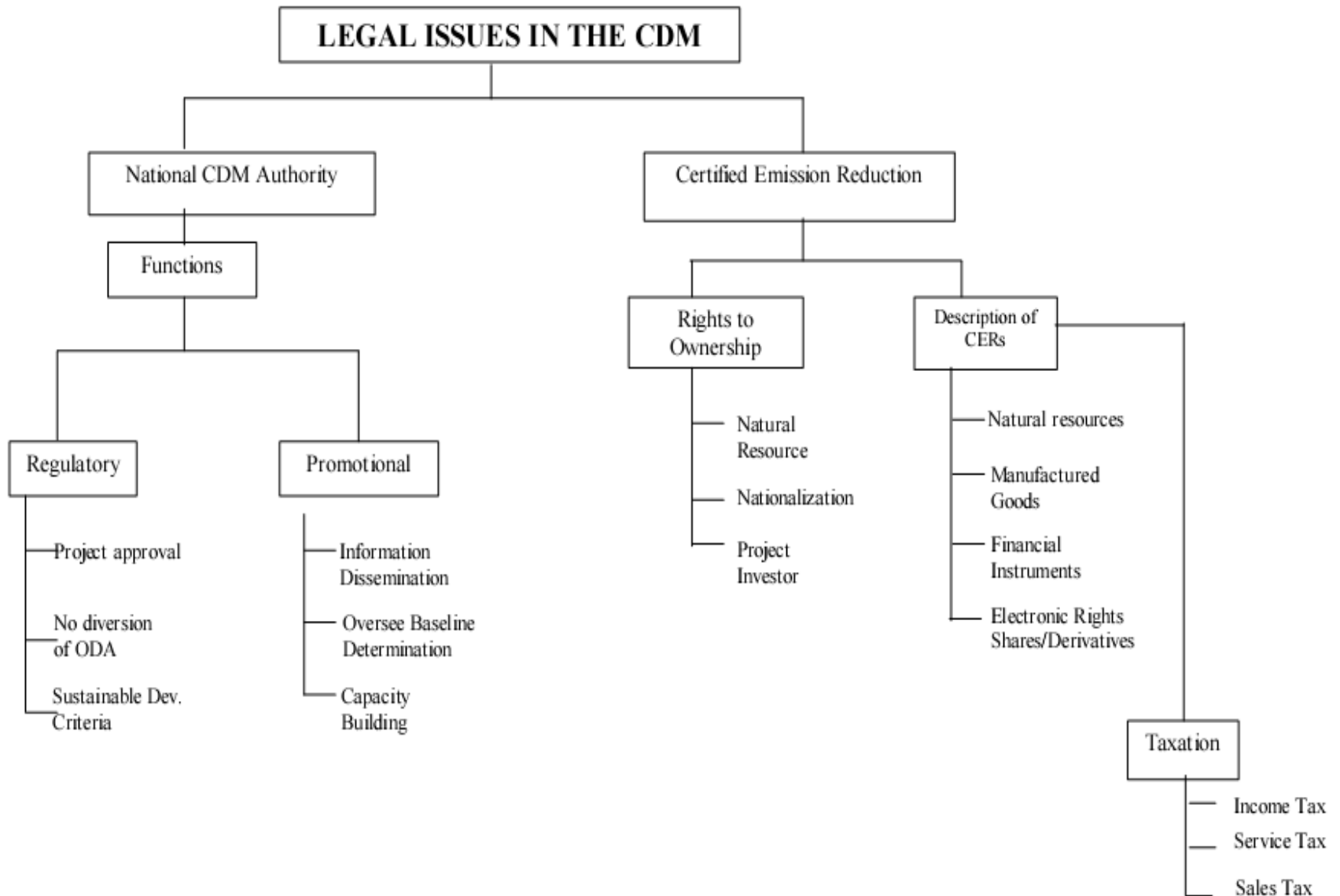


Legal Issues on Implementation of CDM Projects in the Pacific and Emission Reduction Transactions

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 introduce or 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 country
- 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

CDM and Existing Domestic Laws and Regulatory Frameworks

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

CDM and Existing Domestic Laws and Regulatory Frameworks

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.

CDM and Existing Domestic Laws and Regulatory Frameworks

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.

CDM and Existing Domestic Laws and Regulatory Frameworks

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.

CDM and Existing Domestic Laws and Regulatory Frameworks

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 & Managing Entities (CME) for managing the PoA; Multi-county 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!