

Legal Basis and Key Considerations for Establishing an Effective ETS Legal Regime

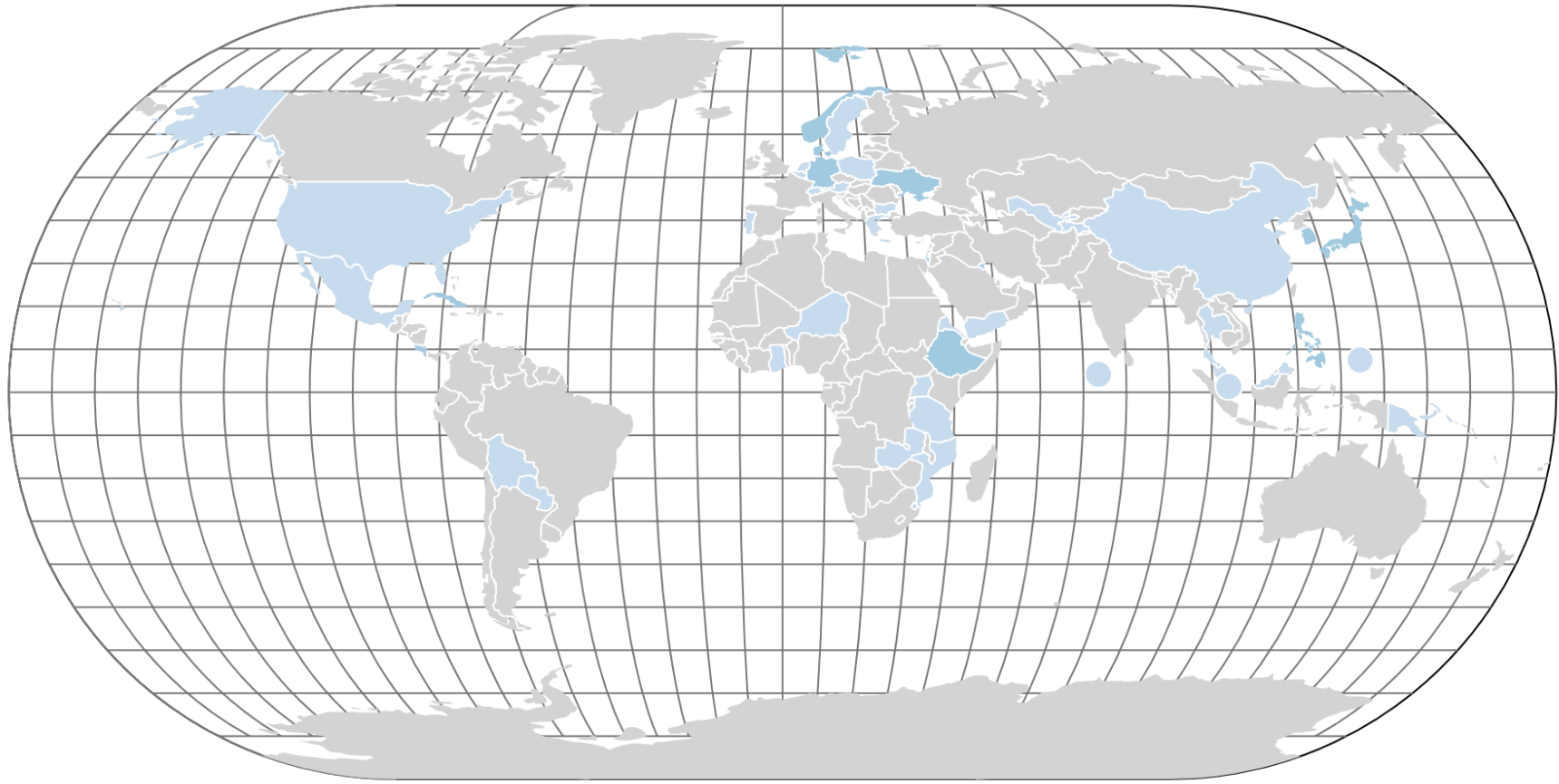
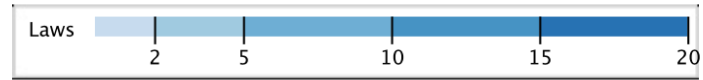
Michael Mehling

Bangkok | 8 November 2018

Role of Law in Climate Change

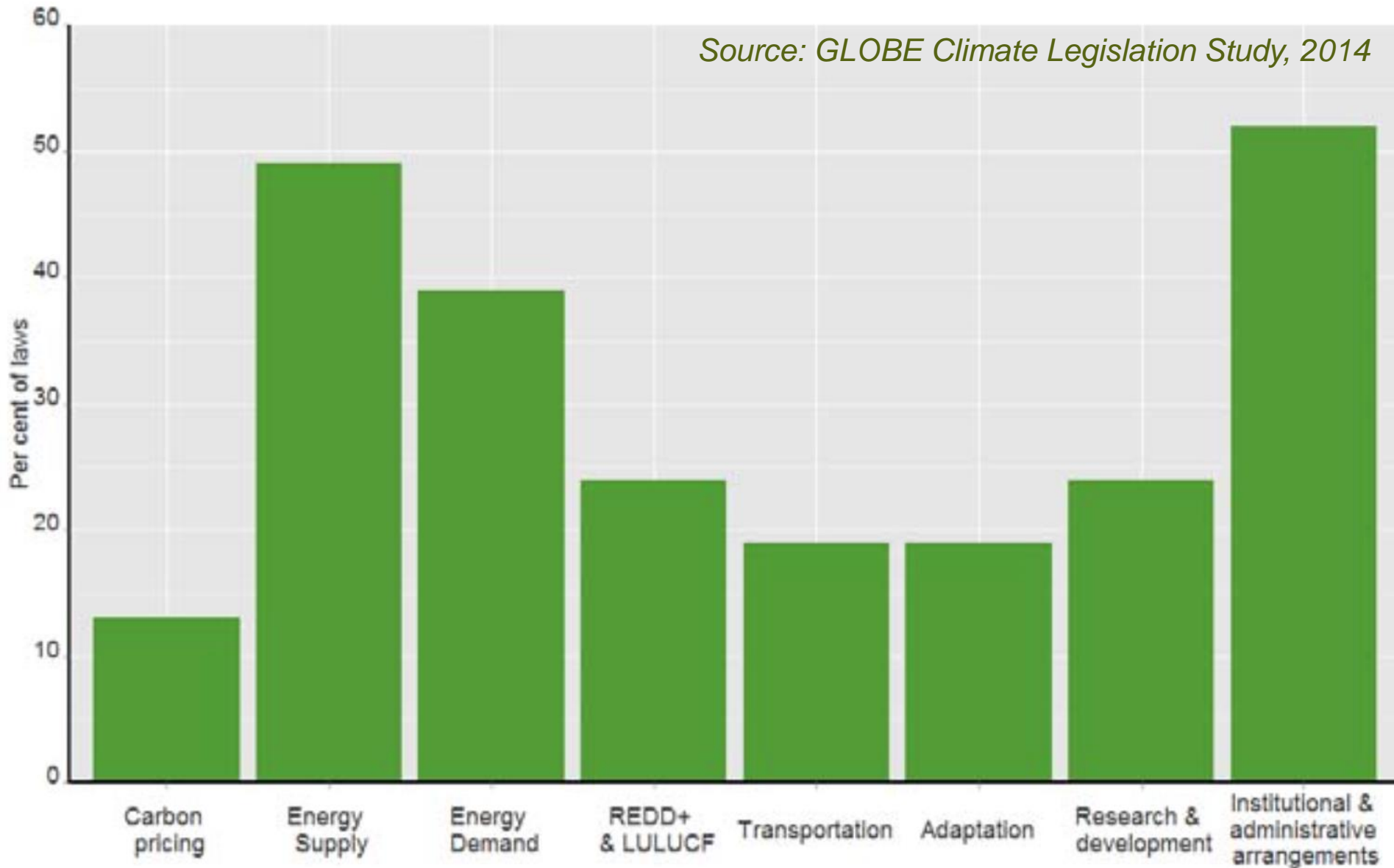


Climate Legislation over Time: 1997

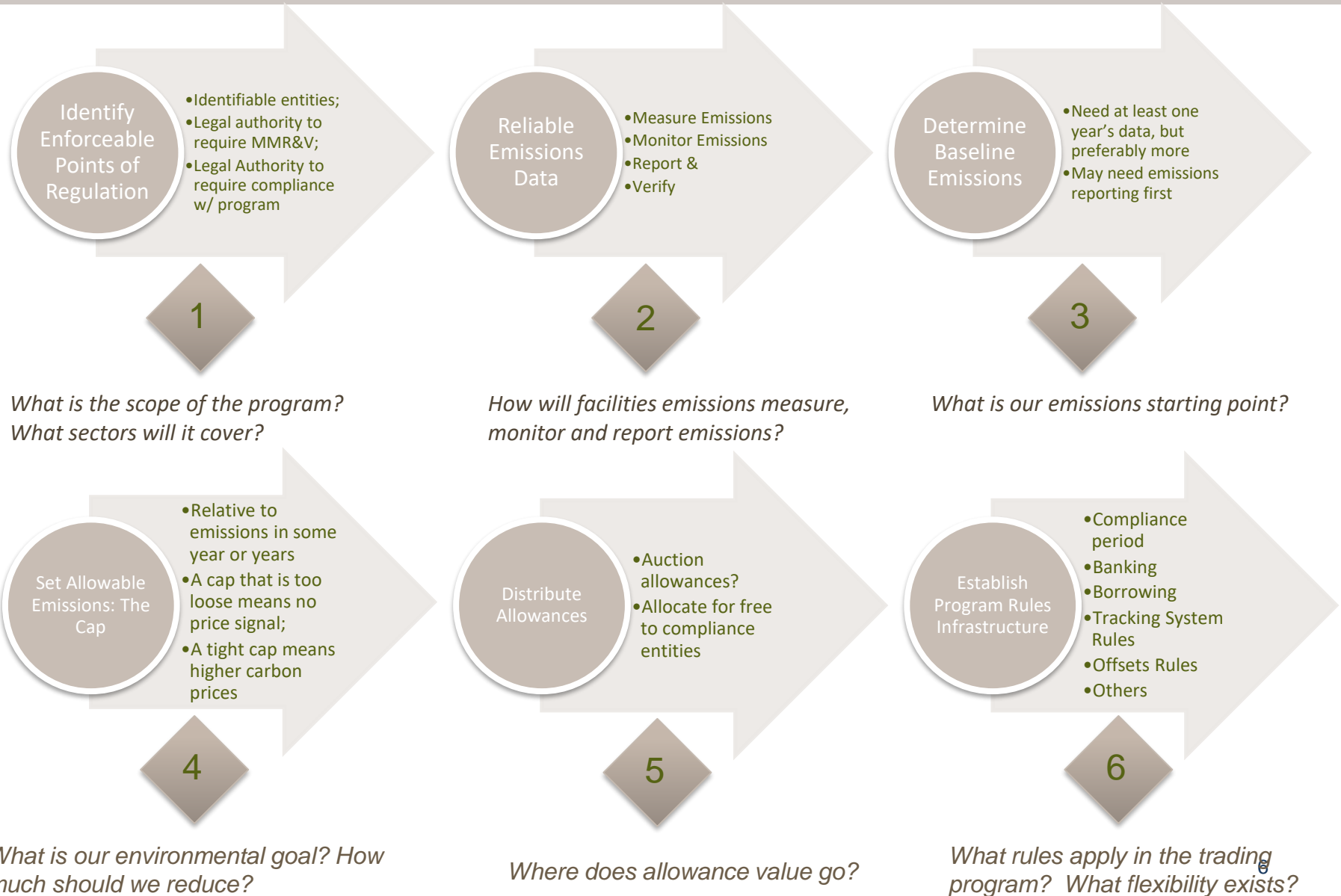


Coverage of Climate Laws

Source: GLOBE Climate Legislation Study, 2014



Designing an ETS



Key Steps in ETS Establishment

- Emissions targets, scope and point of regulation
- Obligation to surrender allowances for emissions
- Distribution of emission allowances
 - Definition of benchmarks
 - Auctioning rules
- Collection and management of emissions data
 - Technical guidance on measurement
 - Accreditation of third party verifiers
- Establishment & operation of a transaction registry
- Regulatory framework for the emissions market
- Rules on compliance and sanctions

Regulatory Needs and Functions (1)

Category	Needs/Functions	Explanation
Establishment	Legal Mandate	The initial authorization – in accordance with the doctrine of statutory reservation, for those jurisdictions where the doctrine applies – to adopt and operate an ETS
Design and Implementation	Scope and Coverage	Definition of the boundaries of the ETS, requiring a decision about the sectors and – within each sector – the types of activities to include, as well as the greenhouse gases whose emission is covered. Coverage also entails a decision on the point of regulation (upstream or downstream emissions) and on the inclusion of indirect emissions
	Data Collection and Inventory Generation	Defining targets and determining the burden of abatement under an ETS presupposes accurate data on current emissions from each of the sectors and covered activities, and a central system to manage this data
	Nature and Stringency of Target	Decision on the level of greenhouse gas emissions allowed under the ETS, with direct implications for its environmental stringency and the balance of supply and demand for carbon units in the market. Targets can be defined as an absolute emissions quantity (a “cap”), requiring an emissions limitation, stabilization or reduction effort from current levels, or as a relative emissions quantity (“baseline”), defined relative to projected emissions or a benchmark such as the carbon intensity of production
	Issuance of Units and Definition of Benchmarks	Method by which the initial supply of allowances is issued to covered sectors. Where a fixed supply of carbon units has been defined (absolute cap), these can be issued at cost through auctions or sales, or assigned free of cost based on historical emissions or sector- or product-specific benchmarks. In the case of a relative target, the baseline has to be broken down to sectors, activities or entities, typically also as a benchmark

Regulatory Needs and Functions (2)

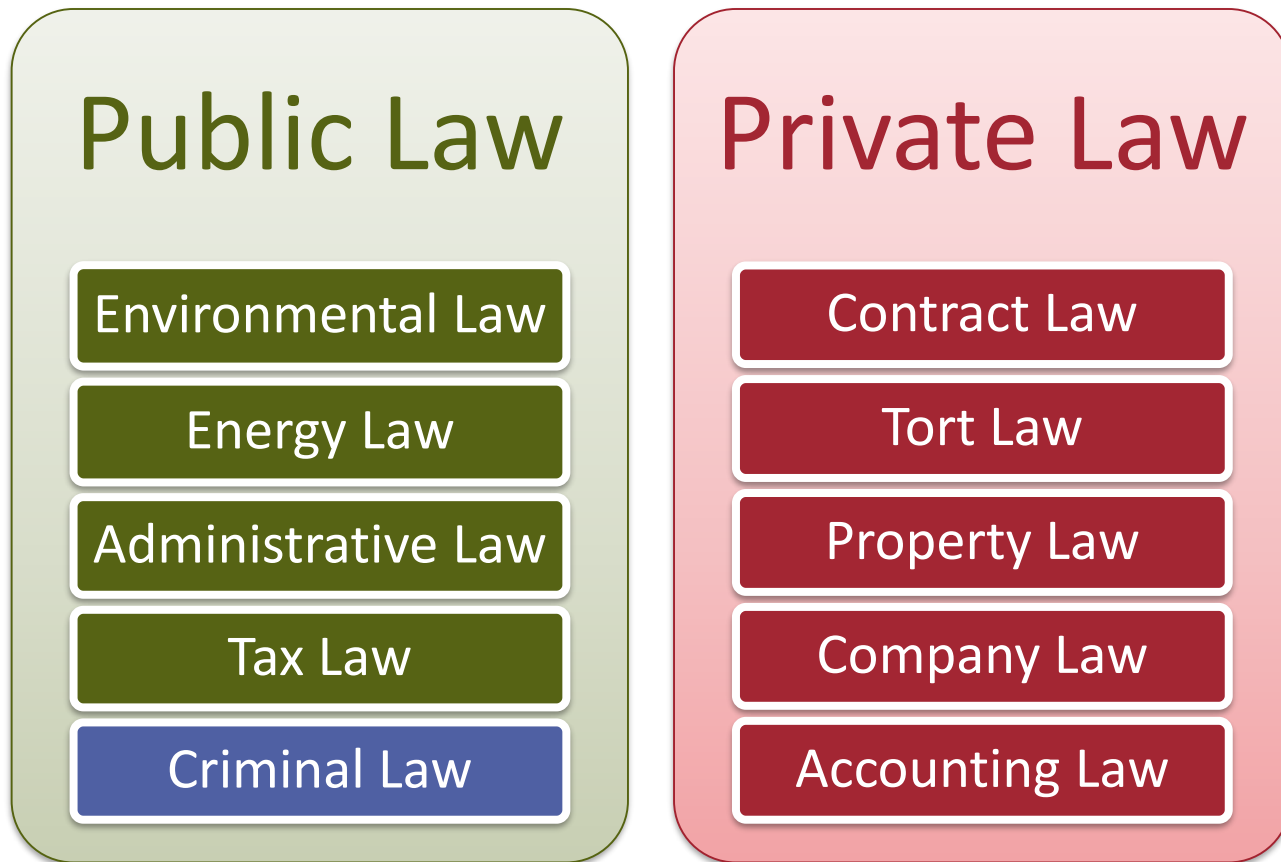
Category	Needs/Functions	Explanation
Design and Implementation	Price Management and Compliance Flexibility	Measures used to intervene in price formation and avoid price extremes or excessive volatility, for instance through supply-side interventions such as cost containment reserves or auction reserve prices, as well as to afford covered entities greater compliance flexibility through provisions allowing for banking and borrowing of units or use of offsets
	Registry	An electronic system to ensure accurate accounting of carbon units issued under an ETS by tracking the ownership of units held in electronic accounts, as well as the movement of units between accounts including the initial issuance, transfers, surrender and cancellations
Operation and Management	Monitoring, Reporting, Verification (MRV)	Accurate information about current emissions from compliance entities is critical for the functioning of an ETS. Clear and consistent criteria and guidelines are therefore needed for the measurement of emissions, their verification by public or private entities, and the format and frequency of reporting verified emissions
	Compliance and Enforcement	A compliance framework to ensure that covered entities adhere to their obligations under an ETS and are subject to imposition of sanctions in the event of a violation
	Market Oversight and Regulation	Regulatory framework to ensure market integrity and prevent fraudulent or manipulative behavior in the primary and secondary carbon market

(Some of the) Legal Questions to Address

- Establishing the ETS Framework
 - Legal Basis/Overlap with Other Areas of Law
 - Administrative Process and Infrastructure
 - Compliance and Enforcement
- Basic Rights and Property
- Legal Nature of Allowances
- Financial Services Regulation
- Legal Aspects of Transactions
- Accounting and Taxation Issues
- Legal Standing and Dispute Settlement

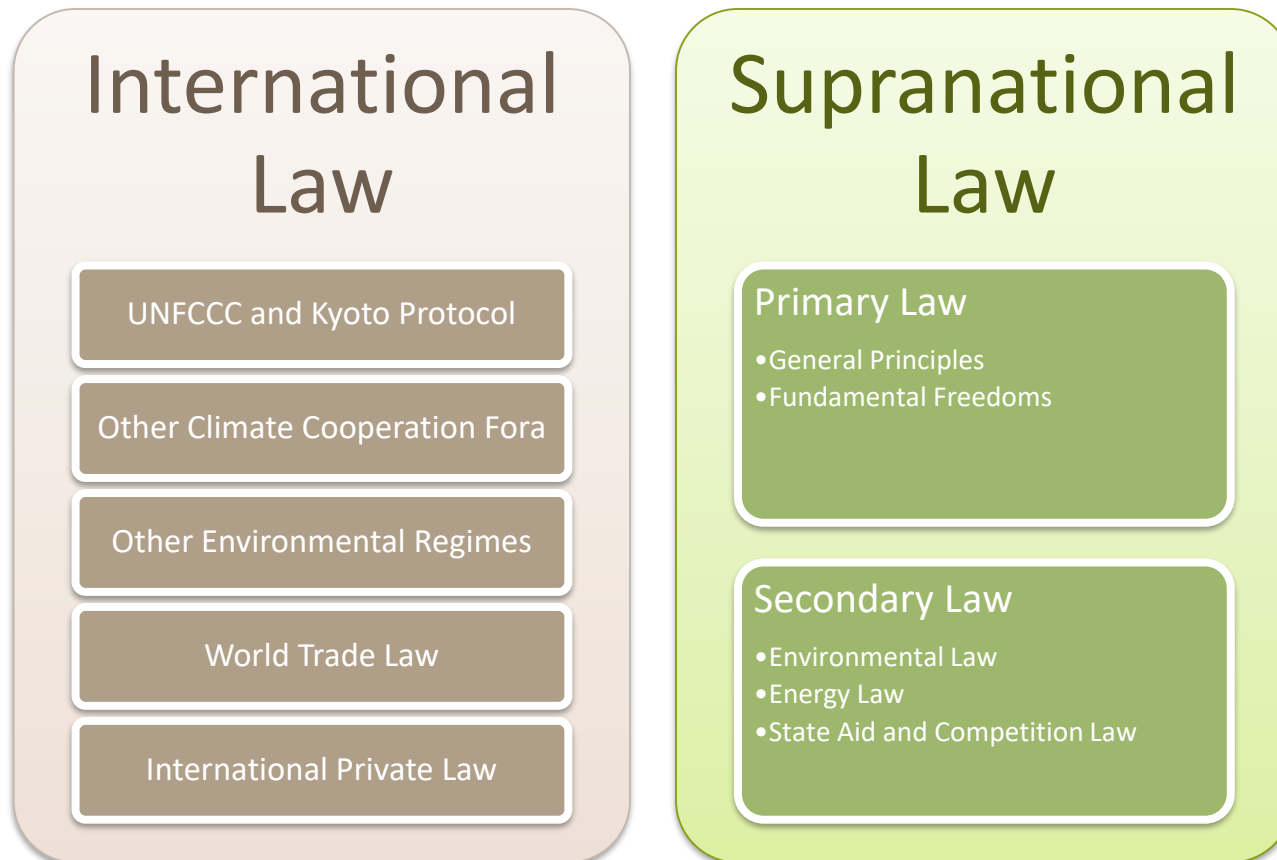
Situating Emissions Trading in the Law

- Legal Basis: Domestic Plane



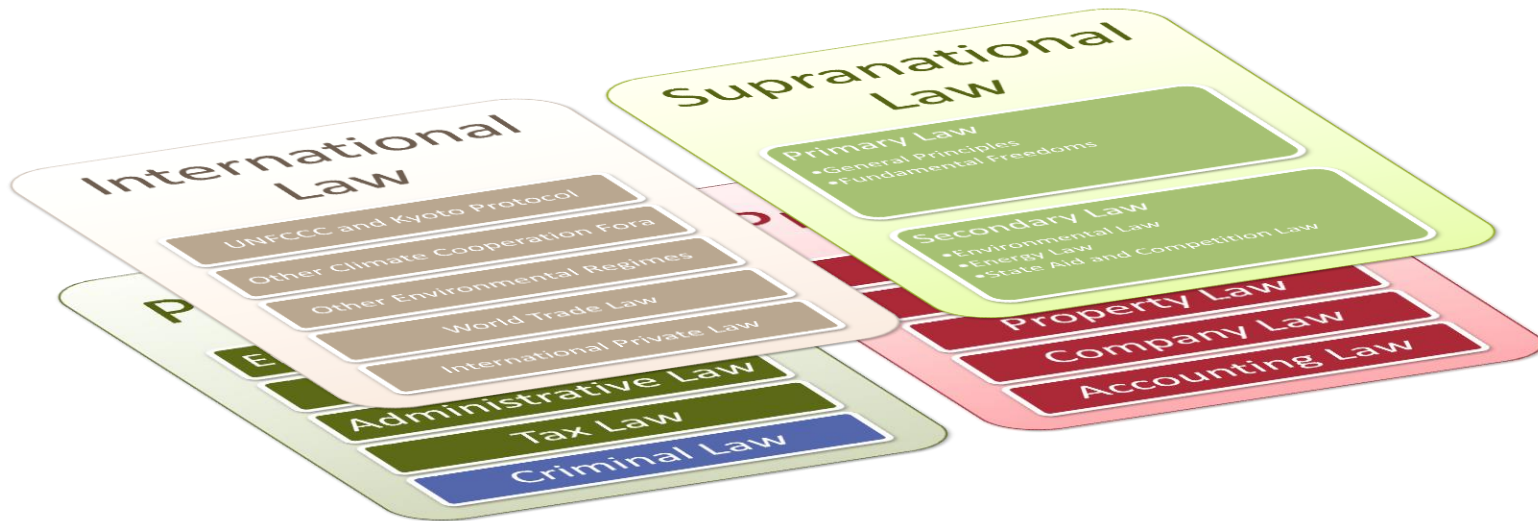
Situating Emissions Trading in the Law

- Legal Basis: International Plane



Situating Emissions Trading in the Law

- Legal Basis in a Multilevel System



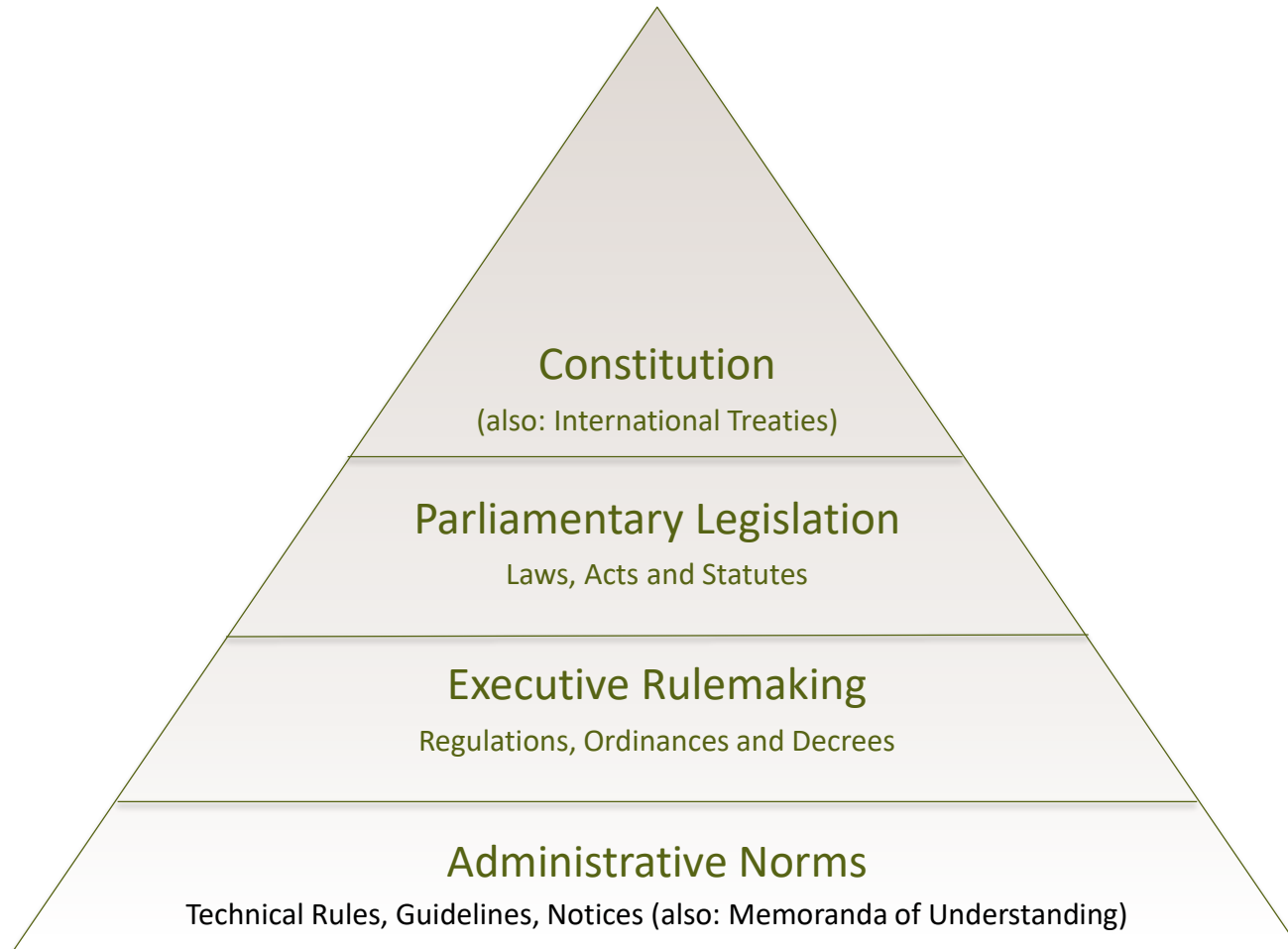
Situating Emissions Trading in the Law

- Legal Basis in a Multilevel System



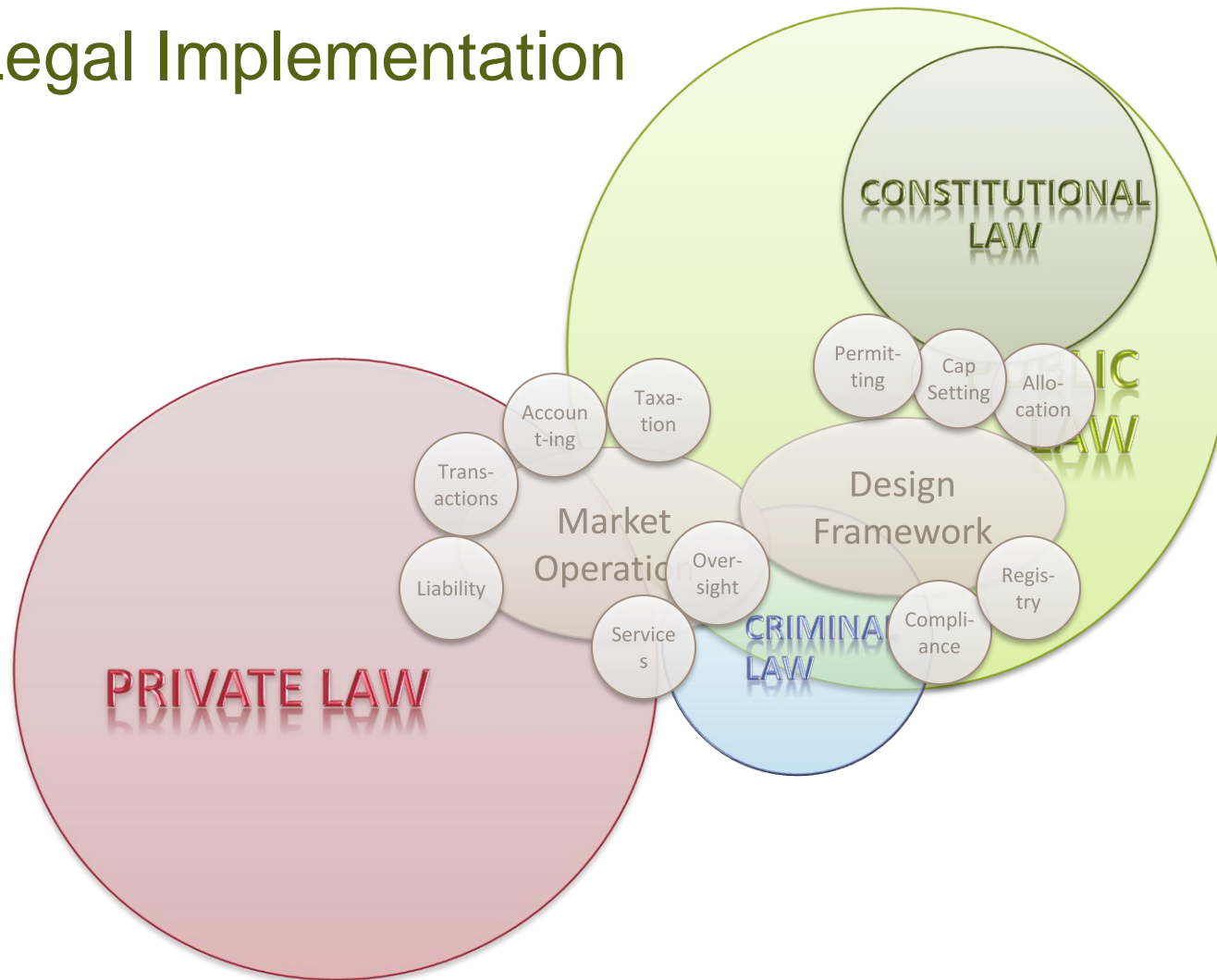
Situating Emissions Trading in the Law

Normative Pyramid



Situating Emissions Trading in the Law

- Legal Implementation



Criteria for Legal Instruments

- **Legality**
 - Legal precedent
- **Process**
 - Duration, participants
 - Legitimacy, transparency
- **Flexibility**
 - Predictability, certainty
 - Adjustability to changing circumstances
- **Resilience**
 - Judicial resilience
 - Political resilience

Thank you for your attention!

Questions?

@ mmehling@mit.edu

☎ 617-324-7829



MIT Center for Energy and Environmental Policy Research

Center for Energy and Environmental Policy Research

Massachusetts Institute of Technology (MIT)
MIT Building E19-411 400 Main Street, 4th
Floor Cambridge, MA 02142-1017

@ ceep@mit.edu

☎ 617-253-3551 617-253-9845



Massachusetts
Institute of
Technology

<http://mit.edu/ceep>