

# **Implementing CDM projects**

## **Guidebook to Host Country Legal Issues**



**BAKER & MCKENZIE**

# Implementing CDM Projects

## A Guidebook to Host Country Legal Issues

Paul Curnow,  
Baker & McKenzie

Glenn Hodes,  
UNEP Risoe Center

Editors

August 2009



BAKER & MCKENZIE



© August 2009  
UNEP Risoe Centre  
Risoe DTU  
Box 49  
DK-4000, Roskilde  
Denmark  
Tel +45 4632 2288  
Fax +45 4632 1999  
[www.uneprisoe.org](http://www.uneprisoe.org)

ISBN 9788755036673

#### Disclaimer

The findings, opinions, interpretations and conclusions expressed in this guidebook are entirely those of the authors and should not be attributed in any manner to the United Nations Environment Program (UNEP), UNEP Risoe Center, Technical University of Denmark, or Baker & McKenzie. This report is intended as a public resource for stakeholders undertaking activities that reduce greenhouse gas emissions, whether under the Kyoto Protocol's Clean Development Mechanism or other market-based instruments for carbon trading. While this guidebook provides independent analysis of legal issues material to such activities, and has been prepared for informational purposes, it should in no way be relied upon or construed by the reader as legal advice. Independent legal or commercial advice should always be sought when undertaking a CDM Project or entering into the types of contracts described herein. Contractual provisions provided are examples only and should be carefully considered and modified to suit the particular circumstances of an individual project.

# Acknowledgments

The genesis of this Guidebook was a project run by Baker & McKenzie some years ago as part of *CCLaw Assist*, an initiative funded by the United Kingdom Foreign & Commonwealth Office. That two-year project, which supported the initial background research for this Guidebook, mentored a number of lawyers from developing countries on climate law and policy, including the domestic legal issues relevant to the implementation of CDM projects. The support of the United Kingdom Foreign & Commonwealth Office is greatly appreciated. The publication of the Guidebook comes through the generous support of the Norwegian Ministry of Foreign Affairs, through a collaboration agreement with UNEP DELC.

The research into the Guidebook has been carried out over a number of years by a range of people to whom we are very grateful. In particular, we thank a few people for their sustained contributions:

- Monique Miller, Lachlan Tait, Louisa Fitz-Gerald, Simon Greenacre and Clare Gregory from the Sydney office of Baker & McKenzie who have done most of the detailed editing of research material and structuring of the chapters, as well as many colleagues from Baker & McKenzie's Global Environmental Markets Practice, who contributed material for the various case studies and examples provided throughout the Guidebook;
- Kaitlin Gregg, Tomás Carbonell, Jennifer McKnight and Denise Grab from Yale University, who as volunteers at the Environmental Protection Clinic at Yale University, carried out some of the very early research into the range of issues that now make up the chapters in this Guidebook;
- Sameer Sibal, Moksha Bhat and Dushyant Manocha, students at WB National University of Juridical Sciences (NUJS) in Kolkata, India, who carried out project participant interviews and research into the Indian case studies;
- Andrew Gilder, Bernard Namanya, Nupur Chowdhury, Paula Bennati, Larissa Clima, Haroldo de Oliveira Machado Filho, Gustavo Alanis, Tianbao Qin and Xinjun Zhang – all participants in the *CCLaw Assist* mentoring program, whose research has also contributed to various aspects of this Guidebook; and
- Doris Akol from Uganda and Lucila Serra from Argentina, who kindly agreed to act as peer reviewers and who provided useful, insightful comments and suggestions on draft chapters.
- Eva Duer of UNEP's Division of Environmental Law and Conventions (DELC), who made additional substantive contributions to the final text.

Paul Curnow, Partner, Baker & McKenzie

Glenn Hodes, Senior Economist, UNEP Risoe Center

*Editors*

# Table of contents

- 1 Introduction . . . . . 7**
- 2 Executive Summary . . . . . 11**
- 3 Introduction to the CDM in an International Framework . . . . . 15**
  - The UNFCCC . . . . . 15
  - The Kyoto Protocol. . . . . 16
  - The CDM: Article 12 of the Kyoto Protocol . . . . . 17
- 4 Host Country Compliance and Domestic Legal Requirements under the CDM Rules . . . . . 19**
  - The Relationship between the CDM Rules and Domestic Law . . . 19
  - Host Country Compliance with the CDM: Domestic Legal Requirements. . . . . 19
  - Ratifying the UNFCCC and Kyoto Protocol. . . . . 19
  - Establishing a Designated National Authority . . . . . 20
  - Additional Functions for DNAs . . . 23
  - Approving CDM Projects . . . . . 24
  - Supplementary Domestic CDM Laws . . . . . 28
  - Additionality . . . . . 33
  - Avoiding Perverse Incentives: Type E- Domestic Policies and Measures . . . . . 33
  - Domestic Programmes and Policy as CDM Projects: Programmatic CDM . . . . . 36

<b>5 Domestic Law and the CDM: Impacts and Barriers</b>	39	Taxation of Assets	62
Domestic Laws affecting CDM Projects	39	Tax Concessions and Other Fiscal Incentives to Promote CDM Projects	64
Removing Domestic Legal Barriers to CDM Projects	39	<b>8 Domestic Law and the CDM: Environmental Law</b>	67
Identification of Barriers by Host Country DNAs	40	Domestic Environmental Laws	67
Targeted Domestic Law Reform	40	Environmental Impact Assessments (EIAs)	67
<b>6 Domestic Law and the CDM: Property Law</b>	43	Environmental Approvals	68
Property Laws Relevant to CDM Projects	43	Liability for Environmental Harms	71
Other Domestic Property Law Issues affecting CDM Projects	45	<b>9 CDM Project Risks and Risk Management</b>	73
Rights to Revenue from the Sale of CERs	46	Domestic CDM Project Risks	73
Host Country Land Rights	46	Structuring CDM Projects to Manage Project Risks	74
The CDM and State Expropriation	56	Contracting for Different CDM Project Structures	74
<b>7 Domestic Law and the CDM: Taxation and Financial Services Regulation</b>	57	Contracting Risks	76
Introduction	57	Summary of Project Risks and Mitigants	82
The Nature of CERs – Security or Commodity?	57	<b>10 Glossary</b>	84
Foreign Exchange Controls	58		
Restrictions on Foreign Direct Investment	58		
CER Pricing Controls	59		
Taxation Treatment	59		
Taxation of CER Revenues	61		
Taxation of Business Activities and Income	62		



# 1 Introduction

Participants in CDM projects face many risks. In addition to political and economic risks associated with investments in emerging markets, participants face new and unfamiliar risks linked to the Kyoto Protocol and its implementation, such as carbon price volatility, the risk that CERs will lose their value after the first Kyoto commitment period, and the need to obtain all necessary CDM project approvals. Likewise, the CDM Executive Board has identified weak domestic legal regimes as both a key barrier to CDM investment, in general, and as a contributing factor to the unequal regional distribution of CDM project activities. This underscores the need to strengthen domestic CDM regulatory structures in order to facilitate delivery and scale-up of the CDM, as well as the need for related capacity building, "in order to make the CDM function..."

This Guidebook addresses a wide range of legal and regulatory issues arising from the domestic laws, regulations and policies of CDM Host Countries that can affect the development and implementation of CDM projects. Host Country domestic laws interact – both negatively and positively – with the international rules that underpin the CDM. At this critical juncture of change and uncertainty surrounding the evolution of the carbon markets and the flexible mechanisms under

a capacity building tool, the primary audience of this Guidebook is therefore climate change policymakers and CDM project developers in developing countries; however, carbon investors will find it of equal interest. The Guidebook illustrates some Host Country laws that specifically address the CDM, as well as how general domestic legal regimes may impact or inhibit CDM project implementation, such as:

- property rights;
- environmental and planning laws;
- investment and taxation laws; and
- financial services regulations.

The Guidebook further seeks to demystify the myriad, complex issues surrounding the domestic implementation of CDM, such as:

- project approval processes;
- CER ownership; and
- taxation.

Development economists and policymakers have long recognized that predictable legal regimes are a foundation for economic growth and investment, a supposition demonstrated through numerous empirical country studies. As the World Bank notes, "no matter what factors are included in the analyses and what measures of property rights security are used, all report a close

预览已结束，完整报告链接和二维码如下：

[https://www.yunbaogao.cn/report/index/report?reportId=5\\_10395](https://www.yunbaogao.cn/report/index/report?reportId=5_10395)

