
Title:	Drafting Note BSA2
Responsible Principal:	Mark Ellis-Jones
Responsible Advisors:	Mark Ellis-Jones, Kelsey Jack, Rohit Jindal, Jo Blennerhassett
Updated to:	October 2009

1. This drafting note explains the Biodiversity Supply Agreement, wherein a seller undertakes to:
 - implement land-use change or conservation measures associated with enhanced or maintained biodiversity, or
 - enhancing or maintaining biodiversity.
2. This series of documents has been prepared jointly by CARE with funding from the Richard and Rhoda Goldman Foundation, ICRAF and the Katoomba Group.
3. **Warning:** The precedent agreement to which this drafting note relates is a general working draft which will require adaptation according to local circumstances and law. Property, contract and other laws vary depending on the local jurisdiction and it will be necessary to adapt the terms of this agreement into a final contract with the assistance of local counsel. This will ensure that the final agreement complies with local regulations and may be enforced in the local jurisdiction. No liability is accepted for any claims which may arise through use of the precedent agreement to which this drafting note relates, which is intended only as a guide to highlight the key issues that should be considered in PES transactions.

4. Biodiversity Supply Agreement Drafting Note

A. Explanatory Notes

This Agreement provides for the supply of land-use change leading to enhanced biodiversity service provision / implementation of conservation measures leading to enhanced or maintained biodiversity.

B. Agreement Structure

The Agreement follows a structure which sets out:

- Seller obligations
- Buyer Obligations
- Payment Conditions
- Verification Procedures
- Ancillary provisions which structure the contractual relationship

C. Transaction / Deal Structure

This document assumes that the reader has read “Contracting for Environmental Service Supply” and has taken those decisions necessary to structure the framework for and reflect the conditions proscribed by the PES agreement.

D. Agreement Clauses

1. Parties

The Agreement contemplates one Buyer and a Seller, although further Buyers may be added to the Agreement.

2. Buyer: The Buyer must be a legal person capable of assuming the rights and obligations specified under the contract. Fill out the full registered name of the Buyer together with the full registered address.

If more than one buyer is party to the agreement, such buyers should ideally contract on a joint and several basis (where all buyers are liable for the performance of other buyers in addition to their own). The buyers will then enter into a separate agreement between themselves determining how liabilities are to be apportioned. In such a case, a clause similar to the below could be included under Clause 3.

“The liability of each of the Buyers under or pursuant to any of the provisions of this Agreement shall be joint and several”.

3. Seller: The Seller must be a legal person capable of assuming the rights and obligations specified under the contract. Fill out the full identification number of the Seller together with the full registered address.

E. Main Agreement

1. Definitions

Recheck definitions and their uses and contexts when the clauses are close to final settlement.

1.1 “Area Conservation Plan”

This definition is used in the definition of Conservation Measures and Clause 2.1. The Area Conservation Plan sets out the strategy for conservation measures or land-use change included at Schedule 1. This definition should only be included within the agreement where land-use change or soil conservation measures are being contracted. If the contract is for direct biodiversity service provision, this definition should be removed.

1.2 “Conservation Measures”

This definition is used in the definition of “Monitoring Requirements” and Clauses 3.1, 3.3, 4.1, 4.2, 4.3, 5.2, 8.2 and detailed in Schedule 2. This definition will not be used where the contract is for direct provision of biodiversity services. Amend to reflect to the type of conservation measures sought under the agreement.

1.3 “Cultivated Land”

This definition is used in Clause 4.4. This Agreement assumes that biodiversity services are supplied from land within agricultural use rather than forest. This definition allows for distinction between fallowed land and abandoned land and is a guard against additionality should buyers identify this as a key issue. Abandoned land might have a land cover sufficient to provide the desired level of biodiversity services and should not attract payments where the land has no alternative use. The bullet should be filled in an amount which would distinguish between land in long fallow and abandoned land.

1.4 “Dispute Resolution Committee”

This definition is used in Clause 7. See relevant section below to decide whether this definition should remain within the agreement.

1.5 Monitoring Requirements

This definition is used in Clause 4.2 and Schedule 7 and should be amended to reflect the services provided.

1.6 “Payment”

This definition is used in Clause 3.2, 4.1, 4.2, 4.3, 4.5, 4.6, 8.2, 8.3 and Schedule 4. The definition should be amended to reflect the nature of payment; cash, in-kind goods and services or in-kind vouchers.

1.7 “Payment Schedule”

This definition is used in the definition of Payment, Clauses 2.2, 3.2, 4.1, 4.2 and Schedule 3.

1.8 “Programme”

This definition is used in Clauses 2.4, 4.1, 4.4, 4.5, Schedule 5 and definitions of Land-Owner and Participating Land-Owner. The bullets must be filled in to provide clarity.

1.9 “Seller’s Land ”

This definition is used in Clause 4.1 and Schedule 6. Frequently the Seller will be a local authority with a predefined geographical area over which it has authority. Where the Seller does not have a geographical mandate, this should be defined by way of a map for which provision is made at Schedule 6.

1.10 “Seller’s Warranties”

This definition is used in Clause 6.1.

1.11 “Biodiversity Services” This definition is used in 2.1, 2.2, 2.2, 3.1, 3.3, 4.1, 4.2, 4.3, 5.2, 8.2 and in Schedule 1. Delete if land-use change is provided under the agreement.

2. Seller Obligations

Clause 2.1: Amend to reflect what is provided under the agreement; implementation of conservation measures or supply of biodiversity services. The carve-out is superfluous within the context of the agreement but is there to remind the Seller that Land-Owners must join the programme in free will only.

3. Buyer Obligations

Clause 3.1: PWS contracts may or may not require that the Buyer supplies any raw materials necessary to construct conservation measures, e.g. seedlings, grass splits, manure. Delete as appropriate.

4. Payment Conditions

Clause 4.1: This sets out the basis for payment and refers contract parties to Schedule 3 where the contract price and instalments should be specified.

Clause 4.2: To ensure conditionality, payment should be made only once the execution of Seller obligations are ascertained. It will not be unreasonable for Sellers to insist that payment

is made within a certain time. If this request is accepted, this qualification can be added to this provision. This clause includes a carve-out for any payments due on contract execution (e.g. to cover input costs) – which should be specified within the Payment Schedule. Payment is required where supply is to the “reasonable satisfaction” of the Buyer. This provides flexibility within a generalised contract although buyers may wish to specify more precisely what these terms are, especially in non-Commonwealth jurisdictions.

Clause 4.3: This will reflect decisions made regarding which land qualifies for payments. As perverse incentives will likely arise where conserved land is excluded, provision is made for side contracts. Although this reference is not necessary under this agreement, it is included for the sake of appearance.

Clause 4.4: It is likely that not all land covered by the agreement will be eligible for payments. By altering the definition of “Cultivated Land” – specific demarcations can be set.

Clause 4.5: Contract parties may have decided the minimum and maximum land-holding allowed to participate. This clause should be amended to reflect this decision.

Clause 4.6: This clause should be deleted where payments are made in cash.

5. Verification

Clause 5.1: Verification runs from Clause 4.2. Times should be set at which verification takes place.

Clause 5.2: This sets out how verification will take place.

6. Seller Warranties

Clause 6.1: Certain restrictions can be placed on Seller behaviour which contractually guarantees the quality of service provided. Such restrictions should be placed under Schedule 5 in a list form.

7. Dispute Resolution

Clause 7.1: If there will be no alternative dispute resolution process and contract parties are satisfied that any contractual dispute can be dealt with fairly and speedily within the national legal system, then this definition can be removed.

8. Term

Clauses 8.1: Fill in bullet to stipulate term. It would be unwise to allow the agreement to run in perpetuity particularly if the contracts are to be executed for the purposes of a trial.

Clause 8.2: The inclusion of this provision has no legal implication and parties will not be liable if they fail to reach agreement for a further agreement. However it is included here as a display of good faith.

9. Variation, Novation, Force Majeure

These “boilerplate” provisions are included as standard and establish codes of conduct in the event a contract variation is sought, novation is required or an “act of God” impeded contract performance. Novation occurs where one party transfers all of its rights and responsibilities under a contract to a third person. The consent of all parties, including the incoming party, is required for a novation to occur.

10. Execution Clause: Local legal advice should be sought to ascertain the requirements for execution to be effected.

11. Schedules

Schedule 1: Specify area conservation plan. It is anticipated that this would be loosely specified under a trial where there is an element of uncertainty as to precise nature of any conservation technology. Once a market is ‘firmed-up’ it is likely that conservation technologies will be more precisely defined.

Schedule 2: specifies the Conservation Measures required under the contract.

Schedule 3: Insert payment schedule.

Schedule 4: Insert list of payments-in-kind. Otherwise delete.

Schedule 5: This is the list of warranties / representations that the Seller will give in respect of the service to be provided. Amend as appropriate.

Schedule 6: This should state / map the area covered by the contract.

Schedule 7: Set out monitoring requirements / criteria / techniques.