or political,⁸³ provoking a “lost connection with [their] place and diminished authority and responsibility for territories, lands, and waters.”⁸⁴ Particularly, political marginalization displaces Indigenous communities by depriving them “of self-governance and decision-making authority in their territories even when they have not been physically relocated.”⁸⁵ Consequently, the impacts of conservation without considering Indigenous communities’ interest in it, have brought devastating consequences for these human groups on multiple levels, questioning the true purpose and cost behind these efforts.

Another precedent to bear in mind when analyzing Indigenous communities and conservation is the frequent superposition between Indigenous or tribal lands and protected areas.⁸⁶ Although at first glance this superposition may seem a good occurrence, considering the benefits of the people and their land’s symbiotic relationship, numerous conflicts have arisen from the differences between traditional preservationists’ approaches and Indigenous communities’ belief systems and stewardship of the land.⁸⁷ As explained, these conflicts are based in a proliferation of protected areas under a fortress approach, with legal systems inherited from colonial powers that failed to recognise Indigenous communities’ customary title to ancestral lands.⁸⁸ Even more, protected areas have “marginalized [Indigenous communities] to the extent that their own aspirations for their futures are diminished,”⁸⁹ under the idea that settlers’ expectations should prevail over existing cultures.⁹⁰

There are different types of conflicts within protected areas involving Indigenous communities, normally these arise because Indigenous rights are restricted or infringed by the decisions of park authorities.⁹¹ Indeed, the main conflicts appear when the rights of Indigenous communities are unrecognised or plainly overlooked, for example when commercial exploitation of wild plant and animal products is widespread on areas populated by Indigenous communities, but their participation is minimal.⁹² Another example is when the use of biological knowledge in scientific, commercial and public domains comes from ancestral

⁸³ See Stevens, “Indigenous Peoples”, *supra* note 11 at 37.

⁸⁴ *Ibid.*

⁸⁵ *Ibid* at 38.

⁸⁶ See Borrini-Feyerabend & Hill, *supra* note 41 at 185–88; Lourdes Barragán Alvarado, Pueblos Indígenas y Áreas Protegidas En América Latina (2008) at 22–24, online (pdf): *Ministerio para la Transición Ecológica y el Reto Demográfico* <www.miteco.gob.es/es/parques-nacionales-oapn/proyectos-de-cooperacion/2pueblos-indigenas_tcm30-287856.pdf>; Paúl Cisneros & James McBreen, “Superposición de Territorios Indígenas y Áreas Protegidas En América Del Sur: Resumen Ejecutivo” (2010), online (pdf): *International Union for Conservation of Nature* <www.iucn.org/sites/dev/files/import/downloads/resumen_ejecutivo_superposicion.pdf>.

⁸⁷ See Alfonso Peter Castro & Erik Nielsen, “Indigenous people and co-management: implications for conflict management” (2001) 4 *Environmental Science & Policy* 229 at 232–34; Chapin, *supra* note 75 at 30.

⁸⁸ See Domínguez & Luoma, *supra* note 76 at 7.

⁸⁹ Langton, *supra* note 77 at 87–88.

⁹⁰ *Ibid* at 88.

⁹¹ See Soliku & Schraml, *supra* note 57 at 140.

⁹² See Langton, *supra* note 77 at 88.

knowledge without the consent of the traditional owners of that knowledge, and without any social and economic benefits to the knowledge owners.⁹³ Or when restrictions on protected areas are so pervasive that Indigenous communities are actively suppressed by military and bureaucratic action, being prevented from obtaining livelihoods from their former lands that are now declared as parks.⁹⁴ Even more blatantly severe, conflicts may arise when the creation of protected areas involves the forcible eviction or displacement of Indigenous communities even without their consent.⁹⁵ In summary there are several types of conflicts within protected areas involving Indigenous communities, where there is an evident lack of participation of these communities. Consequently, consultation with Indigenous communities—as “mere stakeholders”⁹⁶—is considered the appropriate mechanism in this vision, within conservation and other wildlife-use planning processes.⁹⁷

Therefore, scholars have called for a necessary reconciliation between Indigenous Communities and park management.⁹⁸ Normally the solution to this nonobservance of Indigenous communities’ rights has come by promoting the recognition of Indigenous values and knowledge in the conservation process, but the tendency must be to involve them as relevant actors such as prominent stakeholders in the discussion and management of protected areas, recognizing their priorities and decision-making structures.⁹⁹ Indeed, to enhance conservation inside and outside protected areas, partnerships with Indigenous communities offer one of the best options for achieving on-the-ground conservation.¹⁰⁰ This calls for states and other relevant stakeholders to build strong relations and agreements with Indigenous communities—as another relevant stakeholder—which may require new legislation, policies, institutional linkages, and processes.¹⁰¹

All these factors must lead us to reconceive the nature of conservation and the role of Indigenous communities within it, firstly by recognizing Indigenous communities and their territorial rights, and then by including them in planning of conservation projects and empowering them to participate. This could include co-managing protected areas, engaging Indigenous communities in the administration, consultation mechanisms, royalties or other significant solutions to prevent or solve conflicts, and other tools to promote a broader and effective conservation everywhere Indigenous communities live or are settled.

⁹³ *Ibid* at 88–89.

⁹⁴ See Adams & Hutton, *supra* note 72 at 156–60; Langton, Rhea & Palmer, *supra* note 66 at 26.

⁹⁵ See Domínguez & Luoma, *supra* note 76 at 7; Daniel Brockington & David Wilkie, “Protected Areas and Poverty” (2015) 370 *Philosophical Transactions of the Royal Society* 1 at 3; Adams & Hutton, *supra* note 72 at 170.

⁹⁶ Langton, *supra* note 77 at 88

⁹⁷ *Ibid.*

⁹⁸ See Finegan, *supra* note 81 at 5–10.

⁹⁹ See Stevens, “Lessons”, *supra* note 70 at 267–80; Javier Beltrán, ed, *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies*, vol 4 (Gland, Switzerland: IUCN, 2000) 7–12; Langton, Rhea & Palmer, *supra* note 66 at 32–34. See generally Borrini-Feyerabend et al, “Governance: From Understanding”, *supra* note 41 at 10–12; Brosius & Hitchner, *supra* note 68.

¹⁰⁰ See Alcorn, *supra* note 67 at 426.

¹⁰¹ *Ibid.* See also Borrini-Feyerabend & Hill, *supra* note 42 at 185.

These ideas will be analyzed from the perspective of the Kawésqar Indigenous communities located in the far south region of Patagonia, Chile. Indeed, this research aims to frame the existing conflicts with the Chilean government and aquaculture projects and offer possible solutions to the governance of protected areas in the region.

3. THE KAWÉSQAR PEOPLE AND THEIR NATIONAL PARK AND RESERVE

In this section I delve into the Kawésqar people history, and their close relationship with the sea, and especially with protected areas. From this basis, I explain the creation of the Kawésqar National Park and Reserve, and the critical issues of the conflict between administrative agencies, aquaculture projects, and Indigenous communities.

3.1. THE KAWÉSQAR PEOPLE

The Kawésqar are the descendants of a group of canoe-going hunter-gatherers that travelled across waterways in the Southern regions of Chile.¹⁰² Estimated to have arrived 6,500 years ago, the the Kawésqar originally inhabited territory extending from the Gulf of Penas to the Magellan Strait.¹⁰³ The Kawésqar territory was also frequented by other Southern ethnic groups, such as the Chonos, Aónikenk, Selk'nam and Yaganes, many of them already extinct.¹⁰⁴

Researchers have estimated that the historic number of the Kawésqar population was between three thousand and four thousand.¹⁰⁵ However, following the first contacts with Western civilization, conflicts for land occupation¹⁰⁶ and new diseases decimated the population, so that by the end of the nineteenth century, their population depleted to only five hundred individuals, and fifty years later by 1953, just sixty persons were left.¹⁰⁷ By 2014 there were “around 400 [four hundred] people registered as Kawésqar in the Magallen Region: 236 in Punta Arenas, 157 in Puerto Natales, seven in Puerto Williams and seven in Puerto Edén.”¹⁰⁸

From the 1930s through 1960s, the Kawésqar people were forcibly relocated by the Chilean government from their territories to the North, into Puerto Edén, on Wellington Island, which also contributed to the population decrease.¹⁰⁹ During this time, and even before, religious missionaries also intervened, believing Kawésqar people had to be “civilized,” such as by separating children from their families and sending them to Punta Arenas—the region’s

¹⁰² See Christine Gleisner & Sara Montt, “Kawésqar: Historical Overview and Tales of the Indigenous Peoples of Chile” (2014) at 59, online (pdf): *Foundation for Agricultural Communication, Training and Culture (FUCOA)* <www.fucoa.cl/publicaciones/pueblos_originarios/kawesqar>.

¹⁰³ *Ibid.*

¹⁰⁴ See José Luis Alonso Marchante, *Selk'nam: Genocidio y Resistencia* (Santiago de Chile: Catalonia, 2019) at 345–51.

¹⁰⁵ See Gleisner & Montt, *supra* note 102 at 59.

¹⁰⁶ See Marchante, *supra* note 104 at 353–54. See generally Alberto Harambour & José Barrera Ruiz, “Barbarie o justicia en la Patagonia occidental: las violencias coloniales en el ocaso del pueblo kawésqar, finales del siglo XIX e inicios del siglo XX” (2019) 71 *Historia Crítica* 25.

¹⁰⁷ See Gleisner & Montt, *supra* note 102 at 62.

¹⁰⁸ *Ibid.* at 63. See Marchante, *supra* note 104 at 358.

¹⁰⁹ See Marchante, *supra* note 104 at 355.

capital—to be educated.¹¹⁰ At this point it is important to notice that the Kawésqar were nomadic people so settling down was very rare and difficult for them.¹¹¹

The Kawésqar community formally organized under the name “Consejo Kawashka” (Kawashka Council) at the end of the 1980s. And only as recently as in 1993, with the enactment of *Law No. 19253* or “Indigenous Law,” the “Kawésqar” or “Alacalufe” communities were formally recognised as one of Chile’s ethnic groups.¹¹² Indeed, *Law No. 19253* recognised several ethnic groups along with several rights, mainly: development rights, land-access rights, cultural rights, and political-participatory rights.¹¹³ By 2014, there were “seven recorded Kawésqar communities in the Magellan Region: four in Punta Arenas, two in Puerto Natales, and one in Puerto Edén.”¹¹⁴

To date Kawésqar people and their descendants’ subsistence mainly comes from artisanal fishery and seafood collection, and handicraft.¹¹⁵ However, exploitation of endangered species by non-Indigenous hunters and fisherman has given rise to stricter controls that limit the activities of the Kawésqar, despite having been granted special permits.¹¹⁶

Considering the rich biodiversity and important natural resources, such as hundreds of glaciers and endemic species,¹¹⁷ important parts of the historical Kawésqar territory were declared national park and reserve.¹¹⁸ For instance, the town of Puerto Edén lies within the Bernardo O’Higgins National Park, the largest in the Southern Hemisphere.¹¹⁹ Nevertheless, the vast majority of Kawésqar people have returned to live near two cities to the south of Bernardo O’Higgins National Park: Punta Arenas and Puerto Natales. In this context, recent territorial claims have been formulated by the Kawésqar communities expressed in collective demands by their current Indigenous organizations, as well as by their members demanding individual lands to improve their conditions of habitability and development.¹²⁰

¹¹⁰ See Iris Fernández Soto, *Navegando en Las Profundidades de Una Vida Ancestral*, 1st ed (Punta Arenas: Kajef, 2010) at 49.

¹¹¹ See Gleisner & Montt, *supra* note 102 at 64; Joseph Empeaire, *Los Nómades del Mar* (Puerto Edén: LOM Ediciones 2002) (Pueblos Originarios de Chile: Biblioteca Collaborativa).

¹¹² See Law No 19253, Establece Normas Sobre Protección, Fomento y Desarrollo De Los Indígenas, y Crea La Corporación Nacional De Desarrollo Indígena, Art. 1, Oct. 5, 1993, Diario Oficial [D.O.] (Chile).

¹¹³ See Marchante, *supra* note 104 at 9–14.

¹¹⁴ Gleisner & Montt, *supra* note 102 at 63.

¹¹⁵ *Ibid.* See Marchante, *supra* note 104 at 356, 360.

¹¹⁶ See Marchante, *supra* note 104 at 360–62.

¹¹⁷ See Gleisner & Montt, *supra* note 102 at 63.

¹¹⁸ See Alan M Friedlander et al, “Marine communities of the newly created Kawésqar National Reserve, Chile: From glaciers to the Pacific Ocean” (2021) 16:4 PloS One.

¹¹⁹ See Juan-Carlos Aravena et al, “Parque Nacional Bernardo O’Higgins/Territorio Kawésqar Waes: Conservación y Gestión en un Territorio Ancestral” (2018) 46:1 Magallania 49 at 51.

¹²⁰ See Marchante, *supra* note 104 at 359.

3.2. A PARK WITHOUT SEA

“A Kawésqar without sea is like nothing, a simple word.”

- Haydee Aguila, a member of the Atap Kawésqar community¹²¹

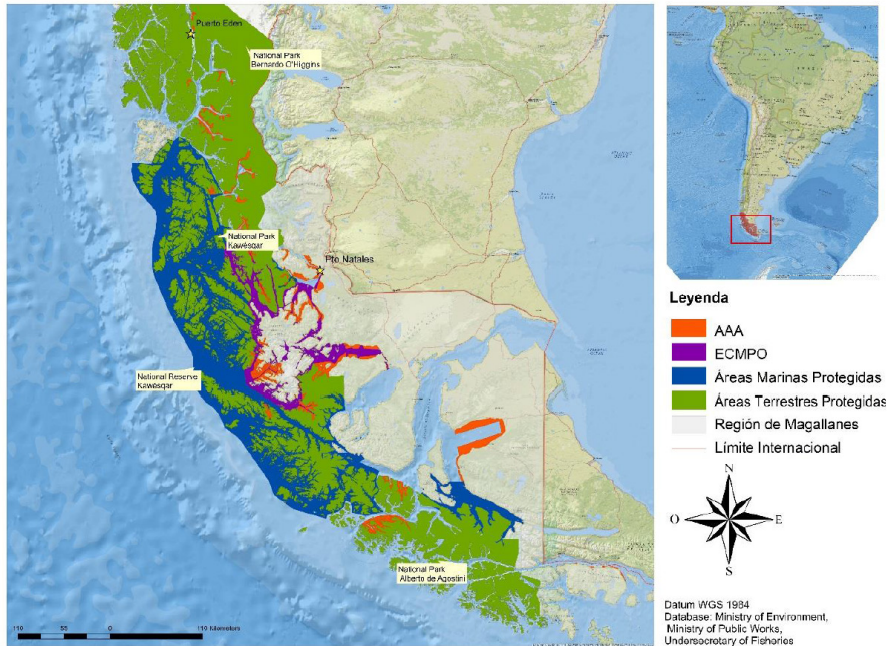


Figure 1. Land Protected Areas (green), Marine Protected Areas (blue), Appropriate Areas for the Development of Aquaculture (AAA) (red) and Marine Coastal Space of Indigenous Peoples (ECMPO) (purple) in the Magellan Region.¹²²

As it is explained in this section, the Kawésqar National Park originated from a public-private partnership conservation effort, without properly addressing the Indigenous communities' concerns, as a prime example of the current tensions arising within economic development and conservation efforts. This story begins in 1991, when Douglas Tompkins, an American conservationist and businessman, started to buy land in the south of Chile to protect its native forests from logging.¹²³ This idea of creating a larger protected area with full public

¹²¹ See Michelle Carrere, “Salmoneras en Chile: la Defensa de la Reserva Nacional Kawésqar” (22 July 2020), online: *Mongabay* <es.mongabay.com/2020/07/salmoneras-en-chile-la-defensa-de-la-reserva-nacional-kawesqar/> [translated by author].

¹²² See J Barrena & M Hernando, “Los Conflictos Del Desarrollo en Territorios y Maritorios Indígenas Rurales” (2020) 48:3 *AgroSur* 17 at 20.

¹²³ See Benedikt Hora, “Private Protection Initiatives in Mountain Areas of Southern Chile and Their Perceived Impact on Local Development—The Case of Pumalín Park” (2018) 10:5 *Sustainability* 1584 at 1588. See George Holmes, “What is a land grab? Exploring green grabs, conservation, and protected areas in Southern Chile” (2014) 41:4 *J Peasant Studies* 547 at 561–564; Claudio Rivera & Arturo Vallejos-Romero, “La Privatización de La Conservación En Chile: Repensando La Gobernanza Ambiental” (2015) 36:1 *Bosque* 15 at 20.

access grew over the 1990s and culminated in 2013 with the Yendegaia Foundation (another legal entity of Tompkins) in Tierra del Fuego near the Kawésqar ancient lands.¹²⁴ Then, the Tompkins Conservation Trust decided to donate the land (407,625 ha) to the state of Chile, looking to create the *Red de Parques Nacionales de la Patagonia Chilena* (Chilean National Patagonia Park Network).¹²⁵ In 2017, an agreement protocol was subscribed between the state of Chile and the donor entities related to Douglas Tompkins to specify the arrangements of a joint and coordinated project between the parties, which involved the donation of private properties and the state's commitment to include state-owned property in the new and existing parks, as well as to proceed with the recategorization of protected areas that did not have the national park protection standard.¹²⁶

Within the multiple donations, the state of Chile committed itself within two years from the transfer of ownership, to allocate some of these lands permanently to their conservation and protection through the creation of the Kawésqar National Park. To accomplish this, it was decided that the recategorization of the Alacalufes Forest Reserve (with a total land area of approximately 2,313,875 ha) would be added to the donated lands (nearly 26,000 ha) and other state-owned properties to create the Kawésqar National Park.¹²⁷ However, prior to the formal creation of the new Kawésqar National Park, a Process of Indigenous Consultation (PCI) with the Kawésqar people was carried out,¹²⁸ with the attendance of nearly all the Kawésqar communities.¹²⁹

The PCI final report clearly noted that the Chilean government could not reach an agreement with the Kawésqar people, indicating that:

Despite making all the pertinent efforts to reach an agreement regarding the measure consulted, there was a disagreement from the Kawésqar people to the establishment of the Park, as long as a claim on the sea was not resolved.... The Kawésqar People are nomadic canoe people of the sea, who culturally understand the sea and the land as a whole in relation to themselves. The sea is part of their worldview and part of how they decode reality and interpret it. For this reason, their reluctance to accept a

¹²⁴ See Hora, *supra* note 123 at 3.

¹²⁵ *Ibid* at 6; Francisco Zorondo-Rodríguez et al, "Why would new protected areas be accepted or rejected by the public?: Lessons from an ex-ante evaluation of the new Patagonia Park Network in Chile" (2019) 89 *Land Use Policy* at 2.

¹²⁶ See "Gobierno y Tompkins Conservation Sellan Acuerdo Para Donación de Tierras y Creación de Red de Parques Nacionales de 4,5 Millones de Hectáreas" (15 March 2021), online: *Ministerio del Medio Ambiente de Chile* <mma.gob.cl/gobierno-y-tompkins-conservation-sellan-acuerdo-para-donacion-de-tierras-y-creacion-de-red-de-parques-nacionales-de-45-millones-de-hectareas/>.

¹²⁷ See Zorondo-Rodríguez et al, *supra* note 125 at 2.

¹²⁸ See generally *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, 1989, ILO Convention No 169, art 6 (1)(a) (entered into force 5 September 1991. Article 6 (1)(a) obliges governments to consult Indigenous peoples, through appropriate procedures and through their genuine representatives, whenever they are considering legislative or administrative measures which may affect the peoples directly).

¹²⁹ This process was carried out between June 29 and November 2 2017. See "Sistematización Del Proceso De Consulta Indígena Al Pueblo Kawésqar Por La Ampliación Y Re-Clasificación De La Reserva Nacional Alacalufes: Informe Final" (October 2017) at 50–55, online (pdf): *Ministerio de Bienes Nacionales de Chile* <www.bienesnacionales.cl/wp-content/uploads/2017/12/InformeFinal_PCI_revLTV_NBA_LPA_FINAL_05102017_F2.pdf> [Ministerio de Bienes Nacionales de Chile].

proposal that does not include the sea is entirely reasonable although they agree with the formation of the National Park for the protection of the environment against the advances of aquaculture, mining operations, and intensive tourism.¹³⁰

As a result of this Indigenous consultation process the new national park was named Kawésqar National Park,¹³¹ and it was decided that the administration of the Park would rely on the National Forestry Corporation (known as “Conaf” under its Spanish acronym), and the Indigenous communities that participated in the PCI,¹³² to exercise the co-management of the Park.¹³³

However, despite this great advance, the Government of Chile denied the Kawésqar communities’ request—as people of the sea—to include marine areas in this particular national park, in what could constitute a violation of international conservation standards.¹³⁴ Indeed, although it goes beyond the scope of this article, it is important to remark that the IUCN has constantly warned about the responsibility of states to ensure that High Conservation Value Areas (HCVA) are not sacrificed in favour of industrial projects.¹³⁵ As it will be explained, this Chilean government decision allowed the contravention of this guidance. In this regard, it is important to notice how these consultation processes undermine the efforts to recognise Indigenous sovereignty, since from a strict point of view they do not permit to meaningfully decolonize environmentalism, as consultation does not necessarily mean consent or significant decision-making power.

For example, the consultation process in Chile, regarding environmental impact assessment of projects, “has displaced the discussions on the substantive rights of Indigenous peoples for procedural debates.”¹³⁶ As Carmona Caldera argues, this “displacement effect” is generated by restrictive judicial and administrative interpretations of the criteria and nature of consultation rights.¹³⁷ Consequently, substantive disagreements between Indigenous communities and the state remain, emerging after the environmental assessment of projects, on subsequent stages of their development, through judicial or even violent actions.¹³⁸

Thus, the maritime surface—2,628,429.2 ha—formerly contained in the Alacalufes Forest Reserve, was separately protected by the creation of the Kawésqar National Reserve, under the

¹³⁰ *Ibid* at 52–53 [translated by author].

¹³¹ *Ibid* at 45.

¹³² *Ibid* at 41–43.

¹³³ *Ibid* at 45. See also *Desafecta Reserva Forestal ‘Alacalufes’. Créase el Parque Nacional ‘Kawésqar’ y la Reserva Nacional ‘Kawésqar’, en la Región De Magallanes y de la Antártica Chilena* (Chile) 2019, Decreto número 6.

¹³⁴ See Daniela M Carranza et al, “Socio-Environmental Conflicts: An Underestimated Threat to Biodiversity Conservation in Chile” (2020) 110 *Environmental Science & Policy* 46 at 55–56. See generally Lausche, *supra* note 5 at 25.

¹³⁵ See Carranza et al, *supra* note 134 at 53.

¹³⁶ See Cristóbal Carmona Caldera, “Evaluación Ambiental, Consulta Indígena y El Desplazamiento de Los Derechos de Los Pueblos Indígenas” (2020) 88:248 *Revista de Derecho* (Universidad De Concepción) 199 at 200.

¹³⁷ *Ibid* at 228.

¹³⁸ *Ibid* at 227.

sole administration and management of Conaf.¹³⁹ This creation of a national park without sea was labeled an ‘ethnocide’ by the Kawésqar people, since the separate protection of the marine space through a National Reserve would allow the development of industrial activities within its boundaries,¹⁴⁰ in another form of perpetuating colonial violence against Indigenous communities. Indeed, it seems, as explained below, that the intended separation between sea and land had one particular motivation in mind: aquaculture.¹⁴¹

3.3. THE CONFLICT

“If there is no protected sea for the Kawésqar, there will be no future for our people, and we will have been active or passive participants and accomplices in a self-genocide.”

- Leticia Caro, a member of the Kawésqar Nomads of the Sea community¹⁴²

Chile is the second largest producer of salmonids in the world after Norway with 25 percent of the world’s production,¹⁴³ positioning salmon exports as one of the most important economic activities in the country.¹⁴⁴ In this context, several aquaculture projects have been moving their operations to the southern regions of Chile,¹⁴⁵ in what could be explained by the moratorium of new administrative permits for these projects in Los Lagos and Aysén regions due to their environmental impacts.¹⁴⁶ Accordingly, a continuous increase of aquaculture projects in the southern regions is expected,¹⁴⁷ along with the social and environmental impacts of these activities.¹⁴⁸ Aquaculture introduces various social impacts including the disparity in the distribution of the benefits and access to native species among the poorest people in the

¹³⁹ See *Desafecta Reserva Forestal ‘Alcalufes’. Créase el Parque Nacional ‘Kawésqar’ y la Reserva Nacional ‘Kawésqar’, en la Región De Magallanes y de la Antártica Chilena*, Chile 2019, Decreto número 6.

¹⁴⁰ See Laura Nahuelhual et al, “La Región de Magallanes y Antártica Chilena Frente Al Cambio Global. Reporte Regional Centro de Investigación: Dinámica de Ecosistemas Marinos de Altas Latitudes de La Universidad Austral de Chile” (December 2019) at 49, 64, online (pdf): *Centro de Investigación Dinámica de Ecosistemas Marinos de Altas Latitudes* <www.centroideal.cl/wp-content/uploads/2019/12/Reporte-IDEAL-CHILE-boceto-2911-web.pdf>.

¹⁴¹ See Barrena & Hernando, *supra* note 122 at 19–20.

¹⁴² Juan Carlos Cárdenas Núñez, “Parque Kawésqar y El Genocidio Cultural En La Patagonia Chilena” (23 January 2018), online: *el Mostrador* <www.elmostrador.cl/noticias/opinion/2018/01/23/parque-kawesqar-y-el-genocidio-cultural-en-la-patagonia-chilena/>.

¹⁴³ See “Informe Trimestral de Exportaciones de Salmón” (6 November 2020) at 1, online (pdf): *Consejo del Salmón de Chile* <www.consejodelsalmón.cl/wp-content/uploads/2020/11/Informe-Exportaciones-Consejo-del-Salmón-oct-2020.pdf> [Consejo del Salmón de Chile]; Nahuelhual et al, *supra* note 140 at 40. See generally Suthamathy Nadarajah & Ola Flaaten, “Global Aquaculture Growth and Institutional Quality” (2017) 84 *Marine Policy* 142 (On the global trend of increasing aquaculture activities).

¹⁴⁴ See Consejo del Salmón de Chile, *supra* note 143 at 1.

¹⁴⁵ See Nahuelhual et al, *supra* note 140 at 38–39; See also Cárdenas Núñez, *supra* note 142 (by 2018, Chile’s Undersecretariat of Fisheries was processing 251 applications for salmon concessions in the Magellan Region. Of these, around 50 have already been granted in the marine areas surrounding national parks, another 20 were in advanced processing and three farming centers started operating that year).

¹⁴⁶ See Barrena & Hernando, *supra* note 122 at 18.

¹⁴⁷ See Nahuelhual et al, *supra* note 140 at 43.

¹⁴⁸ See Carranza et al, *supra* note 134 at 50 (for a summary of the environmental impacts of aquaculture sectors behind conflict-generating projects that threaten biodiversity in Chile).

location areas,¹⁴⁹ recreational impact damages,¹⁵⁰ blocked access to coastal resources by pond and pen/cage structures,¹⁵¹ navigational hazards,¹⁵² privatization of public lands and waterways,¹⁵³ among other causes of social disruption.¹⁵⁴

From an environmental perspective the most relevant impacts of aquaculture generally come from the production of carnivorous species,¹⁵⁵ such as salmonids. Indeed, the specific analysis of the impacts associated with these species is important, since Atlantic salmon, Coho salmon and Rainbow Trout represented about 64 percent of the total biomass produced in the Chilean aquaculture activity in 2018.¹⁵⁶ Some of the impacts of salmonid production are: the generation of organic and inorganic waste;¹⁵⁷ biological pollution as a product of escaped fish;¹⁵⁸ and excessive use of chemicals such as antiparasitics, antibiotics, and antifungals.¹⁵⁹

Consequently, the Kawésqar people, and environmental and Indigenous rights organizations,¹⁶⁰ have expressed their concern about the socioenvironmental impacts that these aquaculture projects may have on the pristine marine environment of the Magellan region and the Indigenous and non-Indigenous communities.¹⁶¹ As mentioned, the Kawésqar communities stated this concern in the PCI carried out before the creation of the Kawésqar

¹⁴⁹ See Mónica Tapia & Luis Zambrano, “From Aquaculture Goals to Real Social and Ecological Impacts: Carp Introduction in Rural Central Mexico” (2003) 32:4 *Ambio: J Human Environment* 252 at 257.

¹⁵⁰ See C Scott Shafer, Graeme J Inglis & Vicki Martin, “Examining Residents’ Proximity, Recreational Use, and Perceptions Regarding Proposed Aquaculture Development” (2010) 38:5 *Coastal Management* 559 at 571.

¹⁵¹ See JH Primavera, “Overcoming the Impacts of Aquaculture on the Coastal Zone” (2006) 49 *Ocean & Coastal Management* 531 at 539.

¹⁵² *Ibid.*

¹⁵³ *Ibid.*

¹⁵⁴ *Ibid.*

¹⁵⁵ See Alejandro Buschmann et al, “Acuicultura, Pesca y Biodiversidad En Ecosistemas Costeros de Chile” (2019) at 12, online (pdf): *Mesa Biodiversidad* <cdn.digital.gob.cl/filer_public/86/3b/863b82f8-b481-4c93-b83b-ac1ad69cb9b9/8biodiversidad-acuicultura-buschmann.pdf>.

¹⁵⁶ See “Informe Ambiental de La Acuicultura: Período 2017 a 2018” (16 October 2019) at 229, online (pdf): *Subsecretaría de Pesca y Acuicultura* <www.subpesca.cl/portal/618/articles-105757_documento.pdf>.

¹⁵⁷ See Norbert Kamjunke et al, “Land-Based Salmon Aquacultures Change the Quality and Bacterial Degradation of Riverine Dissolved Organic Matter” (2017) 7 *Scientific Reports* 1 at 11; Renato A Quiñones et al, “Environmental Issues in Chilean Salmon Farming: A Review” (2019) 11 *Reviews in Aquaculture* 375 at 378; Primavera, *supra* note 151 at 536–37.

¹⁵⁸ See Quiñones et al, *supra* note 157 at 387–88. See also Primavera, *supra* note 151 at 534.

¹⁵⁹ See Alejandro Buschmann et al, “Salmon Aquaculture and Coastal Ecosystem Health in Chile: Analysis of Regulations, Environmental Impacts and Bioremediation Systems” (2009) 52 *Ocean & Coastal Management* 243 at 245. See also Quiñones et al, *supra* note 157 at 385; M.A. Urbina et al, “Effects of Pharmaceuticals Used to Treat Salmon Lice on Non-Target Species: Evidence from a Systematic Review” (2019) 649 *Science Total Environment* 1124; Primavera, *supra* note 151 at 536; Nahuelhual et al, *supra* note 140 at 42–43 (for an overview of the specific environmental impacts of aquaculture in the Magellan region).

¹⁶⁰ See El Desconcierto, *supra* note 12.

¹⁶¹ See Cárdenas Núñez, *supra* note 142.

National Park and Reserve; in fact, they explicitly requested a ban on intensive industrial fishing and aquaculture of exotic species introduced into regional waters, by incorporating protected marine areas inside the boundaries of the National Park or by other legal means, instead of relegating them to a national reserve.¹⁶² Given these concerns, it is clear why the Kawésqar communities advocated for a marine national park, rather than a reserve.

Certainly, it was widely known that the main difference between a national park and a national reserve was that in the latter commercial activities, such as aquaculture, could be authorized without the legal hurdles that makes it almost impossible to locate these projects within a national park. In fact, under article I of the Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere,¹⁶³ to which Chile is a signatory, the difference between a park and a reserve is that a national park is established “for the protection and preservation of superlative scenery, flora and fauna of national significance”¹⁶⁴ while a national reserve is created “for conservation and utilization of natural resources.”¹⁶⁵ Furthermore, the Chilean legislation explicitly prohibits the authorization of aquaculture projects in protected areas such as a national park, although it exempts national reserves.¹⁶⁶

Since the publication of the Supreme Decree that created the Kawésqar National Park and Reserve in 2019, to date 36 aquaculture related projects valued at nearly \$230 million have been submitted to the Environmental Impact Assessment Agency of Chile in the Magellan region.¹⁶⁷ Even more alarming is that some companies are even moving the location of their permits and authorizations to relocate aquaculture projects into the area covered by the Kawésqar Reserve.¹⁶⁸ In fact, up until June 2020, administrative concessions for salmon aquaculture in the Kawésqar Reserve included 69 granted concessions (24 of them are already operating)

¹⁶² See Ministerio de Bienes Nacionales de Chile, *supra* note 129 at 44. See also Kira Gerwing & Timothy McDaniels, “Listening to the Salmon People: Coastal First Nations’ Objectives Regarding Salmon Aquaculture in British Columbia” (2006) 19:3 *Society & Natural Resources* 259 at 268.

¹⁶³ See Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Organization of American States, 1 May 1942, art 1.

¹⁶⁴ *Ibid.*

¹⁶⁵ See Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, Organization of American States, 1 May 1942, art 2.

¹⁶⁶ See Lorna Püschel, “Regulación de Actividades En Áreas Protegidas” (2019) 7:11 *Revista de Derecho Ambiental* 88 at 97-98. See also Sergio Praus, Mario Palma & Rodolfo Domínguez, *La Situación Jurídica de Las Actuales Áreas Protegidas de Chile*, (Santiago de Chile: Fondo para el Medio Ambiente Mundial, 2011) at 92.

¹⁶⁷ See Gobierno de Chile, “Sistema de Evaluación de Impacto Ambiental: Buscador de Proyectos” (last visited 9 February 2022), online: *Servicio de Evaluación de Impacto Ambiental* <seia.sea.gob.cl/busqueda/buscarProyecto.php?CP=0> (The research range is from January 30, 2019 to March 13, 2022, within the Magellan region, in the category of aquaculture and fishing activities, including all submitted projects within that time frame).

¹⁶⁸ See Carrere, *supra* note 121. See also El Desconcierto, *supra* note 12.

and another 119 concessions pending approval.¹⁶⁹ All of this has happened even without an approved management plan for the protected area.¹⁷⁰

This situation has led the Kawésqar communities to fight back against the projects that operate within the Kawésqar Reserve by filing judicial actions and even going to the Congress to plead their case.¹⁷¹ Specifically, their main strategy has been the request for Marine Coastal Space of Indigenous Peoples (*Espacios Costeros Marinos para Pueblos Originarios* or otherwise known as “ECMPO” under its Spanish acronym).¹⁷² ECMPO is a Chilean legislative instrument that delegates the administration of these spaces to Indigenous communities who exercise a “customary use” of the place, prioritizing this use over other uses of the sea, and freezing any other requests for use at the time the request is issued.¹⁷³

In summary, the Chilean Government decisions and private agreements regarding the destination and protection of the land and the sea in the Magellan Region, has led to an increase of aquaculture projects in the Region. Given the severe environmental and social impacts of this activity, it has raised different conflicts especially with Indigenous communities, such as the Kawésqar, since the vast majority of these activities are located in the marine and coastal spaces where this group has developed their ancestral practices, within the boundaries of the Kawésqar National Reserve.

4. A COMMUNITY CONSERVATION APPROACH TO THE KAWÉSQAR NATIONAL PARK AND RESERVE

The co-management system established for the Kawésqar Park constitutes a move in the right direction, nonetheless the exclusion of the marine space, by relegating it to a national reserve without collaborative governance, raises difficulties in achieving substantive conservation. Thereby the Kawésqar Park and Reserve case contains several facets that can be addressed through a community conservation approach. Indeed, as described in the first

¹⁶⁹ See Christian Paredes Letelier & Ignacio Martínez Jadue, “Razones Jurídicas Contra La Expansión Salmonera En La Reserva Nacional Kawésqar” (13 August 2020), online: *Ciper Chile* <www.ciperchile.cl/2020/08/13/razones-juridicas-contra-la-expansion-salmonera-en-la-reserva-nacional-kawesqar/>.

¹⁷⁰ *Ibid.* See also Carrere, *supra* note 121.

¹⁷¹ See Senate of the Congress of Chile, News Release, “ONGs y Comunidad Indígena Cuestionan Relocalización de Concesiones Acuícolas En El Parque Nacional Kawésqar” (2 July 2020) online: *Republica de Chile Senado* <www.senado.cl/ongs-y-comunidad-indigena-cuestionan-relocalizacion-de-concesiones/senado/2020-07-02/115636.html>. See also Carrere, *supra* note 121.

¹⁷² See Barrera & Hernando, *supra* note 122 at 20. See also El Desconcierto, *supra* note 12.

¹⁷³ See also Francisco Araos et al, “Espacios Costeros Marinos Para Pueblos Originarios: Usos Consuetudinarios y Conservación Marina” (2020) 45:1 *Anuario Antropológico* 47 at 52–55 [Espacios Costeros Marinos]; Laura Escobar Mendoza, *Conflictos Por Uso de Territorios Entre Espacios Costeros Marinos de Pueblos Originarios y Concesiones de Acuicultura, a La Luz de Lo Dispuesto En La Ley N° 20.479*, (Bachelor of Arts in Law and Social Sciences, Universidad de Chile, 2018) [unpublished] at 44-71; Francisco Araos et al, “Marine Indigenous Areas: Conservation Assemblages for Sustainability in Southern Chile” (2020), 48:4 *Coastal Management* 289 [Marine Indigenous Areas]. (On the strategical use of ECMPO and the conflicts that arise with Aquaculture projects); Florencia Diestre de la Barra & Francisco Araos Leiva, “La Recuperación de Los Comunes En El Sur-Austral: Construcción Institucional de Espacios Costeros Marinos de Pueblos Originarios,” (2020) 57 *Polis* 1 (for an overview on ECMPO and its impact on Indigenous people as an instrument to legitimize their discourses and narratives as a key tool for the protection of the commons and the territory).

section of this article, community conservation contains multiple instruments and ways to face problems that emerge within conservation around the world. This article focuses on a possible solution to the conflict from a collaborative management framework. To accomplish this, this section is divided in two parts: first, I resume the reasons why the collaborative management approach is the most appropriate for the case on the basis of the content displayed in the first and second parts of this article; second, I put forth a set of recommendations of how to apply the collaborative management framework to the Kawésqar National Reserve and some broader lessons.

4.1. A COLLABORATIVE MANAGEMENT APPROACH

As explained in the first section of this article,¹⁷⁴ a collaborative management approach, also referred to as co-management or joint management,¹⁷⁵ demands the development of a partnership with other relevant stakeholders, such as the Kawésqar communities in the area. Certainly, the Chilean government embraced this albeit flawed approach for the Kawésqar National Park, when deciding to constitute a separate national reserve for the adjacent sea. This erroneous determination, thoroughly analyzed in the previous section, has brought several consequences, primarily the increased number of aquaculture projects in the protected area, causing major and foreseeable socioenvironmental impacts and conflicts.

Naturally, considering how expansive the protected area is, the existence of specialized administrative agencies, and the number of Indigenous communities impacted, it is reasonable to suggest that the Indigenous communities cannot effectively ensure the protection of the area by themselves. Hence, a strategic partnership between governmental agencies and Indigenous communities appears to be the most feasible approach. In the following paragraphs I explain why a co-management approach must be implemented in the National Reserve as well.

The need for strategic partnerships is also supported in Chile by the strong influence that that market conditions have in the management of marine-coastal spaces.¹⁷⁶ Indeed, there is a wider use of market-oriented private management instruments in the marine space, such as permits and extraction quotas for big fisheries, and the Chilean government still struggles to prevent and correct externalities from this extractivist model.¹⁷⁷ Conversely, the influence of market forces in the southern marine space contrasts with local social bases, many of whom are “marginal and [do] not have the capacity to effectively control the performance of market agents, nor to improve the performance of state hierarchies and the interests of specific groups.”¹⁷⁸ Therefore, given the preponderant power of market conditions on the management of marine-coastal spaces, it should be considered that even if Indigenous communities are included in the co-management, the same disparity may arise, which could be combatted with a strong management plan that builds capacities within the Indigenous communities to empower their participation, as I will explain later.

¹⁷⁴ See Section 1.II.

¹⁷⁵ See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 12.

¹⁷⁶ See Nahuelhual et al, *supra* note 140 at 64.

¹⁷⁷ *Ibid* at 34, 60.

¹⁷⁸ *Ibid* at 64 [translated by author].

In this scenario, and considering that new environmental governance models promote partnerships, the development of co-management agreements between the state, Indigenous communities and other relevant stakeholders is essential. In fact, “the degree of agreement and cohesion between them is a significant determinant of good management and governance of the marine-coastal space.”¹⁷⁹ Therefore, the administration and use of the marine-coastal space must include all stakeholders, and their corresponding levels of knowledge of ecological and social processes, and different conceptual visions, practices, and ethical and value positions of what the sea and its coasts mean.¹⁸⁰

In this context, collaborative management meets the needs of the Kawésqar National Reserve, just as collaboration of Indigenous communities as stakeholders is essential for the management of the protected area.¹⁸¹ Kawésqar people possess unique knowledge of the marine area and their resources, besides the added motivation to keep their sea culture alive. Although Kawésqar people have abandoned some of their most ancient traditions, they still possess vast knowledge of the Patagonian fjords, which could enhance the efficient use of the allocated resources to conservation, from the biodiversity hotspots to fish and hunt to skillful capacities regarding water channels and their navigation routes and tides.¹⁸² Also, access to the natural resources in the reserve is essential for the “local livelihood, security and cultural survival”¹⁸³ of the Kawésqar,¹⁸⁴ as they are people of the sea who live from fishing.

At the same time, Kawésqar people have historically enjoyed customary rights over the sea channels and areas covered by the reserve,¹⁸⁵ and their local interests are strongly impacted by the way in which the area is managed.¹⁸⁶ Certainly, the environmental and social impacts of aquaculture activities massively—and increasingly—conducted in the reserve affect the Kawésqar people. In this regard, the decisions in the management of the reserve, like what kind of activities can be developed, and what the protection objective of the area is, are complex and highly controversial,¹⁸⁷ for the whole region and Kawésqar communities.

Moreover, the agencies’ previous management of the National Reserve failed to meet the Indigenous communities’ expected results, which is explained by the frequent use of ECMPOs. Accordingly, the increasing number of aquaculture projects in the National Reserve are accompanied by noxious environmental impacts which are clearly unintended given the

¹⁷⁹ *Ibid* [translated by author].

¹⁸⁰ *Ibid*.

¹⁸¹ See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13.

¹⁸² See Gleisner & Montt, *supra* note 102 at 27.

¹⁸³ Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13.

¹⁸⁴ See Gleisner & Montt, *supra* note 102 at 63. See also Marchante, *supra* note 104 at 356, 360

¹⁸⁵ See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13. See also Aravena et al, *supra* note 119 at 58–59. Alonso Barros Van Hovell Tot Westerfler, “Titularidad y Subjetividad de Las Aguas Nativas Chilenas En El Marco Del Convenio 169 de La OIT y La Declaración de La ONU Sobre Los Derechos de Los Pueblos Indígenas” (2011) 1 Actas de Derecho de Aguas 197 at 208 (On the Indigenous customary rights over water courses in Chile).

¹⁸⁶ See Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13.

¹⁸⁷ *Ibid*.

Reserve's connection to a National Park.¹⁸⁸ Therefore a co-management approach is the most suitable framework to offer a solution for the dispute around the Kawésqar National Reserve governance. In this sense, a similar or identical kind of governance may be equally optimal as the one established for the Kawésqar National Park.

4.2. RECOMMENDATIONS

This article focuses on solutions to conservation conflicts within protected areas from a collaborative management framework. Nonetheless, this section, besides delving into approaches to implement a collaborative management, also puts forth a broad set of public policy and regulatory recommendations to solve some of the most pressing conservation problems that arose without a proper collaborative governance framework. In this regard, the following recommendations should be considered on a case-by-case basis.

4.2.1. KAWÉSQAR NATIONAL RESERVE RE-CATEGORIZATION

The first and foremost solution, although less feasible action that goes beyond the scope of this article, would be to recategorize the Kawésqar National Reserve as a national park. This would tackle several problems such as the lack of legal weight to prevent undertaking aquaculture projects within the National Reserve boundaries, due to the limits on commercial fishing activities in national parks.¹⁸⁹ Another problem to be tackled with this solution would be the government's failure to treat the land and sea as an interconnected ecosystem. Indeed, there are evident differences among protected land and marine areas in Chile, in terms of coverage, ecosystems representativity and management,¹⁹⁰ which could be corrected in this case by putting land and marine areas under the same legal statute.

4.2.2. HYBRID GOVERNANCE

A collaborative management approach for the natural reserve could also involve a better environment for the development of aquaculture projects. In fact, it's possible that reasonable agreements, like the relocation of projects to less critical points for conservation purposes, could be reached with the participation of all relevant stakeholders. Undeniably, aquaculture has serious harmful environmental consequences, but the use of these mechanisms could be a road to establish a hybrid governance of aquaculture using a social license approach.¹⁹¹

In this regard, it has been concluded that “[t]he ability of conservation and livelihoods to coexist therefore depends partly on the willingness of parties to recognise problems as

¹⁸⁸ See Barrena & Hernando, *supra* note 122 at 18. See also Carranza et al, *supra* note 134 at 50; Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 14.

¹⁸⁹ See Püschel, *supra* note 166 at 97–98. See also Praus et al, *supra* note 166 at 92.

¹⁹⁰ See Ignacio J Petit et al, “Protected Areas in Chile: Are We Managing Them?” (2018) 91:1 *Revista chilena de historia natural* 1 at 3. See also Francisco A Squeo et al, “Towards the Creation of an Integrated System of Protected Areas in Chile: Achievements and Challenges” (2012) 5:2 *Plant Ecology & Diversity* 233.

¹⁹¹ See Joanna Vince & Marcus Haward, “Hybrid Governance of Aquaculture: Opportunities and Challenges” (2017) 201 *J Environmental Management* 138 at 139, 142 (“social license, also referred to as the ‘social license to operate’ (SLO) is an intangible, unwritten and impermanent social contract between industry and social groups” (Gunningham et al, 2004; Parsons and Moffat, 2014)).

shared ones and to discuss them collaboratively.”¹⁹² Indeed, some scholars, for example, have proposed “that principled engagement requires deep, non-transactional collaboration among core stakeholders.”¹⁹³

4.2.3. MARINE COASTAL SPACE OF INDIGENOUS PEOPLES

Another alternative in this early stage of negotiations for the recognition of a collaborative-management approach, that does not solve entirely the governance problem, would be to promote the wide use of ECMPOs in the Kawésqar National Reserve. As explained,¹⁹⁴ ECMPOs are a Chilean legal instrument that delegates the administration of specific marine coastal spaces to Indigenous communities who exercise a customary or ancestral use of the place, prioritizing this use over other uses of the sea, such as aquaculture and industrial activities, and freezing any other requests for use at the time the request is issued.¹⁹⁵ This is what makes this instrument so relevant in limiting aquaculture industries on marine spaces of Indigenous relevance.

ECMPOs are a powerful institutional tool, that begin with an administrative request by Indigenous communities, and allow the “legal recognition of marine Indigenous tenures, recovering the collective control over common pool resources and maritime space.”¹⁹⁶ In fact, this figure has already been used against salmon industries,¹⁹⁷ even in the Kawésqar National Reserve.¹⁹⁸ In this regard, a wider and strategic use of ECMPOs could be critical to respond to the current threats to the future of the local territories and Kawésqar people’s customary practices from aquaculture projects.¹⁹⁹

Nevertheless, it is not an easy process, and some hurdles must be overcome, such as the colonial political context, the opportunities for financial or technical support, the possible alliances with other agents to improve the requesting process,²⁰⁰ and even the aquaculture association’s opposition.²⁰¹ After requesting enough ECMPOs, Indigenous communities could

¹⁹² See Steve M Redpath et al, “Understanding and Managing Conservation Conflicts” (2013) 28:2 Trends in Ecology & Evolution 100 at 107.

¹⁹³ See Fisher et al, *supra* note 59 at 549.

¹⁹⁴ See Section 2.III.

¹⁹⁵ See Araos et al, “Espacios Costeros Marinos,” *supra* note 173 at 52–55. See also Escobar Mendoza, *supra* note 173 at 44–71. See also Araos et al, “Marine Indigenous Areas,” *supra* note 173 (On the strategical use of ECMPO and the conflicts that arise with Aquaculture projects); Barra & Leiva, *supra* note 173 (for an overview on ECMPO and its impact on Indigenous people as an instrument to legitimize their discourses and narratives as a key tool for the protection of the commons and the territory).

¹⁹⁶ See Araos et al, “Marine Indigenous Areas” *supra* note 173 at 301.

¹⁹⁷ See Michelle Carrere, “Chilean Law Pits Indigenous People Against Salmon Industry,” *Mongabay* (20 March 2019), online: <news.mongabay.com/2019/03/chilean-law-pits-indigenous-people-against-salmon-industry/>.

¹⁹⁸ See Barrena & Hernando, *supra* note 122, at 20; El Desconcierto, *supra* note 12. See also Figure 1 at Section 2.II.

¹⁹⁹ Araos et al, “Marine Indigenous Areas: Conservation Assemblages for Sustainability in Southern Chile,” *supra* note 173 at 13.

²⁰⁰ *Ibid.*

²⁰¹ *Ibid* at 7.

focus on pushing for the development of an institutional strategy for the final goal: effective co-management for the Kawésqar National Reserve.

4.2.4. COLLABORATIVE MANAGEMENT MODEL IN THE KAWÉSQAR NATIONAL RESERVE

The relationship between the management of protected areas and the aspirations of the Indigenous communities linked to those areas is essentially a conflictual one.²⁰² In fact, it is common that the conservation objectives of protected areas do not concord with the expectations of Indigenous communities, which normally demand land and free unrestricted use of the natural resources within the protected areas,²⁰³ since access to the natural resources included in these areas is essential for the “local livelihood, security and cultural survival”²⁰⁴ of the communities.

In the Kawésqar case, the protected areas conflict arises from Indigenous communities’ concerns that take into consideration the current environmental and social impacts of increasing aquaculture activity within the boundaries of the National Reserve and nearby regions.²⁰⁵ Certainly, these are even scientific reasons to demand more intervention by the Indigenous communities in the governance of the Kawésqar National Reserve.²⁰⁶ In fact, “involving Indigenous communities in the planning, from the beginning of the process, seems to be a crucial issue in improving the management of natural areas and mitigating some of the conflicts.”²⁰⁷ In this regard, to achieve meaningful participation from Indigenous communities they must be included in a collaborative work environment comprising management and project identification, design, and administration.²⁰⁸

Therefore, as explained throughout this article, recognition of Kawésqar people as people of the sea is encouraged by changing the top-down approach on the management of the Kawésqar National Reserve to a collaborative management model.²⁰⁹ This change would necessitate the inclusion of the Kawésqar communities in the co-management of the marine space, as is already done within the National Park, improving the relationship between Indigenous communities, the state, and aquaculture developers.

Furthermore, an additional element to consider when implementing a co-management approach in the National Park and Reserve is the need to ensure an adaptive perspective with situated thinking.²¹⁰ As Plummer and Hashimoto suggest, “[a]daptive co-management

²⁰² See Juan V Oltremari & Royal G Jackson, “Conflicts, Perceptions, and Expectations of Indigenous Communities Associated with Natural Areas in Chile” (2006) 26 *Natural Areas J* 215.

²⁰³ *Ibid* at 219.

²⁰⁴ Borrini-Feyerabend, “Collaborative Management,” *supra* note 50 at 13.

²⁰⁵ See Section 2.III.

²⁰⁶ *Ibid*.

²⁰⁷ Oltremari & Jackson, *supra* note 202 at 219.

²⁰⁸ *Ibid*.

²⁰⁹ See Juan J Armesto et al, “Conservation Strategies for Biodiversity and Indigenous People in Chilean Forest Ecosystems” (2001) 31 *J Royal Society New Zealand* 865.

²¹⁰ See Ryan Plummer & Atsuko Hashimoto, “Adaptive Co-Management and the Need for Situated Thinking in Collaborative Conservation” 16 *Human Dimensions Wildlife* 222.

is recognised for its potential to enhance fit,²¹¹ since it calls to take into consideration the particularities of the specific conservation project. Particularly, while developing a co-management governance certain elements should be considered to tailor the approach, such as resource situation and social conditions to adapt the approach to the specific context.²¹² Another key element to consider along these factors is embeddedness, defined as “the centrality of a resource to the local lifestyle [that] can either complicate or simplify efforts at policy change.”²¹³ In summary, when developing collaborative management models, there is a need to consider developing context-dependent strategies, where institutional and organizational structures are synchronized,²¹⁴ specially when Indigenous communities are deeply involved, since social conditions and centrality of certain resources could be radically different within Indigenous worldview, when compared to a colonial conception.

4.2.5. MANAGEMENT PLAN POLICY FOR CAPACITY BUILDING.

Along with the incorporation of a collaborative management approach, it should also be considered the development of a management plan policy to invest in capacity-building.²¹⁵ Moreover, this approach should develop methods to implement structured participatory frameworks for deliberation, as a key element for a wider increase of collaborative governance policies.²¹⁶ Indeed, capacity-building policies are indispensable to ensure effective participation of the Indigenous communities within a co-management approach. Naturally, one of the main limitations to an effective co-management with Indigenous communities as partners, is their disadvantage regarding the lack of technical knowledge to take advantage of contemporary administrative and political institutions.

This asymmetry has been partially corrected by the work of NGOs with the Kawésqar people, who have assisted Kawésqar people with the use of legal mechanisms to protect their interests.²¹⁷ For instance, the administrative requests for the aforementioned ECMPOs in their

²¹¹ *Ibid* at 233.

²¹² *Ibid* at 230.

²¹³ George Honadle, *How Context Matters: Linking Environmental Policy to People and Place*, (Connecticut: Kumarian Press, 1999) at 104, cited in Plummer & Hashimoto, *supra* note 210 at 231.

²¹⁴ See Plummer & Hashimoto, *supra* note 210 at 223.

²¹⁵ See Jonathan Makuwira, “The Politics of Community Capacity-Building: Contestations, Contradictions, Tensions and Ambivalences in the Discourse in Indigenous Communities in Australia” (2007) 36 *Australian J Indigenous Education* 129. For a critical analysis of the role of capacity-building, see Gary Craig, “Community Capacity-Building: Something Old, Something New...?” (2007) 27 *Critical Soc Policy* 335.

²¹⁶ See Rodrigo A Estévez et al, “A Participatory Decision Making Framework for Artisanal Fisheries Collaborative Governance: Insights from Management Committees in Chile” (2020) 44 *Natural Resources Forum* 144 at 158.

²¹⁷ See Greenpeace, “Magallanes: Informe Señala Que Aprobación de Salmoneras En Reserva Nacional Kawésqar Es Ilegal” (30 March 2021), online: *Greenpeace* <www.greenpeace.org/chile/noticia/uncategorized/magallanes-informe-senala-que-aprobacion-de-salmoneras-en-reserva-nacional-kawesqar-es-ilegal/>; “Magallanes: Informe Señala Que Aprobación de Salmoneras En Reserva Nacional Kawésqar Es Ilegal” (30 March 2021) online: *Greenpeace* <www.greenpeace.org/chile/noticia/uncategorized/magallanes-informe-senala-que-aprobacion-de-salmoneras-en-reserva-nacional-kawesqar-es-ilegal/#:~:text=En%20el%20informe%2C%20las%20organizaciones,de%20riesgos%20que%20implica%20la>.

National Reserve have been filed with assistance of these organizations.²¹⁸ Furthermore, other forms of promoting Indigenous communities' participation in conservation efforts within a management plan, while overcoming these institutional limitations, could include, as Bens et al. suggest, enhancing the "cross-cultural understanding, engagement, project codesign and collaborative work, promoting Aboriginal and Western scientific knowledge and methods, codevelopment of objectives, and ensuring that the Indigenous community receives tangible and agreed benefits from the collaboration that have longer term effects."²¹⁹

4.2.6. FINAL REFLECTIONS

It is important to emphasize that solutions to these socioenvironmental conflicts and the promotion of sustainable productive activities depend on the political will of the public and private institutions. Naturally, to develop collaborative approach solutions some agreements must be reached with administrative agencies, with discretion to act within the margins of the law,²²⁰ and private industries, such as aquaculture developers, which also have wide freedom to act within their business. These negotiations must be conducted on the basis of transparency and fairness, based on previously established relationships of trust with a neutral facilitator.²²¹ In this scenario, negotiations "require a paradigm shift, from extractive economic growth policies towards a sustainable development model, including biodiversity as a common good for which there is common responsibility."²²²

5. CONCLUSION

Collaborative management has gained global acceptance as a feasible approach, according to current standards of community conservation and environmental governance. Indeed, there is consensus in the international community that conservation requires the participation of all relevant stakeholders. In other words, contemporary community conservation demands the recognition of different types of governance for protected areas, especially the ones that promote partnerships between states, Indigenous and non-Indigenous communities, and other private parties.

Moreover, regarding Indigenous communities, the current challenge is to guarantee that conservation respects their territorial rights, ancestral laws, and includes their traditional

²¹⁸ See El Desconcierto, *supra* note 12.

²¹⁹ Emilie Ens et al, "Putting Indigenous Conservation Policy into Practice Delivers Biodiversity and Cultural Benefits" (2016) 25 *Biodiversity & Conservation* 2889 at 2904.

²²⁰ See Sebastián Luengo Troncoso, *El Sistema de Evaluación de Impacto Ambiental y la Desviación de Poder en la Calificación de Proyectos* (Argentina: Editorial Hammurabi, 2019) at 46–48.

²²¹ See Estévez et al, *supra* note 216 at 158 (the authors specifically delve into the notion that institutional learning gradually emerged in systematic and structured patterns of reflective interactions among participants. Explaining that it was through carrying out analysis about the positive and negative consequences of incentives and deterrents, assessing expected outcomes of scenarios and management strategies, and communicating local knowledge that a shared understanding began to emerge, becoming a democratic learning process to reach agreements).

²²² Carranza et al, *supra* note 134 at 55.

knowledge.²²³ As recognised by the CBD, this knowledge constitutes a significant contribution to the protection of biodiversity.²²⁴ Therefore Indigenous communities demand greater inclusion of collaborative methods in protected areas management, with effective recognition of their communities, including the access to resources for their subsistence.

From a collaborative management perspective, the Kawésqar National Park and Reserve presents several challenges. Indeed, the realization of a PCI before the creation of the protected areas was an important advance in the recognition of the Kawésqar people, leading to concrete changes, like the inclusion of a co-management modality between government agencies (Conaf) and Indigenous communities in the National Park, or even the national park and reserve name. Nevertheless, the decision to relegate the marine area to a weaker legal form of protection, and exclude the Indigenous communities from its administration, engendered multiple social and environmental conflicts, most specifically, the increased quantity and location of aquaculture projects within the boundaries of the Kawésqar National Reserve.

In this case, considering the intrinsic relation of the Kawésqar people with the sea, Indigenous communities must be listened to and allowed to participate as relevant stakeholders in the co-management of the Kawésqar National Reserve. Indeed, all governments, considering their international legal obligations, must put sustainable principles into action to improve the viability of Indigenous and non-Indigenous communities, which depend on renewable resources harvesting.²²⁵ Further, in this case the solution rests just a few meters away in the Kawésqar National Park, where a co-management governance of the land area has been already defined by the state, enhancing the environmental governance and conservation of the Park.

If a collaborative management project is not undertaken in the foreseeable future, the marine space comprised by the Reserve is likely to be fully occupied by industrial fisheries with massive aquaculture projects, hindering the safeguarding of the protection objectives, not only of the National Reserve but also those of the National Park, compromising the subsistence of the descendants of the Kawésqar.

²²³ See José Aylwin & Ximena Cuadra, “Los Desafíos de La Conservación En Los Territorios Indígenas En Chile” (11 May 2011) at 78, online (pdf): *Observatorio Ciudadano* <observatorio.cl/1287-2/>. Cf Gabriel de Oliveira et al, “Protecting Amazonia Should Focus on Protecting Indigenous, Traditional Peoples and Their Territories” (2022) 13:1 *Forests* 1 at 3 (ignoring the pressures threatening Indigenous communities in or around protected areas in the Amazonia, could also promote a reduction in the integrity and ecological functioning of the protected forest).

²²⁴ See *Convention on Biological Diversity*, 5 June 1992, 1760 UNTS 69 art 8(j) (entered into force 29 December 1993).

²²⁵ See Carranza et al, *supra* note 134 at 55.