

THE PAYMENT FOR ENVIRONMENTAL SERVICES IN COSTA RICA^(*)

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RESUMEN

El pago de servicios ambientales (PSA) en Costa Rica ha llegado a ser un asunto realmente importante y novedoso que debe ser concebido como un instrumento económico y es definido como un sistema financiero de orden, que trata de devolver a los dueños la tierra bajo el régimen del bosque, los beneficios ambientales que ellos proporcionan al país, son un esfuerzo de conservar y sostiene el uso de bosques primarios y/o tropicales. Los beneficios son, la reducción de los gases que causa la lluvia global (por la fijación del carbón, su almacenamiento y evitar la acumulación de agua excesiva en la atmósfera) y la protección de la biodiversidad. En el nivel local y nacional la protección del agua para el consumo humano y para la generación hidroeléctrica, así como el paisaje o la protección escénica de la belleza son también muy importantes.

Algunos de los problemas que encontramos con opciones de orden y control (no consenso político, las agencias administrativas débiles, ninguna sostenibilidad financiera y ningún control del proceso) llegan a ser también evidente como parte de los instrumentos económicos utilizados en Costa Rica.

Palabras claves: Desarrollo ambiental, bosques tropicales, territorio, deforestación, pago por servicios.

ABSTRACT

The payment of environmental services (PES) in Costa Rica has become a really important and novel issue which must be conceived as an economic instrument that is defined as a financial order system that tries to repay to the land owners under the forest regime, the environmental benefits that they provide to the country, as an effort to conserve and sustain the usage of primary and/or tropical forests. The benefits are, the reduction of the gases that cause global warming (through the carbon fixation and its storage to avoid CO₂ excessive accumulation in the atmosphere) and the protection of biodiversity. At the local and national level the protection of water for human consumption and for hydroelectric generation, as well as the landscape or scenic beauty protection are also very important.

But again some of the problems that we found with command and control options (no political consensus, weak administrative agencies, no financial sustainability and no control of the process) are becoming also evident with some of the economical instruments used in Costa Rica.

Keywords: Environmental Development, tropical forests; territory, deforestation, payment for service.

SUMMARY

Abstract

Introduction

1. The Disadvantages of the Payment of Environmental Services
 - a) Institutional
 - b) Financial
 - c) Case study principles that are not applied
2. Advantages of our legal System that can improve the effectiveness of the payment of environmental services
 - a) Values and Principles
 - b) Our national legislation, on this matter, is based on the following values
3. The future of The payment of Environmental Services
 - a) State Policies
 - b) Improving our legislation
 - c) Financial Sustainability
 - d) Fonafifo's Management
 - e) Payment of Environmental Services Control

Conclusions

ABBREVIATIONS

CC: Constitutional Court resolutions
FONAFIFO: National fund for forestry financing
MINAE: Ministry of the Environment and Energy
PES: Payment for Environmental Services
ES: Environmental Services
FL: Forestry Law

INTRODUCTION

The enforcement of command and control instruments in Costa Rica have left a series of contradictions. Since the 1950`s our country started with what specialists called Costa Rica's strip tease of our primary forest areas. But it is true also that 25 % of our territory is today under some kind of protection. A tax on gasoline, to pay the owners of those properties, expropriated or frozen for the protected areas, and to finance de PES, has failed. The Ministry of Treasury has used that income for other purposes. But the efforts continue trying to use economical instruments to obtain some sustainability in our environmental protection.

In the 90`s we started with some economical instruments.

The payment of environmental services (PES) in Costa Rica has become a really important and novel issue which must be conceived as an economic instrument that is defined as a financial order system that tries to repay to the land owners under the forest regime, the environmental benefits that they provide to the country, as an effort to conserve and sustain the usage of primary and/or tropical forests. It should not be understood as a simple commercial transaction between the State and independent or private owners for a service offered to the environment through contracts for the private forest regime according to the Forest Law, number 7575.

The PES is a positive externality, generated by the natural resources, that should be internalized by those who benefit and enjoy them; this internalization can be obtained through the payment or recognition made in favor of any land owner for the service offered to the society. The payment serves simultaneously like tool to diminish the deforestation and to promote the conservation of the forests and other resources associate.

The services benefit the planet and the human beings life quality whether they belong to the local, national and/or international community and their effects are both tangible and intangible.

Within the international community, the benefits are, the reduction of the gases that cause global warming (through the carbon fixation and its storage to avoid CO₂ excessive accumulation in the atmosphere) and the protection of biodiversity. At the local and notional

level the protection of water for human consumption and for hydro-electric generation, as well as the landscape or scenic beauty protection are also very important.

The PES system is a product of a 20 year process and gathered in the Forest Law (FL) 7575. This Law created FONAFIFO as a fully and independently government agency that is in the Jurisdiction of the Environmental and Energy Ministry, in charge of managing the system and creating the manuals and instructions needed for its correct operation. Article 46 of the Law, the State specifically delegates to this agency the enforcement of the PES. FONAFIFO's financing is obtained through a tax percentage to fuels consumption and through the resources coming from the services sold nationally and internationally.

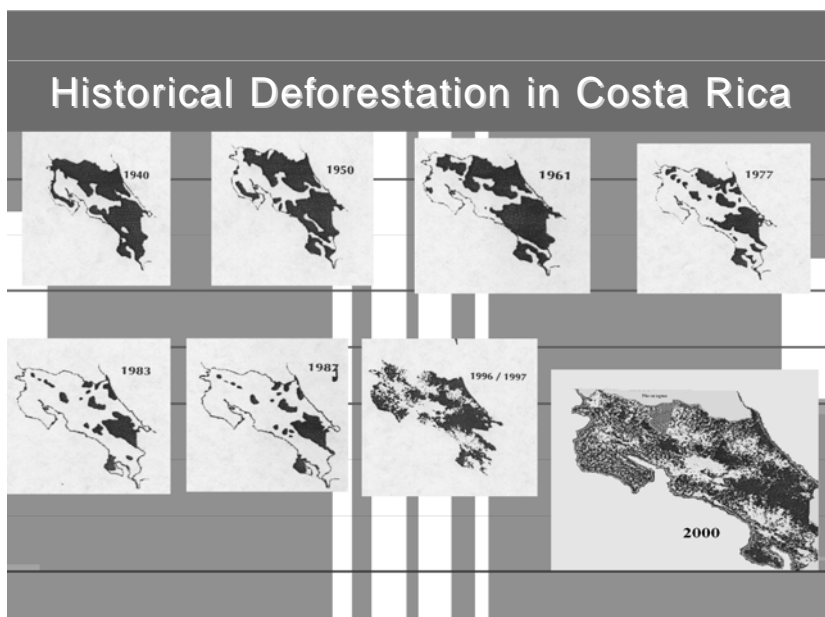
Unfortunately, the sustainability of the PES program, has been threatened by a series of economic, social and institutional conditions that affect its development, that is to say: the financial availability, the lack of clarity and enforcement of the regulations that apply to the payment of these services, FONAFIFO's management of PES has not been the best at the technical, legal and social levels.

This paper will review that the regulations and requirements of the program are not a guarantee to its success. It has been pointed out that the present legislation allows the interaction in the process of several government agencies that have not coordinated suitably the processes to make the services more efficient, effective and profitable.

1. THE DISADVANTAGES OF THE PAYMENT OF ENVIRONMENTAL SERVICES

Costa Rica has been inefficient to fight the countries deforestation rates from the 60's to the 80's and first have of 90's . The command and control instruments have not given the results in the search for a sustainable development.

The pictures below show the historical process of deforestation. In the 90's the use of economical instruments (payment for environmental services) could have been one of the solutions to the problem. But the problems we discovered recently are a sign that something more strong and comprehensive is needed. A State Policy with well specified priorities.



It starts with the inefficiency in the handling and the application of the Deduction of Taxes on the Rent, the Forest Payment Certificate, the “In Advanced” Forest Certificate and the Forest Development Fund and the “soft” credits.

The FL implements the PES, but we also find regulations in the Public Services Regulating Authority Law, Environmental Law and the Biodiversity Law. Furthermore, certain legal instruments have been found to allow civil, criminal and administrative consequences in our legal system. Example: Public Administration General Law, Internal Control General Law, Illicit Enrichment Law, Nation’s Financial Administration and Public Budgets Law.

It should be pointed out that a series of limitations to enforce the environmental services payment actually exist, in the present document we refer to as disadvantage.

Those disadvantages are classified as:

a) Institutional

The lack of coordination between the different institutions that participate in the process, the following ones can be mentioned: the

FONAFIFO, National Registry Office, the National Cadastre Office, the Agrarian Development Institute and the Agronomist Engineers Bar, limit a fast procedure.

One practical example is enough. The certification of the real estate where we can verify two aspects: property rights and natural resources that offer the environmental services (formality with which the land owners actual rights are stated) so they can apply to the program, it includes the property right listed in the National Registry Office and the so established requirements to obtain the payment, takes sometimes months and years depending on what the other agencies and institutions consider as legal.

In the case of the National Registry Office, the interpretations on the affectation of property have appeared, this retards the proceedings and the corresponding payment to the landowners. On the other hand, the National Cadastre Office transfers to the landowners the responsibility to harmonize the information listed in the Real Estate Registry Office with that listed in the National Registry Office, which entails the accomplishment of additional proceedings for any applicant. A similar situation happens in the Agrarian Development Institute, in which the definition of the limitations on lands with agricultural use is very slow. Finally, the Agronomist Engineers Bar through its task of controlling the forest delegates also implies additional requirements for the landowners.

b) Financial

FONAFIFO's management requires working the country's environmental services with certain flexibility. However, as a result of the Financial Administration Law the Nation's Comptrollers Agency and the Procurer Office have concluded that FONAFIFO must adjust its procedures to the established controls for the Public Administration. These administrative adjustments would increase their operative costs and would, in fact, make its operation more complex.⁽¹⁾

(1) CC. Resolution N° 2002-01784, N° 0846-95 SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA.- San José, a las quince horas cincuenta y cuatro minutos del catorce de febrero de mil novecientos noventa y cinco - Exp: 01-008416-0007-CO Res: 2002-01784 SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA. San José, a

Another aspect of great relevance for the analysis of the issue is the sustainability of the environmental services payment system. Actually it cannot be considered sustainable because we don't have a State policy with regard to the PSE, this is an obstacle for its sustainability. Also because it depends to a great extent on the fact that the Central Government should release the corresponding budget funds –which are not offered– as well as it depends on the donations and entities agreements that do not permit a sustainable financing base.

Another aspect to consider are the legal regulations to FONAFIFO's management, until now with the support of a trust fund established with one of the banks of the National Banking System, at a very low cost, the system is more flexible. Recently the Nations General Comptrollers ordered a complete change in the handling of all the funding and evaluate if under the principle of the State's exclusive cash holder. The national and international donors vision of FONAFIFO's role in the financial structure of the system changes dramatically.

c) Case study principles that are no applied

It is important to mention that the Constitutional Court as in the First Courtroom of the Supreme Court of Justice and in the Agrarian Court, there is evidence of a case study tendency to introduce the environmental function, to reach the sustainable development, as a part of the economic and social function of the right to property and a State obligation. It is in the scope of the principle that the forest property is a limited form of property, where the property's ecological function

las ocho horas con cuarenta y nueve minutos del veintidós de febrero del dos mil dos - Res: 2002-01220 SALA CONSTITUCIONAL DE LA CORTE SUPREMA DE JUSTICIA.- San José, a las catorce horas con cuarenta y ocho minutos del seis de febrero del dos mil dos - SALA PRIMERA DE LA CORTE SUPREMA DE JUSTICIA.- San José, a las dieciséis horas del veinte de julio de mil novecientos noventa - N° 241 SALA PRIMERA DE LA CORTE SUPREMA DE JUSTICIA.- San José, a las dieciséis horas veinticinco minutos del veintisiete de julio de mil novecientos noventa - Resolución 036-F-94. AGR SALA PRIMERA DE LA CORTE SUPREMA DE JUSTICIA.- San José, a las nueve horas cuarenta minutos del veintisiete de mayo de mil novecientos noventa y cuatro - N° 51 SALA PRIMERA DE LA CORTE SUPREMA DE JUSTICIA. San José, a las quince horas quince minutos del veintiséis de mayo de mil novecientos noventa y cinco.

principle has been emphasized (meaning the limitations undergone by a land owner whose property has been declared part of a protective zone under the forest regime and the corresponding demands to be properly compensated).⁽²⁾

Among other aspects, the Courts have also referred to the actual IDA's situation, who repeats an error buying or expropriating lands not good for agricultural activities in a zone with forest use, considering that the properties bought by the institution could not be used to produce (given the fact that they are in the middle of a Reserve) they cannot benefit from the incentives that the State offers like a compensation to the land restrictions due to the conservation of its forests.⁽³⁾

The PES is within the range of rights and obligations established in the 3rd section of the FL and considered as an obligation to the private owners as the fulfillment of the environmental function. It is understood as one of the most modern interpretations of the environmental function implementation because the property is committed to conserve the forest through a certain time (approximately 20 years), enjoying all those lands of a special protection for being a privileged forest zone.⁽⁴⁾

2. ADVANTAGES OF OUR LEGAL SYSTEM THAT CAN IMPROVE THE EFFECTIVENESS OF THE PAYMENT OF ENVIRONMENTAL SERVICES

Our environmental International obligations, by means of the international ratification of agreements and other international instruments, to protect the values that prevail as governing principles of an environmental policy is important because it emphasizes:

a) Values and Principles

- The elaboration of strategies and national plans or programs for the conservation and sustainable use of the biological diversity,

(2) CC. Case study numbers 2002-01220, First Court Sentences numbers 0230-90, 0241-90, 0036-94 and 0051-95 and of the Agrarian Court Sentences number 721-A-03 and 344-A-04.

(3) CC. Case study N° 2002-06734.

(4) Pronouncement number C-038-2002.

that allows the rational usage of the natural resources, and guarantees a healthy and ecologically balanced environment.

- Suitable economic measures as incentives for the conservation and sustainable use of the biological diversity.⁽⁵⁾
- Establish policies and development plans in order to protect and to conserve the climate; and implement economic and legal measures and incentives for its research and projection.⁽⁶⁾
- Stabilization of the atmospheric gas concentrations that provoke the greenhouse effect, in order to adapt ecosystems naturally to the climatic change, assuring that the food production is not threatened and that a sustainable economic development occurs.
- Adopt legislative and administrative measures, as well as adequate policies to control, limit, reduce or prevent any human activity that threatens the ozone layer.⁽⁷⁾
- Revitalize all the actions that surround the essential problems related to the inhabitants of the planet life quality improvement, trying to offer an access to basic services such as water, energy, health, nourishing security and biodiversity protection.⁽⁸⁾

(5) Biological Diversity Agreement and Rio De Janeiro 1992, Earth's Meeting and Central America's Environmental Protection and Development Agreement, 1989.

United Nations Declaration

Rio Declaration

Rio Declaration.

Biological Diversity Agreement and Rio De Janeiro 1992. Earth's Meeting and Central America's Environmental Protection and Development Agreement, 1989.

Stockholm Declaration.

Central American Ecological Meeting for the sustainable development: ALIDES

(6) Central American Agreement about the climatic change, Guatemala. 1993. United Nations' Framework Agreement about climate change.

(7) Viena's Agreement to protect the Ozone Layer.

(8) Johannesburg Meeting, 2002.

b) Our national legislation, is based on the following values

- The atmosphere like common patrimony of all the inhabitants of the nation.
- Country's obligation to structure an economic and environmentally sustainable development that can satisfy the basic human necessities without jeopardizing the future generation's opportunities.
- The environmental damage is considered a crime of social characteristics, because it affects the bases of social existence; economical, because it threatens the resources needed for the productive activities; cultural, because it jeopardizes the communities form of life and ethical because it threatens the existence of the present and future generations.⁽⁹⁾
- All living beings have right to the life, independently of the present economic value or potential.
- Recognition of the different environmental services that the ecosystem lends and by means of which it will compensate the land owners who participate in the environmental conservation.

3. THE FUTURE OF THE PAYMENT OF ENVIRONMENTAL SERVICES

a) State Policies

In spite of the values and regulations listed above, the Costa Rican State lacks a Public Policy for sustainable development. Considering that since the reform of article 50 in 1994, that guarantees the fundamental right to a ecological balanced environment, there has been lack of State Policies clear and defined in most environmental issues but most of all, of the PES.

Each government establishes its priorities, without a continuous planning among them; for that reason, the development plans of the

(9) Statutory Environmental Law. Biodiversity Law.

governments beginning in 1994, have been different and even neglectful with respect to the PES. There isn't even a link between these plans and the State's budgetary distribution; which in a final term translates in the lack of enforcement because of budgetary insufficiency.

The program offered by the present government, incorporates the PES figure as a part of the environmental sustainability policies, indicating that the objective in this field will be to offer the financial sustainability, so that the resource protection and the compatible ecosystems is assured. The previous analysis demonstrates the fact that, the PES is important for the biodiversity protection; nevertheless, there aren't new forms of financing through which this economic instrument is sustainable.

The absence of State Policies prevents that an intergenerational vision of the ecology becomes real, this brings as consequence a development and maintenance of an environmental economy of short termed, limited vision. A sustainable development is not obtained by means of this type of policies, it is required to turn into an ecological economy, that can project itself towards the biodiversity and ecosystem long term protection, obligation already adopted by the Costa Rican State at the constitutional level, also as an international ecological policy and by the governing principles of the national legislation.⁽¹⁰⁾

Our country needs to enforce true State Policies that allow and facilitate the creation of environmental awareness in the population. They must focus on environmental education. In this way, the citizen participation in the issues will be facilitated. Coincidentally, the civil society participation must be stimulated, in specific actions that tend to the environmental protection, to obtain positive results in the future. In this way, the PES will become a viable economic instrument that supports not only the conservation and sustainable use of the primary and tropical forest; but also the use of other environmental services: mitigation of the greenhouse effect gasses, hydric resource protection, biodiversity protection and the landscape or scenic beauty protection.

A General Ecological Policy must be adopted to integrally protect the ecosystem and the biodiversity; and to allow regulations and executive policies, where the collective values prevail and not only economic interests of certain groups.

(10) CC. Resolution 4947-2002.

b) Improving our legislation

Sufficient legislation in the matter of environment exists at the domestic level, but they are not structured in a comprehensive form integrating the values contained in the constitutional and international regulations, limiting their effectiveness.

As a result of the previous analysis, the environmental regulations are dispersed; this results in inequality, slowness and complications for any Administration.⁽¹¹⁾ In the issues that are a priority to the PES, the lack of uniformity and legislative technical accuracy is translated, at least, in the superposition of jurisdiction and functions duplication, by the government agencies that manage the implementation of this economic instrument. In the same way, the legislator does not consider important the values that inspire the PES when limiting the term of the contract to five years without anticipating the future ecological protection by the PES or by alternative conservation instruments.

Conflicts between the institutions that participate in the PES management can be solved by:

- High-priority should be given to fortify MINAE, through a State Policy, that really guarantees the financial sustainability of the environmental area (effective transfer of the funds destined specifically by the law to the PES) and that allows the effectiveness in the exercise of its jurisdiction powers.
- The National Registry Office, because of its jurisdiction has conflicts with the IDA and with the National Cadastre Office. In the case of lands useful for the environmental service, the Registry does not record the affectation. In the same way, if the land is affected in addition to limitations imposed by the IDA and the authorization is not obtained for PES the registration will not be granted.⁽¹²⁾ It is a violation to the Law No. 8220 (Simplification of Proceedings).

(11) MONTORO CHINER, María Jesús. *La evaluación de las normas. Racionalidad y eficiencia*. Atelier Administrativo, España, p. 106.

(12) Resolution 10509-2001, Constitutional Court.

- According to the constitutional Article 169, the Municipalities have administrative and government autonomy. It's necessary that when the regulating plans are approved by them, it integrates the values constitutionally established and in the international treaties on Usage and Land Management. The environmental right is cross-sectional, in as much as it flows through other branches of Rights and Laws, and in as much as it protects superior values.

A re-evaluation of the institutional policies is needed. The State is forced to assure the protection of the biodiversity, prioritizing the lands with ecological and environmental use along with lands that have other especial needs. Costa Rica has a very rich variety of land use. Also, to harmonize the information and the exercise of the jurisdictions to offer effectiveness to the principles established in the Law of Simplification of Proceedings N° 8220.⁽¹³⁾

c) Financial Sustainability

The Ministry of Treasury is not distributing the totality of the income collected on the tax on gasoline consumption, and that fails to fulfill the duties established in articles 27 and 28 of Law 8131. In addition, the State has not implemented another way to internalize the environmental services costs or to improve the budget and fulfill the PES requirements.

Therefore it is recommended to:

- Improve the tax income distribution, since there is a legal imperative in article 69 of the FL, to transfer those funds. Considering that they are indeed collected and that there are Court injunctions⁽¹⁴⁾ regarding the taxes distribution with specific use. This has an echo in the PES financial sustainability, for it prevents the money of being available to repay it to the land holders for the environmental service, to cancel effectively and in time the payment to those who already have a contract.

(13) Resolutions 3252 y 1509, both from 2006, Constitutional Court.

(14) Resolution 4480-94, Constitutional Court.

- Internalize the environmental service cost in other sources already legally established, such as: regularization of the rates system of the public services offered.⁽¹⁵⁾ The environmental service is a public service that must be repaid through a rate.
- Promote the mitigation certificate sale of carbon emissions and of environmental services certificates to the developed countries as compensation due to the fact that they cannot offer these services. These joint measures of implementation are very useful to finance the objectives of sustainable development for all the humanity. (to add: ALIDES and international foundation).

d) Fonafifo's Management

The FONAFIFO is an agency fully dispersed, assigned to the MINAE, with an instrumental legal capacity, related to the budgetary handling; it has legal autonomy to fulfill the PES management. The effective regulations orders the use of this economic instrument. Nevertheless, actually FONAFIFO has transferred essential functions to the Trust administration. Furthermore, it hasn't needed a scheme administration that allows it to determine technically where and how to invest the funds destined to the PES. Reforestation has been preponderantly focused while the rest of the environmental services have been neglected. The promotion of the instrument to generate greater sources of financing has been omitted, as well.

FONAFIFO's management system should be changed to allow the fulfillment of the jurisdiction that the system has imposed to it. That means greater environmental service promotion, information and training to those who have lands to use for the PES. A greater conviction power of the necessity of the PES and the importance of maintaining environmental and ecological resource, not only at national level but also at planetary level. A reform to the integration of the Board of directors of the agency, since as it was mentioned before, this is another factor that does not allow the correct and efficient operation of FONAFIFO.

(15) To accomplish Law's 7593 (ARESEP) articles 4 e) and 31.

e) The Payment of Environmental Services Control

The person in charge by law of the previous survey of the land, we have proof of a number of omissions to his control duty over the PES instrument. This happens considering the way his survey is regulated. It permits the satisfaction of basically private and not public interests entrusted to him by the law.⁽¹⁶⁾

The consequence of having removed the PES control from the MINAE's jurisdiction and to delegate it to a professional who works privately makes almost impossible to consider some kind of administrative, civil or criminal responsibility to the Government agencies. Nevertheless, the State has the obligation to watch the delegate's management, that can perfectly respond due to fault in the monitoring. The previous ideas confirm that the monitoring should correspond in a direct and exclusive form to the MINAE.

CONCLUSIONS

We need to look at the macro -economical politics and policies so we can adapt the economical instruments at the national and regional level.

We need strong and affective State policies. Not only each four year good intentions of the parties that share the government power.

The PES needs first of all a financial sustainability. It is necessary to look for them not only in financial State sources but also in other possibilities. The tax on gasoline consumption has revealed a good source but with little political support.

We need to structure a public and private joint venture administrative management procedure to enforce the economical instruments so they become more effective.

We need to manage more technical information so enforcement and control are a reality in correspondence with the objectives of each economical instrument.

(16) Resolutions 4889 and 5425, both in 2002, Constitutional Court.

