



CLIMATE FOCUS

African Regional Workshop

Legal and Regulatory
Capacity Building for
Carbon Trading & CDM
Investment

Nairobi,
28-29 September 2010

Contracting PoAs: Legal Recommendations

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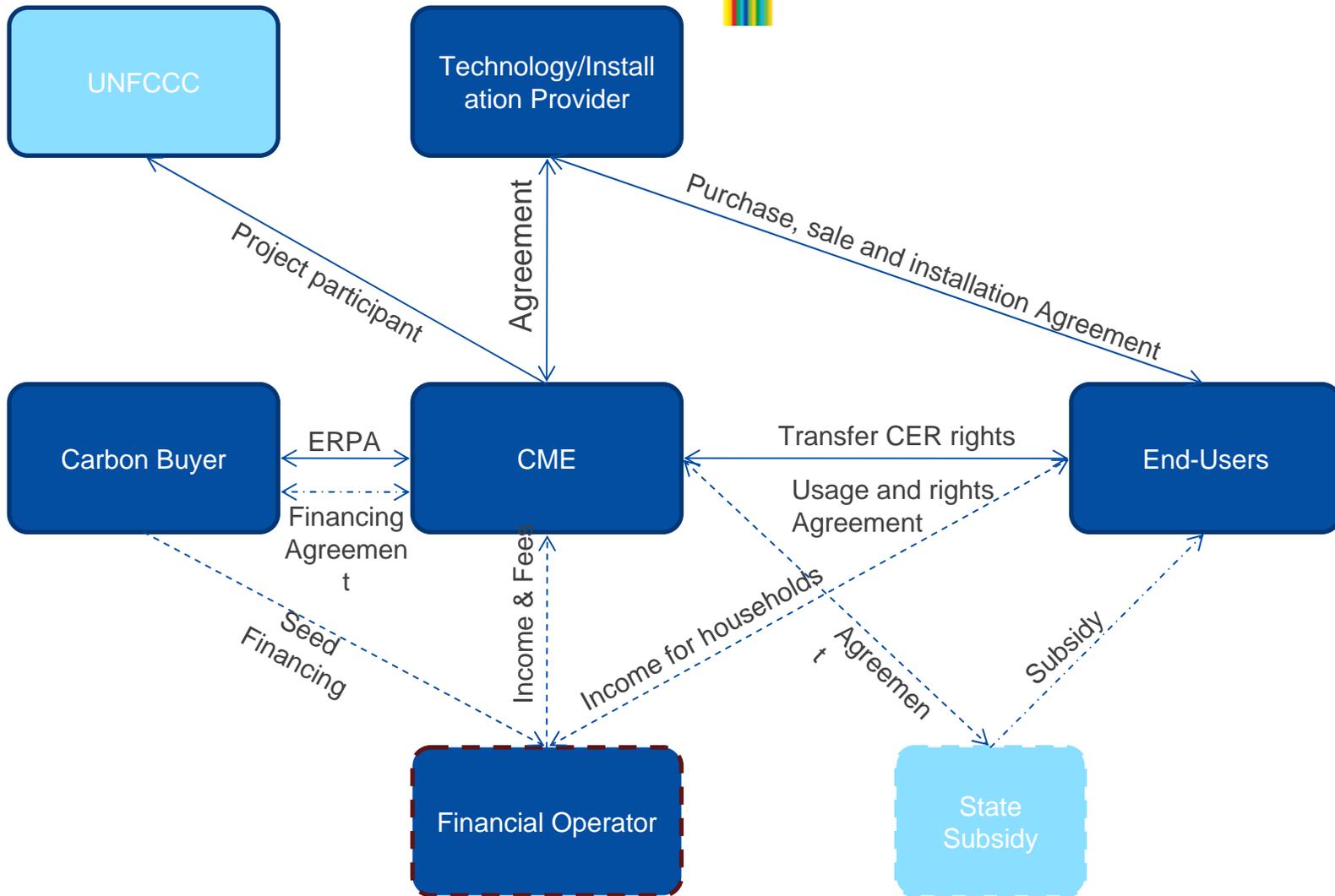
Programmes of Activities: A Terra Incognita

- PoAs are programmes, not projects, i.e. they are large in
 - Boundaries;
 - Time;
 - Number of Actors
- PoAs are cross-cutting experiences
 - Borders;
 - (Loose) infrastructures;
 - Distribution networks;
 - Vertical-horizontal governance structures (public-private-partnerships)
- PoAs are challenging in terms of
 - Prediction of roll out (pace of implementation);
 - Transaction Risks;
 - Financial risks (seed financing);
 - Transaction Costs



PoAs: Pioneering Into the Wild

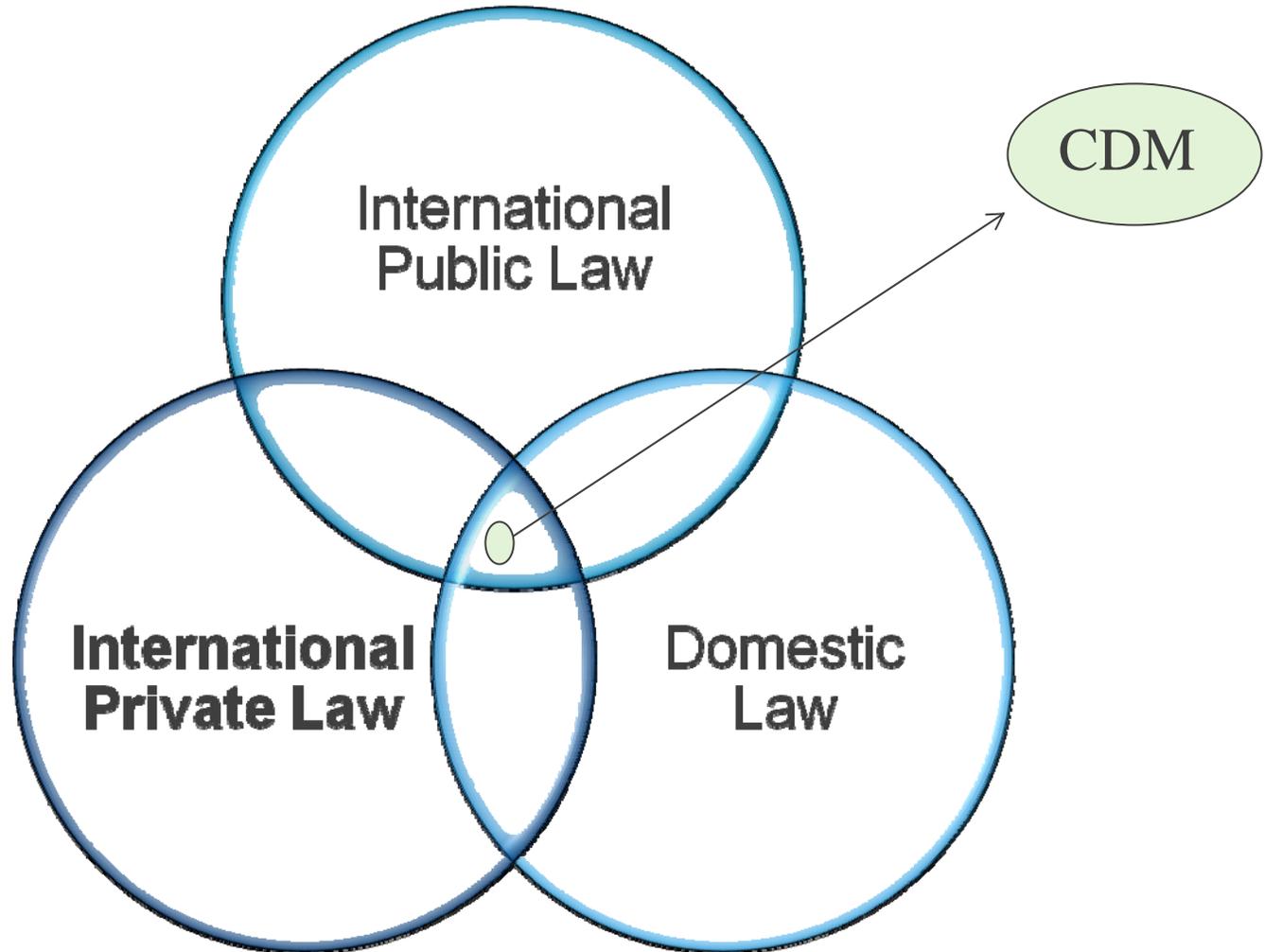
- Experience is scarce:
 - 5 registered projects (first in 2009), one in Africa (Uganda)
 - 52 PoAs under validation
- No issuance of credits yet
- No experience with program roll-out, delays, stakeholder disputes
- In Africa
 - Uganda
 - Tunisia
 - Egypt
 - Morocco
 - South Africa
 - No clarity over project cycle
 - No clarity over post 2012 future



Typical PoA Transaction Model

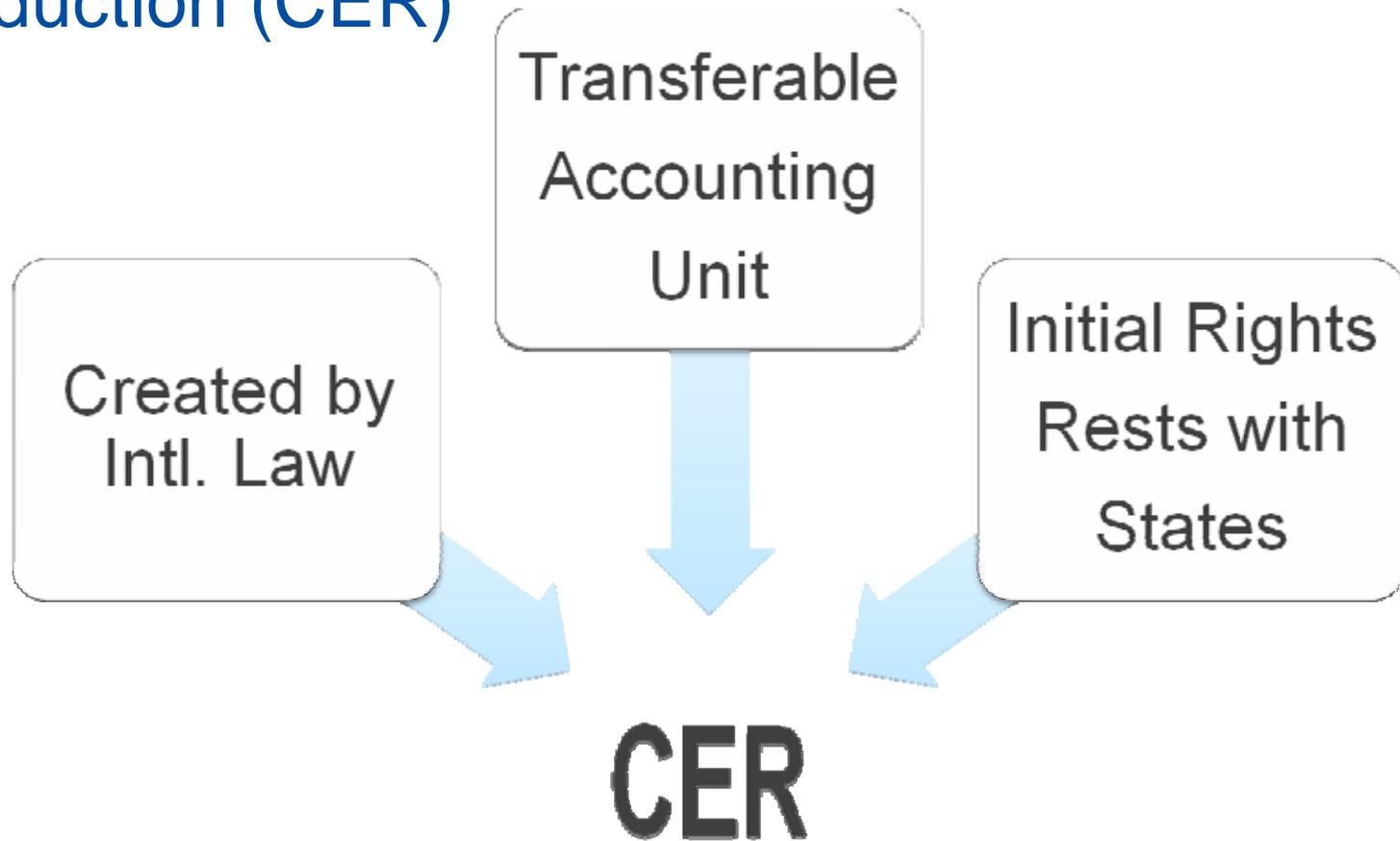


Programmes of Activities: The Legal Regimes





Basic Features of a Certified Emission Reduction (CER)



A unit issued pursuant to Article 12 and the relevant provisions in CDM modalities and procedures, equal to one metric tonne of carbon dioxide equivalent



Three Broad Categories of Contracts

- **Carbon cycle development:** validation and cooperation or *noli-me-tangere* agreements
- **Programme implementation:** technology purchase, equipment installation/maintenance and operations, PoA management agreements (PoA manuals)
- **PoA finance and transaction:** ERPAs, grants, subsidies, loans, etc.



Setting the Applicable Law

Contract Type	Applicable Legal Regime
Category I: Carbon Cycle Development	International Law and Private Law Regime with choice of law (domestic or international)
Category II: Programme Implementation	Private Law Regime: Usually domestic
Category III: Financing and Transaction	Private Law Regime: Choice of law domestic (public subsidies etc.) or international (ERPA)



Purpose of Contracts

- Allocate **responsibilities**;
- Define **obligations** and a **liability regime**;
- Identify and/or allocate **carbon rights** and **title**;
- Structure the programme: A contractual regime is, first and foremost, a **management tool**;
- Tap into **funds, knowledge** and **assistance**.



Key Concepts for PoA Transactions

- Principle of **legitimacy** and **enforcement**:
Construe from and towards the **carbon right holder**:
 - If the Coordinating and Managing Entity (CME): Have the CME be the spider in the net of contractual relations;
 - If the CPA head proponents: Build around a polycentric foundation and harmonize the overall architecture;
 - The right holder must be entitled through a continuous chain of title;
- Principle of **coherence** and **enforceability**: **II**
contracts must **fit** into the **architecture**
chosen:
 - Prepare the implementing agreements together with the financing agreements/ERPA;
 - **Work with templates that may be attached to financing agreements/ERPA;**



Key Concepts of PoA Transactions (cont')

- In each and all of the contracts make an allocation of **carbon rights** and **title**;
- Focus on the **pace of implementation** and set reasonable success benchmarks (**milestones**) as performance incentives and risk management tools;
- Keep the contracts **practicable**: End user agreements in a light-bulb projects need to look different from end user agreements in a landfill programme.



Liability of Validators

- Irregular credits (“excess CERs”) have always been a liability of the DOE in question;
- However, the liability benchmark for CPA inclusions is considerably lower: If the inclusion proves “erroneous”, the validator shall compensate for any issued CERs.
- Recently the scope of liability was somewhat restricted but its substance remains unchanged.



Liability of Validators (cont')

- How to react in the validation contracts?
- Negotiation is not easy for semi-monopolist status of validators
- Identify a fair and balanced share of responsibility: intentional misinformation and gross negligence on the side of the CME should lead to liability of CME; negligence in oversight of DOE should lead to liability of DOE alone



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