

## *Enviro-Legal Due Diligence & Safeguards in Carbon Projects*

Facilitated by  
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### IMBEWU Enviro-Legal Specialists (Pty) Ltd

- Environmental legal consultancy operating in conjunction with an Attorneys firm (Warburton Attorneys)
- Based in Johannesburg
- Providers of wide range of environmental, sustainability, and climate change legal advice, electronic legal registers, due diligence investigations, audits & environmental and climate change legal training.
- Particular specialty: advice on issues pertaining to implementation of climate change mitigation projects, e.g.,
  - relevance of the international context,
  - project initiation,
  - authorisations and consents,
  - contractual matters (management contracts, agreements for purchase and sale of emissions reductions),
  - development of carbon strategies and policies.

### Outline of Session

- Introductory.
- “Linked” enviro-legal considerations arising from the interaction of the international and domestic legal regimes.
- “Unlinked” enviro-legal considerations (arising from the operation of the domestic legal regime).
- Some general legal issues to consider:
  - ownership of CERs;
  - taxation of income from CERs;
  - contractual terms.

### Introductory

## Preliminary note

- This presentation:
  - *Environmental*/legal due diligence.
  - Environmental legal issues arising outside of the realm of the CDM project cycle, e.g., environmental legal authorisation processes that may be applicable to CDM project implementation.
  - South African environmental legal regime as a case study.
  - Not covered:
    - legal issues arising out of the CDM Project Cycle; and,
    - contractual issues
- CDM project cycle:
  - (processes leading up to Validation & Registration, e.g., PIN and PDD development, host country approval, related legal and environmental legal considerations);
  - Validation;
  - Registration;
  - (CDM project operation);
  - Verification;
  - Certification;
  - Issuance (of CERs).

## “Due Diligence”

- “Due diligence”: the performance of an investigation of a business or person, e.g., the process through which a potential acquirer evaluates a target company or its assets ([http://en.wikipedia.org/wiki/Due\\_diligence](http://en.wikipedia.org/wiki/Due_diligence)).
- The evaluation of the likelihood of a CDM project’s environmental legal compliance in the context of various project-related transactions dependant on a legally compliant project, e.g., a loan transaction, a transaction for the purchase and sale of CERs.

## Acronyms

- CDM: Clean Development Mechanism.
- CER: Certified Emissions Reduction.
- DNA: Designated National Authority.
- DOE: Designated Operational Entity.
- EIA: Environmental Impact Assessment.
- UNFCCC: United Nations Framework Convention on Climate Change.

## The CDM: redux1

- The CDM’s location in international law is the Kyoto Protocol to the UNFCCC.
- Founded on a legal regime established by:
  - UNFCCC,
  - Kyoto Protocol (Article 12); and,
  - Modalities and procedures for a clean development mechanism.
- Development of the regime informed by:
  - CDM Executive Board Decisions;
  - Reports of CDM Advisory Panels, e.g., Methodologies Panel, Accreditation Panel.
- CDM Project Cycle: a veneer placed on top of the conventional project development cycle.

### The CDM: redux2

- ❖ A "market-based" mechanism intended to encourage a change in the behaviour of greenhouse gas emitters.
- ❖ Permits an entity in a developing country to:
  - implement a project that achieves *inter alia*:
    - ❖ greenhouse gas emissions reductions;
    - ❖ sustainable development; and,
    - ❖ transfer of environmentally safe and sound technology and know-how; and,
  - generate a so-called "carbon credit" and trade the carbon credit on the international carbon market.
- ❖ A carbon credit:
  - represents the *absence* of one tonne of CO<sub>2</sub> equivalent that would, in a business as usual scenario, have been admitted to the atmosphere;
  - is the saleable/fungible commodity generated by a CDM project; and,
  - trades across both compliance and voluntary markets.

### CDM: project implementation

- ❖ CDM project implementation is no different from the implementation of any other project *but for* the veneer of the international climate change regime.
- ❖ Law associated with CDM project implementation:
  - "Although climate change is an environmental issue the scope of climate change law is much broader than the traditional "environmental law" areas of contamination, planning and development." (Wilder, M., *International Climate Law: Recent Developments and Key Issues*, IETA, Greenhouse Gas Market 2004).
  - Therefore "Climate Change Law" might include:
    - ❖ (various aspects of) International Law
    - ❖ Foreign Investment Law
    - ❖ Public Procurement Regulations
    - ❖ Securities and Financial Regulation
    - ❖ Tax Regulation
    - ❖ Environmental Law
    - ❖ Property Law
    - ❖ Administrative Law

### Implications for CDM project due diligence

- ❖ Due diligences associated with the *conventional* aspects of the project will be applicable, e.g.:
  - Technical;
  - Financial; and,
  - Legal, e.g., does the project activity require environmental authorisation to be undertaken?
- ❖ Further due diligences associated with the *carbon* aspects of the project will also be applicable, e.g.:
  - Technical, e.g., is there an approved CDM Methodology?
  - Financial, e.g., is the project financially additional?
  - Legal, e.g., has the host country's approval been obtained?

### Legal issues in CDM project implementation

Authorisations	Contractual
<p><u>International</u>, e.g., as arising from the Modalities and Procedures: CDM project cycle (not addressed by this presentation).</p> <p><u>Domestic</u>, e.g.,</p> <ul style="list-style-type: none"> <li>- "linked" authorisations arising from the interaction of the international legal regime with the domestic; e.g., host country approval, possible environmental authorisation (EIA); and,</li> </ul> <p>:"unlinked" authorisation arising from the operation of the domestic legal regime, e.g., environmental legal and other authorisations.</p>	<p>Tuesday, 29 May 2007: <i>Strategies for Carbon Contracting &amp; ERPA Negotiation</i> (4.15 to 5.15 – parallel clinic)</p> <ul style="list-style-type: none"> <li>- elements of both international and domestic law;</li> <li>- the presentation will address aspects of due diligence relating to contracting for the purchase and sale of CERs, e.g., is the prospective seller the true owner of the CERs offered for sale?</li> </ul>

“Linked” authorisations:  
arising from interaction of the  
international with the domestic legal  
regimes: DNA & EIA

## Designated National Authority

- For a CDM project to be Registered by the CDM Executive Board the following written confirmations must have been received:
  - written approval of voluntary participation from the DNA of each Party (to the Kyoto) involved; and,
  - confirmation from the host Party that the project activity assists it in achieving sustainable development [according to criteria established by the host Party].
- South Africa:
  - National Environmental Management Act, 1998, Regulations for the Establishment of a Designated National Authority for the Clean Development Mechanism, GNR. 721, GG 27788 of 22 July 2005.
  - SA DNA contacts: telephone: +27 12 317 8298; e-mail: [Victoria.kekana@dme.gov.za](mailto:Victoria.kekana@dme.gov.za) ; website: <http://www.dme.gov.za/cdm/main.htm>

## South Africa’s DNA for the CDM

- Custodian of CDM in South Africa.
- Regulatory function:
  - CDM project evaluation and approval in accordance with the international rules, including confirming that the project assists in the achievement of sustainable development in South Africa.
- Promotional function:
  - To promote and facilitate the development of CDM projects in South Africa.
  - Secure an adequate share of CDM investment in South Africa.
  - To promote CDM projects of a developmental nature.
  - Ensure that the mechanism is in the national interest.

## CDM: environmental assessment and stakeholder participation

- Distinction between “environmental assessment” and “environmental impact assessment”.
- In order to implement a CDM project – confirmation that:
  - Comments by local stakeholders have been invited and due account has been taken of the comments received.
  - Documentation on the analysis of the environmental impacts of the CDM project activity have been submitted and, if impacts are considered significant by the project participants or the host party, an EIA must be undertaken in accordance with the procedures as required by the host party.
  - Opens the door to the *possible* application of South African EIA regime should the project activity constitute a “listed activity”.
- Climate Investment Newsletter (No. 4/2006), *South African CDM Update*: considers the role of EIA in implementing CDM projects in South Africa ([www.climatebusiness.net](http://www.climatebusiness.net)).

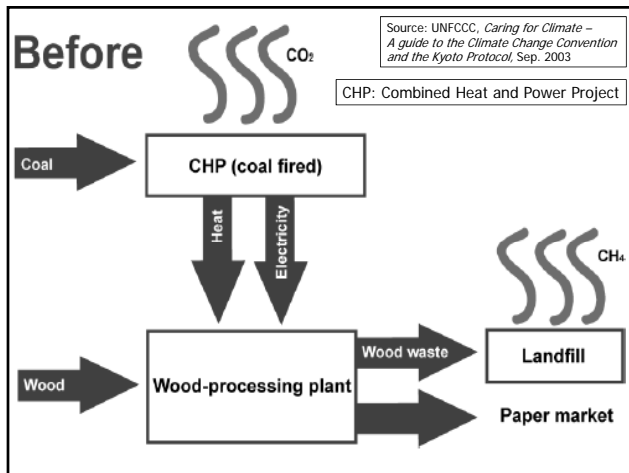
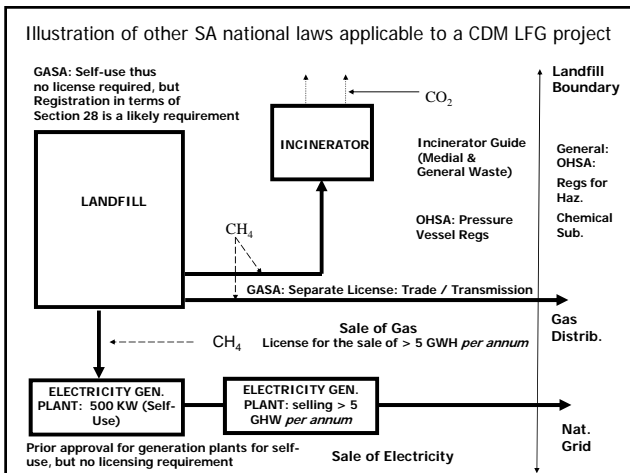


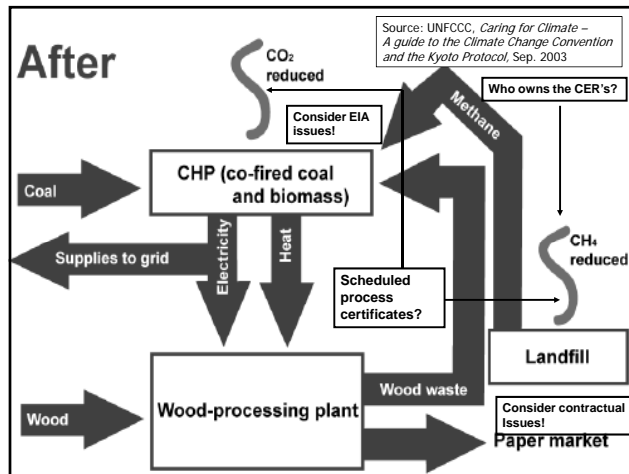
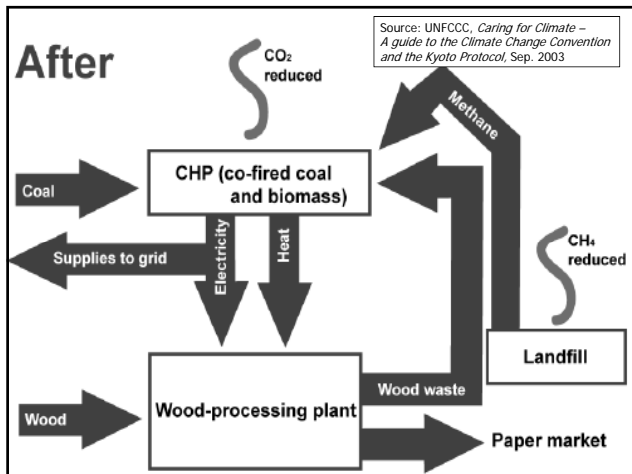
**Discuss:**

**EIA Process Issues  
&  
Lack of capacity at provincial &  
local levels of government**

How these may impact on project implementation and strategies for their management

“Unlinked” enviro-legal considerations (arising from the operation of the domestic legal regime)





### Other domestic legal requirements?

- Common Law e.g., the law of nuisance / neighbour law
- Property law – right of way / servitude
- APPA – scheduled process certificate
- NEM: Air Quality Act
- Health & Safety legal requirements
- Legal requirements related to Hazardous substances
- New Energy related laws and policies
- Waste Management Authorisations (NEM: Waste Management Bill) & MINREOS

### Waste Management Authorisations

- S20 ECA- permit required from DWAF
- Minimum Requirements Documents
- Review permit conditions – compliance essential
- NEM: Waste Management Bill to be finalised in 2007

### Key SA legal requirements for Coal Bed & Mine Methane Projects

- Need to consider both the capture of GHG & use of GHG
- Need for a Production Permit i.t.o MPRDA
- Consider amendment of EMPR i.t.o MPRDA
- Is an EIA required & i.t.o which legislation?
- Public consultation requirements
- Scheduled process certificate i.t.o APPA or licence under NEM: AQA
- Licence or registration i.t.o Gas Act
- Requirements of power-generation legislation
- Health and safety legislation- MHSA
- Hazardous Substances Act
- S20 ECA waste permit

### Some general legal issues to consider

- Ownership of CERs;
- Taxation of income from CERs;
- Contractual terms and risk management.

