



GUIDING QUESTIONNAIRE FOR COUNTRY ASSESSMENTS

The following questionnaire offers guidance on the issues to be considered when conducting an assessment of a country's legal and institutional frameworks relating to Payments for Ecosystem Services (PES). This is the guideline that was developed and provided to the country consultants for their work, which we are now making available online at the websites of the IUCN Environmental Law Centre and the Katoomba Group, and in other ways, for additional stakeholders who may wish to carry out analysis of legal frameworks.

The Katoomba Group and IUCN Environmental Law Centre request to be notified of any use or reproduction of this questionnaire.

Analyses produced based on this questionnaire should acknowledge IUCN Environmental Law Centre and The Katoomba Group.

IUCN Environmental Law Centre and The Katoomba Group additionally kindly request the sharing of resulting analysis with the network and can facilitate dissemination of results to members of its broad global network working on Ecosystem Services. Please contact: thomas.greiber@iucn.org and hmurray@katoombagroup.org.

Directions to country analysts:

Presentation of the information may vary from the order of these questions, as there is a need to maintain a reader-friendliness of the reports. If a question is not applicable or no information is available, the issue raised may not need to be addressed. However, it might be helpful to reconsider such questions in the course of the analysis and conclusions/recommendations parts in order to think about legal challenges (e.g., how to enforce contracts), suggest possible solutions (e.g., how to clarify rights, how to avoid clashes between statutory and customary rights), etc.



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1. Introduction

2. Legal and institutional framework regarding PES schemes

2.1 Legal framework

2.1.1 Constitution

- Is PES in compliance with the constitution?

2.1.2 Specific PES legislation which

- Could provide the legal basis for all aspects of PES:
 - Definition of ecosystem services to be purchased
 - Legislative authorization to allocate budgets
 - Administrative rules and responsibilities
 - General capacity of potential parties to enter into agreements (individuals, communities, private companies, municipalities, governments, ...)
 - Procedures and possible content of contracts

2.1.3 Ecosystem-related legislation which

- Addresses ecosystem services and market instruments such as payments (but only among other issues and not in detail)
 - Environmental (framework) law, forestry law, water law, nature conservation law, PA law, etc.
 - Planning law (including integrated water resources management), EIA (Forestry Management Plans), other zoning or land use laws

2.1.4 Indirectly relevant legislation which

- Encourages the use of economic instruments or creates perverse incentives
 - Development law, tax law, trade law, mining law, procurement law, etc.
 - Especially, land law/property rights law (which will be analyzed in more detail in section 3.)
 - Liability rules in other sectors that may include provisions for obtaining funds based on impacts or harm caused to land cover

2.1.5 Future legislation proposals in design or under consideration

2.1.6 Pros and cons of having/not-having a specific PES legislation:

- Greater stability of PES schemes because of political and public acceptability of the law
- Greater legal certainty (e.g., legal standing of PES parties and institutions, enforceability of contracts)

2.1.7 Conclusions/recommendations on legal framework

2.2 Institutional framework

2.2.1 Institutions involved at all levels

- Public institutions: e.g., agencies that exist to regulate and manage the ecosystem services (e.g. carbon office, EIA office, etc.), mapping of ecosystem services or of demand for ecosystem services, certification bodies, funding agencies, national/local registries for land rights and ecosystem services, etc.
- Private institutions: NGOs (national or international), civil society organizations, private business
- Intermediaries: in charge of finance, identification of sellers/buyers, negotiation, bundling services, support/advisory/capacity building services, roundtables to inform potential buyers and sellers

Remarks:

- Analysis of
 - Role of the different institutions (who plays the leading role and who should play this role?)
 - Their jurisdiction (legal and institutional form, legal and institutional requirements they have to fulfill)
 - Potential conflicts/gaps, possible solutions/needed institutions
 - Assess current situation and identify how to ensure collaboration between/integration of different institutions (Ministry of Finance, Agriculture, Forest, Water, Planning, other Environmental/Management Authorities)
- 2.2.2 At what scale can or should PES be established?
- Local: at the micro-watershed level (easiest to establish)
 - Regional: involving two or even more provinces
 - National: initiated by the central government and its institutions (e.g. through the water law)
 - Trans-national: between neighboring countries (possibility of bi-lateral agreements)

Remarks:

- Analysis of the scales at which PES schemes already exist, obstacles to the establishment of PES schemes at other levels (e.g., different water visions within the country might be a barrier to PES at regional and national levels)
- 2.2.3 How to achieve efficiency of the institutional framework
- Reduction of transaction costs
 - Clarification of roles and responsibilities
 - Other
- 2.2.4 Conclusions and recommendations on institutional framework

3. Property rights issues

3.1 What does the law say regarding land rights?

- 3.1.1 Who owns the land, who owns the natural resources of the land and who owns the ecosystem services of the land?
- Address this question for individuals and communities (do only individuals hold rights, or also communities)
- 3.1.2 Is there a possibility to have a right to use the ecosystem services without being the owner of the land?
- 3.1.3 Is there a possibility to have a right to derive income from the ecosystem services without being the owner of the land (which will enable you to enter into PES contracts)?
- 3.1.4 Is there a possibility to transfer the right to derive income to others, either permanently, or for a limited time (such as through a lease) which might enable continuity?
- 3.1.5 Will the right to derive income from ecosystem services be passed down to one's successors (the right of descendants to inherit land or resource rights) which will ensure continuity?
- 3.1.6 Are customary rights recognized by the legislation?
- 3.1.7 Is there a customary right to access the land and enjoy extractive benefits without being owner or tenant (e.g., indigenous peoples having customary access rights)?
- 3.1.8 Does land use change require prior approval, and are there limits to dividing land rights?
- 3.1.9 How is the land protected from illegal exploitation of the resource?

3.2 What is practice like?

- 3.2.1 If different rights/titles exist regarding the resource, does this lead to conflicts, because one might be able to benefit more from the payments than the other person?
 - E.g., companies vs. local farmers and communities
- 3.2.2 Are the rights given for a sufficient period of time, and over a sufficient size of land?
 - If the land of each single individual is too small (to provide the ecosystem service), will they be able to enter into joint agreements?
 - In order to ensure the sufficient provision of ecosystem services
 - In order to create an incentive to enter into PES schemes
- 3.2.3 How to deal with unclear rights?
 - Can PES be a means to solve the problem of unclear titles?
 - PES might facilitate recognition of rights and strengthen claims
 - PES might give an opportunity to open up for (re-) negotiation of rights
 - Clear land titles can also be considered as a “reward” to enter into PES
 - But PES might also weaken claims/lead to greater conflict, if only holders of secure rights/titles are able to participate and benefit
 - Do other means exist to clarify rights?
 - E.g., registration (why is this a solution or why not)
- 3.2.4 Land rights and water rights might be separated (prices on land that goes with water rights are higher so that poor people are excluded from lands with water rights)
- 3.2.5 How do to deal with customary rights not recognized in the legislation? E.g., if users do not accept water as a market commodity because of their culture/“vision”?
- 3.2.6 How do local people understand all these issues? Do their local definitions match legal principles? What effect is there of differences in perceptions and understanding?
- 3.2.7 Conclusions and recommendations on property rights issues

4. Negotiation

4.1 How are PES contracts negotiated in the country?

- 4.1.1 Participants in these processes: Reflections on the ability/capacity of the institutions for negotiation
- 4.1.2 Pro bono legal expertise available in country?
- 4.1.3 Guidelines and other support tools

4.2 Are tender/bidding processes being used?

- Potential sellers calculate how much it would cost them to undertake the management interventions that ensure ecosystem services, and submit a formal bid for funding. Each landholder bid is then divided by its 'environmental benefit' score and the bids with the lowest cost per unit of environmental outcome are selected, until the available budget is exhausted.

4.3 Are conflict resolution processes being used?

4.4 Conclusions and recommendations on negotiation

5. Contractual issues

5.1 Parties to the contract

- Seller/supplier of the environmental service as well as buyer/beneficiary
- Notion of authority: representation by “honest brokers”
- All parties to PES must have legal capacity to enter into contracts
 - Individuals and organizations might have the right, but not necessarily communities

5.2 Legal nature of the contract

- Private or public nature of the contract (especially in case of public PES)
- In case of private contract, applicable provisions depend on whether the contract is an input-oriented contract (only a certain land use/land use change is owed) or an output-oriented contract (a result is owed, e.g. increased amount/improved quality)
 - Depends on the obligations regulated by the contract

5.3 Objective regulated by the contract

- Explanation of the significant water management problem
- Definition of the water-related ecosystem service which solves this problem

5.4 Obligations of the parties

- Identification of obligations on seller's side
 - Input-oriented obligation (certain behavior is owed) or output-oriented (result is owed)
 - Possibility to refer to a management plan annexed to the contract, including baseline, indicators, clauses prohibiting leakages etc.
- Level of "payments" has to be specified
 - Payments can be made to a number of individuals or their community
 - Especially in cases where indigenous communities are involved, payments need to fit into the existing socio-cultural environment (e.g., if a few individuals receive payments while others do not, the risk of disrupting a community which is based on strong cooperative bonds is created)
 - Where land ownership is communal but individuals have long-term rights to use, it may even be necessary to involve both levels
 - Benefit sharing arrangements and practices
- Definition of payments/benefit sharing arrangements and practices
 - Parties have to determine whether the payments will be in kind or in cash
 - Additionally, the specific amount has to be agreed on
- When will the payments be made
 - Important to set the right timeframe and sequence for the payments
 - If all or majority of the payments are already made at an early stage of the contract, possibilities to enforce contractual obligations over the full contract period will decrease
- Narrow definition of exemptions

5.5 Period of time/duration

- Of the contract
 - Ensure an appropriately long timeframe
 - Interest in renewing expired contracts will come automatically, if the PES scheme is well designed
- Of the service provision
 - If a long-term sustainability/permanent provision is envisaged, possibility of prohibition of future land use changes after the contract expires
 - During the contract period valuable sites (e.g., habitats, biotopes) might have developed which then fall under the protection of a (sectoral) environmental law
- Periodical review of contract obligations
 - Will help to evaluate efficiency and ensure adaptability
 - Provisions for moving prices along with market prices

5.6 Fiscal implications of deriving income from sale of ecosystem services

- Are there differences in establishing sales as a provider vs. a seller, vs. another denomination?
- Implications for a buyer, or investor of ecosystem services

5.7 Securities and risk allocation

- Registration of PES contracts in public registries
- In case the service provider sells his property to another individual, buyer needs to secure that the contractual service will be further provided
 - Can be done by requiring the seller to register the restrictions on the particular property in the public land registry (if one exists) which then also have to be honored by the potential buyer of the land
- Insurance for non-compliance
 - Private insurance companies
 - Government to back up certain cases of non-compliance
 - Self-insurance by creating a reserve fund (part of the payments will be retained/held back in order to use them in case of non-compliance)
 - Use of escrow accounts- retaining revenues to serve as insurance
- Burden of proof
 - Depends on the nature of contract
 - Could also be reversed in the contract according to the parties will
- Evidence
- Other involvement of Government in decreasing risks associated with PES

5.8 Conclusions and recommendations on contractual issues

6. Monitoring, non-compliance and enforcement

6.1 How will the provision of services be monitored?

- Definition how contractual compliance will be determined
 - In order to do so, the baseline has to be set from which the evaluation of the seller's performance can start
- Authority to monitor the seller's activities
 - Granted to the buyer or
 - Granted to a public institution or
 - Granted to an independent verifier
 - Adequate structure to avoid corruption must exist
- Decision on a clear and affordable monitoring process
 - Field inspections:
 - Specific, field-level assessments are defined.
 - Exactly what will be inspected and what test methods will be used are defined.
 - Inspection procedures are agreed and include: the legal authority for inspections; the frequency of inspections; the consequences of refusing inspection; rights of entry for inspectors; whether notification is needed and what documents may be examined.
 - Self-assessments:
 - Reports based on self-monitoring and record-keeping by service sellers and buyers are monitored.
 - Information in these reports is then used either as a direct basis for enforcement actions, or to target inspections.

- A clearly defined, standard procedure is again required, including the method, schedule and format for reporting.
- Data requirements and how long records must be kept must be defined, and whether reports will be made public should be agreed.
- Inspections by the buyers (e.g., water guardians)

6.2 Non-compliance

- Reasons for non-compliance
 - Lack of trust between the parties
 - Possibility to free ride
 - Unfair valuation of the ecosystem services provided
 - Lack of authority in the field (possibility to get away with violations)
 - Lack of (effective) enforcement mechanisms (no deterrence/penalties are too low)
- If an effective contract law is in place, a comprehensive non-compliance regime already exists by law
- If this is not the case, or parties wish to include individual responses to non-compliance, further instruments can be included
 - E.g., contractual penalties
- Enforcement instruments: carrots and sticks
 - Sticks require credibility (meaning that there is a high chance violations will be detected and that responses to violations will be swift and predictable) and disincentives for non-compliance (appropriate sanctions)

6.3 Dispute resolution

- According to the legislation in place, such disputes will probably already fall under the competence of a particular court (which one?)
- However, the parties can also decide to submit the dispute to an arbitral tribunal or to mediation, if this is preferred
 - Consideration should then be given to submitting the disputes to arbitration under the 2001 Permanent Court of Arbitration Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment
 - It has to be ensured that both sides of the contract have *locus standi* (legal personality before the court/tribunal)

6.4 Conclusions and recommendations on monitoring, non-compliance and enforcement

7. Good governance

7.1 Public participation

- Through consultations or negotiations that bring the parties to one table
- Through formal (written) comments within a limited period of time after the public has been officially informed of a draft scheme
- Through field testing by volunteers to determine whether the scheme is effective and efficient or not

7.2 Access to information

7.3 Accountability

7.4 Transparency

7.5 Conclusions and recommendations on good governance

8. Overall conclusions

9. Annexes

OUTLINE FOR ANNEXES TO COUNTRY ASSESSMENT

The purpose of the annex part is to describe and analyze each selected PES project/scheme. For each selected PES project, a case study shall be included according to the following outline:

1. Background description of the selected PES project

- Objective of the PES arrangement
- Parties involved
- Contracts signed
- Duration of the project
- Status of payments made

2. Analysis of how the selected PES project dealt with the issues raised under section 3. – 7. of the guiding questionnaire

After the case studies, contract samples and a bibliography shall be included in the annex part.