



Paper 14

Climate Policy Coherence and Institutional Coordination for South Africa: An Overview of Challenges and Responses

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The BASIC Project is a capacity strengthening project – funded by the European Commission – that supports the institutional capacity of Brazil, India, China and South Africa to undertake analytical work to determine what kind of climate change actions best fit within their current and future national circumstances, interests and priorities. Additional funding for BASIC has also been kindly provided by the UK, Department for Environment, Food and Rural Affairs and Australian Greenhouse Office. For further information about BASIC go to <http://www.basic-project.net/>

About BASIC

The BASIC Project supports the institutional capacity of Brazil, India, China and South Africa to undertake analytical work to determine what kind of national and international climate change actions best fit within their current and future circumstances, interests and priorities. BASIC has created a multi-national project team linking over 40 individuals from 25 research and policy institutions, the majority based in BASIC countries. Project activities comprise a mix of policy analysis, briefings, workshops, conferences, mentoring and training clustered around five tasks lead by teams as follows:

- Task 1 – Mitigation and sustainable development (China Team);
- Task 2 – Adaptation, vulnerability and finance (India Team);
- Task 3 – Policy coherence and institutional coordination (South Africa Team);
- Task 4 – Designing international climate change policy and enhancing negotiations skills (Brazil Team); and
- Task 5 – Creation of developing country expert group/mechanism on a long term basis (All Teams).

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About this Paper

The views and opinions expressed in this paper have been put forward by the BASIC Task 3 Team to advance future climate policy discussions and contribute to capacity development and do not express the views or opinions of the funders or the BASIC Project Team as a whole. Task 3 is coordinated by the BASIC South Africa Team, which comprises: Shirley Moroka, Department of Environmental Affairs and Tourism, Mike Goldblatt, Julie Middleton and Gillian Sykes, Palmer Development Group, South Africa, Catherine Warburton, Andrew Glider, Sibusiso Shabalala and Melissa Basterfield, IMBEWU Enviro-Legal Specialists (Pty) Ltd., Johannesburg, Shirene Rosenberg, City of Cape Town and Harald Winkler Energy Research Centre, University of Cape Town. The author wishes to thank the BASIC Team for comments and guidance on previous drafts of Task 3 Papers. This does not imply support for the views expressed in this paper by any of the individuals and organizations involved with BASIC. Author contact: mike@pdg.co.za

Other papers produced by BASIC Task Team 3 include:

- BASIC Paper 11: A Prompt Start for the CDM? Lessons from Early Experiences from South Africa, Shirene Rosenberg, The City of Cape Town, South Africa
- BASIC Paper 12, Options for Greenhouse Gas Mitigation Mechanisms in South African Legislation: Catherine Warburton, Andrew Gilder, Sibusiso Shabalala and Melissa Basterfield, IMBEWU Enviro-Legal Specialists (Pty) Ltd, South Africa,
- BASIC Paper 13, Climate Policy Coherence and Institutional Coordination: Clarifying Institutional Responsibilities, Mike Goldblatt and Julie Middleton, Palmer Development Group, South Africa

Contents

1	Introduction	1
2	Institutional coordination: the South African experience	2
2.1	South Africa within the UNFCCC	2
2.2	The policy and institutional coordination challenge	2
3	The CDM: Lessons from South Africa	6
4	Options for GHG Mitigation Measures in South African Legislation	7
4.1	Application of available legislation	8
4.2	Legislation conclusion	11
5	Conclusion	12
	References	13

1 Introduction

Task 3 of the BASIC Project addresses the challenge of policy coherence and institutional coordination with regards to climate change policy and implementation responses. The task is made up of three sub-components, all from a South African perspective, focusing on:

- The institutional responses to climate change in South Africa¹
- Lessons from the implementation of the Clean Development Mechanism in South Africa;² and
- Legal and institutional issues related to the UNFCCC and the Kyoto Protocol and their implementation via domestic legislation in developing countries.³

This paper provides an overview of the three South African papers prepared under Task 3 of the BASIC project. The papers all broadly consider the issue of policy coherence and institutional mechanisms to achieve this coherence as well as the consequent implementation actions required. However, the papers approach these issues from quite different perspectives. BASIC Paper 13 focuses specifically on government institutional arrangements established to coordinate climate change policy and integrate it into country development strategies. The South African case study is a useful one because of the strong attention given to this issue in the organisational space provided by the post-apartheid restructuring of state institutions.

BASIC Paper 11 provides lessons from the implementation of the CDM in South Africa. Not all these lessons relate to institutional coordination issues and the paper also makes a range of constructive suggestions for improvements in the rules and operations of the CDM. Many of these are directed at the international level of the UNFCCC and the CDM Executive Board. However, the CDM paper does also raise a range of issues related to domestic institutional capacity and these relate well to the parallel issues identified in the first paper.

The focus of the third paper (BASIC Paper 12) is on legal measures to implement climate change policy – specifically mitigation measures. This provides a useful complement to Papers 11 and 13 as climate policy and strategy will typically need to be implemented via legal or regulatory instruments. The paper has as its starting point the notion that many legal mechanisms are already in place in South Africa that can be used to implement climate change mitigation measures. The paper, using a number of examples, shows how existing legislative instruments can be usefully used or adapted to implement various components of a climate change mitigation strategy.

The legal paper reinforces the analysis set out in Papers 11 and 13. Paper 13 provides an argument related to institutional mechanisms similar to that presented in the legal paper – this being that it is likely to be more effective and faster to use existing mechanisms, be they legal or institutional, to implement climate change response policies than to develop new structures or laws. The CDM paper also shows the

¹ BASIC Paper 13, Goldblatt, M. and Middleton, J., Climate Policy Coherence and Institutional Coordination: Clarifying Institutional Responsibilities in South Africa

² BASIC Paper 11, Rosenberg, S., City of Cape Town, A “Prompt Start” for the CDM? Lessons from Early Experiences from South Africa

³ BASIC Paper 12, Warburton, C., Gilder, A., Shabalala, S. and Basterfield, M, 2007: Options for Greenhouse Gas Mitigation Measures in South African Legislation, IMBEWU Enviro-Legal Specialists, Johannesburg.

importance of a clear understanding of the implications of the legal rules underpinning the CDM. The paper raises some pertinent recommendations about the need to ensure that the legal structure of the CDM is an evolving one that adapts as lessons are learnt from the practical experiences of the CDM.

It is hoped that the three papers may further debate or research within South Africa and the other BASIC countries and raise some considerations for improved institutional and legal arrangements for addressing climate change and the CDM.

2 Institutional coordination: the South African experience

2.1 South Africa within the UNFCCC

South Africa's international response to the issues associated with climate change is in accordance with the framework established by the FCCC and the Kyoto Protocol. The country ratified the FCCC on 27 November 1997, but is not included on Annex I. Consequently South Africa is an FCCC Non-Annex I Party with a "common but differentiated" responsibility to comply with the commitments imposed on all Parties to the FCCC. South Africa ratified the Kyoto Protocol on 31 July 2002. As an FCCC Non-Annex I Party, South Africa has not taken on a quantified emission limitation and reduction commitment in terms of Article 3 of the Kyoto Protocol.

Notwithstanding the absence of a quantified emission limitation and reduction commitment, South Africa's national greenhouse gas emissions profile clearly suggests that the country is under a "commonsense", if not a moral, obligation to take action to reduce its greenhouse gas emissions. In addition, the lack of a Kyoto-delimited national commitment does not mean that South Africa has no legal obligation to take action towards mitigating its impact on global climate change. As a Party to both the UNFCCC and the Kyoto Protocol South Africa has committed itself to taking action in this regard, including formulating and implementing measures to address anthropogenic emissions by sources of certain greenhouse gases.

2.2 The policy and institutional coordination challenge

Greenhouse gas emissions arise from virtually all economic sectors while climate change impacts are even more diffuse as they will be felt by all countries, sectors, social groups and by future generations. The pervasive nature of climate change, necessitating multiple levels of governance, poses formidable policy coherence and institutional co-ordination challenges – nationally and internationally. Additionally, climate protection policies must command widespread support if they are to be implemented effectively over the long-term and this generates extensive stakeholder engagement. Thus achieving policy coherence across all policy areas relevant to climate change is difficult, for example in the energy, agriculture and forestry, trade and industry and transport sectors where the influence of environmental ministries (especially in developing countries) tends to be weak.

In developed and developing countries buzz words such as the need for "joined up" government abound but all too often one branch or tier of government is unaware of what the others are doing - or when they are aware, little can be done for lack of clarity about institutional responsibilities. On a positive note, policies, practices and institutional mechanisms that advance policy coherence and coordination in respect of climate change are emerging in many countries although they are at an early stage of institutional development.

The National Climate Change Coordinating Committee and other structures

South Africa provides a useful case study of approaches towards coordination of climate policy development and implementation. The National Climate Change Coordinating Committee (NCCC) is a central institution in this coordination. The NCCC provides a forum for wide ranging stakeholder input into the policy development process and also acts as a means to disseminate information to stakeholders. These stakeholders include other spheres of government as well as private sector and NGO organizations.

The NCCC is situated within the context of increasingly strong inter-departmental climate policy coordinating structures at the national level, including a high level Inter-Ministerial Committee on climate change. There are also strong inter-governmental planning processes and structures that are aimed at the integration of all national policy across government. Other environmental and sustainable development programmes are planned within these systems and they provide a well developed channel for climate policy integration and implementation if used appropriately.

BASIC Paper 13 provides an analysis of the work and composition of the NCCC, as well as the other government institutions which are used or available to be used for the coordination of climate change policy development and implementation. The NCCC is shown to be a very valuable consultation forum and one which has allowed meaningful input into climate policy development from a range of non-governmental stakeholders. The Committee also provides a link between different tiers of government that reinforces other intergovernmental systems.

The NCCC has limitations, however. These include its limited mandate as an advisory body to the Department of Environmental Affairs and Tourism. This has meant that it has had very limited impact on key policy developments affecting climate change response, such as national energy policy and planning decisions, that fall under the authority of other national departments. Other limitations include the potential for unbalanced power relations on the Committee and the potential for 'regulatory capture' that arises from this type of forum.

The paper provides an overview of the inter-departmental structures established to coordinate government action across national departments and shows how these have evolved and strengthened over the last decade. There are a number of structures and systems for coordination between national, provincial and local government that have been set up for general integrated development planning purposes and more specific environmental and disaster management planning. The paper shows how these various mechanisms can and should be used to integrate climate change considerations into sub-national development planning – rather than developing new structures. The less formal networks emerging between local authorities, largely due to the support of NGOs, is also described and is seen as a valuable contribution to planning and policy capacity at the local government level.

An emerging climate policy network

Outside of the formal mechanisms established by government for climate change coordination and integration a range of stakeholders outside of government play crucial roles in addressing climate change issues. These stakeholders do not work in a coordinated fashion, often they work at cross-purposes or even in opposition to each other. However, they do occupy the same policy space, interact with each other, share ideas and compete for influence over government and over other levers of power. They generally also share a relatively common understanding of the climate change problem but will often propose differing solutions and responses.

The combination of the formal state structures, established government policy, and informal stakeholder interactions around climate change have created a policy network around this issue in which much of the information flows and debates around climate change policy occurs. An understanding of this network is important in understanding what climate policy responses are likely to emerge successfully in the country and in understanding the various power relations that will determine future action in the country. In this light a schematic graphical overview of the key role-players in the network is provided in the paper.

Although only an initial abstraction the policy network “map” highlights some important issues. For example, it is clear from the map that government, and national government in particular, sits at the heart of the network. Most other actors interact with, or via government. This demonstrates the crucial role of adequate capacity at certain points within government and also demonstrates those points where policy interventions or support are most likely to be useful. At the same time there is an emerging “sub network” of local government in which municipalities are sharing information and expertise between themselves within going through national government as an intermediary.

It can also be seen that the new Air Quality Act requires all three tiers of government to oversee and implement it and therefore presents an obvious mechanism for formal integration of greenhouse gas management measures across the tiers of government. On the other hand the renewable energy policy of the DME probably does not provide a similar cross government policy platform.

The network also shows the importance of small number of well resourced and influential academic or research organizations. These organizations have important roles to play in keeping the network informed, in ensuring that the network is fed with new policy insights and options, and in providing “impartial” support.

The importance of the NCCC and the DNA can be seen. These coordinating institutions are able to embrace wide sections of the climate policy network and act as one of the few formal means of allowing actors in the network to engage in a structured and constructive manner.

Finally, it is important to note who is missing from the network. Particularly important, given the noted influence of government within the network, are the two key coordinating structures of government, the Presidency and the National Treasury. In addition to occupying positions of cross-sector coordination these are also, arguably the two most influential components of national government. Their absence demonstrates that climate change possibly remains peripheral to the core concerns of government.

Strengths of the South African policy network

One of the major strengths of the NCCC in particular, and the climate policy network as a whole, is its evident accommodation of a broad range of stakeholder interests. This partly stems from the generally inclusive approach of the South African government, which has attempted to redress the closed and exclusive approach of the apartheid state. The NCCC is an open forum with few barriers to entry. Similarly, the South African UNFCCC delegations strive for the inclusion of a range of interests.

The NCCC is also, on the whole, a highly transparent forum, as are other elements of climate policy making. The NCCC, and associated institutions within the network allow for relatively good access by stakeholders to key decision makers. Stakeholder organizations have many opportunities to state their case, to present information to government and to lobby for their positions. The NCCC also assists in equalizing the influence of stakeholders with lower resourced groupings having as equal access to the forum as more powerful interest groups. In particular, the current policy network, both

the formal NCCC and informal elements, have served to foster good links between research institutions and policy makers. This has provided support to government when internal capacity has been lacking.

Government has also recognized the need for parallel internal and external policy processes. The establishment of the Government Committee on Climate Change (recently superseded by the Interdepartmental Committee on Climate Change) has been a major advance in inter-departmental coordination of climate policy. Although there is some overlap between the GCCC and the NCCC they serve different purposes: the GCCC acting as a means of policy coordination and a mechanism to balance national interests across departments, and the NCCC acting largely as a forum for information sharing, consultation and external policy debate.

Challenges for SA policy networks

Despite the emergence of a climate policy network, with the NCCC at its centre, there remain a number of challenges to the coordination of climate policy and action. The first challenge is the integration or main-streaming of climate policy into the highest levels of economic planning. This will probably only occur with some form of participation by the National Treasury and the Presidency in structures or processes addressing climate change policy.

A related limitation with the current NCCC arrangement is that the committee primarily advises the DEAT. However, the DEAT itself has limited influence over energy or industrial policy or over key levers of spatial and infrastructure planning. There are arguments for the NCCC's mandate to be extended to providing advice to the Inter-ministerial Committee on climate change or possibly to a combination of government departments including at least the DEAT and the Department of Minerals and Energy. In particular, the NCCC appears to have limited impact on direct energy planning. Mechanisms should be sought to enhance the links between the climate policy and the energy policy networks to allow for greater influence of climate considerations in the country's energy planning and policy.

The existence of a well developed mechanism for vertical integration of development and environmental planning between the national, provincial and local spheres of government, suggest that these mechanisms could be better utilized to encourage the flow of information between the spheres of government.

Linked to the above is the need for a strengthening of internal resources within the DEAT. The management of complex domestic and international climate change policy processes, intergovernmental coordination and continual stakeholder consultation and engagement requires significant human resource capacity. The DEAT at present does not have enough resources to allow staff members to adequately address themselves to these tasks. Although other actors in the policy network do support these processes sufficient core capacity is still required within national government.

Although the NCCC allows for an open and equal platform for stakeholders it is likely that the vested interests of some large private and parastatal organisations have greater political power than other stakeholders within the climate policy network. The current NCCC arrangements do create the conditions for regulatory capture – although these are mitigated by access to the committee by counter-balancing forces and by a strengthening interdepartmental network. This is not meant to imply that these more influential organizations play a negative role in the NCCC, in many cases they offer important resources and insights to the forum as well as progressive approaches to addressing climate change concerns. However, the imbalance of power in the climate change policy debate in South Africa cannot be ignored when attempting to understand the dynamics of climate policy development and likely outcomes.

The research capacity that exists remains limited and concentrated in a small number of institutions. Given the importance of such capacity to the policy network this research network should be expanded and strengthened. Recent work undertaken by the Department of Science and Technology is providing support to this and also to improving the relationship between research and national needs around climate change.

A final limitation of the NCCC and the climate network more broadly is that it is largely a policy network and there is limited evidence of implementation efforts being initiated or integrated across departments or actors within the network. Effort should be taken to move towards the next step of integrating actions on climate mitigation and adaptation across departments and of integrating development programmes and climate change responses. Clear potential exists in areas such as low income housing policy where improved insulation, building orientation and use of solar water heating can have benefits for the quality of life of householders, value of housing stock and can reduce greenhouse gas emissions.

The move from a policy network to an implementation network will herald the real integration of climate change and sustainable development considerations into government practice.

3 The CDM: Lessons from South Africa

The CDM is a crucial part of the Kyoto architecture for developing countries. Its core mission is to ensure that GHG reduction opportunities go hand in hand in supporting developing countries achieve their sustainable development priorities. It was conceptualised, to a large extent by developing countries, as a project-based mechanism that could help achieve quantified emission reductions. This was without developing countries taking on binding national targets.

Based on early CDM experiences from South Africa, BASIC Paper 11 presents insights and recommendations addressing developing countries concerns about the limited contribution the CDM is currently able to make to sustainable development as well as contributing to broader discussions about the long term role of the CDM in post 2012 period.

The main conclusions of the paper are that the CDM can make a larger contribution to sustainable development for developing countries. This will however require a review of the CDM that goes beyond mere procedural tweaking of the modalities of the CDM project cycle. Policy-makers are urged to focus on a number of issues to improve the impact and effectiveness of the CDM. These include clear procedures for the use of the CDM for sector-wide policies and measures and for a “programme of activities”. In particular, the paper suggests that programmatic or sector-wide activities are a crucial means of bringing the public sector into the CDM and that clear rules on how government actions, via regulatory activity, can be eligible as CDM project activities are established.

Other recommendations include devising new mechanisms to support the emergence of local designated operational entities (DOEs) as a way of reducing transaction costs and improving long term viability of the CDM in generating host country benefits in countries like South Africa. Developing countries also need to look more closely at the how well their newly established Designated National Authority (DNA) structures are functioning and whether domestic procedures and criteria on, for example, what constitutes sustainable development, can be improved.

Another critical aspect relates to building capacity and providing technical and financial support to developing countries to enable them to engage a much wider set of actors in

taking forward CDM project activities. The focus of attention of CDM policy discussions has been on engaging the private sector at the neglect of the significant and positive role being played by public sector bodies in developing countries in taking forward CDM opportunities – as exemplified by the City of Cape Town.

Supporting public sector bodies, like the City of Cape Town, to engage in the CDM and examining the lessons learnt by other local authorities experience of CDM activities will help engage a critical body of actors in the CDM. Crucially it might help to connect carbon markets with the day to day business of delivering core public services that are vital to the achievement of sustainable development such as more efficient housing, waste and other local amenities which generally fall within the remit of local authorities.

The long term issues will require a more dedicated process to be set up by the international CDM community. The paper argues that it is crucial that early signals are given to CDM markets that investments in CERs will have a value post-2012. It will also signal to a wide range of actors that time and effort spent on the CDM “learning curve” will be rewarded.

This paper puts also forward specific recommendations aimed at assisting developing countries in meeting development objectives in a manner that is less emissions intensive and climate friendly. These recommendations are focussed on the main stakeholders active in the implementation of the CDM, the Executive Board (EB), DOEs, the DNA and project proponents.

4 Options for GHG Mitigation Measures in South African Legislation

BASIC Paper 12 considers whether certain of South Africa’s current environmental statutes could support the implementation of greenhouse gas emissions mitigation actions. The authors suggest this an examination of existing legislative vehicles may profitably be used to introduce urgent mitigation obligations until such time that government embarks upon a comprehensive legislative programme to reduce GHG emissions.

However, in order to understand South Africa’s place within the international climate change legal architecture, this paper first considers the country’s obligations in terms of the United Nations Framework Convention on Climate Change and Kyoto Protocol, and attempts to assess the country’s present status of compliance with these commitments. Against this international background the paper proceeds to consider the national environmental legal dimension which originates in the South African Constitution Act (No. 108 of 1996). The implications of the national environmental law reform process, whence recent South African statutes derive, is considered, and the potential of specific, legislative greenhouse gas emissions mitigation mechanisms are explored. Two key statutes, namely the National Environmental Management Act (No. 107 of 1998) and the National Environmental Management: Air Quality Act (No. 39 of 2004) are discussed as the legislative space for the development of greenhouse gas mitigation mechanisms. Examples of such mechanisms explored in this paper include: voluntary agreements, trading schemes, labelling and monitoring. The paper concludes by providing a number of conclusions and concrete recommendations about development of appropriate legal bases for South Africa’s future climate policy.

The National Climate Change Response Strategy for South Africa

DEAT is designated as the lead agent for South Africa’s response to climate change and has produced A National Climate Change Response Strategy for South Africa (the Climate Change Strategy), which sets out, in a very broad manner, government’s

(mainly DEAT's) notion of how to deal with the challenge. In discussing the integration into government policy and action of appropriate responses to climate change the Climate Change Strategy recognizes the "cross-cutting" nature of the phenomenon and consequent ramifications for diverse activities across a variety of government departments. To be effective these activities, including the development of legislation, requires co-ordination and co-operation between government departments. The Climate Change Strategy admits that awareness within government of the likely impacts of climate change, and the necessary actions to combat such impacts, is "somewhat limited", and anticipates a possible situation where officials of "other departments" might come to view such actions as working against national development priorities. Lack of government capacity to develop and implement the required activities is identified as a further hurdle to South Africa's effective participation in efforts to counter global warming - a point reinforced by Paper 13.

The Climate Change Strategy contains an ambitious list of "key actions" that DEAT considers necessary for mitigating and combating climate change and which, collectively, are described as a "national climate change response programme". Not unexpectedly, the key actions contain interventions that are likely to result in the mitigation of greenhouse gas emissions and which can, therefore, be regarded as mitigation measures. However, the Climate Change Response Strategy provides very little guidance on actions for the practical realization of the key actions. In addition no official indication has been provided on progress towards achieving the key actions since the Climate Change Strategy's appearance in 2004, and neither has the Strategy been updated.

Included among the "key actions" are the establishment of the Designated National Authority (DNA) for the Clean Development Mechanism and using the ongoing law reform process to ensure that climate change issues are provided for in legislation. A stated legislative intention is to deal with greenhouse gas emissions and inventories within the framework of the National Environmental Management: Air Quality Act No. 39 of 2004 (the Air Quality Act).

Tangible evidence that the Climate Change Strategy is not simply a theoretical exercise can be found in the establishment and operation of the DNA and in the promulgation of the Air Quality Act. The Climate Change Strategy notes that the White Paper on Integrated Pollution and Waste Management (2000), the White Paper on a National Water Policy for South Africa (1997) and the National Water Resource Strategy all reference, or directly refer to, climate change.

4.1 Application of available legislation

Paper 12 considers a number of possible legal avenues to support the implementation of GHG mitigation.

Environmental Management Co-operation Agreements

Chapter 8 of NEMA provides, for the first time in South African law, for the possibility of any person or community entering into a voluntary, contractual agreement with certain regulatory authorities for the purposes of promoting compliance with the National Environmental Management Principles. Such contractual agreements are called Environmental Management Co-operation Agreements (EMCAs). Due to the wide scope of the Principles the potential application of EMCAs is extensive.

The crux of section 35 of NEMA is that EMCAs may contain an undertaking by the person or community concerned "to improve on the standards laid down by law for the protection of the environment". The question arises as to whether an EMCA may be used in circumstances where no legal requirements exist regarding the particular issue

regulated by the Agreement. It is submitted that, given the range of environmental issues facing South Africa and the logistical problems relating to monitoring of, and ensuring compliance with applicable legal standards, EMCAs provide a tool for dealing with instances where the legislation is silent on a specific matter.

EMCAs offer an opportunity of providing for environmentally beneficial compliance in situations where there is an accepted absence of regulatory standards. Use of a negotiated EMCA, rather than a statutorily imposed standard, could offer a means of enticing such industries to reduce the impact of their activities on the environment. This is particularly appropriate with regards to greenhouse gas emissions which are currently not regulated in South African law. The newly promulgated NEMA: Air Quality Act 39 of 2004 does not include standards for greenhouse gas emissions. Greenhouse gases are unlikely to be included in this regulatory net for at least 5 to 10 years. Early programmes for the mitigation of greenhouse gases could therefore be managed by way of EMCAs.

The potential attraction and success of such a voluntary measure would be greatly enhanced if it were coupled with an incentive mechanism. For example, if the EMCA were used as a formal mechanism to manage and potentially reward “early” or “additional” action on the mitigation of greenhouse gas emissions, it is likely that industry would find such Agreements to be significantly more attractive.

National Environmental Management Act No. 107 of 1998

NEMA is the foundation of the South African environmental legal regime and has, as its underlying principle, the notion of environmentally sustainable development. NEMA also provides a potentially useful mechanism to give effect to South Africa's international environmental obligations. Chapter Six empowers the DEAT Minister to introduce legislation into Parliament, or to make such regulations as may be necessary, to give effect to an international environmental instrument to which the country is a Party. Paper 12 argues that NEMA provides an opportunity to address both climate change and sustainable development by the promulgation of legislation and/or regulation introducing the FCCC and/or Kyoto Protocol into South African statute law. There is national precedent for such legislative action. The World Heritage Convention has been introduced, in slightly modified form, into South African domestic law as the World Heritage Convention Act (No. 49 of 1999).

NEM: Air Quality Act No. 39 of 2004

The Air Quality Act offers significant scope for mechanisms limiting greenhouse gas emissions and is discussed in more detail below.

The NEM: Air Quality Act No. 39 of 2004 (NEM: AQA) was published for general information on the 24th of February 2005 and will come into operation in a progressive fashion over a period of time. Section 60 (not yet in operation) repeals the Atmospheric Pollution Prevention Act No. 45 of 1965 (APPA) thus anticipating NEM:AQA's future role as the principal law regulating air quality in the country. The overall objective of the Act is to reform the law regulating air quality in order to protect the environment by providing reasonable measures for the prevention of pollution and ecological degradation and for securing ecologically sustainable development while promoting justifiable economic and social development.

The Act provides the DEAT Minister with wide ranging powers to implement the objectives of the Act by way of Regulations, all of which are of relevance as vehicles for the implementation of greenhouse gas mitigation measures.

The list of potential Regulations outlined in the Act anticipates the introduction of a number of innovative, in-country measures for air quality management, which have the

possibility of including measures for the mitigation of greenhouse gas emissions. Examples of potential actions in support of greenhouse gas mitigation, in terms of just two of the categories of Regulation listed in the Act, are as follows:

- “Trading schemes” (section 53(i)): The broad language used by the Act leaves a wide legislative space for more than one intervention, including:
 - a national trading scheme for greenhouse gas emissions (perhaps modelled on the European Union Emissions Trading Scheme or the Canadian Large Final Emitters Scheme, with trading occurring between emitting installations, alternatively with trading being permitted between different regions); and/or,
 - a system for the trade in energy or emissions related certificates (perhaps similar to the Australian Tradable Renewable Energy Certificates).
- “Requirements in respect of monitoring: (section 53(m)): South Africa’s Initial National Communication to the UNFCCC (2005) recognizes that the establishment of an emissions measurement database is imperative due to the dearth of the baseline emissions information required for proper national emissions management. During October 2005, using the country’s first National Climate Change Conference as a backdrop, the South African government and the industrial sector concluded a Memorandum of Understanding in terms of which industry committed itself to monitoring its greenhouse gas emissions.

The Act also provides for a series of “mechanisms” that government will use to ensure progressive compliance with ambient air quality standards. These mechanisms permit actions to reduce greenhouse gas emissions and may therefore also be regarded as potential greenhouse gas mitigation measures.

Given the above mechanisms and regulations inherent in the Air Quality Act it addresses many of the short comings of its predecessor legislation and provides considerable potential for the development and implementation of energy efficient practices and the regulation of greenhouses gases. Nevertheless, the Act currently lacks “teeth” as the development of the National Air Quality Management Framework and national monitoring and information standards, which are relevant to the granting of atmospheric emission licences, are still in their infancy.

Property Rates Act No. 6 of 2004

The Property Rates Act regulates the power of municipalities to impose rates on property. Although not specifically an “environmental” regulation for the purposes of this paper the Act’s provisions on the exclusion of certain properties from rating in the national interest and for the implementation of a system of exemptions, reductions and rebates was investigated. This could be a useful mechanism to provide incentives for the mitigation of greenhouse gas emissions.

Paper 12 argues that the Act provides for the establishment of suitable definitions for types of activities carried out which could then qualify for exemptions or reductions in property rates to encourage such activities.

For example, it is argued that the following wording, if included as an amendment to the rebate provisions of the Act and properly implemented by municipalities, could constitute a measure for the mitigation of greenhouse gas emissions:

A municipality may not levy a rate-

on a (or on the first 30/50% of the value of a property) property on which a Clean Development Mechanism Project, which has been registered with the Executive Board, is being implemented; or on which a project, which is in

compliance with an Environmental Management Cooperation Agreement in terms of section 35 of the National Environmental Management Act, for the reduction of Greenhouse Gas Emissions is being implemented.

The proposed rebate provision above would be restricted to registered CDM projects and to projects which are in compliance with the terms of an EMCA for the reduction of greenhouse gases, since it will be necessary to ensure that the projects are *bona fide* greenhouse gas emissions reductions projects which are fully verifiable. The detailed amendment suggested above is less important than the principle that there is scope within existing legislation for creative approaches to provide suitable incentives to encourage climate change response measures.

4.2 Legislation conclusion

One conclusion that may be drawn from the discussion contained in Paper 12 is that, even within the relatively small sample of South African legislation analysed, there lies considerable opportunity for the legislative introduction of actions that support greenhouse gas mitigation.

This is unsurprising in the case of the DEAT-inspired Air Quality Act which is intended as the primary tool for future air quality management. The lesson that can be drawn from Paper 12, however, is that mitigation opportunities also lie within statutes that are not specifically aimed at achieving an environmental end, and that through the application of creative legal thinking such opportunities may be exploited in defence of the global climate.

The fact that such opportunity exists within different statutes, falling under the jurisdiction of various government departments, suggests that realising the potential will require co-ordination between relevant departments. In this regard concern must be raised at the warning sounded by the Climate Change Response Strategy that awareness within government of the likely impacts of climate change, and the necessary actions to combat such impacts, is “somewhat limited”. The Strategy anticipates a possible situation where officials of “other departments”, i.e., other than DEAT, might come to view such actions as working against national development priorities.

Paper 12 provides some specific proposals to address the intention of the Climate Change Response Strategy including:

- the establishment of an Environmental Management Co-operation Agreement around GHG emissions by industry;
- the prioritisation of vehicle emission reductions under the Air Quality Act rather than the Road Transport Act (as is currently the case);
- further research into potential legal avenues that may be used to implement greenhouse gas emissions mitigation including the potential offered by regulations under the Air Quality Act, with specific focus on regulations establishing a South African National Emissions Trading Scheme and linkages with related international schemes.

This paper has considered only a few of the opportunities that exist to utilise elements of South African environmental statutes as vehicles for greenhouse gas mitigation. The authors hope that this paper and its recommendations will be of value in providing some direction for future actions to mitigate greenhouse gas emissions in South Africa.

5 Conclusion

The legal paper ends with some discussion on the pervasive nature of the climate change problem and notes that even if there are available legal mechanisms a co-ordinated approach to the problem is a prerequisite to success. The paper raises the concern that the level of coordination required is not necessarily achieved in the current South African administration – a point made in Paper 13 on institutional responsibilities. This closes the circle of the three BASIC Project Task 3 South Africa papers and reinforces the starting point for Task 3: the need to continually improve our understanding of the means by which the state can coordinate actions across separate departments and tiers of government in finding solutions to the climate change problem with its cross-cutting impacts and responses.

References

BASIC Paper 11, A Prompt Start for the CDM? Lessons from Early Experiences from South Africa, Shirene Rosenberg, The City of Cape Town, South Africa

BASIC Paper 12, Options for Greenhouse Gas Mitigation Mechanisms in South African Legislation, Catherine Warburton, Andrew Gilder, Sibusiso Shabalala and Melissa Basterfield, IMBEWU Enviro-Legal Specialists (Pty) Ltd, South Africa

BASIC Paper 13, Climate Policy Coherence and Institutional Coordination: Clarifying Institutional Responsibilities, Mike Goldblatt and Julie Middleton, Palmer Development Group, South Africa

All BASIC Papers are available from the BASIC Project website:

<http://www.basic-project.net/>