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REPORT TO WWF

1. INTRODUCTION & SEMINAR OVERVIEW

- 1.1 The Environmental Law Association (ELA) held a Seminar on Climate Change in Durban on 22 May 2010. This was the first comprehensive Seminar organised by the ELA dealing with climate change issues and the legal regime governing climate change.
- 1.2 The principal goal of the ELA Seminar was to explore and encourage discourse on the manner in which South Africa could achieve the shift to a low-carbon economy (as a widely acknowledged crucial response to climate change).
- 1.3 The ELA Seminar was geared, as a starting point, towards ascertaining South Africa's position regarding climate change against the backdrop of the international climate change regime and the most recent negotiations in Copenhagen at COP 15.
- 1.4 The participation in the ELA Seminar of several key international legal scholars in the field of environmental law and climate change law provided fertile ground for the analysis of policy directions and legal mechanisms employed in other countries which could serve as examples for South Africa in navigating the transition towards a low-carbon economy. Specifically, the ELA Seminar also explored drivers towards a low-carbon economy and identified several key challenges and opportunities for South Africa in this regard.
- 1.5 The ELA Seminar attracted a diverse audience, drawing not only on members of the legal profession but also other professionals in the environmental field. The composition of the audience demonstrated a wide interest in the issue of climate change and in particular the legal regulation of climate change in general, which in South Africa remains largely unexplored.

2. PRESENTATIONS AND OUTCOMES

The international arena

- 2.1 The ELA Seminar commenced with some reflections on COP 15 and its outcomes. The international climate change regime forms the basis for action by individual States. Given the global nature of the problem, progress in the international arena represents the starting point for humanity's success in addressing climate change. However, the discourse clearly emphasised that the international climate change negotiations process is highly politicised and complex.
- 2.2 The complex nature of both the rules of international negotiations under the UNFCCC together with the politicised nature of the negotiations could be some of the underlying reasons for what is perceived by many as a weak output from COP 15, namely the Copenhagen Accord.
- 2.3 The Copenhagen Accord has been perceived as flawed by many commentators as it does not represent a binding commitment but rather a political statement of intent in terms of which States may register pledges to cut their emissions. This, many argue, unduly dilutes the obligations of Annex I States currently embodied in the Kyoto Protocol.¹ Yet, on the other hand, commentators are hoping that the status of the Copenhagen Accord may be elevated to a binding agreement in the future.
- 2.4 The presenters at the ELA Seminar emphasised that although the international negotiations process and the existing international climate change regime forms the basis for domestic actions of States to combat climate change, South Africa should base its actions not only on the obligations created in terms of international law as the international regime may not necessarily be effective in addressing climate change or its effects. The concern was expressed that the effects of climate change, which are predicted to be significant will invariably manifest themselves unless strong, and decisive action is taken now. It is therefore vital that South Africa continues to explore domestic avenues to address climate change, even in the absence of any direct obligation and/or responsibility in terms of international law.
- 2.5 At the same time, however, the international climate change negotiations process and the concomitant force that such negotiations (and their outcomes) lend to domestic actions, not to mention the potential funding that flows from the international process, should not be underestimated or discounted.
- 2.6 It was felt by some that COP 15 clearly demonstrated the need to develop an African voice in these international negotiations. Although the creation of a united African voice is rendered difficult due to the diverse range of objectives and interests of various African countries, it is clear that Africa must, given the potential dire impacts of climate change on the people of Africa, rise to the challenge. South Africa, as one of the most developed countries on the African

¹ Annex I States are those countries that face binding emissions limitation targets under the current regime.

continent could and should play a leading role in developing an African voice in the international arena. By the same token, South Africa itself must develop a stronger voice in these negotiations. In this regard, the presenters emphasised the need for South Africa to move beyond the paradigm of simply being an object of potential climate change investment. Instead, South Africa must actively explore and seek out international investment for climate change mitigation and adaptation projects.

- 2.7 Although the formulation of a strong South African voice in international negotiations may not be within the direct purview of the legal sector, South Africa could benefit from a clear policy stance on climate change and a legal review of the international regime as it currently stands.

Climate change regimes in other jurisdictions

- 2.8 The structure of the global economic system is under siege by climate change and the measures required to address its causes and effects. This invariably implies that no State can succeed on its own in addressing this common (i.e. global) problem. At the same time the sheer scale of the challenge also means that each individual State must take measures to restructure its economy. Part of this restructuring process entails changing the behaviour of individuals within society, particularly through altering attitudes towards resource consumption and use.
- 2.9 Delegates of the ELA Seminar were informed of several inventive and illustrative incentive schemes and regulations in other States that encourage efficient resource use and that curb the emissions of greenhouse gases (GHG). For example, in an effort to ease traffic congestion and reduce GHG emissions, Singapore has implemented a network of regulatory measures that disincentivise the private ownership of cars. The scheme, in a nutshell, entails the requirement to obtain a permit to own a car. These permits are limited in number and are awarded on a highest bidder-basis. The permits expire after a number of years. Incentive schemes can play an important role in the way people structure their everyday lives in responding to climate change related issues such as the efficient and sustainable resource use and conservative energy consumption. The application of incentives within the South African context should be thoroughly investigated by both economists and the legal sector alike.
- 2.10 The ELA Seminar also highlighted that a cautious approach must be taken in considering and applying incentive schemes. The experience of the United Kingdom illustrates that individually aimed carbon incentives can have negative consequences. For example, the British government introduced a solar heater incentive scheme aimed at encouraging the installation and use of solar heater systems. However the scheme met with so much support and demand that the UK government could no longer afford the scheme.
- 2.11 In the South African context, where demands on government funding and resources are significant, the use of incentive schemes, either positive or negative, that rely on government funding will have to be approached with

circumspection. South Africa would benefit from a thorough analysis and review of the experience of other States in this regard and to develop schemes that will be both effective and sustainable in the South African context.

The South African Position

- 2.12 South Africa is the 12th largest emitter of GHGs globally and the largest emitter of GHGs in Africa. The South African government has committed to achieving a 34% reduction of GHG emissions below the Business As Usual (BAU) scenario by 2020.² South Africa therefore faces the need to take decisive action in the immediate future in order to achieve this target.
- 2.13 Presenters at the ELA Seminar sought to outline the current legal and economic position of South Africa, the possible avenues available to South Africa in addressing climate change and whether or not the decarbonisation of our economy represents a constraint or an opportunity for South Africa.
- 2.14 Delegates were informed that to date market forces, as opposed to legal regulation, have been the main driver of actions and strategies to address climate change in South Africa. Although various policies exist which grapple, to a lesser or greater extent, with climate change - particularly in the energy sector - there appears to be a dichotomy between policy and the implementation of the aspirations laid down in those policies.
- 2.15 South Africa has not, to date, put in place any legislation that deals specifically and comprehensively with climate change. Nor is any direct reference made to the issue of climate change in our principal environmental statute, the National Environmental Management Act (Act No. 107 of 1998).
- 2.16 In comparison, the United Kingdom has enacted dedicated climate change legislation, namely the Climate Change Act 2008 to address climate change mitigation. Due to the all-encompassing nature of the issue of climate change, there is room for debating the appropriateness of addressing climate change through the implementation of a single statute and a multi-faceted approach to regulation of climate change might be appropriate.
- 2.17 The ELA Seminar highlighted that South Africa has the ability to draw on a wealth of information and experience of other States in developing an approach to addressing climate change in a manner that is consistent with the unique circumstances of and challenges faced by South Africa in this regard.
- 2.18 Whichever approach South Africa ultimately follows in legislating climate change mitigation and adaptation legislation, the ELA Seminar highlighted the fact that the current lack of a regulatory regime is, at least in part, to blame for the inability of South Africa to access climate change funding on a large scale, despite the fact that our economy has one of the highest absorptive capacities for such finance on the African continent.

² Letter dated 29 January 2010 to the Executive Secretary of the UNFCCC. Available at: http://unfccc.int/files/meetings/application/pdf/southafricaphaccord_app2.pdf

- 2.19 The legal sector should therefore be encouraged to carry out comparative assessments of climate change regimes in other jurisdictions and to make recommendations for the development of a South African regulatory regime.

3. QUO VADIS SOUTH AFRICA

- 3.1 Given its position as one of the largest emitters of GHGs, South Africa should and must take immediate and effective action to address climate change. Economists are of the view that there will inevitably be constraints on the economic growth of several sectors of the economy as part of this process, in particular those industries that are fossil fuel intensive. On the other hand, this apparent constraint must be considered against the wealth of opportunity in terms of technology development and what has been dubbed the 'green economy'.
- 3.2 Presenters at the ELA Seminar were in agreement that the 'green revolution' particularly in the energy sector has commenced in the global economy. This revolution is largely being driven by market forces as well as regulation of industrial and economic activity in Annex I States, which has already begun to shift consumer behaviour worldwide. It was noted that rapidly changing consumer behaviour may result in South African export products losing their competitive edge unless climate change considerations begin to become an integral part of the way in which business is conducted.
- 3.3 Significantly, this 'green revolution' could become a major source of economic growth for South Africa's economy. Viewed from this perspective a carbon constrained future does not necessarily equate to a constrained economic growth. However, in order to reap the benefits of the 'green revolution' South Africa will have to introduce a variety of interrelated programmes. On the one hand, regulation to constrain the carbon emission of heavy industry is required, while at the same time regulation is required to encourage innovation, technology development and industries in the renewable energy and renewable resource consumption industries. Additionally, incentive schemes both negative and positive may be employed to alter the behaviour of society as a whole.
- 3.4 These programmes must then be coupled with skills development, education and job creation programmes. A starting point in establishing a legal regulatory framework that achieves all of these milestones will have to be an investigation by the legal sector and other professions into the options available to South Africa in order to fill the knowledge gap that currently exists.

4. THE ELA: KEEPING THE MOMENTUM GOING

- 4.1 The ELA Seminar represents a useful and successful starting point for future initiatives both by the ELA (either alone or in collaboration with other organisations).

- 4.2 The ELA Seminar highlighted the immense interest from the legal sector in climate change issues whilst also clearly demonstrated that there is a lack of knowledge and initiative from the legal sector in South Africa regarding the issue of climate change.
- 4.3 It emerged from the ELA Seminar that in order to achieve the required transformation to a low carbon economy, the legal regulation of behavioural patterns of both business and private individuals will be required.
- 4.4 Market forces and incentives alone will not be sufficient to attain the re-shift of society, as market forces alone will not guarantee that South Africa will be able to access climate change funding effectively in the future. Investor confidence, be that private investment funds, or government, or UNFCCC funding, depends on a successful administrative and regulatory climate change regime.
- 4.5 A field that remains under-researched in South Africa relates to the role that law could play in the transition towards a low carbon economy. Therefore, while the ELA Seminar can be regarded as a success in raising the level of discourse, it is merely the first step in the process of highlighting the opportunities and constraints for South Africa. In moving the initiative forward, a collaborative process of engagement between various professional sectors will be required in order to identify some potential legislative approaches towards addressing climate change. Climate change is a multi-dimensional problem and as such requires a multi-dimensional approach to identifying opportunities and responses.
- 4.6 It would be beyond the ability of the legal sector alone to identify these opportunities and responses as an understanding and knowledge of intricate economic concepts and modelling will be required, along with an understanding of environmental processes, and the potential effects of climate change in South Africa. Having said that, as a representative body for environmental lawyers and other environmental professionals, the ELA is well-placed to explore the integration of climate change considerations into legislative environmental processes. In particular, for example, the role of climate change considerations in the Environmental Impact Assessment process ought to be explored and investigated.

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June 2010

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PHOTO GALLERY



