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Definitions

- UNFCCC – United Nations Framework Convention on Climate Change
- CDM- Clean Development Mechanism
- CERs – Certified Emission Reduction

Legal Framework for CDM

- The Kyoto Protocol and Marrakesh Accords are the International Agreements;
- CDM is one of the three cooperative mechanisms under the protocol aimed at assisting the annex one parties to reduce costs of meeting their emissions targets by achieving reductions in emissions in developing countries at a lower cost;
- It further aims to assist developing countries to achieve sustainable development through implementing projects that promote environmentally friendly investments from industrialised countries;

International Compliance

- Ratification of the protocol is necessary;
- Compliance with the protocol is required to participate in CDM which should be voluntary and establish a Designated National Authority (DNA);
- In order to determine the level of participation a Country should engage in capacity building for the DNA's of host countries for the development of CDM projects

Steps to ensure compliance

- Ratification of the UNFCCC and Kyoto Protocol;
- Legal Establishment of DNA and its mandate;
- The DNA should have legal recognition and a sound legal basis;

Domestic requirements

- Under the Kyoto Protocol the DNA has the authority to approve investments for CDM Projects and transfer CER;
- The initial rights to carbon credits are owned and held initially by parties who are party to the protocol;
- These may be transferred to other non state entities such as companies or project developers;
- Domestic laws are applicable in the implementation stage of CDM projects;
- In the absence of a statute for the ownership of CER's then the international presumption relating CDM applies (project developers of abatement of greenhouse gas are presumed to be the owners)
- Thus private law is relevant particularly the commercial contract law.

DNA of Botswana

- Botswana ratified UNFCCC on the 27th January 1994;
- The Kyoto protocol was acceded to on the 8th of August 2003;
- In 2009 the National Meteorological Service Bill was passed by Parliament (commencement date is 2nd April 2009), whose functions include in '4(q) to implement the clean development mechanism under the Kyoto protocol to the United Nations Framework Convention on Climate Change and, among others register and approve project proposals to assess their ability to meet the set sustainable development criteria.'

DNA of Botswana continued

- Article 12 of the Kyoto Protocol states that projects must result in ‘reductions in emissions that are additional to any that would occur in the absence of the project activity’;
- This Act is in line with the international requirements for provision of a specific legal authority with assessment or approval procedures;
- The one, amongst others, is to maintain a register and approve project proposals based on the sustainable development criterion created by the DNA

LEGAL ISSUES OF CDM

- The only statute that endows CDM with force of law is the National Meteorological Service Act;
- All other details relating to CDM shall be addressed by this Act under the subordinate legislation or regulations;
- The Minister is empowered to make regulations on CDM;
- The key Legal issues relating to CDM are :-
- Ownership of CER'S
- Transfer of CER'S
- Environmental management
- Foreign Direct Investment
- Financial implications

Ownership of CER's

- The protection of ownership rights emanates from the Constitution of Botswana (against deprivation of property rights and interest), and the applicability and certainty of the rule of law;
- There are various types of property recognized by the law such as tangible and intangible property;
- There are different property regimes that regulate real rights and limited real rights in land which include, state land, tribal land, privately owned land and water, procedural laws relating to expropriation of land and registration of title deeds;
- Other rights in property such as patents, trademarks and utility models are protected.

Ownership of CER's continued

- Ownership of CER's is not yet regulated by statute, hence the international norms and practices and common law, which is Roman Dutch Law is applicable;
- The new regulations under the National Meteorological Act, may among others address the following issues:-
- Ownership and title to CER's particularly in the context of Programme of activities where there is a potential competition of owners;
- Various roles and parties and their relationship;
- Define an incentive structure.

Transfer of CER's

- Initial rights to carbon credits are referred to as 'sovereign assets' therefore may be defined as public assets .The key piece of legislation governing the disposal of public assets is the Public Procurement and Asset Disposal Act;
- This Act promotes accountability and transparency in the disposal and management of public assets;
- DNA falls under the supervision of the Board;
- In the event that there is conflict with Public Procurement and Asset Disposal Act, the requirements of the treaty shall prevail;
- Full advantage should be taken where the conditions are favorable to promote domestic capacity development.

Environmental Management

- The principal environmental legislation in relation to CDM is the Environmental Impact and Assessment Act, which is essentially an activity based planning tool;
- If the activities or projects carried out under CDM are not exempted the Act requires all CDM projects to be assessed for any potential effects on the environment and determine the mitigation measures of such projects;
- It is a criminal offense to commence any project without the authorization of this project;
- The other key environmental pieces of legislation are the Town and Country Planning Act, Waste Management and Sanitation Act and the Atmospheric Pollution (Prevention) Act.

Foreign Direct Investment (FDI)

- The Botswana Export Development Investment Authority Act, establishes an autonomous public body (BEDIA), whose duties include to ‘undertake investment within and outside the Southern African Region, publish information on investment and encourage and identify partnerships such as joint ventures and provide advice to prospective investors and purchasers of Botswana goods and services’;
- The most important objective relating to CDM is that BEDIA shall facilitate all aspects of investment processes such as permits, licenses and other authorisations;

FDI Continued

- The other key Acts that promote FDI are the following:-
- Companies Act – this Act allows for external companies to be registered in Botswana with an authorized agent to ‘manage’ affairs;
- Electricity Supply (Amendment) Act which has introduced independent electrical suppliers to acquire land and generate electricity;
- Mines and Minerals Act regulates the mining sector;

Financial Implications

- Financial support is a very critical issue at the start up stage of preparation of documentation for CDM;
- Start up capital is crucial for the CDM projects and where the prospects of obtaining capital are not positive, the financial sustainability of CDM shall be compromised
- For tax purposes, determination of monetary value of CERs is crucial
- Determination of whether CERs are capable of being earned as income or capital gains

Thank you

- Yvonne Kose Chilume
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- Gaborone, Botswana
- Tlotlo Conference Centre