

ABSTRACT- LEGAL CONSIDERATIONS OF ERPAs

Emission Reduction Purchase Agreements (ERPAs) are one of the essential and main documents required in Kyoto compliant transactions under the Clean Development Mechanism (CDM) of the Kyoto Protocol.

ERPAs are briefly defined as sale and purchase agreements between the seller (the Project entity) and the buyer of Certified Emission Reductions (CERs), CERs being values generated by projects undertaken under the CDM. Like all sale and purchase agreements of a new product that is not clearly defined by the legislations of many countries, ERPAs must include more numerous provisions than traditional purchase and sale agreements, in order to safeguard the interest of both parties.

Moreover, ERPAs are essential documents from the perspective of project finance and risk management. Thus, when negotiating, drafting, and executing an ERPA, one of the fundamental objectives is to maximize the value of any emission reductions generated by a CDM compliant project. The lawyer's role is beneficial by helping to maximize the value of CERs and therefore to increase the leverage of the ERPA as a project finance tool that enables the generation of higher revenues for the Project. The lawyer's role in negotiating and drafting ERPAs includes addressing risks, maximizing the likelihood of value capture, facilitating the negotiation of deal terms between the parties and documenting the transaction.

One of the areas where the lawyer can provide the greatest input is that of risk management and risk allocation among the parties. There are many risks that have to be taken into account in CDM transactions, for which legal provisions must be considered in the ERPA. First, there are traditional projects risks that are also common to any other project finance transaction such as the raising of finance, regulatory approvals, construction completion, and so forth. In addition, there are specific Kyoto protocol related risks, which include the necessity of obtaining host country approvals and the approval of the CDM Executive Board, eligibility, compliance and transfer. Finally, there are also host country risks that must be taken into consideration, including potential changes in laws, the possible imposition of taxes on CERs, and inadequate mechanisms for the enforcement of parties' rights. One of the more important risks to address is the uncertainty of future emission reduction achievement, for which the ERPA must provide adequate mitigating mechanisms. The lawyer must therefore be considered as one of the integral and early team members in any Kyoto-compliant project transaction, participating from the onset in negotiating the most equitable and efficient terms for the allocation of risks in a bid to maximize the value of a project's CERs, recommending risk mitigation strategies, and documenting the negotiated terms between the parties.

Chadia El-Meouchi, Esq., Partner

Badri & Salim El Meouchi Law Firm

315 Saïfi - POBox 11-3577

Beirut Central District – 20285603, Lebanon

Tel. +961.1.995900 - +961.3.519777

Fax +961.1.995906

E-mail: legal@elmeouchi.com

Website: www.elmeouchi.com