



LETTER OF INTENT  
and  
EMISSION REDUCTION PURCHASE  
AGREEMENT

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# SCOPE OF PRESENTATION

- Letter of Intent (Lol)
- Due Diligence
- Emission Reduction Purchase Agreement (ERPA)
  - Other Project Documentation

# LETTER OF INTENT

- To be concluded between seller and purchaser of CERs
- Secures exclusivity and confidentiality
- Helps the project owner to obtain financing
- Gives comfort to buyer to start spending money on due diligence and contract drafting and negotiations
- Cost recovery by a party in case the other party unilaterally decides not to move forward with negotiations
- May include some basic or key terms regarding the transaction that will be dealt with in the ERPA

# Due Diligence

What to expect:

- Preparation
- Possible items to be investigated by purchaser:
  - Ownership of host facility/land
  - Legal authority to enter into ERPA
  - Relevant permits
  - Lawsuits and disputes
  - Liens and encumbrances
  - Liabilities hindering progress project
  - Tax

## ERPA: DEFINITION AND TYPES

- **ERPA = Emission Reductions Purchase Agreement**
  - Parties:  
Seller (the project entity) and purchaser
  - Object:
    - Certified Emissions Reductions (CERs)
    - Verified Emission Reductions (VERs)
- **Different types of ERPA's:**
  - Forward contract
  - Spot contract
  - Option contract
  - A combination of the above

# ERPA: OTHER SALE METHODS

- **Other possible sale methods:**
  - Sale and purchase CERs incorporated in debt finance contract relating to the CDM project: (part of) the loan will then be repaid in CERs
  - CERs are used as payment for (renewable energy) technology
  - CERs are bundled with other commodities produced by the CDM project and sold together with those commodities

# ERPA: KEY LEGAL ISSUES

- **Important provisions:**
  - Conditions Precedent
  - Purchase price + payment default
  - Volume and Shortfall in delivery of CERs
  - Legal title to CERs
  - Transfer
  - Warranties, liabilities and indemnities
  - Force Majeure
  - Termination
  - Applicable law and jurisdiction

# ERPA: CONDITIONS PRECEDENT

- Receipt Letter of Approval
- The project having achieved Validation and Registration
- The project having achieved Commissioning
- Legal opinions
- Cross effectiveness of (e.g.) financial closure / power purchase contract / tolling agreement



# ERPA: PURCHASE PRICE (1)

- **Several possibilities:**
  - fixed price
  - indexed price
  - indexed price with floor and ceiling
  - combination

# ERPA: PURCHASE PRICE (2)

- **Taxes**
  - Does price include or exclude taxes?
  - If price excludes taxes: who will bear taxes?
- **Other costs/aspects:**
  - Who pays share of proceeds for CDM EB administrative costs (USD 0.20 per CER)?
  - Who bears risk of increased costs / increases in inflation?
  - Costs of licenses necessary if CERs are considered derivatives and financial arrangements
- **Modalities of payment**
  - Upfront payments generally only if required for financing
  - Security for payment purchase price: e.g. Letter of Credit, parent company guarantee or escrow.
  - Clearing house

# ERPA: PAYMENT DEFAULT

- **Possible remedies for failure to pay purchase price in time**
  - Obligation for purchaser to pay default interest to the seller at a fixed rate of X% per annum
  - Recovery by seller of CERs already delivered to purchaser but not paid for
  - Termination by seller + recovery of outstanding payments
  - Additional damages, if any, to be paid by purchaser (e.g. difference between agreed price and market price of CERs)

# ERPA: VOLUME AND DELIVERY DATE

- **Several possibilities:**
  - Fixed annual volume
  - Fixed total volume with acceleration
  - Percentage of annual volume
  - Delivery date versus delivery period

# ERPA: Delivery and default in delivery

- **Legal title to CERs**
- **Transfer of legal title to CERs**
- **Possible remedies for shortfall or failure to deliver CERs**
  - Negotiate amended delivery schedule
  - Delivery of replacement CERs from other projects / third parties
  - Delivery of additional CERs in future years
  - Pay to the purchaser the costs of replacement CERs / market value of CERs
  - Termination by purchaser (+ recovery of advance payment)
  - Penalty

# ERPA: Warranties, Liability and Indemnities

- Warranties (mitigation of risks & uncertainties)
  - Title to CERs
  - CERs free of liens and encumbrance
  - Seller/Buyer (properly incorporated, authority, not insolvent, no major claims or attachments (Letter of Approval, Validated & Registered))
  - Anti-corruption
- Liabilities
  - Limitation of Liability (Buyer/Seller)
  - Loss of profit & consequential damages
  - Excess emission penalty
- Indemnities  
Depending on due diligence outcome

# ERPA: FORCE MAJEURE

- Failure to perform due to events beyond the control of a party
- Releases party from liability for non performance
  - E.g.
    - Acts of god, riots, war, flood, earthquake, epidemic, strike, change in law (important if HC is politically unstable), etc., etc.
    - CDM EB decisions after date ERPA
    - Failure of the registry functions of the CDM Registry to be operative
- Adequate time to remedy
- Termination as last resort

# ERPA: TERMINATION

- Termination in the event of (for example):
  - Material breach
  - (Prolonged) force majeure
  - Mutual written consent
  - Bankruptcy (etc.) of a party
  - Withdrawal Host Country from UNFCCC or Kyoto Protocol



## ERPA: APPLICABLE LAW AND JURISDICTION

- Applicable law
  - Seller/Purchaser (enforceability ERPA, Legal status CER, transferability CER, liabilities)
- Arbitration
  - Permanent Court of Arbitration (PCA)  
Optional Rules for Arbitration of Disputes Relating to Natural Resources and/or the Environment
  - Expert arbitrators
  - Bilateral Investment Treaties

## ERPA: MODELS/TEMPLATES

- **UNEP:**
  - Draft Contract for Direct Sale of CERs
  - Draft CER Project Investment Agreement (where Buyer has underlying interest in the CDM Project)
    - Published in the UNEP Legal Issues Guidebook to the Clean Development Mechanism (appendices C and D)
    - [www.cd4cdm.org](http://www.cd4cdm.org)
- **CERSPA:**
  - CER Sale and Purchase Agreement template and explanatory document
    - Various languages
    - <http://www.cerspa.org/>

## OTHER POSSIBLE PROJECT DOCUMENTS

- Land purchase/Lease
- EPC Contract
- Grid Connection Agreements
- Grid Connection Construction Agreements
- Way leave agreements
- Regulatory report describing relevant local laws and regulations
- Permitting
- Agreement with DOE
- Gas Purchase/Electricity supply or Tolling Agreement
- Electricity and gas transportation agreements
- Capacity booking agreements
- Commissioning Agreement
- O&M Agreement
- Master Services Agreement/Shared Services Agreement
- (Project) finance documents:
  - Security Documentation
  - legal opinions

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