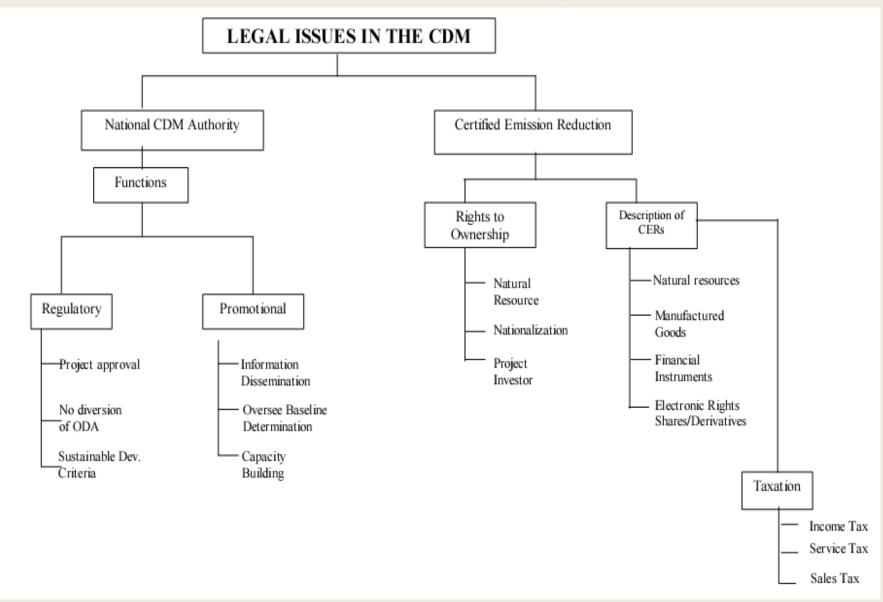
# Legal Issues on Implementation of CDM Projects in the Pacific and Emission Reduction Transactions

## **CDM Legal Issues & PIC's**

- CDM has its own international as well as host country legal requirements
- Even though CDM being a "Buzz" word for quite sometime in PIC's in terms of translating into real registered projects - still in its infancy
- This has resulted in generating not much of interests or awareness on the CDM legal aspects in PICs
- Lately many DNA's being established; potential projects identified; EU's preference for CER's from LDC's & SIDS post 2012 and focus slowly shifting from big developing countries
- PIC's needs to consider introduceor reviewing relevant domestic laws/regulations to facilitate CDM and transaction of CERs

# **CDM Domestic Legal Issues**



### **DNA Legal Issues**

#### The PIC DNAs need to have clear mandate on:

- CDM Policy for the contry
- Legal issues associated with CDM in host country
- Well structured DNA Office as top decision maker with respect to CDM projects approval
- Skilled technical committee to support DNA Secretariat
- Clear & transparent project approval procedures
- Sustainable development criteria
- Client Charter (Deadlines for approval of CDM projects)
- Clear definition of DNA functions

#### Foreign Direct Investment Laws

- CDM project may be affected by the FDI regulations of a host country if any of the participants, financiers, controlling shareholders or owners of the project are not nationals of the host country.
- Some PICs have and many are in the process of formulating FDI laws and regulations- ex: Fiji has special incentive for FI in RE projects – 10 years tax exemption for min of 5 million \$- No duty on importing RE equipment- RMI has similar kind of incentives for RE
- If host country FDI laws likely to restrict or impose cost on foreign investment in a CDM project - impact on the feasibility of the project- Brainstorming Session

### Foreign Direct Investment Laws

- Risk of such interference factored into the price that a purchaser is willing to pay for CERs or FDI approval may be a condition precedent to the contracts establishing the CDM Project and the transfer of CERs.
- For those countries where investment is less attractive, such as PIC's, restrictions on FDI need to be limited and consideration should be given to offering incentives for CDM investment.

#### **Environmental Laws**

- As with all projects, the development of a CDM project requires project developers to undertake environmental impact assessment under the rules of host country.
- In addition, projects will also need to obtain the necessary environmental consents and licences to build and operate the project.
- The fact that the project is a CDM project will not in any way avoid the need to comply with such laws.

#### **Environmental Laws**

- Almost all of the PIC's have developed their host country environmental laws and regulations: EIA procedure; Application for Environmental Permit; Regulations depending on type; nature and project size
- Possible that host countries may look at ways of integrating the CDM environmental assessment processes for proposed CDM projects with a significant environmental impact into their existing environmental assessment processes.
- Adopting such approach would assist in streamlining the assessment of such projects and avoid the need for duplicate impact assessments to be undertaken.

### **Property Laws**

- Nature of property laws varies greatly from country to country - in most cases, existing legal arrangements are unlikely to cover CERs or more generic emission reductions – Inputs from Participants
- It should be possible to utilise existing property laws to govern the allocation of legal title and ownership of CERs
- Especially in PIC's envisaged that as domestic legal systems develop, laws would be developed and registries put in place which specifically deals with the property aspects of CERs

### Legal Issues Related to CER Transactions

### **CER Ownership Issues**

- CERs- economic units produced by a CDM project by the project developer after setting up the facility and obtaining the required licenses & permits - logical to own and accrue the CER.
- CER ownership would be contractually determined between the project parties and therefore fall within the ambit of host country private law.
- Also project developer bears general project risks (common to all projects) but also CDM risks - have a right to claim ownership over the CERs.
- Some countries (for example China) have asserted that CERs should accrue to the state since the rights are negotiated under an international treaty to which only sovereign states can be a party.

### Legal Issues Related to CER Transactions

### **CER Ownership Issues**

- Critical aspect for CDM projects in PIC's could be mainly issues associated with customary rights on land; definition of CER; Taxation; DNA Levy – Input from Participants
- CDM PoA Legal responsibilities of Coordinating & Mnaging Entities (CME) for managing the PoA; Multicounty DNA co-ordination; Appropriate contractual models for CER transactions with Project Proponents -
- Highly recommended to incorporate appropriate clauses/legal measures under the appropriate regulations to address the CER ownership, benefit sharing aspects including implementation of PoA.

### Legal Issues Related to CER Transactions

#### **CDM Risk Issues**

Some of the key risks associated with CDM that any CDM project developer should consider (and that any potential financial investor or purchaser will definitely consider) are:

- Host country political and sovereign risks (e.g. change in host country policy towards the Kyoto Protocol or foreign investment regulations, change of government, change in taxation laws);
- General project risks including Act of God, project underperformance (e.g. too few CERs generated, leading to a breach of contract) and financial underperformance;
- Market risks for CER prices (both in determining a contract price for CERs and determining the level of risk if replacement CERs must be purchased to remedy a shortfall);

### **Conclusions & Recommendations**

- For CDM range of legal instruments required establishment of DNAs including their rules & regulations, to project-based emission reduction purchase agreements.
- PICs should pro-actively examining, adapting and modifying their applicable laws and legal structures to cover CDM issues and concerns

 Most of the PICs have ratified the Kyoto Protocol - first step towards enabling the CDM existing laws and regulations will need to be reviewed - where necessary, adapted as well as new ones incorporated.

### **Conclusions & Recommendations**

- Most CDM projects in PICs small-scale or Programmatic CDM Transaction costs and other bureaucratic requirements involved need to develop CDM policies/legal regulations which are not too cumbersome and will assist in supporting such initiatives.
- CER Taxation in PICs initially preferably no tax subsequent issues: need for a legal/regulatory framework; determining a 'fair' CER fraction as tax; ensuring targeted use of CER tax income; review and analyse the CER taxation procedures in other host countries
- DNA Administrative fee/levy from the CDM project developers Similar to CER taxation; inter ministerial/departmental dialogue and discussions

# **Thank You!**