



Legal and Institutional Frameworks for Payments for Ecosystem Services

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In Partnership with

the
katoomba
group

AGENDA

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The Project

- Focus: Legal & institutional implications of Payments for Ecosystem Services (PES) projects & schemes
- Definition of PES:
 - Legally-binding contract (*under which*)
 - One or more buyers/users (*purchase*)
 - Well-defined ecosystem service (*by*)
 - Providing financial or other incentives (*to*)
 - One or more sellers/providers (*who undertake to carry out*)
 - Particular land use on a continuous basis (*which will generate the agreed ecosystem service*)
- Started by IUCN Environmental Law Centre in December 2007
- Collaboration with Forest Trends' Katoomba Group in April 2008

The Project: Countries & PES Schemes Analyzed

- Brazil 
 - Principal country among the “Megadiversity Countries” with world’s largest freshwater reserve (approximately 12% of the global supply lies within its borders)
 - PES projects: Proambiente, Extrema, Oasis
- Bolivia 
 - “Megadiversity Country” with 2 different visions on water co-exist:
 - Andean region: cosmo-vision based on community and spiritual approach that considers water as a free resource
 - Eastern Bolivian Departments: more pragmatic, more flexible to adoption of PES scheme
 - PES projects: Los Negros “Bees for Water”, Mairana-Comarapa- Los Negros seed fund, ICO Water Planting
- Colombia 
 - “Megadiversity Country” with high ES degradation
 - Chaina Watershed, User Water Associations, Fúquene Lagoon, Munichique – Pinche Conservation Corridor

The Project: Countries & PES Schemes Analyzed

- Peru 
 - “Megadiversity Country” with interesting water realities:

Basin	Population (%)	Water (%)	Comment
Pacific	70%	1.7%	High population density & use of water for agriculture leading to irresponsible water use
Atlantic	26%	97.8%	Very low population density, but large conservation areas providing ES
Titicaca	4%	0.5%	Low population density, no problems concerning demand of water resources

Statutory Legal Frameworks: Constitution

Constitution in Brazil:

- Art. 225: environment belongs to the people and must be defended and preserved for future generations
- But no mention is made either of reward or payment for sustainable use; and
- Preservation is treated as a duty and not a service that is provided

Constitution in Peru:

- Establishes right to enjoy an appropriate and adequate environment
- But no express reference to ES, or to any payment or compensation for managing or preserving natural resources

Statutory Legal Frameworks: Constitution

Previous Constitution in Bolivia:

- State as owner of all natural resources
- ES not expressly recognized or identified
- Instead, natural resources purely considered as economic resources, subject to be “exploited” to achieve economic goals without linking them to national or local environmental benefits

New Constitution in Bolivia:

- Bolivian people as owners of natural resources; State has exclusive right to manage strategic renewable natural resources
- But not clear if private property will also include ownership of ES provided by the land and its natural resources
- Also, prohibits granting of concessions for provision of “water services” (Art. 373)

Statutory Legal Frameworks: Constitution

Constitution in Colombia:

- Natural resources are property of the State (Article 8)
- Environmental protection as a constitutional goal, a healthy environment as a basic right of citizens
- Also, responsibility of citizens to participate jointly with State in activities required to conserve and restore natural resources
- Thus development of PES schemes appears as adequate strategy or tool to involve citizens in environmental conservation

Statutory Legal Frameworks: Specific PES Laws

Specific PES legislation in Peru:

- No such legislation in place yet
- But proposals under development/discussion:
 - Legal Proposal N° 2386/2007-CR of Law for the Promotion and Compensation of ES (incl. definition of ES, creation of fund)
 - Ministry of Environment's Proposal of Law that regulates compensation of ES (establishes that National Water Authority in coordination with Ministry of Environment approve and supervise PES initiatives)

Specific PES legislation in Colombia:

- No national PES legislation or policy in place yet
- But draft national strategy on PES
 - Proposes operative framework for PES implementation including structure of a National Environmental System & decentralized environmental management

Statutory Legal Frameworks: Specific PES Laws

Specific PES legislation in Bolivia:

- No specific legislation or policy on PES in place at national & provincial level
 - Only national attempt to legislate distribution of benefits from carbon emission reductions (law was not passed)
- But PES policy issued in Department of Santa Cruz (Policy for Recognition of ES)
 - Provides opportunity for design and implementation of departmental & municipal PES programs
 - Establishes certain principles:
 - PES as instrument to achieve forest conservation/sustainable forest use
 - Recognizes that in order to promote PES, forest conservation has to become a profitable activity
 - Landowners or legitimate right-holders may participate in PES
 - Payment has to be higher or equal to opportunity costs
 - PES has to bring welfare to rural inhabitants

Statutory Legal Frameworks: Specific PES Laws

Specific PES legislation in Brazil:

- National (federal) legislation on (P)ES:
 - Several bills proposed which have lead to a consolidated bill comprising the different ideas and creating the Bolsa Verde Program
 - Bolsa Verde defines ES, identifies potential PES participants and creates synergies with already existing support (rural funding) program

Statutory Legal Frameworks: Specific PES Laws

Specific PES legislation in Brazil:

- Provincial (state) legislation on ES in state of Amazonas:
 - State Law N. 3.135:
 - Intended to stimulate carbon credit market systems
 - Creates Climate Change Fund & Bolsa Floresta (Forest Grant) Program for residents of state conservation areas in order to fund PES
 - Complementary State Law N° 53:
 - PES taking place within State Conservation Units needs authority from the State Conservation Unit Management Center.
 - Revenue generated by Conservation Units (e.g. visiting fees, environmental fines, sales and services of natural resources) to be deposited into a specific account by Conservation Unit managing entity
 - At least 50% of revenue allocated to State Climate Change Fund in order to pay for Bolsa Floresta Program
 - Although primarily focused on climate change mitigation, its definition of ES to be remunerated includes “*water, its filtration and cleaning*” and “*restoring the equilibrium of the hydrological cycle*”

Statutory Legal Frameworks: Specific PES Laws

Specific PES legislation in Brazil:

- Provincial (state) legislation on ES in state of Espirito Santo:
 - Law N° 8960:
 - Creates State Water Resources Fund (Fundágua)
 - Sources of revenue: Petroleum royalties, water fees, water fines, etc.
 - Among the many applications of these funds is PES which is further defined
 - Law N° 8995:
 - Institutes the PES Program
 - Objective is to remunerate landowners as well as land leasers for preservation and conservation of forested areas on rural properties in order to protect and improve the state's water resources
 - Law also guarantees ownership of and right of sale of any carbon credits that may be generated by such activities which recognizes overlap between water and carbon PES projects

Statutory Legal Frameworks: Specific PES Laws

Specific PES legislation in Brazil:

- Local (municipal) legislation on ES in Extrema in state of Minas Gerais:
 - Municipal Law N° 2100 & Regulating Decrees 1.703/06 & 1.801/06:
 - Create Water Producer Program
 - Intend to protect and improve Extrema's water supply (also directly affects water supply of São Paulo region)
 - Program actively protects forests and restores degraded areas that border bodies of water
 - Starting with the degraded micro-watershed, Córrego das Posses, municipal government intends to expand initiative into the six remaining micro-watersheds of Extrema

Statutory Legal Frameworks: ES-related Legislation

ES-related legislation in Peru:

- Organic Law for Sustainable Management of Natural Resources:
 - Refers to ecosystem services: Art. 10 requires State to elaborate inventories and/or value natural resources & ES they may provide
 - However, no reference regarding the establishment of any kind of compensation or payment for the provision or maintenance of ES
- General Environmental Law (Law N° 28611):
 - Recognizes explicitly importance of ES
 - Requires State to create necessary financial mechanisms to value, reward & maintain provision of ES
 - However, so far lack of implementation

Statutory Legal Frameworks: ES-related Legislation

ES-related legislation in Peru:

- General Water Law:
 - Economic value of water not determined
 - Water as good under public dominion: PES schemes often include some level of government involvement
- Legislative Decree 1081 and its Regulation on the National System of Water Resources:
 - Incorporates an ecosystem vision promoting coordination of multiple natural resources uses related to hydrological cycle
 - Differentiates the concepts of
 - Economical retribution (compulsory payments by water users): amount is determined by taking into account environmental criteria (among others)
 - Water tariffs (compulsory payments by water users): so far, focus on water infrastructure; not yet clear whether they can be set up to conserve watershed-related ES
 - Voluntary contributions to water bill: require request of water user board

Statutory Legal Frameworks: ES-related Legislation

ES-related legislation in Bolivia:

- Environmental Statute (through General Environmental Management Regulation), Forest Law & Protected Areas Law:
 - Establish use of market based instruments & incentives, such as charges, tradable permits, subsidies, etc.
 - However, no use due to lack of implementing legislation clarifying procedures
- Water Law from 1906 is outdated and does not foresee economic instruments
 - But customary rules have developed at community level which sometimes foresee small payments for maintenance of irrigation systems

Statutory Legal Frameworks: ES-related Legislation

ES-related legislation in Bolivia:

- National Forest Policy
 - Recognizes ES provided by forests (such as water-related ES)
 - Creates compensation mechanism for ES: National Fund for Forest Development (FONABOSQUE) as funding arm
 - Need for implementing legislation clarifying questions such as:
 - Who is entitled to participate in these schemes?
 - How will FONABOSQUE work/be managed?
 - How to coordinate and harmonize existing PES policies & role of national, departmental and municipal authorities?
 - How to harmonize PES programs within scope of decentralization process?
 - How to balance sustainable use & conservation of forests with promotion of new human settlements?

Statutory Legal Frameworks: ES-related Legislation

ES-related legislation in Brazil:

- Water Law (Law N° 9433) :
 - Establishes principles which impact PES development:
 - Water as limited natural resource of economic value: Justifies water usage fees/charges which provide potential resource for PES
 - Watershed as territorial unit for implementation of National Water Policy: Recognizes watershed as most appropriate & effective scale for PES
 - Water as good under public dominion: PES schemes often include some level of government involvement
 - Decentralized water resources management: Participation of government, consumers and communities necessary
- Brazilian Forest Code
 - Requires all rural properties to have Permanent Preservation Areas (free from intervention) & Legal Reserves (minimal intervention):
 - Having in mind low rate of compliance, landowners should be remunerated to enter into compliance or continue to comply with Forest Code

Statutory Legal Frameworks: ES-related Legislation

ES-related legislation in Colombia:

- Environmental Law (Law N° 99):
 - Mandates Ministry of Environment to formulate national environmental policies & regulations including compensation taxes & incentives
- National Development Plan (Law N° 1151):
 - Authorizes Ministry of Environment to design financial instruments to encourage conservation
 - Municipalities & Departments are obligated to invest no less than 1% of their ordinary income in maintenance water supply zones
- Forest Conservation Incentive Certificate (CIF, Decree N°900):
 - CIF as an economic instrument seeks to provide an incentive to private landowners to conserve natural forest rather than choose alternative land uses that would lead to forest degradation
 - Defines methodology to determine value of incentive

Statutory Legal Frameworks: Conclusion

- Natural resources (incl. ES) are generally considered as natural heritage of the Nation or subject to State management
 - Therefore, State is usually a key stakeholder in any PES scheme
- Importance of ES is explicitly recognized in specific PES or ES-related legislation
 - These laws often establish direct (or indirect/potential) financial mechanisms to value, reward & maintain the provision of ES
 - However, lack of clarity & implementation/use of given financial mechanisms often hinders establishment of PES schemes & greater number of PES projects
 - Also, lack of clear definition of & regulation on ES & PES often leads to misinterpretation of the concept as promoting “privatization” of water

Statutory Legal Frameworks: Conclusion

- Specific PES legislation or regulations is not necessarily a prerequisite for development or design of PES projects (several projects exist without such specific PES legislation)
- Advantages of specific PES legislation or regulations at national or provincial levels:
 - Guiding & controlling the “market”
 - Providing clear definition of ecosystem services & PES
 - Clarifying rights towards ES
 - Establishing PES funds
 - Clarifying legislative authorization to allocate budgets
 - Establishing clear administrative rules and responsibilities
 - Determining legal capacity of parties affected to enter into agreements
 - Guiding any procedures or specifics to be mentioned in the contracts

Statutory Legal Frameworks: Conclusion

- Possible difficulties & gaps of specific PES legislation or regulations:
 - Incomplete definition of ES (more than carbon)
 - Exclusion of potential participants (local communities)
 - Funding based on short-term vision (international donations)
 - Creating perverse incentives or loopholes within existing legislation

Institutional Frameworks

- Brazil: Water Law has created Watershed Committees (at national & state level)
 - Important potential drivers of PES initiatives, as they are
 - Responsible for formulating & approving Water Resource Plans
 - Dictating water usage fees & their application
 - Deciding on investments to be made in the watershed
 - Ensure broad representation & wide-spread support
 - Representatives of water users up to 40%, municipal, state and federal government up to 40%, organized civil society at a minimum of 20%
 - NGOs cooperate with Watershed Committees, and provide
 - Seed money to fund preliminary studies
 - Field visits and reports necessary to develop the projects
 - Credibility & trust
 - Technical support

Institutional Frameworks

- Peru: Watershed Councils are established
 - Councils bring together principle public institutions of the basin, delegates of Sanitary Service Company of the basin & different users
 - Duties include promotion of IWRM
 - Councils are similar to Management Committee (*Comité Gestor*) which is proposed in PES schemes in San Martin region
 - When elaborating PES schemes it is necessary to understand that in most cases, basins do not respond to political frontiers of provincial or local governments
 - Also implies that different provinces or municipalities have to develop similar public policies for sustainable management of the basins

Institutional Frameworks

- Bolivia: Water Associations play key role
 - PES experiences show that key issue in design & implementation of water-related PES schemes is involvement of local governments
 - Despite central Government exclusive responsibilities related to ES management, some municipal Governments have taken actions towards implementation of PES schemes without involvement of national authorities
 - Water Associations closely collaborate with local Municipalities & civil society, are close to water users & ES providers

Institutional Frameworks

- Colombia: National Environmental System, but decentralized environmental management
 - Administrative & financial autonomy of regions & municipalities that allows for prioritizing regional & local PES initiatives in accordance with environmental problems at local and regional scales

Institutional Frameworks: Conclusion

- Appropriate scale for PES projects & schemes:
 - First at the micro-watershed level
 - Facilitates decentralized management
 - Helps clarification of /dealing with insecure rights
 - Ensures proximity of sellers, buyers & intermediaries
 - Both creates trust & simplifies development & implementation
 - Successful PES projects possible at this level without highly developed legal & institutional PES frameworks in place
 - In a future step, projects/schemes can be scaled up to watershed, provincial or even national level
 - Depends on opportunities to transfer positive results
 - Well-structured & cohesive institutional set-up (horizontal & vertical) facilitates enlargement process
 - Establishment of Watershed Committees at different levels plays key role in overcoming institutional fragmentation & lack of coordination
 - Scaling-up requires development of legal & institutional PES frameworks

Institutional Frameworks: Conclusion

- Watershed Committees should ensure
 - Adequate involvement & representation of all players
 - Building of trust
 - At different levels, strategic planning, technical assistance, financial support
 - Cooperation with NGOs & other partners
- Watershed Committees should avoid
 - Overambitious coverage of participants in the respective watersheds
 - Overestimating available financial and human resources to implement schemes/projects

Property Rights Issues

The case of Brazil:

- Requirements to enter PES contracts
 - **Private landowners:** right to derive income from ES (which can be transferred to heir(s))
 - **Traditional communities:** activities & presence authorized in Management Plans of public lands on which they reside
 - **Indigenous lands:** right to use & derive income from natural resources is guaranteed by law

Property Rights Issues

The case of Colombia:

- PES permitted as long as schemes recognize that natural resources & ES are property of the State
 - **Private landowners:** right to use land which is in compliance with the law (mandates protection of the land's social & ecological functions)
 - **Collectives:** law recognizes traditional rights (including land property) of Afro-Colombian & allows legal representatives to sign contracts on behalf of community
 - **Indigenous:** law recognizes property & possession rights of land traditionally occupied by IP

Property Rights Issues

The case of Bolivia:

- Land rights-holders also hold rights to renewable natural resources on their land
 - This has enabled individuals & communities to participate in PES schemes
 - Landless individuals (who cannot participate in PES due to lack of rights) may be included in PES by the granting of specific usufruct rights
- Due to unclear tenure, PES must take a flexible approach & include actors who do not have formal ownership rights
 - Adverse possession: demonstration that there is no legal land owner
 - Acceptance of de facto property & tenure rights in cases where property & tenure are clear but lack formal title
- Registries can improve the security of rights & benefit PES
 - However, Bolivia's numerous registries are not coordinated

Property Rights Issues

The case of Peru:

- Rights granted over natural resources (i.e. forests) do **not** imply rights over ES provided by the natural resources
 - So, not clear to whom rights to ES should be granted
- Lack of clarity regarding rights to ES:
 - Many actors who influence provision of ES lack rights over land or natural resources
- Recommendations for Peru
 - Establish rights-holders as responsible party for producing or maintaining ES
 - Include in design & establishment of PES schemes actors who lack formal rights over land or natural resources
 - Register PES contracts & transactions in public registry

Property Rights Issues: Conclusion

- Clarity who holds rights over ES supports development of PES
 - Linking rights over ES to rights over natural resources can help gain legal security for establishment of PES schemes
- Lack of formal land rights does not preclude parties from participating in PES, but makes it more difficult
 - Thus, efforts to legalize titles or clarify land tenure can strengthen PES & increase small-holder participation
- Registries can improve the security of rights & benefit PES development, including in cases of property transfer or inheritance
- Establishment of PES can grant value & mitigate ES degradation
 - But it can also introduce perverse incentives

Property Rights Issues: Conclusion

Recommendations:

- If possible, prioritize transactions in areas where land tenure is relatively clear & where enough landowners have legal title to render a transaction feasible
- Where titles do not exist but customary ownership can be proven, invest necessary resources to assist potential PES sellers in obtaining proper documentation to formalize customary rights
- Find a way to include people without title or formal rights in the design & implementation of PES schemes
- Utilize registries to document legal title & obligations associated with the land & to help ensure continuity of a PES scheme over time

Contractual Issues

- Legal nature of PES contracts
- Analysis of different legal issues related to PES contracts
- Development of a data analysis matrix
 - Lessons learned from case studies
 - Improved assessment for PES legal regime in the region
 - Clarity and replicability
 - Necessary input for future development of water-related PES projects & schemes

Contractual Issues

Issue	Purpose	Options	Advantages and disadvantages
Risk allocation			
Objective			
Parties			
Rights and obligations “seller”			
Performance and success indicators “seller”			
Rights and obligations “buyer”			
Payment structures			

Contractual Issues

Issue	Purpose	Options	Advantages and disadvantages
Representation and warranties			
Defaults and remedies			
Dispute settlement			
Governing law			
Taxes			
Term			

Contractual Issues: Conclusion

- Legal nature of the PES contract
- Legal security to underpin the importance of PES schemes
 - Legal capacity to sign agreements
 - Rights over ecosystem services
 - Land tenure and registry
- Enactment of legislation as a step forward
- Development of contracts
 - Relatively simple
 - Clear obligations and consequences of non compliance
 - Trust relation building process

Discussion / Questions & Answers

Thank you very much for your attention!

The floor is open!