Durable Freshwater Protection (DFP) mechanisms assessment and analysis

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A critical step in the DFP framework is identifying the potential land and water legal and non-legal protection mechanism(s) that are most likely to abate or mitigate current or future threats to a particular freshwater ecosystem over the long-term[1]. But how do we know what legal and non-legal mechanisms exist, which authorities are competent to make relevant decisions, and what financial resources might be available in a particular national or subnational (or transnational) context? Do existing mechanisms sit under the environment, land, water, fisheries, and/or some other sectoral authority? Which authorities might make decisions that could be detrimental to DFP? What barriers are keeping existing mechanisms from being used as they were intended, or sustained over the long-term? Or, could a seemingly unrelated or innovative mechanism be enacted or creatively applied in a freshwater protection context? Is there precedent for multiple mechanisms being layered? And, what if no protection mechanism currently exists for addressing a certain threat, like dams, or threats more generally from productive sectors? Are existing mechanisms well-suited to protect all key ecological attributes?

The exercise of researching existing legal, institutional and financial enabling conditions and asking questions as to how these tools are or could be applied to the freshwater challenges being faced is typically a fundamental building block to develop a DFP strategy or program. A legal, institutional and financial assessment, or scoping study, of existing DFP mechanisms has proved valuable in places like the Balkans, where country-by-country studies were undertaken by in-country legal analysts. In general, the most useful assessments will be undertaken by someone with a legal background; familiarity with laws, regulations, judicial actions, and other mechanisms in the particular country; and fluency in the official language.

The scope of an assessment can be delimited depending on the availability of resources or required timelines. Assessments can be narrowly focused on the application of area-based conservation mechanisms (i.e. protected areas and OECMs) to freshwater systems, for projects defined for instance by the 30x30 Target (which only 'counts' those types of protections). Alternatively, assessments could cast a much wider net, looking not only at conventional protections but also at regulations around water use and management, energy and food production, extractives/mining, fisheries, aquaculture, and forestry; water and land rights (e.g., land and water conservation instruments, such as easements), as well as rights of nature recognized in the national constitution or legislation or by national courts; and much more. Studies may start by focusing only on legislation and later expanding, as a second stage, to cover nonbinding policies, plans and strategies; or they could cover only national governance frameworks, identifying subnational instruments as an area for further research. Studies may start with an analysis of only framework water, environment or protected areas laws and foresee a second phase to investigate 30x30 opportunities in sectoral statutes (e.g., forestry, fisheries, land use, etc.). Studies may also cover an analysis of mainly the letter of the law and recommend analysis of secondary sources to investigate

[1] "Protection Mechanisms" should be defined broadly to include legal and administrative arrangements, tax and other financial incentives, institutional responsibilities and appropriate financial resources needed to ensure that the implementation of the appropriate protection mechanisms can be assured of success. The focus of the subject matter examined should be equally broad to include land and water as well as relevant activities (hydro construction, construction) and resources (trees, minerals) that occur thereon or therein.

how ambiguities have been interpreted or how specific protection mechanisms have been applied in practice.

The DFP framework, which starts with an identification of threats to key ecological attributes, should help to shape the focus of a legal, institutional and financial enabling condition assessment. For instance, if future dam construction is a primary concern, assessing existing mechanisms through the lens of whether any mechanisms exist to prevent dams in designated rivers can narrow the search. In general, most countries commonly will have legal mechanisms for conserving wetlands, lakes, and riparian buffers (e.g. designation of protected areas, requirements for the preservation or restoration of riparian areas, or the use of conservation easements) and for regulating water quality (e.g. prohibitions on pollution, water quality and wastewater standards, water body classification), but mechanisms for safeguarding the hydrologic regime and connectivity of rivers (e.g., environmental flow requirements, water reserves), and for allowing community-based conservation of local freshwater systems and resources (e.g., community-managed fisheries reserves, areas under the jurisdiction of community management institutions) are less likely to exist. Where there are no legal options for addressing critical threats or promoting freshwater conservation objectives, it will be necessary to exercise creativity to conceive of and enact those mechanisms – a likely long-term proposition – and building political support and coalitions may be required. Leveraging existing mechanisms, wherever possible, is recommended, as is identifying policy measures to be addressed over the short-, medium- and long-term. For example, it may be that a national law foresees the category of a protected river, but does not unpack its legal regime. Could this gap be addressed through a new regulation? Or would an amendment be required? Or the country's environmental laws create and regulate an area-based protection mechanism with relevance for freshwaters, but the mechanism has never been applied in practice -- a common issue across geographies.

Many successful freshwater protections have been enacted locally, where communities have mobilized and leveraged mechanisms available at the municipal or similar level, with the longer-term intention of achieving stronger provincial or national-level protections. Looking at locally available mechanisms may be out of scope for an assessment designed to inform a country-wide DFP strategy or program, but a project-level assessment could and probably should aim for that level of detail. And even a national-scale assessment should, if possible, include an overview, through a constitutional analysis, of how the mandates for environmental protection (including area-based conservation), water, land-use and other sectoral planning and management (inclusive of riparian buffers) are allocated across government levels (national, state and local). Transboundary cooperation agreements should also be considered as many international basin organizations have water management powers and functions that could enable or hamper durable freshwater protection.

A comprehensive legal, institutional and financial assessment should go further to identify the administrative entities (e.g. ministries, agencies, and departments, at all relevant levels) responsible for regulating, enforcing, overseeing, and/or managing land and water protection mechanisms, and evaluating their relative power and capacities compared to other entities whose mandates may be in conflict. For instance, the agency responsible for maintaining and controlling water quality may have relatively less influence compared to the agency responsible for overseeing mining development or another activity that generates economic benefit in the jurisdiction. Understanding these power differentials can go far to helping to identify not only which mechanisms might be available, but also which administrative agencies might be the most viable and effective partners for implementation of the

DFP strategy. Political borders may also be relevant, as one state or national authority may be more open to putting in place protection mechanisms than a neighboring jurisdiction.

Various TNC country programs have commissioned DFP policy legal, institutional and financial assessments, and those examples – and the terms of reference underpinning them – can be helpful resources for programs considering their own assessments. Defining the scope of the assessment at the outset may be among the harder challenges, given the potential for an assessment to expand almost indefinitely to include every angle and scale in environmental protection in the applicable jurisdiction.

Below we provide links to example terms of reference and reports that may be of use when considering how to structure and bound an assessment. (Note that some reports are in the official national language and have not been translated into English given the need to retain precision of the legal language.)

Terms of Reference:

- An Assessment of Applicable Laws and Institutions relevant to the Development of a 'Durable River Protection Mechanism' in the European Union and Countries in the Western Balkan Region (Example of an assessment focused exclusively on river protections)
- Legal Research for XX country on Durable Freshwater Protection Opportunities (Generic Terms of Reference for a country-scale assessment)
- The protection of freshwater ecosystems under existing conservation programs in Ecuador: legal mechanisms and management effectiveness (Ecuador example, in both English and Spanish)

Reports:

Ecuador

- Análisis Del Marco Legal Existente En El Código Ambiental Y Demás Normas Nacionales E Internacionales Aplicables En Ecuador Sobre Figuras Y Categorías De Protecciones Oficiales Que Podrían Ser Aplicadas Para La Protección De Biodiversidad De Agua Dulce (In Spanish. Deepl translation: Analysis Of The Existing Legal Framework In The Environmental Code And Other National And International Norms Applicable In Ecuador Regarding Figures And Categories Of Official Protections That Could Be Applied For The Protection Of Freshwater Biodiversity.)
- Propuesta De Un Primer Borrador De Instrumento Legal Para La Declaratoria De Reserva Fluvial Del Sistema Curaray - Nushiño, Como Un Río De Flujo Libre Manejado Por Comunidades Locales; Y Definición De Una Ruta De Trabajo Para La Oficialización De La Propuesta (In Spanish. Deepl translation: Proposal of a First Draft of a Legal Instrument for the Declaration of the Curaray - Nushiño River Reserve System as a Free Flowing River Managed by Local Communities; and Definition of a Work Route for the Officialization of the Proposal.)

Balkans

- Investigation of the Legal, Policy and Institutional Feasibility of Establishing a Durable River Protection Mechanism ("DRPM") in Slovenia
- Assessment of Applicable Laws and Institutions relevant to the Development of a 'Durable River Protection Mechanism' in Montenegro
- Investigation of the Legal, Policy and Institutional Feasibility of Establishing a Durable River Protection Mechanism ("DRPM") in the Republic of Serbia – DRPM Country Report Serbia

- Investigation of the Legal, Policy and Institutional Feasibility of Establishing a Durable River Protection Mechanism ("DRPM") in Croatia
- Investigation of the Legal, Policy and Institutional Feasibility of Establishing a Durable River Protection Mechanism ("DRPM") in Bosnia and Herzegovina

Angola

- Review of legal instruments that can be used to create freshwater systems and source water protection status – Key diplomas

Assessments of legal mechanisms may feel challenging to design and interpret for individuals without a legal background. Please visit the TNC DFP Connect site for contact information if you need assistance after having considered these examples and how they might be adapted for a particular context.