

Critical Issue: Legal Circumstances

Are the legal circumstances amenable? ¹

Marine Conservation Agreements (MCAs) can be constructed using a variety of legal tools, ranging from private purchase and sale agreements to public leases to community agreements. An assessment of the available legal mechanisms should indicate what types of agreements are useful *and* enforceable. Typically, local counsel in the places where these projects will be implemented should assist the development of agreements. Nevertheless, one should be aware of the available tools as well as the strengths and weaknesses of each. Flexibility and creativity will most likely be necessary, as legal mechanisms intended for a different purpose may need to be adapted for conservation objectives.

MCAs are often based on an ongoing *quid-pro-quo* – incentives in exchange for conservation. Theoretically, an agreement can continue for as long as the law allows and as long as the parties to the agreement consider it in their interest to conserve the resources. Conversely, an agreement may face termination due to legal constraints on term or when the parties decide it is no longer in their best interest. While some believe the latter point is a weakness of private agreements, it may also be a strength. It could open the door to conservation in places where resource owners would not initially consider formal, government-sanctioned, legal protection through legislation or rules. Having flexibility in how long an agreement can last also provides conservationists the possibility of adjusting their portfolio of conservation areas as science develops a better understanding of the most important geographic locations to allocate funding. The major challenge of continuing a private agreement is developing and continuing an arrangement that will be appealing to the resource owner *and* the conservationist over time. Legal mechanisms allow the parties to formalize that agreement.

Legal Mechanisms

The most straightforward means to formalize a conservation agreement is to use a standard contract or lease. The primary advantages of these instruments are that they can be readily tailored to the specific needs of the conservation agreement, and are relatively inexpensive and straightforward to implement. In the event that terms are breached, the judicial system is available to settle the issue. Naturally, a contract or lease is only as good as the practical legal means to enforce it, and it is often the case that judicial systems are weak in many parts of the world. However, an important strength of conservation agreements in weak legal contexts is that, by design, compliance is motivated by the benefits provided under the agreement rather than the threat of legal retribution. Thus, as with any agreement, it is crucial to select well the parties with whom the agreement is made, and ensure that the incentives offered will have a lasting appeal to secure lasting compliance.

On public lands the principle mechanism for conservation agreements is the *concession* or natural resource lease. Terrestrially (and in marine environments) the largest land areas in the world are owned by governments and they often seek to put them under private management, principally for natural resource exploitation such as logging and mining (and aquaculture). In many areas it is possible to use these same legal agreements to acquire resources for purposes of conservation. The basic idea is to pay governments a competitive fee as if entering an agreement to exploit commercial resources, usually in the form of a tax on either area or volume of resources, and to manage the area for conservation. If conservation is established as a public benefit, conservation organizations may not have to pay the government for the concession. In some countries it may be illegal to do this, requiring concessionaires to use (*i.e.*, exploit) the resources or lose their rights to them. In other countries, it may be permissible explicitly or with new interpretations of existing laws. Moreover, in many cases protection over substantial durations can be achieved through long lease periods and renewal clauses. Concessions vary in length, but are often decades long with automatic renewal if the terms of the agreement are met to the satisfaction of the parties.

¹ Largely adapted from: Conservation International. 2007. Draft - Conservation Incentive Agreements: An Introduction and Lessons Learned to Date. Guidance Manual. Washington, D.C. pp 51.

A major advantage of concessions is that they open the possibility of conservation across vast areas of public lands that might otherwise never be considered for protection. They can also be faster to implement and more flexible than conventional protected areas, which may take years, if not decades, to create in many countries. However, the option of re-zoning public lands or marine areas as formal protected areas should not be overlooked in the context of a conservation agreement. Conservation agreements may actually be the first step towards formal government-sponsored legal protection. When it is possible to negotiate for formal legal protection, it may be prudent to seize the opportunity.

On private lands, legal mechanisms in addition to standard contracts that can be used in the context of a conservation agreement include purchase and sale agreements, easements and government registrations of conservation status. In these cases, the private resource owner agrees to sell or conserve the resource in exchange for an incentive, and potentially buttresses that agreement by creating an additional legal protection for the resource. As described previously, conservation easements allow a landowner to make a legal declaration to give up “development rights” to property without losing ownership of it. This has the advantage of allowing the landowner to continue using the property, as long as they do not exploit the resources protected by the easement. A third party, like a conservation group or land trust, will accept the responsibility of monitoring the easement and can rely on the judicial system to enforce it. Easements have the additional advantage that they attach to the property, so change of ownership does not affect the conservation status. Easements are well developed in the U.S., where the government offers a financial incentive in the form of a tax deduction or tax credit, and are beginning to grow in popularity in some countries in Latin America. However, the often weak tax collection systems in many developing countries will limit the usefulness of this approach. (As long as you pay for the easement or use rights weak tax collection is not an issue).

In some countries, resource owners can transfer property ownership to a foundation incorporated for the purpose of conservation, with specified guidelines for conserving the property in its articles of incorporation. The foundation directors may include the resource owners, as well as others involved in the conservation agreement. The original resource owners may continue using the resources within agreed upon limits. The articles of the foundation may also prohibit the sale of the resources. This approach has the added advantage of scalability, for example allowing multiple landowners in a particular area to participate in a single foundation, as well as communal landowners. Motivations to participate in such schemes might include a desire to protect the conservation status of an area from government action, to achieve the minimum area needed for ecological purposes or for nature-based enterprises, tax advantages, or conservation incentives offered by third parties.

Again, legal mechanisms are a means to formalize conservation agreements; they are not an end in themselves. Unless the parties are selected well, the incentives designed properly and monitoring is conducted, the legal mechanism alone will not likely ensure conservation. Public or private legal mechanisms are varied, and some creativity is generally required to identify an appropriate mechanism for a given application.

Discussion Questions:

1. What are the major international, national, and local laws affecting the ability to undertake MCAs?
2. What are the major legal obstacles preventing MCAs from being implemented?
3. What is the necessary legal framework to implement a MCA (i.e., identifiable, transferrable, and defensible rights)?
4. What are the formal and informal land and sea tenure scenarios (i.e., who owns and controls the lands and resources) which dictate the nature of MCAs, to include public, private, communal, tribal, usufruct, traditional, and customary rights, among others.
5. What are the legal factors limiting the ability of land and resource owners from transferring their ownership and rights to a private conservation organization?
6. What are the important contractual/agreement clauses, terms, and considerations for MCAs (such as parties, duration, purpose, liability, payment, enforcement and arbitration, geographic area, rights and responsibilities).

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7. What are the formal and informal enforcement mechanisms available to organizations through MCAs?
8. Are there public trust issues (or similar common law rights and doctrines) outside the U.S. that may impact MCAs?
9. What are the perceived obstacles related to historical practices and interpretations?
10. What are the best means to address the actual legal and policy obstacles to MCAs versus the perceived obstacles based on historical practice and interpretation?
11. What are the legal options to overcome some residency requirements for property acquisitions in some areas?
12. Can these mechanisms be applied to communal or cooperative land holdings?
13. What are the major legal differences between contracting with a government entity and a private or local/communal entity?

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Summary Findings

High-level law and policy analyses should be undertaken for geographies where MCAs are a new strategy. The international, national, state, and local laws affecting MCAs are complicated and varied, and thus require a specific geographic look.

New interpretations of existing laws that were originally enacted to serve purposes very different from MCAs may backfire if policymakers feel the laws have been manipulated to serve an illegitimate purpose. As such, NGOs must be careful when making legal interpretations and assertions.

There can be differences between the intent and interpretation of laws and the application of laws. In some cases, there may be legal opportunities to apply MCAs, but the historical application of laws makes it prohibitive. In other cases it may not be legally acceptable to apply MCAs, but historical irreverence for laws may make it possible. In either case, NGOs must be mindful of the intent, interpretation, and application of laws and policies at all levels of government.