

# Legal Guides for PES and REDD

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# Growth of PES initiatives

- CDM
- Watershed services
- REDD
  
- All of these transactions require legal documents
  - *Even for the simplest agreements*
  - *Transaction costs can become significant*

# Growth of PES User Guides

- Institutional issues and legal frameworks
- Draft contracts
  - Watershed
  - Carbon
  - REDD
- Web-based tools



**CARBON FORESTRY  
PROJECTS IN  
DEVELOPING COUNTRIES:  
LEGAL ISSUES AND TOOLS**



Patsy Davis

2000



the  
katoomba  
group

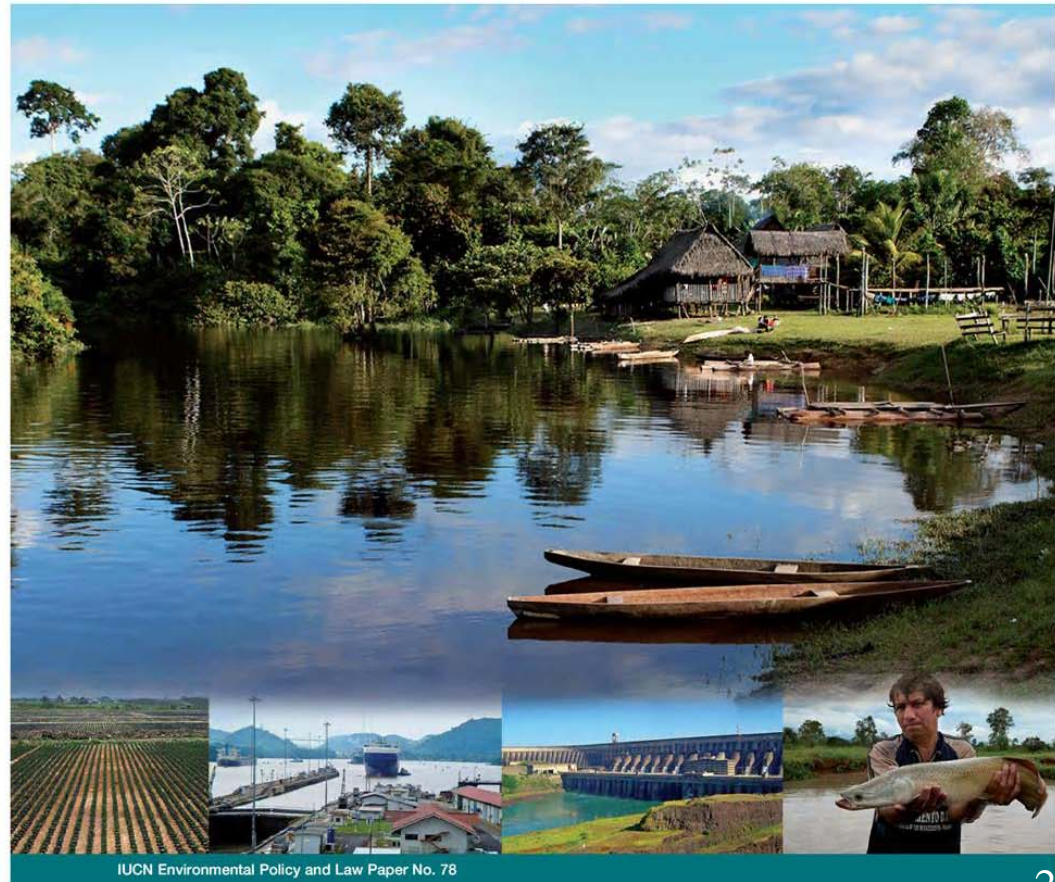
\* Case studies  
from South  
America

\* Published  
In 2009

# Payments for Ecosystem Services

Legal and Institutional Frameworks

Thomas Greiber  
Editor



IUCN Environmental Policy and Law Paper No. 78

- **Why do law and policy matter to payments for water-related ecosystem services?**
  - Explain importance of laws and institutions that support rather than hinder PES
  - At broadest scale, can correct market failures hindering provision of services generally
    - use some case studies to show jurisdictions where PES has been *unsuccessful*, in part because of legal and/or institutional obstacles
  
- **There are six key issues that warrant attention in this regard**
  - Enabling legal framework
  - Adequate property rights
    - Nature of the right
    - Demonstration of the right
  - Enabling Institutions
  - Contract formation
  - Compliance monitoring, dispute resolution, and enforcement
  - Good governance

# The law and policy of PES

## ■ Enabling legal framework

### ■ Constitutional provisions

- May reserve ownership of resources and services to the nation
  - *What if resources and lands reserved to public?*
  - *Do not need a constitutional provision for PES*
  - *Ensure that right to a clean and healthy environment does not exclude right to ES*

### ■ Legislation

- Definitions of ES may be incomplete or create confusion over terminology
- May prevent state from paying private parties over services
  - *Do you need a specific law on PES for watersheds?*
- *What level of legislation (federal or state)*

### ■ Regulation

- Definitions of ES may be incomplete, may create confusion over terminology, may prevent state from paying private parties over services

# The law and policy of PES

## ■ Property rights

- considerations vary depending on whether land is publicly, privately, or commonly held
- Nature of the right
  - Do not necessarily need complete ownership to engage in PES
  - Bundle of sticks metaphor
    - Problem of layered ownership of the same resource
    - Rights to use, transfer, extract, etc.
- Need to be clear which aspect of ownership is necessary for PES
  - Occupancy or use rights may be sufficient
- Issues of additionality on public lands
- Security of rights
  - E.g., illegal (but accepted) settlement in public lands
  - Unclear title
  - Communal title
    - Land owners/occupiers, particularly in Latin America, have limited titles to lands or other means of demonstrating property rights
    - Can commitments be made by individuals?

# The law and policy of PES

## ■ Enabling Institutions

- Explain what an institution is
  - Set out differences inherent in public versus private, and national versus local
- Functions of institutions
  - Policy development
  - Intermediaries/brokers
    - Example of FONAFIFO, [ecosystemmarketplace.com](http://ecosystemmarketplace.com)
  - Administration
    - Implementation of program
    - Fund disbursement
    - Fund raising and management
  - Registry of title and transactions
- Monitoring
- Insurance
- Contract enforcement



DUKE LAW

**Model Contract for  
Conservation, Sustainable  
Management,  
and Enhancement  
of Forest  
Carbon Stocks**

the  
**katoomba**  
**group**

# Contract Formation

## ■ Key Issues

- Note importance of low transaction costs
  - *A foolproof contract may be too lengthy and expensive to be practical*
  - *And may not reflect custom of transactions*
- ID of buyers and sellers
  - *What constitutes proof of legal right to deliver?*
- Objective and scope
  - *Payment for service or product / input or output?*
- Rights and obligations of parties
  - *Will this depend on the nature of the property right? Whether private, public or communal lands?*
- Performance metrics for sellers
- Payment structure
- Contract term
- Representations and warranties
- Defaults and remedies
- Compliance monitoring
- Dispute resolution
- Governing law

# Contract Between [\*] and [\*] Relating to Conservation, Sustainable Management [and Enhancement] Measures of Forest Carbon Stocks

This Agreement stipulates payments to participating landowners and aims to actively protect forests in their natural state from development[, and to restore degraded areas]. Specific measures include a number of [soil conservation], [forest maintenance], [and reforestation] practices with the goal of improving related ecosystem services and avoiding carbon emissions from [deforestation] [and forest degradation] by maintaining [and enhancing] forest carbon stocks. In order to achieve these results, the parties agrees as follows:

## Parties

This agreement is made on [\*] [\*] 20[\*\*] between:

- [\*] (the “Buyer”) with registered office at [\*];
- [\*] [(the “Seller[s]”)] [/] [the “Seller Aggregator”] [with registered office at [\*]].
- Collectively referred to as “the Parties.”

## Parties:

Parties to the contract may vary in complexity, particularly on the seller side. In its simplest form, the agreement would be between two private parties, a single buyer and a single seller. The seller must be a legal person with power to enter into a contract and authority to convey rights in the property and determine the uses and management of the property. Because the Project may involve a group of sellers or even whole communities of different levels of social-economic development, the contract should have a set of specific provisions to address such variations (e.g., different requirements of proof of land title/authority, provisions for transferability of obligations, representation of landowners, multi-benefit payments, etc). It is also important to consider that when there is more than one seller or landowner in

## GLOBAL KATOOMBA GROUP


- > Background
- > Legal Initiative
- > Incubator Initiative



## NEWSLETTER SIGNUP



## SEARCH FOR PES RESOURCES




## REGIONAL KATOOMBAS: INTERNATIONAL

## Katoomba Group Legal Initiative: Addressing legal frameworks and private contracting in payments for ecosystem services

Analysis and engagement with partners working on ecosystem services transactions, policies and laws over the past decade have demonstrated a clear need to better understand the gaps and limitations related to complex legal considerations which affect ecosystem services project participants and the public sector. Working in this space, the **Katoomba Group Legal Initiative**:

1. Examines existing law and policy frameworks around PES;
2. Informs the development of equitable PES laws and policies; and
3. Collects and disseminates tools and resources related to PES law and policy to individuals, lawyers, and project developers.

### IUCN-Katoomba Group Analysis of Legal and Institutional Frameworks

Since January 2008, the Tropical America Katoomba Group and the IUCN Environmental Law Centre have worked together to analyze legal and institutional frameworks around water- and carbon-based payments for ecosystem services. This work includes in-depth regulatory and institutional assessments of Bolivia, Brazil, Colombia, and Peru, conducted by country-based analysts with substantial PES experience. Key topics include: legal and institutional frameworks related to PES; property rights; contracts; securities and risk allocation; negotiation processes; monitoring, non-compliance, and enforcement; dispute resolution; and public participation.

- **NOW AVAILABLE!** *Payments for Ecosystem Services: Legal and Institutional Frameworks*, a report developed by IUCN and the Katoomba Group that examines the legal and institutional frameworks for water-related PES in Brazil, Bolivia, Colombia, and Peru.
- For information and presentations from the August 2008 workshop that presented preliminary findings of the joint IUCN-Katoomba Group initiative, please see the [Katoomba events page](#).
- Download the guiding questionnaire for country assessments, a framework that can be used to examine some of the issues that arise in this area or to inform future legal and institutional country assessments.

### Katoomba Group Legal Initiative-CARE Online PES Contract Toolkit

Contracting for ecosystem services is a relatively new phenomenon, and a process that can be confusing, opaque, and filled with hidden costs. In order to help level the playing field between market participants, the Legal Initiative provides resources and tools tailored toward small-scale ecosystem services providers and natural resource-dependent communities.

The Katoomba Group Legal Initiative and CARE have worked together to create an online PES Contract Toolkit, for use by project developers, communities, individuals, and lawyers to simplify and de-mystify the process of contracting for ecosystem services. The toolkit currently contains template contracts, contract-drafting guidance under the Clean Development Mechanism of the Kyoto Protocol, and links to publications related to PES contract-drafting. New tools and resources for the toolkit, including



## Legal Initiative: Online PES Contract Toolkit

Contractual models, tools and guidance for drafting contracts for ecosystem services and REDD transactions

### TOOLS

- > [Template PES Contracts](#)
- > [CDM Contract Guidance](#)
- > [Publications](#)

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### INSTITUTIONAL SUPPORT

The Katoomba-CARE **Online PES Contract Toolkit** houses a growing collection of transactional resources for use by communities, project developers and lawyers interested in contracting for ecosystem services. Our goal is to make low-cost transaction management solutions easily accessible to interested parties. Resources include template contracts, contract drafting and design guidance, and topical publications and links. The toolkit is updated and populated with additional resources on an ongoing basis. By providing a variety of tools at one site, we hope to build technical capacity as well as confidence in PES as a natural resource management tool.

### Objectives of the Online PES Contract Management Center

1. Help project developers and communities to understand the rights and responsibilities of contractual arrangements.
2. Reduce transaction costs related to the development of PES and REDD projects.
3. Provide resources to help local lawyers develop expertise in PES contract design.
4. Help to formalize PES transactions so that essential contractual elements are standardized and facilitate a progression towards accepted norms.

*DISCLAIMER: The template contracts, documents, and links on this site are offered to highlight the key issues that should be considered in PES and REDD transactions, not to provide a substitute for experienced, local legal counsel. As this field is evolving rapidly, it will be essential to engage legal counsel in conjunction with any PES transaction to ensure that any agreements reflect the latest developments in the field and comply with all current local and national legislation.*