

CLIMATE CHANGE LAW IN SOUTH AFRICA:

A PRACTITIONER'S PERSPECTIVE

Andrew Gilder:
IMBEWU Enviro-Legal Specialists (Pty) Ltd

www.imbewu.co.za



Structure of Presentation

- IMBEWU Enviro-Legal Specialists (Pty) Ltd.
- Climate Change.
- International Climate Change Regime.
- What is a CDM project? Who can participate?
How are they implemented?
- Unilateral CDM.
- Recent South African Developments.
- Challenges.

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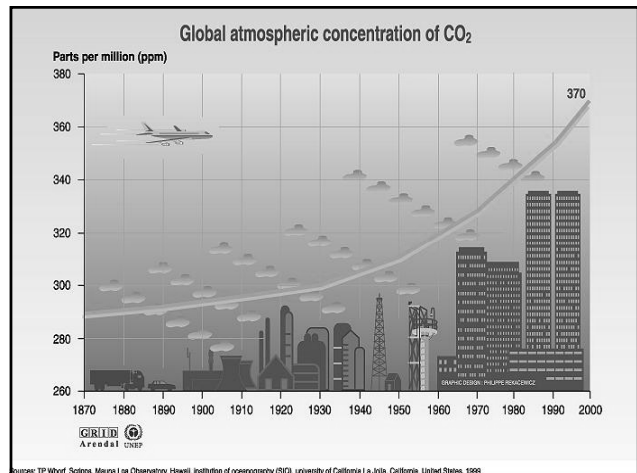
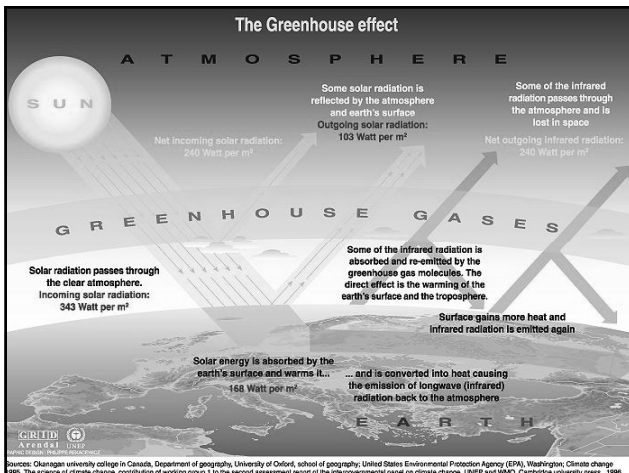
- Specialist South African environmental, health & safety climate change (*sustainability*) legal consultancy.
- Johannesburg-based / Eastern Cape satellite office.
- In conjunction with an Attorneys firm (Warburton Attorneys).
- Wide range of South African environmental, climate change health & safety and sustainability legal advice, electronic legal registers, legal training.
- Specialization: issues pertaining to implementation of climate change mitigation projects, e.g., CDM projects, in South Africa:
 - relevance of the international context,
 - project initiation and development,
 - authorisations and consents (including EIA),
 - negotiation and contractual matters (management contracts, agreements for purchase and sale of emissions reductions).

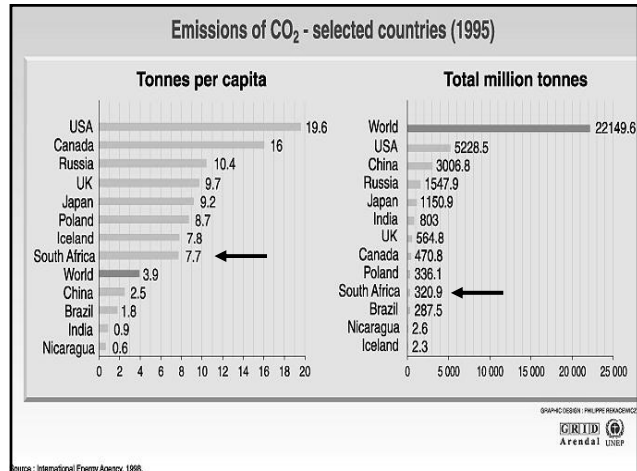
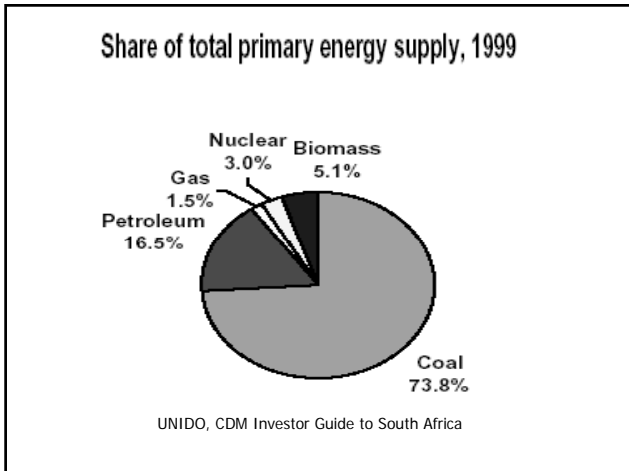
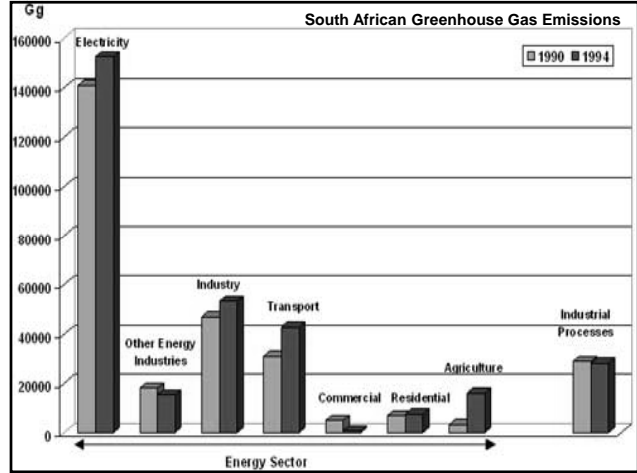
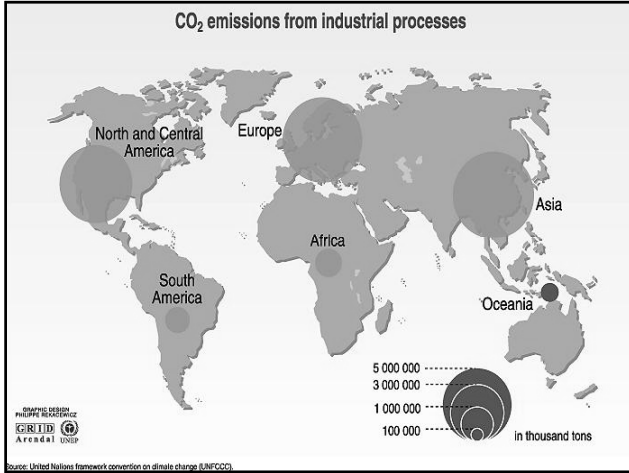
Climate Change

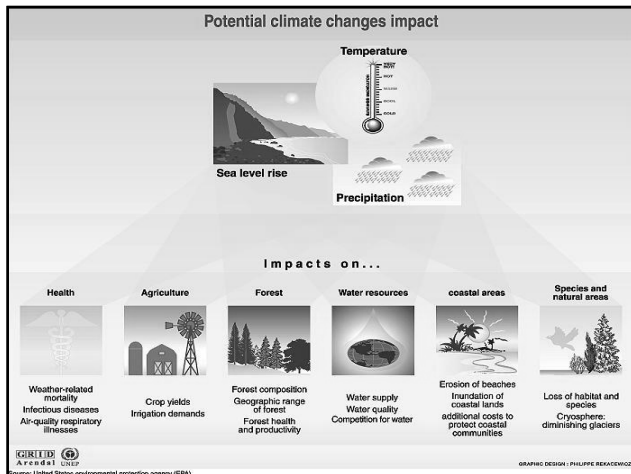
Climate Change

“Global warming is the single biggest environmental challenge faced by the world today”.

(Valli Moosa, Business Day, 11 October 2004).







Climate Change Law?

Climate Change Law

- ☛ “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.”
- ☛ “Climate change related transactions...will generally involve cross boarder transactions amongst international players, potentially with a different level of understanding of the complex legal issues and risks involved”. (Wilder, M., *International Climate Law: Recent Developments and Key Issues*, IETA, Greenhouse Gas Market 2004).

- Environmental Law
- Property Law
- Foreign Investment Law
- Securities and Financial Regulation
- Tax Regulation
- Public Procurement Regulations, e.g., where an arm of government seeks to invest in a CDM project

The international climate change regime

United Nations Framework Convention on Climate Change (UNFCCC)

- 1988:
 - World Meteorological Organization (WMO) and UNEP establish Intergovernmental Panel on Climate Change (IPCC).
 - UN General Assembly takes up issue of Climate Change.
- 1990:
 - 1st IPCC report concludes that international negotiations on a climate change convention should begin.
 - General Assembly opens negotiations.

UNFCCC(2)

- UNFCCC opened for signature in 1992 - flowed from the Rio Earth Summit:
 - 50 signatures for entry into force,
 - 21 March 1994 – entry into force,
 - South Africa ratified in 1997.
- **Key principle:** Parties committed to stabilizing greenhouse gas concentrations at levels that would prevent “dangerous anthropogenic interference with the climate system” (Art. 2).

UNFCCC (3)

- Distinction between Annex I and non-Annex I countries >>> developed and developing.

Annex I Parties – to demonstrate leadership in addressing climate change and on basis of “common but differentiated responsibility”:

- adopted non-legally binding commitment to reduce GHG emissions to 1990 levels by 2000.

[SA is a non-Annex I country (developing)]

UNFCCC (4)

- UNFCCC – two broad areas of activities, aimed at achieving:

● Mitigation >> currently more prevalent internationally; and

● Adaptation >> currently less prevalent, although receiving increasing attention .

Kyoto Protocol

- Problems with a “framework” convention and non-legally binding commitments:
 - COP 1 (Berlin Mandate, 1995) – decided that aims of UNFCCC too broadly stated & more detailed targets were required.
- New negotiations embarked upon, leading to the adoption of the Kyoto Protocol at COP 3 (Kyoto, Japan, 11 December 1997).
- SA ratified the Kyoto Protocol in mid-2002.

KP (2)

- Six greenhouse gases (Annex A):
 - Carbon Dioxide (CO₂), Methane (CH₄), Nitrous Oxide (N₂O), Hydrofluorocarbons (HFC), Perfluorocarbons (PFC), Sulphur Hexafluoride (SF₆)
- Emissions Reductions Targets (“Annex B countries” = mainly UNFCCC Annex I countries):
 - Reductions of at least 5% from 1990 greenhouse gas emissions levels in the period 2008-2012 (“the first commitment period”, Art.3)
- No developing country commitments.

KP (3)

- Flexible mechanisms – to assist in achieving emissions reduction targets:
 - Joint Implementation (JI),
 - Clean Development Mechanism (CDM),
 - Emissions Trading.
- Annex I Countries (developed) can participate in all three.
- Non-Annex I (developing) countries: CDM
- Entry into force: *ratification, acceptance, approval or accession by not less than 55 Parties to the UNFCCC, incorporating Annex I Parties, which accounted for at least 55 per cent of the total CO₂ emissions for 1990 (Art. 25(1)).*
- Came into operation on 16 February 2005.

KP(4) Implications of Kyoto entry into force

- Reduction of climate changing emissions becomes a priority for the vast majority of the world (thirty-five industrialised countries and the European Union).
- Most industrialised countries become legally obliged to reduce their greenhouse gas emissions to clearly defined levels by the year 2012.
- Emissions commodified and priced, and an infrastructure created for trade in these new commodities.

KP(5) Implications of Kyoto entry into force

- Companies operating in Kyoto countries will have to factor the cost of carbon emissions into their operations.
- Flexible mechanisms become operational.
- The Kyoto Protocol's compliance system becomes operational.
- The Adaptation Fund, established in 2001 and allowing for the provision of assistance to countries in need to assistance with adapting to the negative effects of climate change, can also become operational.

CDM: Purpose

- Kyoto Protocol Art. 12:
 - To assist non-Annex 1 Parties in achieving sustainable development (in accordance with that country's understanding of sustainable development).
 - To contribute to the ultimate objective of the UNFCCC.
 - To assist Annex 1 Parties in achieving compliance with "part" of their emissions reductions targets = "Supplementarity".
- Lead to the transfer of environmentally safe and sound technology and know-how (UNFCCC, Art.4, KP, Art.10, Marrakech Accords).

CDM: Drivers

- Main Driver: the need for Annex I Parties to comply with their Kyoto Protocol emissions reductions targets.
- Secondary Driver: International "carbon market" = commodity market for carbon dioxide equivalent (CO₂e) emissions reductions.

Minimum International Requirements for CDM

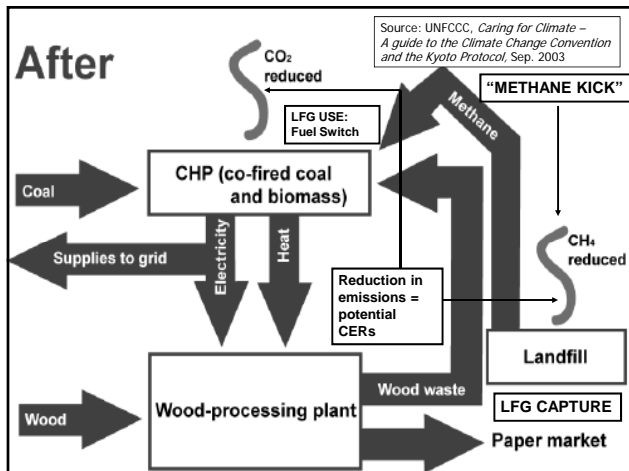
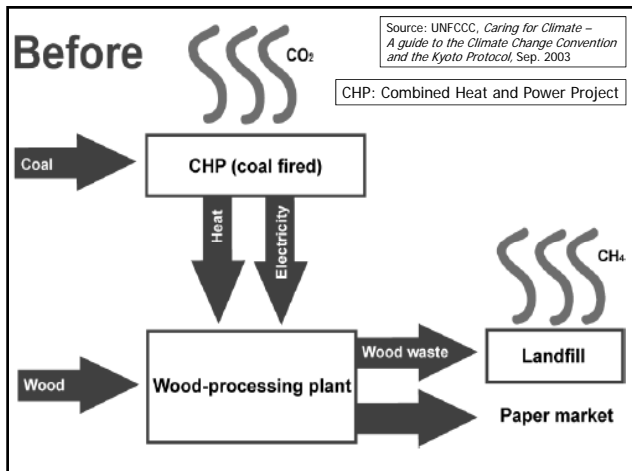
- CDM project must assist the Host country in achieving sustainable development.
- Voluntary participation by all parties involved.
- CDM project must achieve real, measurable, and long-term benefits related to the mitigation of climate change.
- CDM project must result in emission reductions that are "additional" to any that would occur in the absence of the certified project activity = "Additionality".

(KP, Art. 12(5), CDM-M&P, Paragraph 28 and 40(a))

What is a CDM project?
 Who can participate?
 How are they implemented?

What is a CDM project?

- GHG mix uniformly in the atmosphere, making it possible to reduce their emissions anywhere on the planet and to achieve the same net reduction effect.
- This enables countries with emissions reductions targets to take mitigation actions in pursuit of their emissions reductions targets in places where it is most economical / feasible to do so.
- Annex I countries can earn CERs towards their GHG emissions reductions targets by investing in CDM projects in Non-Annex I countries:
 - the overarching intention being to contribute to investment, clean technology transfer and sustainable development in the Non-Annex country.



Who can participate in a CDM project?

- Non-Annex I Country:
 - Must be a Party to the KP.
- Annex I Country:
 - Must be a Party to the KP.
 - Assigned amounts calculated (GHG emissions reductions targets).
 - National accounting system for GHG emissions in place & submitted a national GHG inventory.
- Public or private entities within developed and developing countries (Art. 12(9)).
- Bi-lateral, Unilateral projects.
- No nuclear projects.

How are CDM projects implemented?

- Marrakech Accords = detailed rule book outlining a CDM Project Cycle (Modalities and Procedures for a CDM, COP 7, Marrakech, 2001).
- Clarified by decisions of the CDM Executive Board:
 - 10 members - supervises the CDM.
 - Advised by *inter alia* a Methodologies Panel.
 - *Inter alia*:
 - recommends further M&P and rules of procedure,
 - approves new methodologies for baseline calculations, monitoring plans & project boundaries,
 - registers projects and issues CERs
 - accredits "operational entities".

CDM PROJECTS MUST COMPLY WITH NATIONAL, PROVINCIAL AND MUNICIPAL LEGISLATION

Step	Definition	Responsible Entity
<small>(Source: Guide to the Clean Development Mechanism, UNCTAD, 2003)</small>		
1. PROJECT DESIGN	A document with the information needed about the proposed CDM project that is submitted for validation.	Project participants
2. VALIDATION and REGISTRATION	Validation is the process of independent evaluation of a CDM project. Registration is the formal acceptance of a validated project by the UNFCCC.	Operational entity Executive Board
3. MONITORING	The collection and archiving of all relevant data necessary for establishing GHG emissions by sources occurring within the project boundary during the crediting period.	Project participants
4. VERIFICATION and CERTIFICATION	Verification is the periodic independent review and determination that GHG reductions have occurred as a result of the registered CDM project activity during the crediting period. Certification is the written assurance that a project activity achieved the GHG reductions stated during the specified time period.	Operational entity Operational entity
5. ISSUANCE	Certified emission reductions (CERs) are issued to the Parties' account.	Executive Board

Project Design Document (PDD)

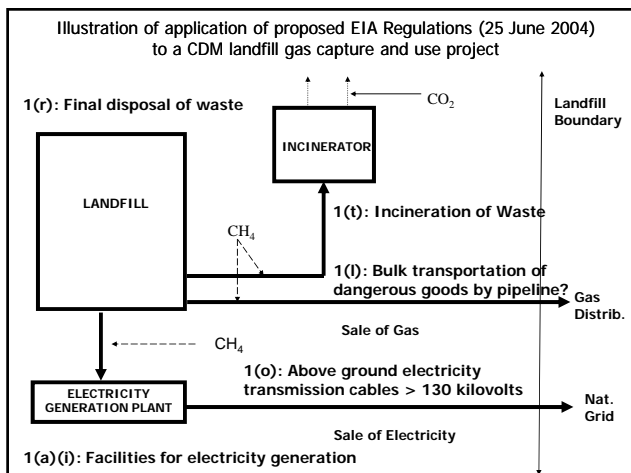
- PDD must include:
 - Description of project activity,
 - Baseline methodology & description of how the project reduces greenhouse gas emissions below those that would have occurred in the absence of the project, i.e., that the emissions reductions are "additional" and not "Business as Usual".
 - Duration of project (crediting period): 10 years or 3 renewable periods of 7 years (21 years),
 - Monitoring and Verification methodology,
 - Calculations of GHG emissions,
 - Environmental impacts & Stakeholder comments.

In order to undertake a CDM project:

- Comments by local stakeholders must have been invited and due account must be taken of the comments received. (Marrakech, paragraph 37(b))
- Documentation must be submitted on the analysis of the environmental impacts of the CDM project activity 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. (Marrakech, paragraph 37(c))
- Opens the door to application of South African EIA regime should the project activity constitute a "listed activity":

South African EIA Regime

- Environment Conservation Act No. 73 of 1989 and EIA Regulations (1997).
- National Environmental Management Act No. 107 of 1998.
- Certain "listed activities" are prescribed by legislation and regulation.
- If a project activity should constitute a "listed activity" then it triggers the EIA requirement.
- Regime is currently under amendment (new EIA Regulations pending).



Unilateral CDM

Unilateral CDM

- ❖ The CDM Executive Board decided (18th meeting, Feb. 2005) that:
 - “the registration of a project activity can take place without an Annex I Party being involved at the stage of registration”.
- ❖ Suggests that “the Annex I Party involvement in a CDM project can take place anywhere between registration of the project with the CDM EB and the issuance of CERs from the CDM registry” (e-JIQ, March 2005).
- ❖ To acquire CERs from such a “unilateral” project an Annex I Party would need to provide submit a letter of approval in terms of paragraph 40(a) of the Marrakech Accords.
- ❖ Importance for Non-Annex I (developing) countries, e.g., SA, or private entities within Non-Annex I countries that have the financial ability to develop CDM projects for their own account and either sell, trade or bank the CERs produced.

Recent South African developments

National process requirements flowing from the Marrakech Accords

- Marrakech Accords, paragraph 40(a):
 - written approval of voluntary participation, and
 - confirmation of assistance in achieving sustainable development, from
 - the **DESIGNATED NATIONAL AUTHORITY (DNA)** of *inter alia* the host country, i.e., the country where the project is located.
- South African Cabinet decision of 3 October 2003: placed DNA function into DME.
- South African Cabinet decision of 6 October 2004: approved A National Climate Change Response Strategy (DEAT) >> DNA as priority.
- GN. R. 1478 of 24 December 2004: *Regulations under Section 25(3) of the National Environmental Management Act, 1998: Establishment of a Designated National Authority for the Clean Development Mechanism.*

South Africa – developments generally

- ❖ National Climate Change Response Strategy (September 2004).
- ❖ South African's *Initial National Communication to the UNFCCC* (2005).
- ❖ First South African National Conference on Climate Change (October 2005).
- ❖ Government and business sign a Memorandum of Understanding:
 - private sector committed itself to compile an inventory of greenhouse gases emitted by industries.

South Africa – developments generally

- Marthinus van Schalkwyk (DEAT Minister), during his time spent at COP 11 / MOP 1:
 - Indicated that it is too early for the developing world to set targets for the reduction of greenhouse gas emissions, and alluded to certain “outstanding” issues in the context of the Kyoto Protocol, e.g., the slow rate of technology transfer in the CDM.
 - Stressed that CDM is fundamental to the UNFCCC and Kyoto architecture and called for the COP to send a clear signal to the carbon market in regard to the post-2012 situation.

CHALLENGES?

Challenges (1)

- Information dissemination:
 - Understanding of the nature of CDM.
 - Awareness of the implications for project implementation of administrative decisions, e.g., EIA authorisation.
- Information gaps:
 - Potential assistance from government for implementing CDM projects, e.g., within the context of its drive for “energy efficiency” and use of “renewable energy” (Renewables Target: “10 000 GWh renewable energy contribution to final energy consumption by 2013”, RE White Paper, Nov. '03).

Challenges (2)

- Miscellaneous:
 - Municipalities and the MFMA.
 - Property nature of a “CER” and implications for ownership.
 - Tax:
 - Are CER sales to a party outside SA viewed as the export of a commodity and thus zero rated for VAT?
 - Within the context of the income tax regime: are CER sales regarded as “sales on account of revenue” or as “sale of capital”?

Text of the UNFCCC / Kyoto Protocol / Marrakech Accords:

<http://www.unfccc.int>

UNFCCC CDM website:

<http://www.unfccc.int/cdm>

Other:

www.pointcarbon.com

www.ieta.org

cdmwatch.org

cd4cdm.org

www.imbewu.co.za

