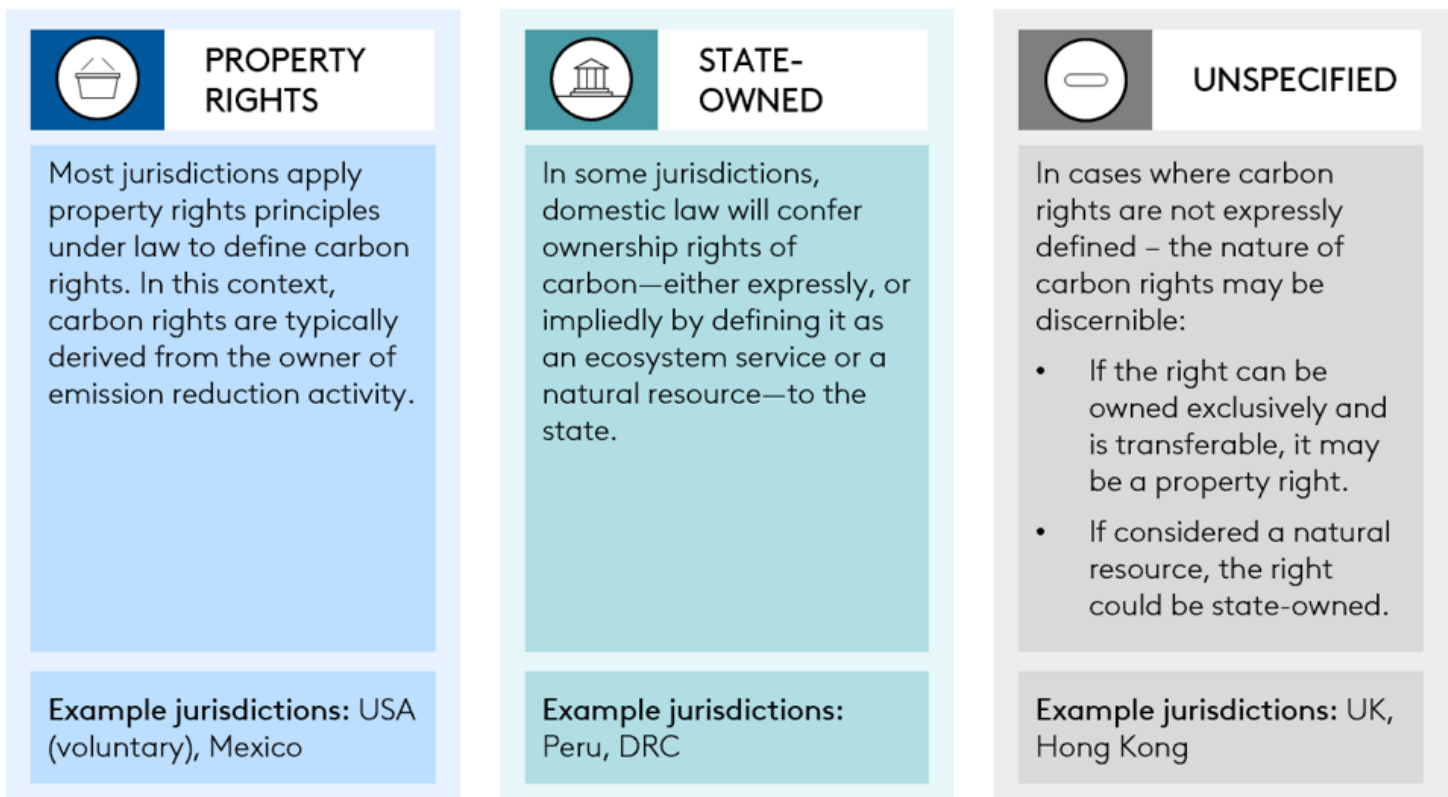


Rights to ERCs and Their Benefits

Full Description

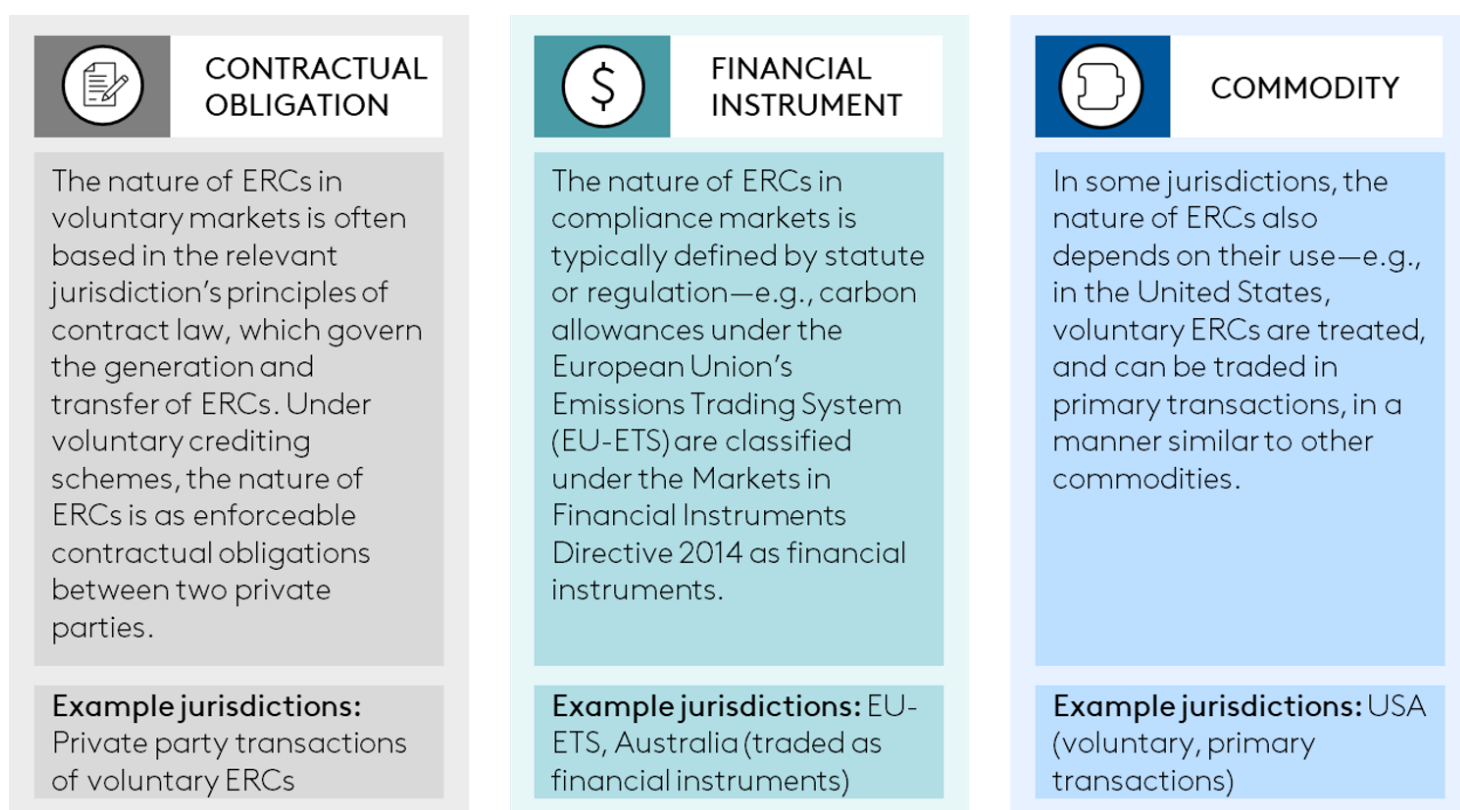
The ability to demonstrate ownership of carbon rights is critical to the ability to generate and transfer ERCs in all carbon market schemes. Governments can support ERC generation by clarifying the legal rights to carbon. Carbon rights are either expressly defined under domestic law or, where not expressly defined, may be discernible by considering other factors related to the activity generating the carbon emission reduction or removal (e.g., treatment of property, natural resource management) (Figure 11). In respect of project-based activities generating carbon emission reductions or removals, the legal rights to such emission reductions or removals are generally attributed—either expressly or impliedly—to the owner or entity in control of the project (i.e., the land or technical solution giving rise to the emission reduction or removal). Alternatively, some countries expressly define carbon rights as belonging to the state under natural resource management laws or regulations. Similarly, in respect of jurisdictional-based activities generating carbon emission reductions or removals, the carbon rights may be attributed to jurisdictional governments either by regulation or contract. Even if the system for defining carbon rights is well-understood based on local law in a given jurisdiction, the processes for demonstrating the holders of such rights are often much more challenging. Particularly for nature-based solutions giving rise to carbon emission reductions or removals, proving that a project proponent holds title to the land from which the emission reductions or removals are generated can be an administratively burdensome and expensive process.

Figure 11. Representation of carbon rights and example jurisdictions.



Clarifying the legal nature of ERCs is crucial to clearly inform how ERCs are regulated. Under most crediting schemes, both compliance and voluntary, the owner of the underlying carbon rights will be issued the resulting ERCs based on the domestic legal and regulatory regime and the standard and methodology for the applicable crediting scheme. The legal instrument by which carbon rights are then transferred—contractual obligation, financial instrument, or commodity (Figure 12)—will vary across jurisdictions and may also depend on the crediting scheme under which the ERC was issued or the intended use of the ERC. This legal nature will also inform the terms of ERC transactions; underpin the processes by which market participants can protect their rights if default or dispute arises; affect tax and accounting treatment; treatment in bankruptcy events; treatment of derivative contractual interests; and risk weighting and capital costs of ERCs that are held by supervised financial institutions. As such, it is critical to understand the law governing ERCs, which, depending on the jurisdiction and crediting scheme, may be the law of the jurisdiction in which the emission reduction or removal activity is based, the jurisdiction of the seller or the buyer of the ERC, or the jurisdiction in which the registry housing the ERC is located.

Figure 12. Representation of legal nature of ERCs and example jurisdictions.



Legal regimes that cover ERC generation, ownership, and use should ensure that the rights of eligible interest holders are appropriately defined and protected. For financiers, these considerations are significant because the ability to establish clear carbon rights through demonstration of title or land tenure may be required as a prerequisite to generating and trading ERCs, as well as to demonstrate unencumbered ownership or other interests in cases of contractual breach or dispute. Key issues include legal ownership of emission reduction and removal activities; transferability of legal title; ownership of land on which emission reduction and removal activities are situated (e.g., public or private); customary land rights held by Indigenous Peoples; whether there are restrictions or controls on foreign ownership of land; and whether expropriation could be triggered. It is helpful for developers and financiers when governments establish clear rules that require project proponents to obtain the consent of eligible interest holders before undertaking emission reduction and removal activities, such as from government parties if the activity is on public land or financial

institutions that hold a mortgage over private land. Additionally, government-defined processes to ensure that the rights and knowledge of IPLCs can be instructive, including with respect to FPIC processes.² This is also essential in seeking to mitigate emission reduction and removal activity-risk by providing relevant stakeholders with the opportunity to exercise self-determination, which may in turn reduce potential conflicts that impact successful activity execution.

Legislated requirements for benefit sharing need to balance the need to implement robust benefit sharing mechanisms with maintaining the commerciality of ERC activities and their ability to raise finance. Transparent and equitable benefit sharing is important not only to ensure the legal carbon rights holders receive compensation, but also to help support the long-term viability of the project activity by encouraging local involvement in the project. It has historically been an activity-level consideration and negotiated between the project developers and ERC offtakers. However, some governments have begun to legislate a minimum level of benefit sharing required for ERC activity registration in that jurisdiction (e.g., Kenya's Climate Change Act³, Tanzania's Environmental Management Act⁴).

Footnote 1: International Swaps and Derivatives Association, [“Legal Implications of Voluntary Carbon Credits”](#), 2021 ; Ben McQuhae & Co, [“The Legal Nature of Carbon Credits”](#), 2023.

Footnote 2: The principle of Free Prior and Informed Consent (FPIC) is enshrined in several international instruments, including United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Convention on Biological Diversity, and the International Labour Organization's Indigenous and Tribal Peoples Convention, 1989 (No. 169). For example, Article 32(2) of UNDRIP provides that: “States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”

Footnote 3: Kenya Law, [Climate Change Act](#), 2016.

Footnote 4: Tanzania, [The Environmental Management Act](#), 2022.

Additional Resources

[UN Sustainable Development Goals](#)

[The Legal Nature of Carbon Credits](#)

[Carbon Integrity \(Project Assessment and Final Decision\)](#)

Page Specific Disclaimer

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