

EXECUTIVE SUMMARY

Transboundary natural resource management (TBNRM) is increasingly presented as a management option that will create new opportunities for development and community earnings. TBNRM is seen to create opportunities for sustainable ecological management, rural livelihoods, regional integration and development. Most TBNRM initiatives are spatially bound and are either mega-parks or development zones. Fresh water, marine resources and air resources are generally not addressed within this emerging movement.

This paper undertakes a review of the applicable international law as well as national law regimes; and the specific agreements establishing TBNRM in southern Africa. On the basis of this review several critical legal issues arise:

- Firstly, what is the basis for collaboration?
- Secondly, what obligations are created at international law that should be taken into account in developing TBNRM initiatives?
- Thirdly, do national law regimes provide adequate support for the realisation of key objectives?
- Fourthly, do the TBNRM agreements create adequate systems for the realisation of these key objectives of international law and the SADC Treaty?

A THE BASIS FOR COLLABORATION

Several general principles of international law set the tone for inter-state collaboration in natural resource management. Specific conventions pick up on these principles and further define the basis for collaboration in specific areas. The principles of **state sovereignty, state responsibility and good neighbourliness** are directly concerned with the relationship between states and are key for transborder co-operation.

State sovereignty denotes a state's right to act without outside interference whereas state responsibility refers to its obligation to act in a way that is not harmful to other states. The principle of good neighbourliness is one aspect of state responsibility. It requires that a state's activities to be carried out in such a manner so that the rights of its neighbours are respected. Implicit in it is the obligation to co-operate in matters of mutual concern. From this perspective the principles are complementary and form the basis for TBNRM.

The **SADC Treaty** further defines the basis for regional integration and co-operation. It incorporates the principles of state sovereignty, state responsibility and good neighbourliness. These are also restated in its protocols as well as some TBNRM agreements. The SADC Treaty provides an enabling environment for the development of TBNRM initiatives. However, these must be in keeping with its overall objectives and principles. Key objectives are the promotion of economic growth, the alleviation of poverty and the enhancement of the quality of life for the peoples of southern Africa. It does not, however, prescribe that states must enter into such arrangements. Although several protocols including the SADC Protocol on Wildlife Conservation and Law Enforcement in Southern Africa and the Protocol on Shared Watercourses encourage this.

Significantly, from a TBNRM perspective, the Treaty sees collaboration as being on the basis of **sovereign equality**, respect for **human rights, equity** and **mutual benefit**. Additionally, it recognises that, citizens and non-governmental organisations are important stakeholders.

These general regimes for collaboration are further defined in specific sectoral international conventions pertaining to wildlife, water and marine resources.

B HUMAN RIGHTS – IMPLICATIONS FOR TBNRM?

International law defines human rights that should be observed in state practice and thus by implication in TBNRM agreements and initiatives. In the environmental sphere good governance has emerged as a key concept and as the basis for management. It requires respect for **rights** and the **establishment of transparent and accountable procedures**. Citizens' rights that are recognised in international law (IL) should also be addressed in TBNRM agreements. These include traditional resource rights (TRR), the right to development, rights of participation, protection of existing rights and the right to a remedy.

TRR recognise the right of communities, with traditional lifestyles, to the natural resources on which they are dependent. Consequently, communities must be recognised as stakeholders and involved in negotiations and management. Such participation must be based on acknowledging the right of prior informed consent. Tenure rights in many national legal systems fail to recognise these rights. Similarly attempts at Community-based Natural Resource Management (CBNRM) generally do not transfer real rights to communities.

The IL framework recognises the need for **local participation** that is pro-active and that creates opportunities for individuals and groups to participate in the formulation of management strategies as well as the implementation thereof. Participation is more than simply consultation, but implies some control over outcome.

International law restricts the rights of states to displace people for development by offering protection to **existing rights**. National systems are poorly developed to recognise this. Where rights are diminished, proper consultative procedures must be adopted and compensation provided for. Also, adequate procedures for contesting these decisions must be provided. TBNRM needs to adopt legally acceptable processes where rights are extinguished or diminished.

Where any right of any person is affected, that person is entitled to a remedy in terms of international law. Most national legal systems recognise this right. However, effective access to a remedy requires more than just statutory recognition of that right. For it to be meaningful and effective administrative decision-making processes must be transparent and citizens must have significant rights of access to information. In many countries, civil society organisations claim that rural people have inadequate access to justice.



C IMPLICATIONS OF NATIONAL LEGAL SYSTEMS FOR TBNRM

Although national legal systems throughout the region have much in common, differences in managerial systems and rights of stakeholders may make defining TBNRM initiatives difficult. However, SADC has already recognised the need to achieve complementarity at this level. The development of Protocols in specific areas (such as wildlife and shared watercourses) goes some way to establishing common systems and sets a clear basis for refining, redefining and amending national laws and policies. Perhaps, a more critical issue is how some general features of the legal system may impact upon, and possibly constrain, the development of TBNRM initiatives. In particular, conflicts between traditional law and general law, land tenure, land use and planning may place significant constraints on the effective development of TBNRM. Several areas are of concern. These include land and natural resource tenure regimes, exclusionary legal systems and poor land planning systems amongst others.

Tenure relations throughout the region are skewed along class and race lines. In most countries, tenure rights of local communities are insecure and limited to rights of use. A consequence of this is that people at this level are **excluded from decision-making and planning**. CBNRM has only had limited success in addressing these systems. **Tenure relations limit the choices made by people at the local level**. The lack of rights rural people have to resources and land limits their ability to enter into collaborative arrangements with communities in other countries for the exchange of goods and services. In some instances national laws, such as phyto-sanitary regulations that makes the exchange of seed material illegal, undermine local livelihoods. Also the vesting of rights to wildlife in the state and the dis-empowerment of communities in this area, curtails it from being a resource that can be used in a collaborative transboundary manner by communities. This reduces communities' abilities to develop and diversify their livelihood strategies and contributes to their continuing poverty.

The **dual legal system** that characterises much of the region has resulted in the trivialisation of customary law and practice. This contributes to the **alienation** of people from management and planning by discounting their rule and value systems.

Land use planning systems often reinforce the exclusion of local communities. Traditional evaluation tools such as Environmental Impact Assessment (EIA) are inadequate for assessing the impact of TBNRM initiatives. As, within existing legal systems, the establishment of conservation areas is not captured in the definition of development and is hence, generally, not subject to an EIA. Most countries have no direct provisions for social impact assessment of such activities unless they are considered as development activities and subject to an EIA. Additionally, land use planning has inadequate systems for weighing the costs and benefits of different land use regimes e.g. agriculture vs. natural resource management.

Failure to address these issues may mean that these national governance systems are simply replicated within TBNRM initiatives. Additionally, it may also mean that historical injustices, such as land displacements, are further entrenched.

D DO THE TBNRM AGREEMENTS ESTABLISH SYSTEMS FOR THE INCORPORATION OF KEY RIGHTS AND VALUES?

Based on the development of IL, at both the global and regional level, TBNRM agreements need to address key rights. Although many agreements attempt to deal with rights issue, the systems for actually addressing these are inadequately provided for.

The **equitable sharing of resources** lies at the heart of co-operation. Despite this systems and criteria that can assist states to agree what is equitable are vague. In the water sector this principle is widely recognised as the basis for the management of shared water resources. In practice there is little consensus about what this means. Legally, a wide range of factors (including geographic, hydrographic, hydrological, climatic, ecological, social and economic needs, existing and potential use, conservation, protection, development and economy of use, and the availability of alternatives) must be taken into account in determining what is equitable. However in practice, despite a provision in the United Nation's Convention on the Law of the Non-Navigational Uses of International Water Courses (UN Convention on Water) that "no use enjoys inherent priority over other uses," precedence tends to be given to existing uses. Even basic human rights to water are compromised (albeit illegally). There is a clear divergence in how this is treated by upstream and downstream states. For example, disputes around the use of the Nkomati River focusing on existing agricultural needs in South Africa's (SA) as opposed to Mozambique's development needs. In the context where regional agreements and national legislation emphasise water development, rather than management, these tensions around use may be exacerbated.

If TBNRM agreements are to address this issue, then they need to **create systems and mechanism for adjusting the rights of the respective parties**. In the Lesotho Highlands Water Project (LHWP) there are no mechanism for adjusting SA's takeoff as Lesotho's own needs grow. A clear link between **human rights to water** and water allocation needs to be made and incorporated into regional water agreements.

The Southern African Development Community (SADC) is committed to the concept of **sovereign equality**. Equality, however, is more than just a matter of legal provision and may be affected by economic strength and politic dominance amongst other things. The inequality between states is manifested in relations of inclusion and exclusion. In the water sector key basin states are excluded from agreements. For example the Zambezi River Authority (ZRA) agreement excludes Mozambique, LHWP fails to include Namibia although these are also basin states. Also some of these agreements favour one party over the other. This clearly needs to be addressed given the new focus on basin management. This is already being addressed through the development of basin commissions. Concerns around issues of equity and the distribution of benefits from the establishment of TBNRM initiatives in the wildlife sector are beginning to emerge. For example, there are concerns that in respect of the establishment of the Gaza-Kruger-Gonarezhou Transboundary Park (GKG) South Africa is likely to have a disproportionate share of the benefits given that Kruger National Park is more developed than either



Gonarezhou or Gaza. Given the imbalances in tourist facilities and infrastructure, it is likely that tourists visiting the parks covered by this agreement will enter through South Africa and possibly reside in Kruger National Park only making day trips into the other parks. This will mean that more tourism dollars will be spent in South Africa, both inside and outside the Park. Interestingly although the agreement makes provision for the sharing of managerial functions, no corresponding systems are created for the equitable sharing of benefits (and costs) associated with the parks development.

The Protocol on Wildlife Conservation and Law Enforcement in Southern Africa (Wildlife Protocol) articulates a number of important principles but fails to create meaningful systems for their realisation. This is largely due to the strong emphasis placed on the **sovereignty** of states. For example, the Protocol recognises the need for CBNRM but offers no guidelines to member states about what the base line of such initiatives should be. States are not urged to develop accountable and transparent systems or to involve communities in planning. Given this, it fails to really address the IL rights of rural communities. And because the approach is left to individual states, the reality is that CBNRM will continue to be shaped by existing tenure regimes. The specific transboundary agreements fall into the same trap – by focusing on sovereignty and failing to create minimum standards for CBNRM - **the extent of inclusion of communities in these agreements is left essentially to the individual states**. Some agreements, such as that establishing the GKG, commit states to “develop frameworks and strategies whereby local communities can participate in, and tangibly benefit from, the management and sustainable use of natural resources that occur within the Transfrontier Park.” Additionally, states undertake to ensure that full stakeholder participation is engaged within their respective countries, so that broad social and political acceptance is achieved for the process. In the absence of minimum standards and procedures – there is no guarantee that the systems created will in fact achieve the desired outcome. Indeed there are no mechanisms for citizens to hold states to these commitments.

Another possible consequence of these transfrontier conservation areas is that they will wrestle the last semblance of legal control from communities, as authority is re-centralised and there is a move from the current focus on local government as agents of communities to national parks authorities as agents of the state. Problems of representation become more acute as there are even fewer systems for downward accountability within this scenario. Participation systems have been more about consultation than shared authority. The institutional systems created for participation tend to be hierarchically organised and prioritise “technical decision-making and knowledge” over the knowledge, concerns, interests and priorities of local communities. In this sense these agreements tend to be patronising.

Given that title to resources is generally vested in the state, public participation is generally seen as a privilege rather than a right. Consequently citizens have no legal basis for demanding inclusion. To achieve effective participation, TBNRM agreements need to adequately provide for accountability and transparency in management. It is important that TBNRM agreements redress, and clearly set out, the respective rights of states and citizens, rather than treat the rights of citizens as a domestic matter.

Most of the TBNRM agreements expressly recognise the need for **communities to benefit** and to be included. However, they fail to establish systems that protect community interest and which guarantee their inclusion. This is because international law generally concerns itself with the rights of states and not the people. SADC states have been cautious about allowing IL to limit, or define in any enforceable sense, their national practice.

The dilemma over community rights and the development of institutional systems are evident in most sectors. In the water sector, countries in the region have moved towards the creation of catchment management agencies at the national level and towards the establishment of basin organisations at the regional level. However, there is poor integration of these structures. Consequently the gaps between water users and the ministries, and water users and multi-lateral institutions responsible for water development, continue to widen. This does not bode well for successful transboundary management, as local users are not incorporated into the planning process at the regional level. The lack of local participation in transboundary water development may contribute to tension between the state and communities and between communities across borders. Other TBNRM initiatives, with the possible exception of Zimbabwe Mozambique and Zambia Transboundary Natural Resource Management Project (ZIMOZA), have also not created institutional systems that link these two levels.

Conflict Resolution systems are poorly developed. In particular, no provision is made for addressing conflicts between citizens and their state, citizens and another state or different groups of citizens. Litigation is extremely limited as a mechanism for resolving conflict. At the inter-state level, states may have recourse to the International Court of Justice or to arbitration. The UN Convention on Water makes an important step forward for addressing conflict. It requires states not to discriminate between its own citizens and other citizens in determining access to the courts. Despite this, this Principle has not been incorporated into regional agreements. The success of this, as a tool for conflict resolution, is linked to the opportunities each national system creates for citizens to defend their rights both against the state and other citizens. TBNRM agreements should make provision for the principle of non-discrimination. Nevertheless, given the existing tensions, greater attention also needs to be given to the issues of negotiation, mediation and arbitration. Additionally, it is important to bring the concept of equitable utilisation in line with that of justice.

Another key issue is how to reconcile development and private interests. Increasingly TBNRM seeks to include the private sector as a stakeholder and a major partner. SDIs are essentially private sector driven co-operative arrangements with the primary purpose of stimulating economic activity. The real challenge facing these regimes is how to reconcile private sector interests and the objectives of broader-based development. In particular, the issue arises as how to ensure that these developments promote the realisation of SADC's objective of poverty alleviation, improved livelihoods and development. The issue of equality between stakeholders, and how to ensure the effective participation of communities given the existing inequalities, is not addressed. Indeed many of these initiatives may increase opportunities for existing private sector but not for local communities. In this context, the participation of the state in these initiatives



may need to be increased. Also opportunities for more diversified participation in economic planning is essential. Again the legal regime needs to be modified to ensure a more equitable balance between the rights and interests of the various stakeholders.

The IL regime, at the global and regional level, creates important guidelines for developing TBNRM initiatives. The issues of sovereignty, governance relations, equity, mutual and diverse interests, local rights, conflicting values and interests need to be addressed. Additionally TBNRM must develop systems that can meet the challenge of sustainable management, poverty alleviation and development.



INTRODUCTION

Transboundary natural resource management, for the purposes of this project, refers to “any process of co-operation across international boundaries that facilitates or improves or purports to facilitate or improve the management of natural resources to the benefit of all parties in the area concerned.”¹ It is restricted to co-operation across international boundaries.

The World Conservation Union’s Regional Office for Southern Africa (IUCN ROSA) commissioned this review of the legal and policy framework for TBNRM as part of a wider review process that seeks to interrogate TBNRM. The other two papers commissioned are:

1. A Critique of Transboundary Natural Resource Management in the Region.
2. A Comprehensive Review and Analysis of Specific TBNRM Initiatives in the Region.

Collectively, the papers seek to improve the “understanding of TBNRM in the region and highlight key challenges confronting TBNRM initiatives, with a view to developing a regional TBNRM programme.”

The Terms of Reference for this paper, require it to:

1. describe specific multilateral arrangements and arrangements of a transboundary nature;
2. describe, at a general level, the implications of national legislation in SADC countries for transboundary initiatives; and
3. highlight the constraints and opportunities, and identify key problems and gaps.

The review is based on a desk review of transboundary natural resource management (TBNRM) agreements and the relevant legal and policy instruments and frameworks at the national level. It was not possible, given the vast number of agreements in this area, to review all relevant agreements and thus a representative selection of key agreements was made. In addition to the actual agreements many secondary sources were also reviewed. Regrettably, no agreements or legal documentation on Spatial Development Initiatives were obtained;² this section is based entirely on secondary sources.

Only formal and predominantly written or recorded agreements were reviewed. Although there are undoubtedly cross-border community initiatives that are regulated by customary law and practice, none of these are discussed. This would require field research, which clearly falls outside the terms of reference. Consequently the review is skewed towards state initiatives. Many countries in southern Africa have strong traditional institutions that are key players in the natural resource management (NRM) sector.³ The importance of initiatives at the community level can’t be discounted.

¹ Griffin, 2000

² Despite requests to the responsible authorities.

³ Irrespective of whether this legal pluralism is recognised or not.

Given the terms of reference⁴ this paper considers existing, and not potential, areas of transboundary collaboration. Consequently the areas of air pollution, inland fisheries and forestry are not reviewed here. This could be an area for further research as some of these resources offer opportunities for collaborative management. A case in point is inland fisheries. Indeed some countries, including Malawi and Zimbabwe, have national legislation that is directly concerned with this area and that deals with transboundary issues. However, as far as is known, there are no collaborative transboundary agreements dealing with inland fishery. Similarly although all the countries have air pollution legislation and are subject to the customary international law requirements regarding good neighbourliness, there appear to be no transboundary agreements in this area. Similarly, collaboration in forestry is not addressed even though the current draft SADC forest protocol makes provision for collaborative transboundary management. At least three SADC states, Zimbabwe, Malawi and South Africa, have legislation that directly addresses transboundary forest issues.

It is thus a broad overview as opposed to a rigorous analysis of TBNRM initiatives or a comprehensive review of national legislation. It is intended to assist and inform thinking about TBNRM:

- The first part describes the general framework for TBNRM and focuses on the legal basis for co-operation, the human rights context and general issues emerging from national legislative and policy framework. Much attention is paid to developing a human rights approach because, despite the rhetoric around rights, it remains an under-developed area in the literature and is poorly developed in practice. This human rights framework sets the basis for reviewing the agreements; TBNRM initiatives are essentially promoted from an ecological or economic perspective.
- The second part examines existing TBNRM agreements. This takes a sectoral approach⁵ as this allows the reader to easily ascertain what the state of the law is in relation to any given resource. These resource-focused sections identify key issues within the national legal framework that may provide opportunities for, or hinder, the development of TBNRM initiatives. These descriptive accounts are followed by a brief analysis that may assist in developing appropriate models.
- The third and final part is more analytical; it identifies and addresses key legal and policy issues that should form the basis for developing successful TBNRM initiatives that meet not only regional development and conservation objectives but that also address human rights and governance concerns. Throughout an attempt is made to understand what the “lived reality” of the law is – that is, how it is implemented and experienced.

⁴ see above

⁵ An alternative approach could be to classify TBNRM initiatives on the basis of objective of management, primary actors, purported beneficiaries, or the land type on which the activity is based. See, for example, the paper by Brian Jones and Eben Chonguica that forms part of this study and is published as paper 2 in this series.



PART ONE-THE GENERAL FRAMEWORK FOR DEVELOPING TBNRM APPROACHES

This part considers the broad legal framework in which TBNRM programmes may be developed. It considers the implications of the legal regime at the global, regional and national levels. It is divided into four sections:

- Firstly, it considers **the legal authority for co-operation and the underlying principles on which such collaboration is based**. It identifies principles that have emerged at the global level and how this regime has been further developed by the regional co-operative regime established under the SADC Treaty.
- Secondly, it considers how **human rights** set the tone for collaboration and state-citizen relations.
- Thirdly, it describes customary international law principles that define or inform **environmental managerial approaches**.
- Fourthly, and finally, it considers the implications of the specific **national regimes** for co-operation. More detailed information about national legal regimes in respect of specific resources and initiatives is presented in Part II, which focuses on specific TBNRM initiatives.

A THE LEGAL BASIS FOR COLLABORATION

The United Nations Charter⁶ urges states to co-operate so as to avoid the scourge of war, re-affirm fundamental human rights, establish conditions under which justice and mutual respect can be maintained and promote social progress. To these ends, states commit to practice tolerance and to live together in peace as good neighbours and to employ “international machinery for the promotion of the economic and social advancement of all peoples.”⁷

The framework for this broad commitment to collaboration is further developed through principles of customary international law,⁸ regional agreements and specific multi-lateral treaties.

1 General Principles

Customary international law⁹ defines several fundamental principles that set the basis for co-operation. These are:

- state sovereignty,
- state responsibility and
- good neighbourliness.

The principles of state sovereignty and state responsibility are complementary. State sovereignty denotes the state's right to act without outside interference, whereas state responsibility refers to its obligation to act in a way that is not harmful to other states. This is more of a duty of diligence than one of strict liability. The principle of good neighbourliness may be thought of as one aspect of state responsibility. It requires a state's activities to be carried out in such a manner that the rights of its neighbours are respected. Implicit in it, is the obligation to co-operate in matters of mutual concern.

The SADC Treaty,¹⁰ adopted in August 1992, sets the basis for regional integration and co-operation in the southern African region. Today there are 14 members of the community.¹¹ It specifically recognises the above three principles of international law. Additionally, it commits member states to the fundamental principles of:

- Sovereign equality of member states.
- Solidarity, peace and security.
- Human rights, democracy and rule of law.
- Equity, balance and mutual benefit.
- Peaceful settlement of disputes.

⁶ Adopted on 26 June 1945 and entered into force on 24 October 1945.

⁷ Preamble, United Nations Charter

⁸ Customary international law refers to state practice that has, through long and consistent use, emerged as internationally applicable law.

⁹ Customary international law binds all states; Treaty law only applies between the Parties to it.

¹⁰ The Treaty assumed the force of law upon ratification by the member states in September 1993. This has direct implications for the development of national policy, law and programmes. Nevertheless the actual incorporation into national law will depend on the systems of incorporation applicable in the various states.

¹¹ Angola, Botswana, Democratic Republic of the Congo, Lesotho, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.

2 Priorities and Objectives of Collaboration

The general principles identified above, set the basis for regional co-operation in the areas set out in the objectives and in Article 21 on Co-operation. Article 21 commits member states to co-operate in the areas of:

- Food security, land and agriculture;
- Infrastructure and services;
- Industry, trade, investment and finance;
- Human resource development, science and technology;
- Natural resources and environment;
- Social welfare, information and culture; and
- Politics, diplomacy, international relations, peace and security.

Additionally, several environment multi-lateral treaties, to which a significant number of SADC states are party, commit the parties to co-operative inter-state management.

Although the SADC Treaty does not specifically address TBNRM it recognises the value of co-operation. Article 5, paragraph 2 commits states to:

- Harmonise political and socio-economic policies and plans;
- Encourage the peoples of the region and their institutions to take initiatives to develop economic, social and cultural ties across the region, and to participate fully in the implementation of the programmes and projects of SADC;
- Develop policies aimed at the progressive elimination of obstacles to the free movement of capital and labour, goods and services, and of the peoples of the region generally, among Member states; and
- Promote the development, transfer and mastery of technology.

TBNRM initiatives could fall within the ambit of such collaboration provided however that they contribute to fulfilling SADC's objectives. The objectives¹² constitute the reasons for co-operation and should be used as the basis to "test" TBNRM initiatives against. Several objectives are directly relevant for natural resource management. Firstly, the objectives include "the sustainable utilisation of natural resources and environmental protection."¹³ However, this objective must be seen in the context of other objectives, and in particular, in the context of the desire to "promote economic growth, alleviate poverty and enhance the quality of life for the peoples of southern Africa."¹⁴ Secondly the objectives call for "self-sustaining development on the basis of collective self-reliance and the inter-dependence of the states"¹⁵ Although many of the existing TBNRM agreements purport to address these objectives, the ability to support and promote such development needs to be critically assessed and not just assumed.

Although co-operative initiatives are potentially an important strategy, they should be balanced with appropriate national level activities.¹⁶ What such balance is, is a matter of interpretation – nevertheless the Treaty's objectives suggest that

¹² see Article 5.

¹³ Article 5.1.g.

¹⁴ Article 5.1.a.

¹⁵ Article 5.1.d.

¹⁶ Article 5.1.e; this objective recognises the need to "achieve complementarity between national and regional strategies and programmes".

TBNRM initiatives will need to be balanced with local and nationally driven management programmes.

The SADC Treaty also recognises that achieving its objectives requires “evolving common political values, systems and institutions.”¹⁷

Advocates of TBNRM argue that such initiatives will address not only these, but other SADC objectives. TBNRM initiatives, it is argued will promote the realisation of the objective to “promote and defend peace and security”¹⁸ where it lessens conflicts around resources. While this maybe true for inter-state conflict it may not be the case with internal conflict. Indeed TBNRM may exacerbate conflict within states. See for example Box 2. Similarly, advocates argue that TBNRM will, consistent with the SADC objectives, “promote and maximise productive employment and utilisation of resources of the region.”¹⁹ It is also argued that it will “strengthen and consolidate the long-standing historical, social and cultural affinities and links among the peoples of the region.”²⁰

3 Comment

This global and regional framework for collaboration implies that the founding principles of TBNRM initiatives in the region must include state sovereignty, state responsibility and good neighbourliness. Additionally provision for sovereignty equality should be made.

Although most existing TBNRM agreements specifically recognise these values their actual realisation will be affected by the balance of power between states. If equality is to be a reality and not just rhetorical then negotiation processes need to recognise the inequality between parties rather than romantically dismiss the impact of power relations. Measures must be created to deal with and to protect weaker states against abuse of power. In some cases this may involve special technical support for states or detailed benefit sharing provisions. Indeed this can be an important area for state-non-governmental organisation (NGO) or state-private sector collaboration in achieving national objectives.

The SADC Treaty provides an enabling environment for the development of TBNRM initiatives that are in keeping with its overall objectives and principles. It does not however prescribe that states must enter into such arrangements. However, the Wildlife Protocol²¹ specifically recognises the value of TBNRM initiatives and encourages members to enter into such arrangements.²² The Protocol on Shared Watercourse System in the Southern African Development Community Region (Shared Watercourses Protocol) provides for collaborative management of shared waters. The draft Forest Protocol encourages member states to enter into collaborative and integrated management of forests that span their borders.²⁴

¹⁷ Article 5.1.b.

¹⁸ Article 5.1.c.

¹⁹ Article 5.1.f.

²⁰ Article 5.1.h.

²¹ The provisions of the Wildlife Protocol are discussed in more depth in the section on wildlife management.

²² Article 7.

²³ Article 19/Draft November 2000.

TBNRM initiatives should promote the realisation of the objectives of the SADC Treaty. The issues of conservation and sustainable use can not be separated from the economic development objectives. While at face value TBNRM initiatives appear to address both these objectives, its success in actually achieving these objectives should not be assumed. Their realisation will be based on how these agreements are framed and are implemented. In respect of development and economic growth and the alleviation of poverty it is clear that TBNRM promoters will need to understand the development strategies and needs of the region. An important challenge is how to reconcile these initiatives with the agricultural aspirations of the region. In particular TBNRM initiatives will need to move beyond simply classifying veterinary provisions as a constraint to environmental management to seriously evaluating the potential benefits of livestock production at the national and household level against the benefits of wildlife management. Additionally, some reconciliation between national and household economic objectives will need to be reached.

TBNRM initiatives should not only contribute to development and economic growth but also should enhance the standard and quality of life of the peoples of southern Africa and support the socially disadvantaged. Clear criteria for determining what amounts to improvement in quality of life is critical. Indicators of improved quality of life may include an increase in the available cash people have, an increase in economic opportunities, inclusion in governance and management of resources, as well as respect for cultural systems and other social values. These different improvements may not all be achievable in all instances. For example, a transboundary park may result in the loss of traditional resource rights but increase tourism revenue nationally. Thus, TBNRM initiatives need to clearly address these issues and develop systems for reconciling conflicting objectives. In particular it will need to squarely face the controversy around the success of member state's wildlife programmes from a community perspective and to test its assumptions about what constitutes an improved livelihood. It is important, to acknowledge that while TBNRM, like national natural resource management initiatives may increase the legal entitlements of communities it may result in a corresponding decrease in de facto rights. Additionally, we need to decide who determines that there has been an improvement in the quality of life. In this regard different stakeholders may place different values on the outputs of TBNRM. However, given emerging rights of participation in international law, this determination process should be inclusive of all stakeholders. The difficulties in reconciling these different values are evident from the example in the Box 2. The real challenge is for TBNRM initiatives to create systems that effectively promote community interests.

In respect of SADC's peace and security objective it must be asked whether TBNRM may exacerbate existing conflicts. Such conflicts may include conflicts of authority, conflicts over rights and in particular loss of title, conflicts over access to natural resources, as well as conflicts about the distribution of benefits. TBNRM initiatives should move to resolution of existing and potential conflicts through the development of appropriate conflict resolution mechanisms. Transboundary parks are particularly problematic where these further entrench the loss of rights of local communities, for example, by the transfer of title or authority to state authorities (such as parks' departments) or through the formalisation of such title. The exacerbation of conflicts may directly undermine the objective of achieving sustainable utilisation of natural resources and effective protection of the environment.

B HUMAN RIGHTS FRAMEWORK

International law defines the relationship between states. However it also increasingly regulates the relationship between citizens and the state and states' obligations vis-à-vis natural resource management.

Human rights considerations have been a key aspect of global co-operation since the creation of the United Nations, at the end of the Second World War. Since then, the human rights framework has been developed considerably. This development may be linked to struggles of the world's peoples against colonialism, oppression, genocide, sexual discrimination and other evils. The adoption in 1966 of the International Covenant on Economic, Social and Cultural Rights marked the beginning of the adoption of agreements at the global level that moved beyond first generation²⁴ human rights. In the following decades rights regimes continued to develop. These included rights of indigenous people and tribal minorities, farmers, women and children. The 1990s saw the adoption of agreements that consolidated these approaches. These include the Vienna Declaration and Programme of Action²⁵ and at the environmental level, the Rio Declaration on Environment and Development²⁶

Human Rights are a key consideration in that they create the framework not only for inter-state action but also for how states deal with their own citizens. Consequently human rights place constraints on how environmental management at both the national and regional level is carried out.

Given these limitations understanding the human rights context is particularly important. It is also important because the current drive towards TBNRM focuses on ecological and economic objectives and neglects the rights issue. TBNRM approaches are increasingly posed as an important tool for natural resource management in southern Africa. Its perceived value lies in increasing options or opportunities for habitat protection, tourism, employment, economic empowerment and an increase in the benefits realised from natural resource management. The ecological importance of these mega-management areas tends to be emphasised: "international borders are political, not ecological boundaries."²⁷ TBNRM is also increasingly advocated because ecosystems and natural resources, such as water, fauna, and air, are shared (by states) in that they move across or straddle political boundaries. Scale is also seen as important from an economic perspective. A key issue that has not been addressed in existing literature, is what the implications of this increase in size is for local level rights and interests. Additionally the issue of how this re-location of primary managerial responsibility at the inter-national level will affect already marginalised and fragile communities is not addressed. Given this failure in the literature (and practice) to address these issues, this section considers the relationship between TBNRM and citizens' (human) rights and sets the basis for evaluating existing initiatives and for developing an approach to new TBNRM initiatives.

²⁴ These are civil and political rights.

²⁵ Adopted by the United Nations World Conference on Human Rights in 1993.

²⁶ Adopted at the United Nations Conference on Environment and Development in 1992.

²⁷ Griffen *et al*, 2000, xii



It is now widely accepted in environmental circles that good governance is essential to establishing sustainable natural resource management systems. Good governance requires respect for rights and thus human rights law is an important consideration. It also focuses on the processes of decision-making and the implementation of these decisions. Good governance requires the setting up of transparent and accountable procedures.

1 Traditional Resource Rights

Today international law recognises the rights of peoples, indigenous people and communities embodying traditional lifestyles to natural resources. Such rights are also known as traditional resource rights. These rights should be an important consideration in defining any natural resource management initiative, including transboundary ones. Article 8j of the Convention on Biological Diversity, for example, provides that subject to national legislation, states must:

“respect, preserve and maintain knowledge of indigenous and local communities embodying traditional lifestyles relevant for the conservation and sustainable use of biological diversity.”

These rights are also recognised in a number of non-legally binding international agreements to which many SADC states are party.²⁸ Chapter 26 of Agenda 21, for example, provides support for indigenous peoples' rights to ownership and control over traditional resources. It states that:

“Some indigenous people and their communities may require, in accordance with national legislation, greater control over their lands, self-management of their resources, participation in development decisions affecting them.”

and

“Indigenous people and their communities have a historical relationship with their lands and ... have developed over many generations a holistic traditional scientific knowledge of their lands, natural resources and environment ... national and international efforts to implement environmentally sound and sustainable development should recognise, accommodate, promote and strengthen the role of indigenous people and their communities.”

Important too is the legal protection against the arbitrary extinguishing of these rights. Such extinction may take place through displacement, conversion of use and acquisition. The 1988 United Nations Commission on Human Rights' Guiding Principles on Internally Displaced People, although not directly concerned with traditional resource rights, recognises that certain groups may require greater legal protection from forced displacement. Principle 9 provides that states are under an obligation to prevent the displacement of indigenous peoples, minorities, peasants, pastoralists and other groups with an attachment to their land. This right is particularly important for protecting traditional resource rights and must be respected in developing TBNRM initiatives. This issue is further addressed under the next section²⁹ Existing practice is discussed in the part dealing with specific TBNRM agreements.³⁰

²⁸ Including the African Charter on Human and People's Rights, International Labour Organisation's Indigenous and Tribal people's Convention and the Convention on Biological Diversity.

²⁹ 2. Protection of Existing rights, page 18.

³⁰ See for example the discussion on Kgalagadi Trans-national Park (page 73), and comment (pages 85-91)

Closely related to traditional resource rights is the “right to development,” which is enshrined in the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights as well as in the International Labour Organisation Convention 169. The right to development includes the right of peoples to control their own resources and accordingly limits the powers of the state and makes states accountable to human rights standards. However which “people” constitute a “people” in law and thus entitled to such right is a controversial matter. It will however almost certainly include groups recognised as “indigenous peoples.” In southern Africa this includes the San People.

This right to natural resources needs to be taken into account in defining and establishing trans-national resource management agreements. This may require acknowledging communities as stakeholders and involving them in negotiations and management of such initiatives. The acknowledgement of traditional resource rights requires the recognition of the right to prior informed consent (PIC). PIC, in turn, requires full acceptance of an activity by the community concerned and implies the right to stop the activity from proceeding or to halt it if it has already begun.³¹

It is important for TBNRM initiatives to strive to be consistent with these rights.

2 Protection of Existing Rights³²

All rights that are protected in law may not be arbitrarily extinguished. This includes rights to land and resources even where these may be less than the right of ownership. Rights that are less than ownership include rights of use, passage and management. Rights may only in limited circumstances be extinguished for development projects.

This right has special relevance for TBNRM in southern Africa as many communities throughout this region have suffered displacement as a result of natural resource management and development initiatives. The most obvious examples of this is displacement for the construction of large dams (including transboundary dams) and game fences; parks’ initiatives have historically displaced people and some current transfrontier conservation areas (TFCA) initiatives reinforce this historical displacement of people. A cautious approach should be taken in developing TBNRM initiatives so that they do not reinforce such displacement or contribute directly to further displacement.

The 1998 United Nations Commission on Human Rights Guiding Principles pertaining to internally displaced people, although not legally binding, creates a useful first step for dealing with displacements and the loss of rights. These Principles affirm the right of all persons against arbitrary displacement and extinguishing of their rights. Arbitrary displacement includes large-scale development projects, which are not justified by compelling and overriding public interest.³³ Where rights are extinguished or diminished, then in keeping with international law principles, compensation should be provided.

³¹ IUCN, 1997, 90.

³² This section is based on the Mohamed-Katerere and Ncube (2000) Report on the Independent

Investigation of Human Rights Abuses within Zimbabwe's Communal Areas Management Programme for Indigenous Resources.

³³ Principal 6.



Principle 7 of these Principles provides that the free and informed consent of those to be displaced must be sought prior to their displacement. Additionally the extinguishing of rights would need to be carried out in such a manner so that it does not violate other civil and political rights. Coerced displacement may also violate the rights to freedom of movement and residence. Article 13 of the Universal Declaration of Human Rights, provides that everyone has the right to freedom of movement and residence within the border of each state. This right may only be subject to such limitations as are determined by law solely for the purposes of:

- securing due recognition and respect for the rights and freedoms of others, or
- meeting the requirements of morality, public order and general welfare in a democratic society.

It is further provided that these rights and freedoms may in no case be exercised contrary to the purposes and principles of the United Nations. Similar provision is made in Article 12 of the African Charter on Human and People's Rights.

States are required to provide assistance to internally displaced persons. This includes the obligation to ensure, to the greatest practicable extent, that proper accommodation is provided (Principle 3). Principle 18 provides that all displaced people, regardless of the circumstances, have a right to an adequate standard of living including essential food, potable water, appropriate clothing, sanitation and essential medical services. Again where TBNRM initiatives displace people and can be legally justified, compensation will need to be made.

3 Respect for Civil and Political Rights³⁴

Human rights law establishes rights that need to be observed by states in their administrative and management practices. The concept of the "inherent dignity" of human kind sets the basis for this. The Universal Declaration of Human Rights acknowledges this dignity and in Article 5, provides that:

"no one shall be subject to torture or to cruel, inhuman or degrading treatment or punishment."

What constitutes "degrading or inhuman treatment" may be established with reference to other conventions. No state action, including the establishment of TBNRM initiatives, should result in degrading or inhuman treatment. The International Covenant on Civil and Political Rights establishes the right, in Article 17, to non-arbitrary or unlawful interference with one's privacy, family or home. Most SADC countries recognise this right within their constitutions. From a transboundary management perspective, the implication of these rights is that any interference with local rights must not only be done subject to national law, but also in a manner consistent with other civil and political rights.

³⁴ This section based on the Mohammed-Katerere and Ncube (2000) Report on the Independent Investigation of Human Rights Abuses within Zimbabwe's Communal Areas Management Programme for Indigenous Resources.

4 Rights of Local Participation

An analysis of environmental conventions³⁵ adopted at UNCED, and thereafter, reveals that participation in management and decision-making by all stakeholders is now considered fundamental for sustainable environmental management. This shift took place in the broader development context in which the issue of governance and sustainable development had moved to the centre-stage of environmental management. In this context devolution and participation had emerged as important issues. This shift took place amidst increasing concern by governments and non-governmental actors about the success of natural resource management and the ability of the state to effectively engage in this area. It resulted in a global trend to participatory approaches to natural resource management.³⁶

These agreements provide for participation that is proactive and that creates opportunities for individuals and groups to participate in the formulation of management strategies as well as the implementation thereof. Principle 10 of the Rio Declaration, for example, provides that: -

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.”

The well-established methods for public participation in commonwealth countries of political representation through voting, public rights to object to development plans and the right to institute proceedings for judicial review of administrative process clearly do not fulfil the requirements of proactive participation. The well-established methods fail because they do not take cognisance of the lived reality of rural people. They fail, too, to give people real control over outcomes. TBNRM initiatives need to build systems of participation based on the social reality if they are to be more than a superficial commitment to this right.

From an environmental justice perspective, participation must:³⁷

- Allow people a say in decisions that affect their lives;
- Include the promise that the public contribution will influence the ultimate decision;
- Communicate the interests and meet the process needs of all participants;
- Seek out and facilitate the involvement of those potentially affected;

³⁵ These include the Rio Declaration, Agenda 21, the Convention on Biological Diversity, the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and sustainable Development of all types of Forests, International Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification.

³⁶ Adams and Hulme, 1998; Agrawal and Gibson, 1999; Tyler, 2000 cited in the Mohamed-Katerere (2001)

³⁷ Kuhn, S (1999) 649-50.



- Involve participants in defining the participation process;
- Communicate to participants, how their input was, or was not, utilised;
- Provide participants with adequate information; and
- Treat participants as equal partners.

Article 23 of the SADC Treaty specifically commits SADC and the governments of member states to “involve the peoples of the region and non-governmental organisations in the process of regional integration.” And further, that SADC will “co-operate with, and support the initiatives of the peoples of the region and NGOs, contributing to the objectives of this Treaty, in the areas of co-operation in order to foster closer relations among the communities, associations and people’s of the regions.” This goes some way to recognising the need for participatory processes at the regional level.

The status of rights of participation remains controversial – some consider these rights as human rights while others simply consider them as statements of intent. This controversy stems in part from the fact that the new generation of environmental agreements, in establishing these new approaches has not placed enforceable obligations on the state. Nevertheless, there is a strong moral and ethical basis for arguing that these rights (whether established or emerging) should set the framework for developing TBNRM initiatives.

5 Right to a Remedy

Where any right of any person is affected, that person is entitled to a remedy in terms of international law. The International Covenant on Civil and Political Rights Article 2 provides that:

“any person whose rights and freedoms, as herein recognised, are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity.”

Similarly, Article 8 of the Universal Declaration on Human Rights recognises that every person has a right to an effective remedy to protect her or his rights. Similarly the Rio Declaration recognises this right to redress and a fair administrative and judicial process.

Most constitutions in the region recognise that citizens have a right to a remedy. However, in many of the countries effective access to justice remains a problem. Access to information is a key aspect of this.

6 Comment

This human rights framework places limitations on the state and creates the framework for defining the relationships between states and their citizens. Importantly a human rights approach requires that environmental management and choices must not be driven by purely technical considerations but should be informed by the political, social and cultural. Institutional systems for decision-making and planning consequently can not (if rights are taken into account) be based on hierarchies of technical competence.

Development and conservation initiatives, including transnational resource management, need to take into account traditional resource rights of indigenous people, all peoples and communities embodying traditional lifestyles. In some cases this will require acknowledging communities as stakeholders and involving them in negotiations and management of such initiatives. The acknowledgement of traditional resource rights requires the recognition of the right to prior informed consent. This right requires full acceptance of an activity by the community concerned and implies the right to stop the activity from proceeding or halt it if it has already begun. Many SADC states are resistant to the express recognition of people's rights within multi-lateral agreements arguing instead that this issue is purely a domestic matter. As is illustrated in Box 1, practice in many states falls short of recognising such rights.

Rights may not, under international law, be arbitrarily extinguished. Thus, in defining TBNRM initiatives the implementing state agencies must exercise their powers so as not to undermine the right to housing and an adequate standard of living. Also, there is an obligation on the state to exercise its powers with respect for human dignity and the right not to be subject to inhuman treatment.

Where rights are extinguished it is important that proper consultative procedures are followed and that persons are compensated for any loss of rights. The emerging international law framework indicates that forced displacement is unacceptable globally unless it is for compelling and overriding public interest. Several transboundary parks threaten human displacement. It is unlikely that these transboundary initiatives could qualify as "compelling" particularly given the negative attitude of many communities to such activities. Campbell et al,³⁸ for example, note that many communities in Zimbabwe perceive wildlife and National Parks negatively – wildlife is seen as destructive as it damages crops, increases livestock mortality, and poses danger to human life. They note also that many residents in the Sengwe area bordering the proposed GKG Transfrontier Park remember the forced removals when the National Park was created. Based on interviews in that area they estimate that from a household perspective it is 5-10 times more lucrative to poach animals than to wait for benefits from so called community management. The value of transboundary approaches to communities in Mozambique can also be called into question. Firstly the small game populations mean that returns from wildlife-based tourism may be low. Secondly the impact on livelihoods that derive income from charcoal, firewood, palm wine, game and fish will need to be considered.

All persons are entitled to a remedy where their rights are affected by a state action. However effective access to a remedy requires more than just statutory recognition of that right. For it to be meaningful and effective, administrative decision-making processes must be transparent and citizens must have significant rights of access to information. In many countries of the region civil society organisations claim that rural people have inadequate access to justice. Given this TBNRM agreements need to make effective provision for addressing conflicts and should not rely on existing systems.

³⁸ (2000)

C ENVIRONMENT MANAGEMENT PRINCIPLES

International law, at both the global and regional level, identifies environmental management principles that should be observed in TBNRM. Key customary international law principles include the precautionary principle and the originator principle (polluter pays principle). As principles of customary law these should be observed in the environmental management practices of all states. Other legal concepts, which have emerged at the global level but are not yet legal principles, such as inter-generational equity and environmental justice may inform management and planning. These are not discussed here.

Legal principles are standards that guide action, their interpretation is linked to particular circumstances. Unlike rules they do not create hard-and-fast standards. Essentially a principle “states a reason that argues in one direction, but does not necessitate a particular decision.”³⁹ A principle may thus be overridden or its application modified by other principles. Where principles are in conflict they are weighed against each other. Additionally the principles are applied in the context of environmental management and development objectives including sustainable use and conservation. The Convention on Biological Diversity (CBD), for example, recognises that development is an over-riding priority of developing countries, this as discussed earlier, is echoed in the SADC Treaty.

1 Precautionary Principle

The precautionary principle requires that harm be avoided rather than redressed. At international law the formulation of this principle varies from a strict precautionary approach bordering on prevention to a precautionary approach based on an assessment of risks. It may however be interpreted so as to reconcile conflicting interests – for example the desire for development against the desire to avoid environmental damage.

The approach to the precaution principle in most developing countries is reflected in the Principle 15 of the Rio Declaration, it provides:

“In order to protect the environment, the precautionary approach shall be widely applied by states according to their capabilities. Where there are threats of serious or irreversible damage, lack of scientific certainty shall not be used as a reason for postponing cost effective measures to prevent environmental degradation.”⁴⁰

Similarly the CBD notes in its preamble:

“... it is vital to anticipate, prevent and attack the causes of significant reduction or loss of biological diversity at source,”

and

“... where there is a threat of significant reduction or loss of biological diversity, lack of full scientific certainty should not be used as a reason for postponing measures to avoid or minimise such risk.”

³⁹ Dworkin cited in Dickson, B.

⁴⁰ My emphasis.

2 The Originator Principle

This principle is the corner stone of environmental liability. Where an action has unwanted consequences the issue arises as to who should be responsible to assume the costs associated with that action.⁴¹ Environmental law seeks to internalise these costs. In keeping with principles of criminal and civil liability, the originator principle demands that the person who initiated the action is responsible for its consequences.

Where there are many intervening actors who contribute to damage caused it is not always easy to determine where liability should fall. Indeed in some circumstances it may be cost effective to place this responsibility elsewhere, such as in a local authority and find other ways of recuperating the cost. This has typically been the case where water suppliers have assumed responsibility for water quality and established, for example, municipal water purification systems. Where it is possible and cost effective to make the originator responsible, the originator principle comes into effect. The best-known principle derived from this is the polluter pays principle.

This principle requires that the polluter be held responsible for the environmental and economic effects of his or her polluting activities. The Rio Declaration, for example, provides:

*"States shall develop national law regarding liability and compensation for the victims of pollution and other environmental damage; they shall co-operate in an expeditious and more determined manner to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdictions or control to areas beyond their jurisdiction."*⁴²

and

*"States should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should in principle, bear the costs of pollution, with due regard to the public interest and without unduly distorting international trade and investment."*⁴³

3 Comment

As principles of customary environmental law, both the precautionary principle and the originators principle should inform environmental choices at all levels. Recognising these customary international law principles creates opportunities for harmonising environmental management approaches not only within states but also at a regional level.

The precautionary principle recognises that managerial decisions are not only technical decisions but are also informed by ethical, ecological, developmental, social and other considerations. Recognising this principle necessarily implies that

⁴¹ The origins of this principle can be traced back to the Trail Smelter Arbitration (33 AJIL (1939) 182 and 35 AJIL (1941) 684 and the Corfu Channel Case ICJ Rep(1949) 1.

⁴² Principle 13.

⁴³ Principle 16.

institutional systems created must be capable of moving beyond the narrow limits of technical risk assessment and must be capable of making lifestyle choice type decisions. This requires the recognition of the multiple values that inform decision-making of multiple stakeholders and can be addressed through the inclusion of multiple stakeholders. TBNRM initiatives incorporating this principle will need to create decision-making process that are able to evaluate and deal with a range of factors. Processes and institutional systems will need to be inclusive.

The originator principle requires that notions of environmental responsibility go beyond established legal rules of causality and that new approaches be developed for appropriate apportioning of responsibility for the negative impacts of development.

Existing TBNRM initiatives tend to focus on sharing of benefits and neglect the issue of costs. Recognising the originator principle requires developing systems of sharing of costs based on responsibility. This is particularly important, as “responsibility” for the costs of TBNRM may not be equal and thus should be shared proportionately. An example would be the cost to individuals states of the transmission of wildlife diseases from one state to another state on biological diversity at the national level.



D CROSS-CUTTING ISSUES AT THE NATIONAL LEVEL

At the national level, law applicable to natural resource management defines relationships between citizens, as well as between the citizens and the state. If national law is to meet the key objectives of sustainable development and conservation, then it must create an enabling environment for human and environmental sustainability. On the basis of recent (the last 10-20 years) legislative interventions by the state, key shortcomings can be identified. Problems can be identified at two levels:

- issues of power and the legitimacy of the law; and
- how development and systems of resource use are planned.

Issues of power and authority have emerged as critical both for inter-state relations and relations within states.

Resource sustainability is not only a factor of power relations but is also derived from the technical soundness of management. Two critical issues can be identified here: inadequate resource assessment and monitoring systems and impact assessment. Also important are the respective roles of different forms of technical knowledge in this process. Related to this are issues of responsibility for negative impacts at both the human and environmental level. Increasingly law is being used by SADC states to create managerial systems that address these concerns and at this level a plethora of laws, strategies and action plans have been adopted. This issue is considered here and then picked up again under the sections on specific resources.

1 Compatibility

Although national legal systems throughout the region have much in common, differences in managerial systems and rights of stakeholders may make establishing TBNRM initiatives difficult. Indeed SADC has already recognised the need to achieve complementarity at this level. The development of Protocols in specific areas (such as wildlife and shared watercourses) goes some way to establishing common systems and sets a clear basis for refining, redefining and amending national laws and policies.

Most of the region has legal systems that are derived from the English legal system. Under this approach law tends to be detailed and defines the “entire” ambit. In contrast law in Mozambique is framework legislation – “laws are limited to stating the general principles and guidelines which instruct the elaboration of regulations which will define the specific powers and authorities, rights and obligations as well as procedures and system for the exercise of powers, authority, rights and obligations established or recognised in the law.”⁴⁴ This does not in itself present a problem for co-operation – it must be remembered that in respect of Mozambique for a full understanding of the law both acts and regulations must always be considered. This is not to deny the importance of regulations in the other states.

⁴⁴ Garvey, J (1997) 2.

2 Power Relations

It is now widely accepted that management responsibility and authority need to be linked – necessitating an empowerment of those that live with resources. Where resources remain under state control, and there is a relative scarcity of resources, there is an acknowledgement that the focus must be on expanding partnerships. Social and political movements in the twentieth century increasingly demanded rights vis-à-vis the state and within society. This resulted in the emergence of human rights – “inalienable rights.” At this level rights to the environment, rights of good governance and rights of indigenous peoples have emerged as human rights. Issues of participation, transparency, access to information, the right to redress and accountability have been key focuses. Most governments in the SADC region have moved to address these issues. There has been an explosion of legislative and policy interventions. Despite policy and legislative pronouncements, the lived reality has not always met these intentions. This section considers how key aspects of these relations of power have been constructed within current legislation and policy.

Three issues are considered here: legal pluralism, tenure relations and planning systems. Also important, but not considered here, are issues of state accountability, access to information and the right to redress.

Legal Pluralism

Colonial states throughout the region constructed the relationship between their imposed European systems and local legal norms⁴⁵ so as to systematically deny Africans rights. On the one hand certain aspects of law, particularly personal law, was acknowledged and used to justify the creation of dual political systems that were used to deny Africans citizenship of the new states. At the level of land and natural resources a conflicting approach was taken. Generally as part of the process of acquisition of natural resources and land customary law was held to be inapplicable to these newly acquired state and private resources. This denial that Africans had rules defining rights to natural resources and lands fitted in with the state's desire to restrict access to these resources and to retain the benefits for itself and its settlers. Varying approaches were taken to the applicability of customary law to natural resources in tribal/traditional/communal/customary land. In most however customary law, modified through practice, continued to apply.

Many of the SADC countries continue to have legal systems that replicate this schism. An on-going dilemma for many SADC states is how to reconcile these different value and legal systems. Independent states have generally found it useful to maintain a distinction with regard to the applicability of general and customary law. In some, such as Zimbabwe and Mozambique, there was a deliberate attempt after independence to wrestle all authority away from traditional authorities on the grounds that they had been colonial puppets. Most

⁴⁵ Customary Law is the law of the indigenous people or groups of indigenous people in a given country that has been established over a long period of time. It tends to be locally specific. Many customary law systems are flexible and constantly going through a process of modification in response to new factors. Despite the modification of rules in many instances a clear set of general principal may be identified. General law is the received colonial law as modified by parliament and case law. It is predominately written and its application is based on precedent.

SADC states now recognise, at least at a policy level, that given that customary law reflects local values and practice, systems must be created that acknowledge this role. This approach however is restricted to customary/communal/tribal/traditional land and general law applies to state held land and resources.

In some cases the current legal systems may treat custom of various groups in different ways – for example, the state might recognise the law of the majority yet treat historically disadvantaged groups or minorities as if they have no law. For example, in Botswana, the general presumption is that the San do not have “law”. As Bishop argues, this is both illogical and erroneous: *“San law is essentially a law of consensus. Many of the rules of conduct are geared toward encouraging smooth relations among the constituents rather than providing sanction for transgressions. If they do arise, disputes are settled informally in a style which stresses conciliation and restoration.”*⁴⁶

By retaining control over many resources the state has been able to deny the applicability of customary laws and practices. Consequently, in practice, there are often conflicting rules for management that are used by different stakeholders. Generally the state attempts to enforce general law while local communities struggle to continue to use their own systems of management. This conflict creates a legitimacy crisis and has had dire consequences for natural resource management. It affects community reactions to development initiatives, as illustrated in Box 1 and results in conflicting, and sometimes hidden, management strategies. A further consequence of this is that there are many local uses that are not acknowledged as legal and hence are discounted in the cost benefit analysis of establishing CBNRM initiatives, parks, dams and other development activities. This problem is likely to be exacerbated in TBNRM where decision-making is further removed. Alternatively, hybrid value systems may develop - where the distinction between customary law and general law has become blurred – legal norms at the local level may indeed be a reflection of the interaction between these two legal systems and a range of social, moral and religious norms.⁴⁷

BOX 1: EPUPA DAM - NAMIBIA

“The proposed construction of a hydro-power station in the Epupa district of the Kunene, has unleashed a storm of protest from the surrounding villagers. They say the project is in conflict with the cultural norms of the area. At a recent second public hearing on the project held in the capital, the villagers accused the government of failing to consult with the people affected and take into consideration their culture and traditions. “If they build what will happen to our graveyards and our animals?” asked Headman Hikumuine Kapika. He said there would be no compromise on the issue as it was regarded as taboo to construct a house over the grave of an ancestor. He warned that any attempt to go ahead with the construction would mean an infringement of the rights of the Kaoko people. “Why should they force us to accept their proposal when we told them that we reject the idea totally?” he asked.

<http://www.mg.co.za/mg/news/97jan1/09jan-namhydro.html>

⁴⁶ <http://www.gtz.de/ordoden/capetown/cape07.htm>

⁴⁷ Hellum (1999) 60

It is not possible to create meaningful systems for participation without acknowledging the multiplicity of social and cultural values and hence legal norms. By excluding local norms and values, the law and legal process becomes alien - effectively limiting the ability of local people to utilise the law in ways that enhance their life choices and support their development choices. The development of TBNRM initiatives needs to undertake negotiation with the affected communities and their participation as equal and valuable stakeholders, if these initiatives are not simply going to perpetuate the historical injustice of trivialising customary law and practice. This requires full disclosure and not just selective determination of the issues for discussion.

Another important spin off of this is a continued conflict around perceived and actual roles of traditional and legal institutions regarding land and natural resource management. These conflicting perceptions around authority do not bode well for TBNRM. Where there are such conflicting perceptions then negotiating transboundary agreements needs to include all relevant authorities – real or imagined.

Land and Natural Resource Tenure

Tenure may be understood as the rights and obligations pertaining to a given resource. Tenurial rights vary from ownership rights to use rights to no rights. They denote who the owner of resources is, whom the beneficiary is, who has rights of management, and where ultimate authority lies. Tenurial relations define the rights (or lack of rights) and obligations of various stakeholders not only to resources but also in relation to each other.

Current tenure arrangements are the product of a multiplicity of struggles and social relations. Throughout the region tenure relations continue to reflect extreme imbalances in access to land based not only on race and class, but also access to power. This is true despite land reform initiatives throughout the region. It is particularly evident in countries with significant settler populations such as Namibia, Zimbabwe and South Africa. Despite increasing recognition of local level tenure rights, state ownership remains key. In Mozambique, the state retains title to all land under the Land Law. Communities however “may have permanent rights by fact of occupation... communities may (also) apply for land use title, have their boundaries delimited, and enter into contracts with commercial firms.”⁴⁸ Policy in Mozambique apparently seeks to move beyond the dualistic models of the region and facilitate partnerships between investment and customary sectors.⁴⁹ In a number of countries, including Mozambique and Zambia, the private sector, often represented by foreign capital, is becoming an increasingly important contestator for land and natural resources. In Mozambique foreign concessions pose a serious threat to local smallholder rights.⁵⁰

In all the region's countries local peoples' tenure rights have been modified or displaced by the colonial occupation of land and by the acquisition of land by the state for conservation. In particular, many have lost rights with the imposition of

⁴⁸ Barnes, G (2000) 1.

⁴⁹ Barnes, G (2000) 1.

⁵⁰ McGregor (1997) pp 3-9.

wildlife and forest laws and the creation of protected conservation areas. In most of the region these trends have been perpetuated or only superficially tinkered with after independence. For many years, large forestry concessions in Botswana were granted primarily to large companies or private individuals⁵¹ to the disadvantage of local people under the Fauna Conservation Act of 1961. This Act has now been replaced by the National Parks Act, 1992. In Zimbabwe, until very recently, a similar practice was evident. Yet despite this customary tenure and traditional values about land have persisted. Customary tenure has also been modified by practice with increasing trends to individualisation of ownership and control over resources. In some instances however, this may simply be a reversion by residents to their well-established (customary) practice.

There remain parts of the region where land tenure arrangements are poorly defined or where the legal regime is not implemented. For example, the entire West Caprivi area in Namibia has been declared a game reserve and consequently falls under the authority of the Ministry of Environment. In practice however, other government agencies and ministries have initiated projects in the area. Local institutions, including traditional institutions, have generally been alienated from decision-making. The uncertainty around land tenure has been cited as a key factor in the movement of two to three thousand Khoe and other people from this area into Botswana.

The alienation of traditional authority, key to the land alienation process, also began in the colonial era when powers of traditional authorities were transferred to state authorities. In many countries this disempowerment has continued in the independence period. In Botswana, for example, this authority was transferred to government Land Boards under the Tribal Land Act.⁵² The Act also establishes grounds for cancelling customary land rights.⁵³ These Boards may allocate land for residential, arable, grazing, and business purposes, and it is the Land Boards who oversee the land use zoning and planning processes in conjunction with the District Councils.

In some instances the colonial authority argued that there was no indigenous law in this area, while in other states they just denied its application to land and natural resources. Botswana's 1992 Wildlife Conservation and National Parks Act and their Unified Hunting Regulations limit the aboriginal title of the San to the Central Kalahari.⁵⁴

Recently there have been increased moves to recognising the role of local level institutions and communities in the land regime. In Mozambique, for example, the Land Law seeks to empower communities through establishing consultative procedures. Namibia is the only country in the region where local rights to resources are on a similar footing with private ownership or rights. The difference is that in respect of the communal areas this is conditional. Zambia, however, has legislative provisions⁵⁵ that provide for the conversion of customary tenure into leasehold tenure. This provision can clearly be used to create more secure rights for rural dwellers.

⁵¹ Hitchcock (1999) 11.

⁵² Section 10 and Section 13

⁵³ Section 15 and Section 32 & 33.

⁵⁴ <http://www.gtz.de/ordoden/capetown/cape07.htm>

⁵⁵ Lands Act Chapter 184.

The historical disempowerment of communities in respect of land was repeated in relation to other resources. Key features continue to exist today. Community rights are generally derived from the state and are distinguished from freehold rights.

The rights of communal/customary/traditional land dwellers to resources are typically use rights that are severely limited. Full rights of ownership are generally vested in the state as is overall managerial responsibility. In Lesotho, for example, communities only have rights to trees and forests that they plant on land lawfully held by them;⁵⁶ title to all other trees lies with the state. In some of the countries communities may apply for communal title to forestland located in customary areas. In Zambia, the Forest Act 1999, vests all ownership of trees and forest produce thereof on customary land, state land, national forests and local forests in the President.⁵⁷ The Zambian Forestry Commission may assign the control and management of local forests to a local community, traditional authority or joint Forest Management Committee.⁵⁸ Similarly, in Malawi, participatory forest management approaches may be adopted in village forest areas on customary land.⁵⁹ The Malawian Act also creates village level entitlements to revenue from the lease of indigenous forests. In Mozambique, where land law is empowering, it is somewhat ironic that forest and wildlife law encourages rather than requires local community involvement.⁶⁰ The law is more protective than empowering.⁶¹

The general approach to wildlife resources is that ownership is vested in the state. In areas designated for state protection (state/national forests, national parks and sanctuaries) communities have virtually no rights. However most countries have created some form of rights regime to natural resources on land designated as customary or traditional. These rights range from use rights to mechanisms for establishing community-based management regimes. Managerial rights are generally enjoyed only at the instance of the state or some other legal authority. The Malawian Fisheries Conservation and Management Act, 1997, establishes village committees as managerial authorities for fisheries under their jurisdiction.⁶² One common method for redressing inadequate local rights is the development of community-based natural resource management (CBNRM) initiatives. In the SADC region CBNRM programmes include the Communal Areas Management Programme for indigenous resources (CAMPFIRE) in Zimbabwe; Administrative Management and Design for Game Management Areas (ADMAGE) in Zambia; Living In Finite Environments (LIFE) in Namibia; Natural Resource Management (BNRMP) in Botswana; The Chuma Tchatto programme in Mozambique. Broadly the intended aims of these initiatives include:

- increasing access to resources,
- addressing the injustice of historically skewed access regimes,
- increasing local participation in management,
- developing more secure rights to resources,
- creating incentives for conservation,
- promoting conservation and environmental sustainability.

⁵⁶ Section 3(1) of the Forest Act, 1978.

⁵⁷ Section 3

⁵⁸ Section 168.

⁵⁹ Section 25, Forest Act, 1997.

⁶⁰ Kloeck-Jenson (2000) 2-4.

⁶¹ Kloeck-Jenson (2000) 4.

⁶² Banda (undated) 6.

These programmes vary considerably, not only in the kinds of rights they give local communities, but in the forms of organisation. While there have been many important achievements by these programmes and they have been empowering in many instances, they have not fundamentally redressed the imbalance of power between the state and community.⁶³ This raises the issue of whether these programmes are extensions of the state or grassroots-based.⁶⁴ Systems for reconciling community rights and interests and ecological considerations are poorly developed.⁶⁵ While certain kinds of benefits are increased, communities may question the distribution of benefits.⁶⁶ In some instances costs to communities may exceed benefits. In some quarters there is an increasing scepticism about the motivation of donor support for CBNRM – fearing that it is simply an “attempt to delay radical campaigns for land reform.”⁶⁷

Planning

In many instances loss of control from “diminished” customary rights is exacerbated by local government systems that effectively alienate and exclude local people and values from planning. The inclusion of traditional or customary authority is more often ceremonial than real. Communities themselves have often been displaced in management and decision-making through the establishment of “representative” political systems that are upwardly and not locally accountable. In Zimbabwe, for example, rights to resources lie with the Rural District Councils (elected local government bodies) which are accountable to the central ministry and not local communities. The passing of the Local Government Act in 1998 in Malawi decentralised development activities and formally empowered local administrative structures. At the local level in Malawi communities were unsure about how these new government structures would influence their traditional structures.⁶⁸ In some countries local governance structures are poorly developed. Most notable are those of Namibia and Mozambique. In these countries local institutions may play completely different roles. In some instances the governance vacuum, created by highly centralised national structures and disempowerment of traditional structures⁶⁹ or by war,⁷⁰ may create opportunities for new and acceptable forms of local organisation.

Resource planning and management systems may also be key in the power arena. Consultative processes may be fairly restrictive. Most commonwealth systems have a highly formalised system of land use planning. In many cases the first step is a technical assessment of appropriate land use. Most often there is only minimal consideration of other factors. These plans are then subject to consideration by the dominant interests in the region being planned. These interests may include mining, organised agricultural bodies, industry, local government representatives and government departments etc.. These plans are then made available for public

63 See for example case studies of natural resource management in Southern Africa by Shackleton and Campbell (2000); Mohamed's (2000) review of fisheries Co-management Programme in Malawi; ZERO, Mohamed-Katerere and Stewart (1996).

64 Jones (2000) 86.

65 See for example Mohamed-Katerere and Ncube (2000).

66 ZERO, Mohamed-Katerere and Stewart (1996) on CAMPFIRE in Zimbabwe and Kayambazintu (2000) 60 on joint forest management in Malawi.

67 Moyo, 2000, 54.

68 Kayambazintu (2000) 58.

69 Namibia.

70 Mozambique.

comment. In Lesotho, for example, the Commissioner of Lands is required to publish a notice in a government gazette and to invite objections. As a method of inviting participation this approach is highly ineffective given that populations are largely rural, have only limited access to newspapers and may have low literacy rates. Often communities have no direct representation in this planning process. This, land use framework, sets the basis for development activities. A similar approach is taken in Zimbabwe and Botswana.

Even where attempts are made to include people at the local level in planning the power relationships may not be significantly reformed. Of critical importance is how different forms of knowledge are taken into account in the planning process. Generally, western technical knowledge is prioritised over indigenous technical knowledge in decision-making systems. Additionally social values may be placed second to “technical knowledge” in decision-making systems. This is reinforced through hierarchical planning systems where local plans (based on local values and priorities) are made subject to approval by “technical committees.” While the role and value of technical knowledge should not be trivialised, reconciling difference can not be about imposition of authority – instead systems based on communication and transparency between different kinds of “specialists” (including local “ordinary” people) should be created.

BOX 2: TBNRM MAY EXACERBATE LOCAL CONFLICT

Social differentiation, cattle and conflict with wildlife – Sengwe, Zimbabwe

Communities in the Sengwe project area are markedly differentiated. Surveys show that over a third of households have no cattle, while a quarter have more than 11 heads per household. Generally, cattle owners are the wealthier and more influential households. Some cattle barons from distant areas use the areas designated for Peace Parks as seasonal grazing areas, mostly in extreme drought years. Wildlife is regarded as being in conflict with livestock, and thus the wealthy and influential households in the local communities may resist any attempts at destocking cattle or introducing wildlife.

Another important component of local livelihood systems is irrigated agriculture; irrigation systems are often damaged by wildlife. The community may be divided over the impact of wildlife on irrigation, as many households do not have access to irrigation plots (e.g. 57% in the Chishinya area of Sengwe).

Source: Campbell et al 2000

3 Resource Management

Establishing sustainable resource management systems is not just about good governance; it requires the development of management systems based on accurate resource assessment, resource monitoring, and impact assessment. Information is key here. Research is also important for reviewing and maintaining sustainable systems. It may require rules protecting certain species and habitats. It may also demand measures for ensuring/maintaining environmental quality. Systems for inter-sector collaboration are important in particular where different values are placed on natural resources by line ministries. Values placed on

resources affect use and thus accurate valuation systems that are able to deal with a range of values including economic, social and cultural factors are important. It is beyond the scope of this paper to extensively review measures across the SADC region. In this section only two aspects are considered: these are land use planning (including environmental impact assessment) and the control of animal and plant diseases.

Land Use Planning and Assessment of Environmental Impact

Land use planning in most countries of the region is legally regulated. Differences in these systems may undermine effective planning and hence conservation. Some aspects of this are considered here.

Development activities may impact upon the conservation of resources as collaborative and inter-sectoral approaches to planning are poorly developed. For example in respect of water, land use affects water supply and quality and it also impacts upon soil fertility. Land use patterns may also contribute to water stress. In particular land use practices that increase siltation, such as overgrazing or the loss of vegetative cover, contribute to water stress.

Success in achieving inter-sector co-operation in land use and development planning varies across the region. Some countries use a system of zoning, while others use environmental impact assessment (EIA) or a combination of both. Other resource monitoring and assessment tools may also be useful. Most SADC countries have either environmental impact assessment law,⁷¹ draft law⁷² or policy.⁷³

The extent to which social and other non-technical issues are addressed as part of the EIA process varies from country to country. Most EIA laws and policies focus on controlling negative environmental impacts of development. An exception to this is Mozambique's Environmental Framework Law, which forms the basis of the EIA regulations promulgated in that country in 1999. This law provides for assessment of all material impacts and not only negative impacts. Under Zambia's EIA Regulations,⁷⁴ for example, activities near environmentally sensitive areas such as indigenous forests, areas of high biological diversity and wetlands are subject to EIAs. Increasingly countries in southern Africa are making conversion of forestland to agricultural land subject to EIA. In addition some countries, such as Zimbabwe, restrict the conversion of parks land under their national parks legislation. The Parks and Wildlife Act in Zimbabwe prevents the re-designation of more than two percent of Parks Land at any one time.

Given the definition of development, in most countries of the region the impact of conservation initiatives on local livelihoods and social systems is seldom taking into account. This loophole has meant that TBNRM areas have been created without full social impact assessment being carried out. Mozambique's legislation

⁷¹ South Africa, Zambia, Malawi, Seychelles, Mozambique, Mauritius and Namibia.

⁷² Tanzania and Lesotho.

⁷³ Zimbabwe.

⁷⁴ Promulgated in 1997 under the Environment Protection and Pollution Control Act.



is exceptional. The Mozambican Environmental Framework Law defines "environment ... in terms of ... a combination of biodiversity of different organisms as well as the socio-economic and health conditions of communities."⁷⁵ The law "places this human factor in the context of being one component of an ecosystem."⁷⁶

In addition to the use of EIA procedures, in much of the region, development activities are generally subject to some form of permit or authority. However these assessment provisions are generally inadequate in dealing with TBNRM initiatives. Not all TBNRM initiatives would be considered as development activities and thus subject to an EIA. Lesotho's Town and Country Planning Act 1980 defines development in Section 9(2) as the "carrying out of any building, engineering, or other works or operation in, or over or under land, or the making of any material changes in the use of land." Material change refers to the conversion of two dwellings to single dwelling, advertising, waste disposal and does not cover conversion to TFCA. Similarly EIAs may be inadequate in this regard. Namibia's Environmental Management Act requires EIAs only where the activity is likely to have a negative environmental impact. Zimbabwe uses similar criteria. It would classify the construction of large dams but not the establishment of parks as a development activity.

Sanitary and Phyto-Sanitary Controls

The control of disease, in both animals and plants, is important for SADC states, particularly in order to protect agriculture (and plantation forests) and agricultural export markets and also to ensure species survival and genetic diversity. All SADC countries have legislation dealing with the control of animal and plant diseases. Measures adopted include both preventative measures and reactive measures. Preventative measures include controls over importation of infected plants and animals. Reactive measures include rights of destruction and criminal sanctions. Approaches to control and monitoring vary and it is clearly important that these measures are harmonised.

Wildlife areas are generally seen as incompatible with livestock production. Under the World Trade Organisation Agreement on the Application of Sanitary and Phyto-sanitary Measures, sanitary barriers are legitimate non-tariff barriers to trade in livestock and livestock products. Exporting countries must be able to substantiate claims that their livestock is free of specific livestock diseases. For many countries, including Zimbabwe, Namibia and Zambia, this requires the establishment of special disease-free zones requiring special infrastructure, legislation and personnel. The protection of the national territory from the introduction of diseases is essential. The creation of new wildlife areas as part of transboundary initiatives may impact on national agricultural activities. Synchronising measures to control the transmission of wildlife diseases will be important. SADC has under its Food and Natural Resources sector initiated a Regional Tsetse and Trypanosomiasis Control programme. Tsetse fly threatens subsistence activity and commercial agriculture and places a substantial threat to food security.

⁷⁵ Garvey (2000) 5

⁷⁶ Garvey (2000) 5.

All the livestock exporting countries have legislation controlling animal diseases. In Zimbabwe, under the Animal Health Act, various measures that have a transboundary impact are adopted. These include the disposal of animals straying into Zimbabwe that are suspected of being disease ridden.⁷⁷ This includes the destruction of wildlife.⁷⁸ Another measure to protect livestock is the construction of veterinary fences.⁷⁹ Game fences, although not strictly transboundary initiatives, certainly affect the potential for transboundary natural resource collaboration.

The Botswana government constructed a game and livestock-proof veterinary cordon fence south of the Caprivi Game Reserve in order to control the movement of both wild and domestic livestock out of the Caprivi into Botswana, where an outbreak of Contagious Bovine Pleuropneumonia had occurred in 1995–1996. This, in Botswana's view, was necessary to protect their beef export. Namibia, however, expressed concern that this interfered with the movement of wild species across the border between Botswana and Namibia and undermines its potential to utilise this resource for safari hunting and tourism. An ad hoc committee on fences recommended to the Botswana cabinet that the fence along Namibia's border west of Kwando be moved back 30 kilometres to facilitate the movement of wild populations.⁸⁰ Namibian officials are reported to have launched a top-level probe into the 'negative impact' of an electrified fence Botswana is building along the Namibia-Botswana border at the southern side of the West Caprivi Game Park. This dispute goes to the heart of the conflict around the most productive land use options in order to achieve key economic goals. It is unclear whether this conflict has been resolved. However this discussion demonstrates the need for formal agreement to be reached in relation to such issues. And indeed for a better understanding of the role of fencing as a management tool and how it can be used appropriately.

A less considered issue, but one as important, is the implication of the spread of diseases amongst mammalian wildlife. The extent of protective mechanisms within national legislation in southern Africa is not known.

4 Comment

National legislation presents special challenges for developing TBNRM initiatives at two levels. Firstly there is the problem of harmonisation of management approaches and values. This is currently being addressed. Key issues here are resource impact assessment and monitoring systems and the control of threats to biodiversity and other livelihood choices. Secondly, given the multiple perceptions of authority and the multiple tenure arrangements, developing legitimate TBNRM may be problematic. Thirdly, given that most states in the region have not been able to create function systems that effectively empower local communities and recognise their rights, TBNRM faces the real danger of entrenching historical injustices. In particular it may concretise earlier resource appropriations by the

⁷⁷ Section 9.

⁷⁸ Section 16.

⁷⁹ Section 12.

⁸⁰ http://www.mg.co.za/mg/news/97june1/12june-nam_fence.html

state and inequitable land distribution regimes. Fourthly, given the failure of planning systems to incorporate local communities into planning, unless this is addressed, TBNRM initiatives run the threat of not being compatible with local interests.

Environmental Impact Assessment

Although all countries in the region have some system for assessing environmental impact these approaches vary. EIA needs to be harmonised and existing deficiencies must be addressed if TBNRM initiatives are to become a viable strategy for human and environmental sustainability.

Current EIA procedures (with the possible exception of Mozambique) are inadequate tools for assessing social impact of land use change unless such change is considered to be development. This failure is not surprising as the focus of legislation has been to prevent biodiversity loss and environmental degradation and not to safeguard development interests. TBNRM initiatives should address this deficiency and establish systems for assessing social impact prior to their adoption and also for on-going monitoring.

Additionally systems for assessing the value of competing land use systems need to be assessed. Legislation in many countries prioritises agricultural land use over and above natural resource management. This prioritisation is largely due to the position of agriculture in the economy and its perceived over-riding contribution to food security. If natural resource management, including transboundary initiatives, are to succeed then its benefits for participant areas and adjacent areas needs to be demonstrated. Systems for reconciling conflicts between different land use need to be considered. EIAs maybe useful in preventing and mitigating negative impacts of other land use on nature-based development activities. We need also to move beyond the use of the EIA as coercion to encouraging developers to make environmentally friendly choices. Developers may continue to make land use and management choices that undermine the potential of natural resource management areas unless the benefits of these areas can be demonstrated and out weigh the benefits of existing practice.

Sanitary and Photo-Sanitary Controls

The harmonisation of sanitary and phyto-sanitary is essential to protect agriculture, forestry and biological diversity. TBNRM initiatives will need to directly address this and establish systems for control and deal with the problems of disease created by mega-parks.

One method of control used widely in the region is the establishment of veterinary fences.⁸¹ Environmentalists allege that these have had a devastating impact on wildlife:

⁸¹ These include:

- Zimbabwe's fences around Gonarezhou and Hwange National Parks with less pronounced but similar effects.
- The 200-km long electrified fence on the South-Africa-Mozambique border.
- In Namibia, fences around Etosha National Park and Skeleton Coast National Park.
- Fences in Botswana include Setata Fence, Ikofa Fence, Caprivi Fence, Northern Buffalo Fence, Nxai Pan Buffalo Fence, Phefodiakoka Fence,

*"In Botswana wildlife traditionally migrated from the arid south to the wet north for water and food during the dry months. The fences block the migratory routes. Wildebeest, zebra, hartebeest, eland and other species die along the fences from thirst, hunger, injuries and exhaustion. During the 1983 drought approximately 50,000 wildebeest died along the Kuke cordon fence. The fences are controversial with some people saying the fences are blamed for wildlife deaths that would have happened otherwise from drought."*⁸²

Strategies for controlling disease that are acceptable to a wide range of stakeholders will need to be developed.

The spread of disease amongst mammalian wildlife as a result of TBNRM is an issue that has received only minimal attention. The likely impacts of tuberculosis and Feline Immuno-deficiency Virus in the lions of South Africa's Kruger National Park on neighbouring populations in Mozambique and Zimbabwe as a consequence of the formation of GKG, have not been publicly acknowledged. However the potentially devastating impacts within South Africa itself on neighbouring populations has been acknowledge. Peter Mokaba, the former deputy tourism minister, noted that the situation was so serious that South Africa might have to ask for international help. Dr. Dewald Keet, the chief state veterinarian at Kruger, said that private game farms like Timbavati, Mala Mala, Sabi Sand, Londolozi and Sabi-Sabi, which are unfenced where they adjoin the park, were already infected with TB.⁸³

Entrenching Historical Injustices

There is a real threat that TBNRM initiatives will simply reinforce the existing land tenure system and further entrench the loss of community rights. For example, the establishment of the Kgalagadi Transfrontier Park entrenches the displacement of the San people supposedly in the national interest. The agreement makes no specific acknowledgement of their rights, notwithstanding the recognition of the San's land claim for 25,000 ha by the former South African Minister of Land Affairs.⁸⁴ It is difficult to see how these rights will be recognised in a meaningful way. Given past practice, it is probable that resolution will be along the lines of the Makuleke Community with regard to the Kruger National Park in South Africa. In this case although land title has been restored to the community their rights are subject to the status of the area as a national park. A consequence of this is that the community has extremely limited rights of management.

The historical injustices created by the existing tenure regime and the legal trivialisation of traditional institutions and systems should not be perpetuated or reinforced by TBNRM if it is to find broad support amongst local people. Multi-lateral designation of TBNRM areas that fail to take local rights into account may circumvent any national systems available for addressing historical resource claims. The threat that this will indeed be the case is high. There are numerous cases where communities have lost rights through the establishment of national parks. Mongwe and Tevera,⁸⁵ for example, note that although the land rights of

⁸² IMERCSA's website

⁸³ <http://www.corelight.org/lions/report.html>

⁸⁴ Griffin et al, 1999, 56

⁸⁵ (2000) 79

the San (Basarwa) people were recognised when the Central Kalahari Game Reserve was established, these rights were subsequently extinguished when the Basarwa were removed from the park. The Botswana government claims that they were moved for their own benefit and development. However Mongwe and Tevera⁸⁶ observe that there was “insufficient consultation to justify its conclusion that the Basarwa had voluntarily moved. In fact the available evidence suggests that they had been coerced by government to move and had done so under fear of possible reprisals.” Where such displacements have taken place in parks that lie on international borders it is likely that the new bi- or multi- lateral agreements will entrench such displacement.

The subordination of customary law and practice has not only violated the integrity of many communities but has also resulted in conflict of values informing natural resource management. Unless real attempts are made to grapple with these issues in the design of TBNRM initiatives, there is a real threat that the trivialisation of local values will be further entrenched. This is particularly poignant, as the main parties in TBNRM initiatives are likely to be state entities rather than communities; consequently agreements are likely to prioritise the legal and value systems applicable at this level. Indeed none of the existing legal agreements establishing TFCA create systems for the recognition of community rights.

Unless this is directly confronted it is likely that TBNRM initiatives will simply replicate the top-down environmental management systems prevalent throughout the region that exclude local knowledge and values. Kasweswe-Mwafongo⁸⁷ writes about environmental law reform in Malawi that:

“The state has assumed greater control through sectoral laws, regulations, policies and institutions. Thus the methods of promoting proper environmental management practices have been typically top-down. There have been no serious attempts to understand and learn from traditional or indigenous environmental governance systems. This... has rendered all innovative efforts at sound environmental management impossible.”

Take Local Concerns Into Account

Land use planning tends to place central and technical values, priorities and interests over local ones. Hierarchical planning systems entrench the dominance of the centre. Similarly international relations require consensus between states and not at the multiplicity of levels that make up countries. This creates problems at two levels – firstly in the process of negotiating the establishment of TBNRM areas and secondly in planning activities.

If TBNRM initiatives are to win real support from local communities they must be able to demonstrate that its benefits exceed those of other land use options. There must be a real assessment of the costs and benefits of different land use options and an opportunity for all perceptions to be vocalised and heard. There is often an assumption that community-based wildlife management holds multiple benefits for communities. This assumption may indeed be misplaced. Firstly, there

⁸⁶ (2000) 80
⁸⁷ (1999) 120.

is a growing body of evidence that suggests that given the insecurity of tenure, communities have a greater interest in short term benefits. Secondly, such management often means communities lose access to wildlife for subsistence purposes.⁸⁸ Access to other resources such as wood products may also be lost. Thirdly, rights of passage and access routes are often extinguished. The loss of access routes for fire and water collection may increase women's working hours. Campbell et al⁸⁹ note that parks on borders may reduce illegal cross-border traffic and result in a loss of jobs. Fourthly, losses in agriculture may occur – livestock are increasingly faced with the threat of disease (such as foot and mouth) and may be subject to increased attacks from predators. Large mammals, such as elephant and antelope, may threaten cultivation. Fifthly, increased wildlife populations pose an increased threat to human life and security. Finally, children's rights may be directly affected – their access to play areas may be threatened. Also their access to fruit and other wild foods, which are important food supplements particularly in times of drought, may be reduced. TBNRM initiatives may well place similar costs on communities.

The lack of rights rural people have to resources and land limits their ability to enter into collaborative arrangements with communities in other countries for the exchange of goods and services. In some instances national laws, such as phytosanitary regulations, make the exchange of seed material illegal. The vesting of rights to wildlife in the state and the disempowerment of communities in this area curtails it from being a resource that can be used in a collaborative transboundary manner by communities. This reduces communities' abilities to develop and diversify their livelihood strategies and contributes to their continuing poverty.

At the crux of respecting local rights is creating systems for negotiation with communities as equal partners. The form of governance, the rules of management, systems of inclusion etc. adopted must be a matter of local democratic choice. Incorporation of community values can not simply be a matter of including traditional leaders or local government representatives.

⁸⁸ Zero et al 1996.

⁸⁹ 2000.

PART TWO-RESOURCE MANAGEMENT

This Part considers **existing TBNRM initiatives** in southern Africa. These broadly fall into two groups: conservation focussed initiatives and spatial development initiatives. In the latter economic development is the key objective and conservation a spin off. Most agreements with a primary conservation focus are resource specific or restricted to a specific land use category. Thus a resource specific analysis is taken to the conservation focussed agreements. This is justified not only by the predominance of this approach with TBNRM initiatives, but also because environmental law (at global, regional and national level) has been traditionally organised in this way. There are of course some exceptions to this, such as the IUCN ROSA facilitated ZIMOZA agreement.

This Part is divided into the following sections:

- **water resources** (shared watercourses).
- terrestrial **wildlife** and wildlife land. A broad definition of wildlife is used that includes both fauna and flora. This includes forests and inland fisheries in so far as it falls within these land categories.
- **marine resources.**
- **spatial development initiatives**

The issues of inland fisheries and forests have not been dealt within any depth, although these are potential areas of co-operation, because there are no existing agreements focusing on these resources.

Each of these sections considers the applicable international law regime, the actual TBNRM agreements and the treatment of key issues and approaches within national law.

There are two types of fresh water resources that are of a transboundary nature – these are ground and surface water. Very little legal or other consideration has been given to international issues pertaining to ground water resources. Consequently, this section focuses on joint management of surface water.

There is a myriad of legal and policy instruments applicable to fresh water management in the region. This section considers the international law setting, regional law and national law as well as specific transboundary agreements.

1 International Water Law

The United Nation's Convention on the Law of the Non-Navigational Uses of International Watercourses (UN Convention on water) is the key international agreement dealing with transboundary water law. The General Assembly adopted it in May 1997. It has not as yet entered into force but it represents a consensus on what the customary international law is. In the region only South Africa has signed the convention. Nevertheless its provisions are worth discussing as it encapsulates customary international law, and the SADC members have specifically acknowledged that they are bound by customary international law. Customary international law is derived from state practice.

This Convention covers issues of equitable and reasonable use of water, participation, the obligation not to cause significant harm, obligation to co-operate, the exchange of data and information, planning, protection, preservation and management, the right of non-discrimination, and the settlement of disputes.

Sovereignty and Equitable Use

The “doctrine of absolute sovereignty”, was in vogue amongst many states in the late nineteenth century particularly amongst upstream users. The opposite and equally extreme assertion of rights was “the doctrine of absolute riverian integrity” advocated primarily by downstream states. “Rights of prior appropriation” were also in vogue. All these doctrines tend to take an all or nothing approach and in some way are akin to exclusive property rights. The Lac Lannoux Arbitration in 1957 explicitly rejected the doctrines of absolute sovereignty and riverian integrity. The tribunal acknowledged that states had to utilise water with respect for neighbouring state's rights. Since then states have increasingly moved towards recognising that sovereignty must be limited by the responsibility not to cause harm to any other riparian state.

In practice upstream states have tended to place emphasis on the requirement of equitable utilisation whilst downstream states have focussed on the obligation not to cause harm. Increasingly donor bodies place emphasis on the requirement not to cause harm. For example, the World Bank will not fund projects unless a finding of no appreciable harm can be made.⁹⁰ This shift towards a “community of states” approach is also reflected in UN Convention on water.

⁹⁰ Wolf, 1999, 7.



Provision is also made for the use of shared water resources on the basis of “reasonable and equitable use” with a view to “attaining optimal utilisation thereof and benefits therefrom.” This, however, is counterbalanced with an obligation not to cause “significant harm” to the interests of one’s neighbour. This approach is a step along from the concept of limited territorial sovereignty in that there is recognition that not only must harm be avoided or compensated, but that sharing must take place. Nevertheless how this is to be applied in practice is uncertain. For example, in 1960 the Indus Water Treaty in the spirit of sharing – simply gave the two concerned states, India and Pakistan, the right to use three tributaries each as their own. This does not seem to be what is envisaged by sharing. The Convention, although setting the framework by articulating key principles, provides inadequate guidance on procedures.

Consequently what amounts to “reasonable and equitable use” is a matter of interpretation by the parties. The following factors inter alia are applicable in determining reasonable and equitable use: geographic, hydrographic, hydrological, climatic, ecological, and other natural factors; social and economic needs of each riparian state population dependent on the watercourse effects of use in one state on the uses of other states; existing and potential use, conservation, protection, development and economy of use, and the costs of measures taken to that effect; and the availability of alternatives, of corresponding value, to a particular planned or existing use. Article 6 provides that the “weight to be given to each factor is to be determined by its importance” and that “all relevant factor are to be considered together.” Article 10 provides that unless there is agreement or custom to the contrary “no use enjoys inherent priority over other uses,” however “in the event of conflict between uses, ... special regard (must be) given to the requirements of vital human needs.” This establishes broad criteria for shared use; actual determination of use will be dependent on numerous non-legal factors including economic and military might.

Notification of Adverse Effects

In addition to the obligation not to cause harm is the obligation to give notification of possible adverse effects. However the Convention is silent on what affects are significant. The Convention seeks to reduce the potential for conflict by requiring notification of planned procedures; however what this approach fails to acknowledge is that it is most often existing developments that create the greatest conflict. Yet no mechanisms are established to resolve this kind of conflict.

Co-operation

The UN Convention on water requires riparian states along an international watercourse to communicate and co-operate with each other. Accordingly provision is made for the exchange of data and information, notification of possible adverse effects, protection of ecosystems, and emergency situations.

2 Water and Human Rights

Access to water may be considered as fundamental to human life and indeed as a human right.

It is now widely accepted that a right to water can be derived from other human rights. It can, for example, be derived from the Universal Declaration of Human Rights which in Article 25 recognises that all people have a:

"right to a standard of living adequate for the health and well-being of himself and his family."

Water is essential to achieve this. Such access may also require that water be of a good quality. Rights to water may also be considered to be a derivative of the right to life.

There is dispute as to the extent of human rights to water. It may be considered simply as being the right to sufficient water to sustain life. This begs the question: what constitutes "sufficient", what is adequate and what is well being? Should such a right be restricted to a right to drinking water and water for sanitation purposes or does it include rights to water for producing subsistence food? Gleick argues that such right is restricted to "basic needs" that is for drinking, cooking and fundamental domestic use. However a statement of understanding of the United Nations provides that "vital needs include drinking water and water required for food production" so as to prevent starvation.

This right to water is now explicitly recognised in the UN Convention on Water, which states in Article 10:

"in the event of a conflict between uses of water in an international watercourse special regard shall be given "to the requirements of vital human needs."

Consequently where water-needs can not be satisfied from internal waters "a country is not permitted to exploit a shared water resource in a manner that deprives individuals in a neighbouring country of access to their basic human needs."⁹¹ This application of the human rights principle suggests possible application of the human rights doctrine to other issues including the determination of what constitutes "equitable utilisation."

The environment may also be thought of as having a right to an adequate amount of water for the "preservation and natural regeneration of the environment." If so then international use systems and national use systems must ensure the realisation of these fundamental rights.⁹²

3 SADC Water Protocol

Member states signed the Protocol on Shared Watercourse Systems in the Southern African Development Community Region (Shared Watercourses Protocol) at the 1995 SADC Summit in South Africa. The Shared Watercourse Protocol had attained the required number of ratifications and has therefore come into force. However, a number of member states wanted amendments. Thus at the 2000 Summit in Namibia an amended protocol was presented for signature. The revised version seeks to foster closer co-operation for "judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourse systems and advance the agenda of regional integration and poverty alleviation in the

⁹¹ UN Convention on the Law of the Non-Navigational Uses of International Watercourses

⁹² Green Cross International, 2000, 10.



region.” SADC has also prepared a Regional Strategic Action Plan for Integrated Water Resources Development (1999-2004).

The ratified Protocol provides the current framework for the management of shared watercourses in the SADC area as the amended version has not yet been ratified. The Protocol makes provision for the equitable sharing of shared watercourses, the relationship between conservation and development, the exchange of information, water quality, notification of hazards and the control of alien species.

Sovereignty

Article 1 provides that each riparian or basin state shall be entitled to use the water within its territory and without prejudice to its sovereign rights. Nevertheless certain limitations are set upon such use. There are five critical components to this: balancing development with conservation, inter-state co-operation, equitable sharing of water resources, developing compatible national systems, and notification of emergencies.

Equitable Use

Critical to the issue of transboundary management and indeed at the core of the Protocol, as with most international water law, is the issue of “equitable sharing” of shared water resources. This agreement repeats the unresolved problem of international law by not clearly determining criteria for such allocation.

Member states have agreed to utilise shared watercourse systems in an equitable manner and particularly, with a view to attaining optimum utilisation thereof and obtaining benefits therefrom consistent with adequate protection of the watercourse system. Utilisation of a shared watercourse system in an equitable manner within the meaning of paragraphs 4 and 6 requires taking into account the following factors and circumstances:

- Geographical, hydrographical, hydrological, climatical and other factors of a natural character;
- The social and economic needs of the member states concerned;
- The effects of the use of a shared watercourse system in one watercourse state on another watercourse state;
- Existing and potential uses of the shared watercourse system; and
- Guidelines and agreed standards to be adopted.

Despite these guidelines there is little certainty about what will be equitable in any given circumstance.

Development and Environmental Protection

Member states have agreed that they will maintain a proper balance between resource development for higher standards of living for their peoples and conservation and enhancement of the environment to promote sustainable development.



They have agreed to take all measures necessary to prevent the introduction of alien aquatic species into a shared watercourse system that may have detrimental effects on the ecosystem. Additionally, they have agreed to maintain and protect shared watercourse systems and related installations, facilities and other works in order to prevent environmental harm.

Member states have agreed that the use of a shared watercourse system within their respective territories for purposes other than domestic use or use that results in the discharge of waste into such waters, must be subject to a permit from the relevant authority. Such permit shall be granted only after such state has determined that the intended discharge will not have a detrimental effect on the regime of the watercourse system.

Co-operation

Member states have recognised that effective management of shared water resources requires close co-operation particularly in the study and execution of all projects likely to have an affect on the regime of the watercourse system. Such co-operation includes the exchange of information and data regarding the hydrological, hydrogeological, water quality, meteorological and ecological condition of such watercourse system.

Additionally member states have agreed to notify, without delay, other potentially affected States and competent international organisations, of any emergency originating within their respective territories. States may, however, carry out planned measures without notification where they are needed to save life, or to protect public health and safety, or to protect other equally important interests. In the case of an emergency situation, the member state may also proceed with implementation or execution, without notification. However in these circumstances a formal declaration of the urgency of the measures must be communicated to other member states.

Institutions

The Protocol makes provision for collaborative institutional development to foster closer co-operation for judicious, sustainable and co-ordinated management, protection and utilisation of shared water resources. Such institutions include watercourse commissions, water authorities or boards.

The SADC Water Sector based in Lesotho is mandated:

- to facilitate integrated planning, development, management and equitable utilisation of water resources at both the national and regional level;
- to mobilise resources (human and financial) for integrated planning, development, management and equitable utilisation of common water resources and the implementation of approved regional programmes; and
- to promote joint and cross-border water resources development investments and provide guidance on cost sharing arrangements.



4 Basin and River Agreements

There are a large number of agreements in southern Africa dealing with the management of basins or specific rivers or water development.

Some of these provide for river basin management and, accordingly, establish multi-lateral managerial institutions. These include the Tripartite Technical Committee (Mozambique, Swaziland and South Africa); Limpopo Basin Technical Committee (South Africa, Botswana, Zimbabwe and Mozambique); Trans-Caledon Tunnel Authority (South Africa and Lesotho); Komati Basin Water Authority (South Africa and Swaziland); Vioolsdrift Noordoewer Joint Irrigation Authority (Namibia and South Africa). Additionally there are agreements establishing dams and those managing sections of watercourses for particular purposes such as the Zambezi River Authority between Zambia and Zimbabwe.

Zambezi River Basin

The Zambezi River Basin includes eight of the fourteen member states of SADC; these are Angola, Botswana, Namibia, Malawi, Tanzania, Mozambique, Zambia and Zimbabwe. The basin is subject to several hydropower initiatives, the Zambezi River Action Plan (ZACPLAN), and a non-governmental organisation initiative to manage wetlands. Additionally several states have plans to extract water from the Zambezi through both inter-basin transfers as well as a possible extra riparian transfer. See Box 3.

Zambezi River Authority

The Zambezi River Authority (ZRA) involves only two of the eight riparian states, Zimbabwe and Zambia. The ZRA was established when the colonial Central African Power Corporation (CAPCO) was dissolved. The lower Zambezi in Mozambique is governed by a different agreement that oversees the generation of power at Cahora Bassa. Mozambique has also established a national authority responsible for the Zambezi within its territory.

The ZRA was established simultaneously by Acts of Parliament in Zambia and Zimbabwe in 1987. Its primary objective is to use the waters of the Zambezi River for power generation for the two states. The ZRA serves as the secretariat and executing agency and is tasked with the monitoring, operation and maintenance of the Kariba Dam, the investigation of the potential for development of new dams, recruitment of manpower and submission of development plans and programmes. Additionally the agreement establishes inter-state conflict resolution mechanisms.

For many, this agreement is particularly problematic, as the Authority is not seen to reflect an equal relationship between Zambia and Zimbabwe. Many argue that Zambia is being given a raw deal in the ZRA partnership.⁹³ Pertinent issues identified by Mutembwa include the division of CAPCO assets, the employment structure within ZRA, infrastructure development by the ZRA at Kariba and how the ZRA is carrying out its mandate to identify and develop power generating projects.⁹⁴

It is unclear how, in the event of disputes and downstream impacts, the ZRA deals with Zambia and Zimbabwe's obligation under the SADC Protocol and international law generally.

Zambezi River Action Plan

The Zambezi River Action Plan (ZACPLAN) is a multi-lateral agreement of the eight riparian states. It was adopted in 1987. The main purpose of this plan is to develop regional co-operation for the environmentally sound management of the Zambezi River and to strengthen regional co-operation for sustainable development. This initiative is co-ordinated by the SADC Water Resources Sector Co-ordination Unit based in Lesotho.

The overall objective of ZACPLAN is to ensure that the shared resources of the Zambezi River are used in a manner that guarantees maximum long-term advantages to all participating states. The plan, adopted by SADC in 1987, consists of 19 projects (ZACPROS). The specific objectives and targets of ZACPROS are to:

- create an inventory of existing and potential development projects, evaluate the environmental impact of major projects, and initiate a basin-wide information exchange;
- develop regional legislation necessary for the management of the Zambezi and minimum national legislation required by riparian states for enforcement;
- develop a basin-wide unified monitoring system related to water quality and quantity;
- develop an integrated water-resource-management plan for the Zambezi River basin, create a relevant water-quality and water-quantity database, and review all sectors that benefit from or affect water-resource development projects in the basin; and
- develop and adopt a management simulation model, simulate the various development scenarios in the basin, and present an integrated water-resource-management plan.

⁹³ Mutembwa, 1998, 30

⁹⁴ Mutembwa records that:

- Of the total establishment of 252 employees, only 27 were Zambians, thus, underscoring inequitable distribution of employment within ZRA.
- There is a great imbalance between infrastructure owned by the two countries, a perpetuation of what was inherited from colonial days. During the construction of Kariba power station and dam most Federal Power Board assets were located in Zimbabwe, particularly at Kariba.
- Although the ZRA headquarters is in Lusaka, this is essentially a technicality, as most ZRA Functions like engineering, purchasing, tendering and stores are effected from Harare.
- Zimbabwe which was given 50 percent of CAPCO assets; the other 50 percent went to the ZRA. The assets were then shared 25 percent each to Zambia and Zimbabwe

The SADC Environment and Land Management Sector (SADC ELMS) was entrusted with executing and co-ordinating the programme, assisted by a committee representing all member states. This later became the ELMS Water Resources Subcommittee, responsible for advising ELMS on regional water resources issues and is now the Water Sector Co-ordinating Unit also based in Lesotho.

The ZACPLAN constitutes a pragmatic action plan that could address critical transboundary water resource issues. It must be pointed out, however, that to succeed the scheme must seek to and reconcile the concerns of riparian communities in the plan.

Upper Zambezi Management Project

The Upper Zambezi Management Project is a joint programme between Zambia and Namibia. Its object is to prepare a plan for the wise management of the Zambezi basin in the Western Province of Zambia.

Okavango River Basin

The Okavango River Basin lies in Angola, Namibia, Botswana and Zimbabwe. In September 1994 Angola, Namibia and Botswana signed an agreement to establish a Permanent River Basin Commission, the Okavango River Basin Commission (OKACOM).

The objective of this Commission, as set out in Article 1, is to act as technical advisor to the contracting parties on matters relating to the conservation, development and utilisation of water resources. Specifically its functions include advising the parties on the safe yield from the river basin, the reasonable demand of consumers, criteria to be adopted in the conservation, equitable allocation and sustainable utilisation of water resources, the development of water resources, the prevention of pollution, measures to alleviate water shortages.⁹⁵

Each of the parties has appointed commissioners from their relevant institutions to the Commission. The Commission has a Basin Steering Committee that works with a study manager who is mandated to co-ordinate the different activities pertaining to the technical work of OKACOM.

The agreement provides a useful framework for collaboration. There are currently several collaborative initiatives:

- OKACOM is currently undertaking an Environmental Assessment and Integrated Basin Management Plan, which is expected to be completed by 2004. This should provide a more thorough understanding of the complex dynamics underpinning the river basin as well as a comprehensive management plan aimed at promoting sustainable development and protection of Okavango resources. The OKACOM process provides an opportunity for basin states to define Okavango River in-stream flow requirements and environmental water demand.

⁹⁵ Article 4.

- OKACOM has also compiled a draft Trans-boundary Diagnostic Assessment (TDA) as part of the baseline data for the Okavango Commission. This has fostered the initiation of a consultative process among the basin's stakeholders, established the current status of the basin as a whole, identified causes of degradation, and imminent threats, and indicated critical gaps in knowledge, policy and institutional arrangement.

The agreement establishing OKACOM specifically advocates the use of Agenda 21 principles in natural resources management and acknowledges the Helsinki rules (now consolidated in the UN Convention on water) on the use of international waters. Despite this it is evident that the agreement sets an insufficient basis for preventing conflict. This stems in part from an inadequate understanding of the demands placed on the basin and its ability to meet them. The agreement fails to provide clear guidelines on how conflicting demands, from agriculture, local communities, urban and industrial development, environment and tourism, both within and outside the basin are to be resolved. Also there is an inadequate understanding of threats to the basin. Perceived threats to the basin include unplanned abstraction from watercourses and aquifers; growth of effluent disposal and non-point pollution sources; and the accelerated erosion of land hydro-geomorphologically linked to the basin. All these factors are inextricably linked to patterns of socio-economic developments, particularly urbanisation.

This is typified by two areas of conflict - one actual, the other potential. In 1996 Namibia announced that it was going to fast track its plans to pipe water from the Okavango River to its capital, Windhoek, given a crippling drought faced by Namibia. Unexpectedly good rains in Namibia in 1997 delayed plans to pipe the water. Nevertheless the 250km pipeline still remains part of Namibia's master water plan.⁹⁶ Reports in 1998 suggested that Namibia is still planning to extract water by 2003.⁹⁷ It is not clear how this conflict can be resolved in the long-term and if any of the agreements adopted can assist in that process. Namibia has said it will wait until the Okavango River Basin Commission undertakes a study before it begins extraction. Botswana asserts that the survival of the Okavango Delta, riparian communities, fish and wildlife depends on adequate water flow. The tourism industry is dependent on the survival of the Okavango Delta. These needs are particularly crucial during years of low rainfall. Communities in Botswana asserted that they are dependent on the Delta for almost everything and that without it, they would have to move or die.⁹⁸ Communities raised a number of important issues including whether all other alternatives had been explored, including extraction from the Cunene and the desalination of Atlantic Sea water. Additionally they have asserted their right to be party to the negotiation process as actors. From Namibia's perspective the pipeline was justified as an emergency measure because reservoirs were running dry and human livelihood was threatened.⁹⁹ It is reported that Namibia may appeal to the International Court of Justice to rule on its right to use water if its neighbour Botswana opposes a proposal to take water from the Okavango River.¹⁰⁰

⁹⁶ <http://www.mg.co.za/mg/news/97feb1/7feb->

⁹⁷ <http://www.mg.co.za/mg/news/98feb1/5feb-botswana.html>.

⁹⁸ <http://www.mg.co.za/mg/news/98feb1/5feb-botswana.html>.

⁹⁹ <http://www.mg.co.za/mg/news/98feb1/5feb-botswana.html>.

¹⁰⁰ <http://www.mg.co.za/mg/news/97jan2/28jan-okavango.html>.

Botswana's response to this crisis has been to mobilise civil society through the formation of the Okavango Liaison Group. However, the Treaty and institutional processes create inadequate mechanisms for community participation and hasn't been useful in guiding these attempts. The Okavango Liaison Group consists of representatives from environmental NGOs, the University of Botswana, the local hotel and tourism association and the private sector.

This conflict also illustrates the inadequacy of the concept of equitable utilisation of water resources. Additionally it shows that the antiquated concepts of absolute sovereignty and riverine integrity by upstream states and downstream states respectively continue to inform use despite formal commitment to equitable sharing. It also reveals the tension between the state and communities and, in particular, the weak systems of accountability, and the inability of the state to adequately represent community/local interests. Consequently, it is important to redress the respective rights of states and citizens.

There are various other plans to use the resources of the basin. It is also reported that a new power project for the Western Caprivi region to provide 20 to 30 megawatts of electricity to the area is planned.¹⁰¹ According to the Windhoek Post a resource study estimates that evaporation will be about 1.5 million cubic meters and will only have "a minor impact" on the flow into the Okavango swamps in Botswana. Namibia is yet to undertake a pre-feasibility study and hold discussions with Botswana and Angola which share the Okavango River.

Nkomati/Komati/Incomati River Basin

South Africa, Swaziland and Mozambique share this river basin. It is subject to several agreements including an agreement between Swaziland and South Africa that governs the River within these countries, an agreement involving all three states, and an agreement between South Africa and Mozambique pertaining to the Sabi River Catchment in the basin. The Swaziland – South Africa agreement is implemented by a Joint Water Commission established by these states. There is also a Tripartite Permanent Technical Committee that co-ordinates water development activity in the region.

The Basin is also subject to a number of development plans, however only one, the Komati Basin Development Project is discussed here. In addition the impact of use in terms of these agreements on the downstream state of Mozambique is discussed below.

Komati Basin Development Project

The South African and Swaziland governments have agreed to, with the concurrence of the Government of Mozambique, long-term plans for the joint development of the basin. This project was conceived in the early 1980s to provide irrigation water for agriculture and in particular farm development in South Africa and Swaziland.

¹⁰¹ Windhoek Post, 9 September 2000

The building of the Driekoppies Dam was the first sub-phase of the first phase. It was officially opened in July 1998. The Development Bank of Southern Africa (DBSA) as arranged by the owner, Komati Basin Water Authority, financed the dam. The Maguga Dam on the Komati River in Swaziland is the second sub-phase of the first phase of the Incomati River Basin development. The cost of this dam, estimated at E900 million, is shared between the governments of South Africa and Swaziland on a 60/40 basis.¹⁰²

The project also proposes the development of 7400 hectares of irrigated farms downstream. The costs of this development will be borne by the Government of Swaziland and the participating smallholders through finance arranged with government assistance. It will also see the expansion of the Mhlume sugar mill to accommodate an additional 80,000 tonnes of sugar annually. The cost of this development will be borne by the private sector.

Although this project will undoubtedly have positive spinoffs for local people in terms of irrigation and infrastructural development, it is unclear how they will participate in the design and development of the project. This is so, notwithstanding that the project apparently intends to establish smallholder associations in the form and composition to be decided by the members. The Swazi government has also brought traditional leadership into the consultation processes.¹⁰³ Recorded objections and concerns of local people include the loss of San rock art, loss of grazing land, loss of kiaat (an important carving wood) and loss of graves.¹⁰⁴ The compensation and resettlement policy does not adequately cover all these aspects although local people will be able to have graves relocated.

The Swazi Government has established a company, to operate within the framework of the Public Enterprises (Control and Monitoring) Act, 1989, to administer and implement the project on its behalf. This company is the Swaziland Komati Project Enterprise (SKPE) and is wholly owned by the government and managed by a board of directors chosen from the public and private sector. SKPE is structured to behave like a business even though it does not have market-related costs and income streams. It is tasked to ensure it is economically beneficial to the nation, service to the people of the development area and environmentally sound practice.¹⁰⁵

South Africa-Mozambique

South Africa dams the water of the Incomati/Nkomati/Komati River. In terms of an agreement it reached with Mozambique it agreed to ensure a defined flow into Mozambique. Although the previous Minister of Water in South Africa committed it to fulfilling this obligation, in practice South Africa has failed to honour its responsibility to downstream users. This has reportedly resulted in Mozambique's threat to take South Africa to the International Court of Justice. It has also continued with water development activities and in particular the construction of the Injaka Dam even though agreement has not been reached on how to share the

¹⁰² <http://www.ecs.co.sz/komati/project/overview.htm>

¹⁰³ Hitchcock-3, 4.

¹⁰⁴ Hitchcock-3, 4-5.

¹⁰⁵ <http://www.ecs.co.sz/komati/project/overview.htm>

waters. Additionally the construction of a weir immediately upstream of the border by South African farmers has negatively affected water flow into Mozambique.

The basin is under considerable stress particularly as a result of high population concentration in upstream areas and intensive agricultural activity in both Swaziland and South Africa. The bulk of the water is consumed in South Africa placing considerable constraints on Mozambique's ability to develop. Agricultural practice of the sugar industry undermines local livelihoods in downstream Mozambique by causing floods in June, July and August a key crop growing time locally.¹⁰⁶ The question arises as to whether this situation is inequitable and whether there is an "over-consumption of water resources by South Africa" and how the playing field should be levelled.¹⁰⁷ International law is unhelpful because, although it pays lip service to the issue of sharing, it is based on existing uses and needs – effectively maintaining the status quo.

Orange–Senqui River Basin

South Africa, Namibia, Lesotho and Botswana share this river basin. There are a number of agreements that deal with parts or aspects of this basin including a treaty between South Africa and Lesotho establishing the Lesotho Highlands Water Project.

River Basin Agreement

At the 2000 SADC ministers meeting in Windhoek, Lesotho allegedly prevented the signing of an agreement on managing the Orange River basin between themselves, Namibia, Botswana and South Africa.¹⁰⁸ If such agreement effectively perpetuates the status quo it is clear why Lesotho would be reluctant to sign it.

At the sub-regional level, massive water development and diversion schemes to meet new expanded water needs in the Orange and Vaal basins will not only impact on the downstream state, Namibia but may limit Lesotho's rights to use the water in the future. Also of concern is that water taken from the Orange River basin to Gauteng is unlikely to be returned to the basin, but will be fed into the Crocodile and Limpopo basins. In the absence of a basin-wide treaty on water development, the downstream consumers and less developed states will depend on the goodwill of upstream states. That goodwill will be difficult to guarantee in an atmosphere of scarcity and political dominance.

A deprived consumer state is likely to view the river resource as a source of conflict. It is as yet uncertain whether the proposed project for the Orange river will lead to Lesotho demanding a reduction to its commitment to deliver over 2 billion cubic metres of water annually to South Africa by 2020.¹⁰⁹

¹⁰⁶ Leestemaker, 2000, 144.

¹⁰⁷ Leestemaker, 2000, 143.

¹⁰⁸ Lesotho, through its Natural Resources Minister, Munyayi Moleleki, is reported to have first objected to calling the body the Orange River Commission, saying this was not the name by which the river is known by the Basotho and that Lesotho wanted it named Senqui River Commission. At a subsequent meeting, the four countries then agreed to rename it the Orange-Senqui Commission. However, before the scheduled signing of the agreement, Moleleki supposedly told the meeting that his cabinet needed to study the revised document first and that he was not authorised to sign the agreement <http://www.namibian.com.na/Netstories/2000/August/News/0097776b8c.html>.

¹⁰⁹ Mutembwa

Lesotho Highlands Water Project

The Lesotho Highlands Water Project (LHWP) provides for a series of water transfers from Lesotho to South Africa. It is based on the construction of four dams and the development of the Orange-Vaal Transfer System. The formation Treaty outlines the quantities of water to be delivered, the provisions for cost sharing and the calculation of royalties. The supposed objectives of implementation are to:¹¹⁰

- harness surplus water from the highlands of Lesotho and transfer of water to Gauteng for royalties;
- generate hydroelectric power for Lesotho; and
- promote economic development of both states

The Treaty takes an approach that tries to separate domestic functions (which are the responsibility of each state) from matters of joint concern. A Joint Permanent Technical Committee is provided for in the Treaty. This is now known as the Lesotho Highlands Water Commission. The Lesotho Highlands Development Authority manages aspects in Lesotho and the Trans-Caledon Tunnel Authority manages those in South Africa. Section 11 sets issues that can not be determined individually by the respective authorities. These include the appointment of auditors and consultants, operating and maintenance plans, tendering procedures, allocation of costs between the parties and the determination of the quantity of water to be delivered.

The Treaty was negotiated over a period of about thirty years and was adopted during the apartheid era. Consequently various questions have been raised about the equality of the parties and in particular whether Lesotho had a free hand in negotiation. South Africa placed Lesotho under considerable political pressure in the 1980s – South Africa was engaged in a regional policy of destabilisation. It sought to force Lesotho into adopting a non-aggression pact and conducted numerous acts of aggression against Lesotho's citizens. Boadu¹¹¹ suggests that given the alternatives to harness the water resources outside of Lesotho, the agreement is not based on coercion. He argues that in any event establishing a collaborative arrangement is a more cost-effective option than a "coerced and unequal treaty."

The predominant focus of the treaty is on ensuring Lesotho fulfils its obligations. This is achieved by creating "joint control over the tap"; the provisions of access are broadly equivalent to a servitude.¹¹² Responsibility for water deliveries to South Africa and for hydroelectric power generation in Lesotho lies with the LHDA. To ensure that the LHDA performs accordingly, measures for reporting, maintenance of minimum flows in rivers and levels in dams and planning are set out in Article 7. Additionally, specific management procedures are established including a comprehensive management information system and reviewing systems. Although the Trans-Caledon Tunnel Authority has many functions that mirror those of LHDA these are provided for in considerably less detail and no attention is given to its downstream responsibilities. The implication of this is

¹¹⁰ Mochebelele, 2000, 107.

¹¹¹ 1998: 397.

¹¹² Boadu, 1998, 398.

that Lesotho's responsibilities require closer monitoring and management than South Africa's – reflecting how power relations effect legal provisions and constructions.

Consistent with this approach is the Treaty's linkage of delivery and the establishment of the hydroelectric power plant. This is seen as important to prevent Lesotho from shirking its responsibilities. Royalty payments are linked to payments under the South African Custom Union.

Another major problem with the Treaty is that it involves only two of the four basin states. South Africa, then effectively the colonial power in Namibia, supposedly represented Namibia's interests. Consequently, consultation with Namibia was not carried out as extensively as stipulated by international law. Water demand patterns in Namibia were thus not extensively researched. An expected increase in off-take from the Orange River basin upstream of the Namibia-South Africa border will negatively impact on water availability for Namibia and the estuary, which has now been declared a world wetlands site. The long-term survival of this agreement is dependent on recognising the needs of the environment and Namibia and factoring these into any re-negotiation or re-planning of the project.

It appears that not only is there a failure to take into account the needs of downstream users but also to accurately understand the demand in Lesotho. Lesotho will be facing absolute 'water scarcity' by 2025, five years after the completion of the LHWP. This suggests that Lesotho through the LHWP may be exporting itself into water scarcity. Provision could have been made, in the Treaty, giving priority of access to the resource exporting basin state. And consequently it should have allowed for water export to be reduced proportionately to growing demand in the donor basin.

Lesotho has, in fact, been privately demanding a re-negotiation of the 1987 treaty to address some of the concerns raised above. The country has been stalling on the start to the second phase of the project perhaps as a strategy to cause South Africa to address some of the concerns and perceived inadequacies of the 1987 treaty.¹¹³ Mutembwa argues that the LHWP has failed to generate the employment levels widely envisioned. Additionally, the issue of compensation has been problematic. Social benefits to the displaced population are also not flowing as readily as hoped. One notable instance of conflict between Lesotho's government and residents dislocated by the project, is the relocation of 70 households at Mapeleng due to the unforeseen reservoir triggered seismicity.

As with other basin agreements, translocation or access to water by the state does not necessarily mean better access for local people living within the basin. In South Africa, about six million people within the Orange basin do not have access to clean drinking water. Less than half the rural population in the basin has access to a safe water supply. Also, inadequate access to water supply for blacks because of limited reform of water legislation, or resistance by those who historically have had riparian rights, will fuel conflict potential at national level, particularly in the politically volatile Gauteng province.¹¹⁴

¹¹³ Mutembwa.

¹¹⁴ Mutembwa.

Songwe River

The Songwe River forms the international boundary between Malawi and Tanzania. It is a tributary to Lake Malawi and is drained by the Shire, which is a major tributary of the Zambezi.

The Songwe River Stabilisation Treaty, 1990 seeks to stabilise and control flooding in the lower Songwe, which results in a shifting location of the river and consequently the border. The Nordic Development Fund is funding a project to stabilise the Songwe; its objectives are to:¹¹⁵

- determine the technically and economically best option for stabilising the course of the Songwe River, thereby ensuring a stable and definitive international border between Tanzania and Malawi; and
- recommend the most viable development plan based on agreed technical, institutional, economic, environmental and political considerations. The plan shall focus on the utilisation and control of the water resources within the Songwe River Basin addressing opportunities and constraints related to the development of hydropower, irrigation, land reclamation, fisheries and tourism.

The Project will be implemented jointly by the Ministry of Lands and Human Settlements Development, Tanzania, and the Ministry of Water Development, Malawi.

Basin Transfers

Although basin transfers are not always transboundary, where basins are shared multiple states may be effected. There are several initiatives in the region which are potentially conflictual. See Box 3. These include Zimbabwe's proposal to pipe water from the Zambezi to Bulawayo, a South Africa-Zimbabwe initiative to pipe water from the Zambezi to Gauteng. There are also reportedly plans to set up a pipeline to stretch over 1 000 km from the Congo River in the Democratic Republic of Congo to help solve water shortage problems elsewhere in the SADC region.¹¹⁶

In none of these instances has formal agreement been reached. In respect of the intra-Zimbabwe transfer project implementation has begun. This has been a source of tension with Zambia as there was little or no bi-lateral consultation on this matter. These initiatives are indicative of the approach that states have sovereign rights to these resources that do not take into account issues of state responsibility.

¹¹⁵ <http://www.ndf.fi/planafric.htm>

¹¹⁶ <http://www.namibian.com.na/Netstories/2000/August/News/009776B8C.html>

BOX 3: ENVISAGED BASIN TRANSFERS FROM THE ZAMBEZI

- Namibia plans to expand the LONRHO operated sugar irrigation project in eastern Caprivi from 40 to 140 hectares. The IUCN (1992) also suggests that Namibia has plans to channel Zambezi water from Katima Mlilo to Lake Liambezi to irrigate several thousand hectares of cane. Part of the extractions from the Zambezi may eventually find their way to the country's eastern carrier.
- Botswana envisages drawing from the Zambezi after 2020 to meet the expected demand for water in eastern Botswana and the greater Gaborone region. Botswana has already indicated interest to join either Zimbabwe or South Africa in taking water from the Zambezi.
- Zimbabwe proposes to draw water from the Zambezi to Bulawayo from Kariba to Harare (the latter after 2016 when alternative projects close to Harare will have been fully exploited). The Zambezi - Bulawayo extraction envisages abstracting the equivalent of 2 percent of the Zambezi flows during lowest flow or 0.25 percent of the mean annual flow which translates to 1.2 cumecs.⁴⁸
- South Africa plans to draw from the Zambezi between 2.5 billion to 4 billion cubic metres annually after 2020 when the Lesotho Highland Water Project is fully developed. The possible extraction by South Africa of up to 4 billion cubic meters (the equivalent of 130 cubic metres/sec) would exceed the lowest recorded flow of the Zambezi at Victoria Falls (of 120 cubic metres/sec in 1924) by 10 cubic metres/sec. This raises the question of whether or not there is enough water in the Zambezi after all for the simultaneous satisfaction of non-consumptive use (hydroelectric generation) and expected consumptive uses.
- Existing extractions for Zambia include 10,000 hectares under irrigation at Nkambala. Planned projects include the Kafue - Kariba irrigation and Mambova irrigation project which both plan to abstract about 9.28 cumecs⁴⁹.

Source: Mutembwa

5 National Legislation

Water law at the national level has gone through some important developments as states grapple with issues of sustainable management, development and the nature of the resource. The emergence of these new trends are not uniformly adopted throughout the region and there remains a need for law reform to bring laws in all countries into conformity with the spirit and letter of international water law and in particular the Shared Watercourse Protocol. Zimbabwe and South Africa have both been involved in a substantial review of their water law. Other legislation such as Namibia's National Water Act requires updating and extensive revision to achieve sustainable water management as is consistent with their Constitutional Provision, Article 95.¹¹⁷

¹¹⁷ Bethune et al 1998. The constitution provides: This provides that:
"the State shall actively promote and maintain the welfare of the people by adopting...policies aimed at...maintenance of ecosystems, essential ecological processes and biological diversity of Namibia and utilisation of living natural resources on a sustainable basis for the benefit of all Namibians, both present and future."

This section identifies some key features of water law in the region and discusses the degree of convergence in these areas.

Ownership and Rights to Water

Increasingly SADC states have moved away from private rights to water and placed custodianship in the hands of the state. This is particularly true for Zimbabwe, South Africa and Namibia who are all struggling with historical inequalities between the colonial settler communities and the original peoples. In some instances this custodianship is treated as ownership such as by Zimbabwe and Zambia. In others, such as South Africa, it is recognised that the state is simply the trustee of water resources. In Botswana, the law specifically states that there shall be no right of property in water; its use and control is regulated by law and a Water Apportionment Board has general Authority.¹¹⁸

Human rights approaches to water are poorly developed. Nevertheless most states recognise the rights of all people to primary use. Primary use is generally defined to mean use for domestic and stock watering purposes. It does not include rights for agricultural use.

In South Africa, the Water Services Act, Act 108 of 1997, recognises and seeks to ensure and define the rights of access to basic water supply and basic sanitation services. The Act sets out basic water law principles, these include:

- support for the rights of all citizens to basic water services;
- the regulation of water services in a manner which is consistent with and supportive of the broader local government framework;
- the provision of water services in a manner consistent with the goals of water resource management; and
- the protection of the individual consumer and the wider public and the promotion of the broad goals of public policy where water services are provided in a monopoly situation.

Most national legislation does not specifically recognise the environment's right to water. Although there is a shift to recognise multiple uses in policy and practice, few states have recognised this in their legislation. The South African National Water Act establishes the concept of reserve which makes provision for water for the resource base and basic human consumption as a prior claim on water resources.

Other states, like Zimbabwe, do not specifically recognise environmental rights to water but acknowledge that water must be managed so that environmental functions are taken into account. Zambia recognises the ecological functions of water in its water policy. However, this is not carried through in the Water Act, Chapter 198.

Multiple Values and Objectives

Increasingly legislation in the region recognises the multiple objectives of water management. For example, the South Africa National Water Act states that its purposes are to ensure that the nation's water resources are protected, used,

¹¹⁸ Section 4 and Section 3 of the Water Act (Chapter 34:01)



developed, conserved, managed and controlled in ways which take into account, amongst other factors:

- meeting the basic human needs of present and future generations;
- promoting equitable access to water;
- redressing the results of past racial and gender discrimination;
- promoting the efficient, sustainable and beneficial use of water in the public interest;
- facilitating social and economic development;
- providing for growing demand for water use;
- protecting aquatic and associated ecosystems and their biological diversity;
- reducing and preventing pollution and degradation of water resources;
- meeting international obligations;
- promoting dam safety;
- managing floods and droughts,

and for achieving this purpose, to establish suitable institutions and to ensure that they have appropriate community, racial and gender representation.

Similarly the South African Water Policy of 1994 recommends the measures and strategies for integrated management. It creates a holistic approach recognising varying and competing demands and values. Although most national water policies recognise these concerns – there has been insufficient incorporation into legislation.

Despite this shift to holistic management the concept of optimal and beneficial use continue to inform water allocation practices. In Botswana, mining and commercial forestry have entrenched rights to water. In Zambia industrial use of water is specially protected.

Institutions and Public Participation

In many countries the water sector is multi-layered. However in all of the countries it is possible to identify a principle institution responsible for water management. In most this responsibility is allocated at a ministerial level. For example, in Malawi, the Ministry of Water Development is the key government institution responsible for water management services and consists of four major sections namely the Hydrology, Hydro-geology, Rural Water Supply and Sanitation, and the Water Quality Sections. In addition some countries have either localised river or catchment management institutions.

National administration and management of water has increasingly moved towards a catchment management approach consequently addressing earlier problems of fragmentation. However some countries, such as Zambia and Botswana, still use centralised Water Boards to allocate water rights.

Public participation is increasingly provided for in the establishment of catchment-based authorities as many governments now recognise that stakeholder involvement is essential for effective management. This approach however is not consistently used throughout the region. In Malawi's water policy, government has committed itself to facilitate the participation of stakeholders in water management programmes (including users and special target groups) both in the



public and private sectors to ensure that the needs of their relevant interests are taken into account. In Zimbabwe the Water Act makes provision for the establishment of catchment councils. Although these are supposed to include all stakeholders, studies looking at participation have found that the rural poor are largely alienated by processes adopted. In South Africa the National Water Act provides for the establishment of catchment management agencies. As in Zimbabwe, the Minister appoints these. However the South African Act goes a step further and provides that appointment to the governing board, must be done with the object of achieving a balance among the interests of water users, potential water users, local and provincial government and environmental interest groups. A procedure for establishing this is set out in the Act. The Minister is entitled to appoint additional members in order to, amongst other things, achieve sufficient gender representation; sufficient demographic representation; representation of the Department; representation of disadvantaged persons or communities which have been prejudiced by past racial and gender discrimination in relation to access to water; and obtain the expertise necessary for the efficient exercise of the board's powers and performance of its duties. Nevertheless public participation in South Africa still remains a problem.¹¹⁹

Neither Zambia's or Botswana's legislation makes specific provision for public participation. Draft legislation in Namibia¹²⁰ creates a regime for rural communities to define themselves as water user associations and through registration to obtain managerial authority for management of water at the local level.

Regulation of Use

As a result of the shift towards the state as custodian of water, increasingly rights are conferred administratively and not in perpetuity. Where rights are granted in perpetuity provision is made for review and the diminishing of such rights.

Most SADC countries have moved towards the recognition that water must not only be sustainably used but that its distribution must address social, economic and environmental needs. This is typified for example by the Malawian National Water Resources Management Policy (1994) that outlines the policy and strategies for water resources management in Malawi. Salient features of the policy are that:

- water should be managed and used efficiently and effectively in order to promote its conservation and future availability in sufficient quantity and acceptable quality;
- all programmes related to water should be implemented in a manner that mitigates environmental degradation and at the same time promotes enjoyment of the asset by all beneficiaries; and
- water allocation should recognise that water is not only a social but an economic asset, and in a manner that achieves maximum benefit to the country.

South Africa and Zimbabwe have similar provisions. Regrettably in most countries these policy provisions are not always incorporated into law.

119 Savenije and Van der Zaag, 2000, 56.

120 Draft Water Bill.

Much of the legislation in the region establishes systems for environmental monitoring and control of water resource management. This includes legislation in South Africa, Malawi, Namibia, Zambia, Botswana and Zimbabwe. However the success of the legislation varies considerably. The principle water legislation in Namibia is the Water Act, No. 54 of 1956, which covers a range of issues relating to the protection of surface and subsurface waters from pollution and misappropriation, and sets out the state's interest in protecting the resource. A major limitation of the Act is that it does not stipulate that the use of water resources must be socially, economically or environmentally sustainable. Zambia and Botswana's legislation is similar. Moreover, it does not recognise the natural environment as a user of water nor as a provider of essential processes and services.

All the region's countries have laws that require permits or licences for abstracting water from either surface or groundwater sources and for discharging waste or effluent into a water body. Regrettably many of the responsible institutions are poorly organised and have inadequate resources for monitoring, policing, and punishment of offenders. In many cases field and laboratory equipment and logistical support are lacking and human resources are unmotivated. Consequently in many areas water quality controls remain inadequate.

A Commitment to Good Neighbourliness

South Africa is the only country that specifically commits itself in its national water law to the practice of good neighbourliness. Although given that this is also a principle of international customary law, all the region's countries are required to follow it.

Most states' national laws are silent on issues related to regional/international commitments and on the desired extent of co-operation in resource management.

6 Customary Construction of Water Rights

There is little understanding of how traditional water rights were constructed and what local perceptions are today. Interestingly, du Bois¹²¹ notes that there is a structural similarity manifested by pre-colonial water laws in parts of Africa inhabited by populations vastly different in culture and economic activity. These rules, he argues, evince a pattern of stable core-entitlements, rigidly protected from competition, but circumscribed by rules enforcing a regime of sharing.¹²²

¹²¹ (1994) 78.

¹²² du Bois, (1994) 78.

In the case of Botswana, Hitchcock¹²³ argues that traditionally there was a limited sense of private ownership of water resources and that such resources were generally associated with social units such as families or wards. Open surface waters such as rivers and springs, it is said, were open to domestic use by individuals and groups but not subject to acquisition. In grazing districts however rights were confined to the ward in which the waters were located; outsiders were allowed access only with permission of the modisa (overseer).¹²⁴ It appears however that such permission was merely ceremonial. Where water was obtained through investment either through capital or labour, the investor was entitled to such water.

This communal construction of water rights was redefined through the 20th century as a result of the development of water technology and imposed law. There was a shift to private ownership of wells and boreholes. Increasingly access was dependent on formal social arrangements. In this context some traditional leaders imposed levies on water extraction.¹²⁵ In Botswana, it is argued that this trend towards the distortion of custom was sanctioned by the colonial state that recommended the imposition of water allocation rules to control grazing.¹²⁶ In many countries custom was simply displaced by the proclamation of colonial law. In Swaziland, for example, a 1910 Proclamation sought to combine stable entitlements with flexible access by riparian land-owners to the ordinary flow of streams and rivers and empowering the diversion of the surplus flow onto any other land.¹²⁷

Law also ignored the cultural values associated with specific rivers. For example the Nata/ Amanzanyama River has special cultural associations for people in the north-western part of Botswana and in the western part of Zimbabwe.¹²⁸ Yet no mechanism is created in law that recognise, and protect, these cultural associations.

7 Comment: Constraints and Opportunities

This section considers the implications of this multi-layered legal regime for the development of TBNRM initiatives in this area and the reforms needed to support such development. To a large extent the success of regional approaches are dependent on the efficacy of national approaches. There is clearly a need for national laws to be further streamlined and made consistent with regional objectives and policies as well as to create complementarity between the respective national systems.

There have been significant developments in water law. Importantly there is trend towards catchment management and developing multi-stakeholder approaches. Nevertheless there is a need for water reform in many of the countries. Countries need to update their national systems to reflect mutually agreed approaches developed in regional agreements. Harmonisation is also important. In particular

¹²³ (1999) 9; See also Schapera (1938).

¹²⁴ Hitchcock (1999) 9.

¹²⁵ Hitchcock (1999) 10.

¹²⁶ Hitchcock (1999) 10.

¹²⁷ du Bois (1999) 80.

¹²⁸ Hitchcock (1999-2) 3

approaches to local rights (and systems for protecting these) needs to be harmonised if TBNRM initiatives are not to cause conflict and hostility.

One of the major challenges for TBNRM must be how to address and resolve the simmering tensions around water rights and allocation in the region at the inter-state level. Regional experience indicates a growing tension around the use and allocation of water. This is particularly evident in conflict between South Africa and Mozambique as well as between Botswana and Namibia. There is also a lot of displeasure around the Lesotho Water Highlands Project amongst the Basotho people and many suggest that protecting South Africa's water interests was a key motivation for the invasion by South Africa in 1999. Although international law, the SADC Protocol and individual agreements emphasise the equality of all states – in practice this is seldom the case. Differences in political and economic strength may result in skewed agreements. In some cases, like with the ZRA, this is purely historical.

In the context where regional agreements and national legislation emphasise water development, rather than management, these tensions may be exacerbated. Existing water use by upstream states has been prioritised over and above the potential and growing needs of downstream states. This is particularly evident in the continuing low-grade conflicts around the Nkomati River. If TBNRM agreements are to address this issue then they need to establish common values for water allocation and create systems and mechanisms for adjusting rights of the respective parties. The failure to do this, as for example in the case of the Lesotho Highlands Project, threatens those very agreements. The limitations of international law should be acknowledged – these problems have not been rectified by the acknowledgement of states of their obligation to ensure equitable sharing of water resources. As the substantive sections illustrate these rights are subject to multiple interpretations. Additionally what is considered fair legally is dependent on actual needs rather than potential needs. It is somewhat ironic that while many states have moved towards redressing historical injustices nationally, at the regional level these issues have not been seriously addressed. The failure to address these issues within the relevant agreements contributes to a lack of trust and a perception that there is no common regional agenda¹²⁹ and consequently limits the opportunities for co-operative inter-state management and mitigates against the SADC treaty objective of promoting peace and security.

Additionally, certain key concepts that are at the basis of the current inequality, such as the definition of a river basin¹³⁰ and equitable utilisation, will need to be clearly redefined if effective co-operation is to be achieved.

These tensions call into question the effectiveness of legal regimes formed against the backdrop of suspicion and misunderstanding. The question must be posed as to how stable such agreements are. The perception of imbalances in the distribution of benefits and gains, past and future, must be addressed if effective transboundary management is to be achieved. Information management, which

¹²⁹ Leestermaker (2000).

¹³⁰ Savenije and Van der Zaag (2000) 55.

must include gathering, analysing and disseminating, is essential to building such trust and water security yet these are only tentatively provided for in existing transboundary management agreements.

Another difficulty arising from the emphasis on water development rather than management is the threat that this regime poses to environmental conservation and in particular riverine integrity. The concept of sharing of water resources as provided for in the SADC protocol on shared watercourses does not provide a solution because, although it acknowledges the need for basin management, it is based on the recognition of the sovereignty of member states and states have virtually unfettered rights to deal with water in their states. This is so notwithstanding the fact that many, like South Africa and to a lesser extent Zimbabwe, recognise that water must be reserved for the environment or at least has an environmental function. Environmental sustainability is commonly thought of as maintaining minimum flow. Increased salination of the mouths of the Incomati/Komati/Nkomati and Limpopo Rivers may be attributed to increased upstream usage.¹³¹ This continued schism tolls negatively for effective TBNRM in the water sector because it perpetuates water scarcity and consequently contributes to insecurity.

Litigation is extremely limited as a mechanism for resolving conflict. Although at the inter-state level states may have recourse to the International Court of Justice, virtually no litigation opportunities are available where the dispute is between citizens and their own state, citizens and another state and citizens from two different states. The UN Convention on Water requires states not to discriminate between its own citizens and other citizens in determining access to the courts. This Principle creates new opportunities for resolving conflict. The success of this as a tool for conflict resolution is linked to the opportunities each national system creates for citizens to defend their rights both against the state and other citizens. TBNRM agreements should make provision for the principle of non-discrimination. Nevertheless given the existing tensions -greater attention also needs to be given to the issues of negotiation, mediation and arbitration. Additionally it is important to bring the concept of equitable utilisation in line with that of justice.

An additional and related problem is that international law generally concerns itself with the rights of states and not of people. Although countries in the region have moved towards the creation of catchment management agencies at the national level and towards the establishment of basin organisations at the regional level, there is poor integration of these structures. Consequently the gaps between water users and the ministries and water users and multi-lateral institutions responsible for water continue to widen. This does not bode well for successful transboundary management, as local users are not incorporated into the planning process at the regional level. And this may thus contribute to tension between the state and communities and between communities across

¹³¹ Savenije and Van der Zaag (2000) 60.



borders. To achieve effective participation, TBNRM agreements need to adequately provide for accountability and transparency in management. It is important that TBNRM agreements redress and clearly set out the respective rights of states and citizens, rather than treat the rights of citizens as a domestic matter. The inclusion of communities in negotiation is demonstrated in conflict emanating in the Okavango Basin. According to Savenije and Van der Zaag¹³² successful integrated management of shared water resources requires:

- integrated supply and demand management,
- public participation, and
- enhanced regional economic integration.

The existing legal framework does not adequately support the realisation of these aspects. The challenge for TBNRM is to address these issues. Additionally the participation of all basin states in these commissions is essential.

Existing water law at the international, regional and national levels fails to take cultural associations with and traditional rights to water into account in determining distribution and access regimes.

A clear link between human rights to water and water allocation needs to be made and incorporated into regional water agreements. The failure to provide adequately for human rights to water and rights of participation may be attributed to the over-emphasis by states on sovereignty. The relationship between citizens' rights and state rights must be agreed on.

¹³² (2000) 58-59.



B TERRESTRIAL WILDLIFE RESOURCES

This section focuses on the transboundary management of terrestrial wildlife and wildlife land. Wildlife is understood to include all plant and animal species originally occurring within natural ecosystem and habitats with no, or only limited, human influence in their existence and reproduction. Wildlife land refers to all land, which is inhabited by wildlife whether in their natural habitat or not and is not restricted to land legally classified as such.

This section describes specific multilateral arrangements of a transboundary nature in the area of wildlife management. It considers at a general level the implications of national legislation in SADC countries for these transboundary initiatives and highlights the constraints and opportunities for TBNRM. Given the focus on existing practice, forests, air and inland fisheries are not considered in any depth. The major focus of practice in this area has been the creation of new transboundary conservation areas. These have taken various forms from mega-parks to multi-objective resource initiatives.

The section begins with a consideration of approaches adopted at international law. There are numerous multi-lateral agreements pertaining to the management of biological resources to which SADC member states are party. At the global level these include the Convention on Biological Diversity (CBD); Ramsar Convention on Wetlands of International Importance (RAMSAR); and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES). The Convention Concerning the Protection of World Cultural and Natural Heritage is important in that it establishes links between cultural and environmental heritage. Also important are the soft law agreements, the Rio Declaration and the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests (Forest Principles) as well as the global programme of action, Agenda 21. The African Convention on the Conservation of Nature and Natural Resources (Africa Convention) is also applicable. At the regional level agreements include the SADC Protocol on Wildlife Conservation and Law Enforcement in the Southern Africa, the Lusaka Agreement on Co-operative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora and the Master Plan for the Security of Rhino and Elephant in Southern Africa¹³³ and the Southern African Convention for Wildlife Management. SADC is in the process of drafting an Environmental Management Protocol and a Forest Protocol. Various agreements establishing specific transboundary initiatives have also been adopted. A selection of these is considered here.

1 Approaches at International Law

It is not possible to review all applicable global level agreements, thus a selective approach is adopted. International agreements can be broadly divided into two groups – those that set managerial frameworks (such as the CBD, RAMSAR and the Forest Principles) and those that establish specific rules for management and

¹³³ The Lusaka Agreement focuses on illegal trafficking of wildlife products and is not examined in detail here.

co-operation as is the case with the Convention on International Trade in Endangered Species of Fauna and Flora (CITES), which is a trade regulation treaty.¹³⁴ This section focuses on the broad managerial frameworks created. It describes broadly the provisions of the CBD,¹³⁵ RAMSAR¹³⁶ and the Forest Principles as they set the tone for regional co-operation in the management of biological diversity. Also directly relevant, but only adopted by South Africa, is the Convention on the Conservation of Migratory Species of Wild Animals and consequently not discussed here. The Convention Concerning the Protection of the World Cultural and Natural Heritage is discussed briefly because it links culture and the environment.¹³⁷ The African Convention on the Conservation of Nature and Natural Resources is also considered.¹³⁸

State Sovereignty and Responsibility

Environmental management, at international law, is now based on the recognition of sovereignty and equality of states as mitigated by state responsibility. This recognises the rights of states to manage the environment pursuant to their own environmental and development policies. However states have the responsibility to ensure that activities within their jurisdiction do not cause environmental damage beyond the limits of their national jurisdiction.

Environmental Conservation and Development

The object of the African Convention on the Conservation of Nature and Natural Resources, adopted in 1968, is “to harness the natural and human resources of our continent for the total advancement of our peoples in spheres of human endeavour.” In 1992 this approach was adopted globally in the CBD. It explicitly links conservation to development. The objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.¹⁴²

This approach is echoed in the Ramsar Convention on Wetlands of International Importance. RAMSAR’s mission is “the conservation and wise use of wetlands by national action and international co-operation as a means to achieving sustainable development throughout the world”. The Conference of the Parties, at its 3rd meeting in Regina, Canada, in 1987 clarified the meaning of wise use:

“The wise use of wetlands is their sustainable utilisation for the benefit of mankind in a way compatible with the maintenance of the natural properties of the ecosystem.”

At the same time, “sustainable utilisation” of a wetland was defined as:

“Human use of a wetland so that it may yield the greatest continuous benefit to present generations while maintaining its potential to meet the needs and aspirations of future generations.”

¹³⁴ Although RAMSAR focuses specifically on the protection of wetlands of international importance (and calls on each party to designate at least one site), it is considered here as it establishes broad managerial principles and is not simply rule oriented.

¹³⁵ Widely recognised as the most encompassing and important environmental agreement. It has been signed by 180 states including all 14 SADC states. Most of SADC have ratified. The Convention entered into force in December 1993.

¹³⁶ It was adopted in 1971, there are currently 124 parties. 7 of the 14 SADC members are party. These are Botswana, the DRC, Malawi, Namibia, South Africa, Tanzania and Zambia.

¹³⁷ It has been signed by 157 states, in SADC these include Angola, the DRC, Mauritius, Mozambique, Zambia and Zimbabwe.

¹³⁸ It has 43 signatories, 7 SADC states are party to it.

¹³⁹ Article 1.

The flip side of this is the recognition that development must be sustainable. The African Convention provides that the Contracting States shall ensure that conservation and management of natural resources are treated as an integral part of national and/or regional development plans. This approach is integral to the management approach of the CBD and is also recognised in the Rio Principles. The CBD creates obligations to develop national strategies and plans, that integrate the conservation and sustainable use into relevant plans, programmes, policies and decision-making processes.¹⁴⁰

Partnerships and Co-operation

Partnerships and co-operation at all levels (local, national, regional and global) are now seen as central to environmental management. To achieve its objectives, the CBD promotes partnership and co-operation between countries and within countries.¹⁴¹ Parties are encouraged to co-operate in scientific, technical and financial areas. The need for global co-operation in financial, technical and investment matters is also emphasised. However, this is in the context of the recognition of shared responsibility and state sovereignty. The concept of partnerships is also promoted. On the one hand the importance of securing the participation of women and indigenous and local communities is acknowledged. On the other, parties are encouraged to promote co-operation between government authorities and the private sector in developing methods for the sustainable use of biological resources. The Rio Declaration and the CBD both note that global co-operation must be based on the recognition of differentiated obligations of developed and developing states.¹⁴² The special situation and needs of developing countries is also acknowledged.¹⁴³

RAMSAR requires parties to consult with other parties about the implementation of the Convention, especially with regard to transfrontier wetlands, shared water systems, shared species, and development projects affecting wetlands. The Rio Declaration links the issue of public participation to rights to information and fair and transparent administrative processes.¹⁴⁴

Cultural Rights

Both the CBD and the Convention Concerning the Protection of the World Cultural and Natural Heritage recognise the importance of cultural rights and the linkage between culture and environmental protection. The Convention Concerning the Protection of the World Cultural and Natural Heritage obliges states to take legislative steps to protect the cultural heritage of their people. The CBD, Agenda 21 and the Rio Principles recognise that the role of indigenous and local communities must be acknowledged for the conservation of natural resources.¹⁴⁵ This includes not only their rights to participate but also the right to benefit.

¹⁴⁰ Article 6 and 10.

¹⁴¹ Article 5.

¹⁴² Principle 7.

¹⁴³ Principle 6.

¹⁴⁴ Principle 10.

¹⁴⁵ Article 8j and 10c.



Environmental Management

An approach to management of biological diversity that recognises not only the intrinsic value of biodiversity but also its ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values is urged.¹⁴⁶ Environmental management is based on a number of integrated strategies.

Scientific knowledge is seen as important for decision-making. The role of other non-western forms of knowledge (traditional knowledge) is acknowledged. Consequently capacity building and research, monitoring and resource assessment is identified as critical for conservation and sustainable management. Notwithstanding this, it is recognised that where there is a significant threat of loss of biodiversity, the lack of scientific certainty should not be used as a reason to postpone cost effective measures to avoid risk.¹⁴⁷ Monitoring, assessing and minimising negative impacts are key strategies.¹⁴⁸

The CBD focuses on the internalisation of environmental costs and the creation of social and economic incentives for management.¹⁴⁹

2 The SADC Wildlife Protocol

The SADC Protocol on Wildlife Conservation and Law Enforcement in Southern Africa Development Community (Wildlife Protocol) was adopted in August 1999. All 14 SADC states have signed it. However, it has only been ratified by Botswana and has therefore not as yet entered into force.

The Protocol applies to the conservation and sustainable use of wildlife resources, excluding forestry and fishery resources.¹⁵⁰ Article 1 provides that wildlife means “animal and plant species occurring within natural ecosystems and habitats.”

As with all SADC agreements, the basis of the Protocol is the sovereignty of states. The Preamble begins with an affirmation that member states have the sovereign right to manage their wildlife resources and the corresponding responsibility to sustainably use and conserve these resources.

In Article 4 the objective of the Protocol is to establish a common framework for the conservation and sustainable use of wildlife resources in the region to assist with the effective enforcement of laws governing those resources. Specific objectives are to:

- Promote the sustainable use of wildlife resources;
- Facilitate the harmonisation of the legal instruments governing wildlife use and conservation;
- Promote the enforcement of wildlife laws within and between and among states;
- Facilitate the exchange of information concerning wildlife management, use and the enforcement of laws;

¹⁴⁶ CBD Preamble.

¹⁴⁷ CBD Preamble; Rio Declaration, Principle 15.

¹⁴⁸ Article 14.

¹⁴⁹ Article 11.

¹⁵⁰ Article 2.

- Promote the conservation of shared wildlife resources through the establishment of transfrontier conservation areas; and
- Facilitate community-based natural resource management practices.

The Protocol has a number of key features that set the basis for regional co-operation and, in particular, TBNRM. Both conservation and sustainable use are key issues for wildlife management; in particular the potential contribution of wildlife to sustainable economic development is identified.

Article 3 establishes three core principles. These principles focus on both national and international management mechanisms and form a sound basis for TBNRM.

They are:

- **Transboundary Harm:** Paragraph 1 creates an obligation not to cause damage to the wildlife resources beyond the limits of its national jurisdiction. This is consistent with the general international law principle of good neighbourliness.
- **Co-operation:** Under Paragraph 2(a) state parties agree to ensure co-operation at the national level among government authorities, NGOs and the private sector. State parties, in sub-paragraph b, agree to co-operate to develop common approaches to the conservation and sustainable use of wildlife. Finally under sub-paragraph c they have agreed to achieve the objectives of international conventions to which they are party.
- **Implementation:** In Paragraph 3, parties agreed to undertake various initiatives to ensure the implementation of the Protocol. This includes taking policy, administrative and legal measures as appropriate to ensure the conservation and sustainable use of wildlife; taking measures to ensure the enforcement of national legislation and co-operating with other member states to manage shared wildlife resources and any transboundary impacts.

Additionally, several other articles are key to establishing meaningful co-operation in the transboundary management of wildlife resources. In particular those dealing with information, law enforcement and capacity building are important.

In Article 8 the parties have agreed to establish a regional database. This database must be available to both state parties and the general public. The Wildlife Sector Technical Co-ordinating Unit (WSTCU) has general responsibility to ensure the development of the database. It is required to co-ordinate surveys of databases around the region and to use this information to develop a regional database. It is also responsible for developing methodologies for wildlife inventories. Further, upon request, it must assist with national efforts to gather data.

Article 9 addresses the issue of law enforcement. Member states have agreed, in terms of Paragraph 1, to take the necessary measures to ensure the effective enforcement of legislation governing the conservation and sustainable use of wildlife resources. To this end state parties are required to allocate appropriate financial and human resources. Paragraph 3 provides for the enforcement of legislation. The enforcement of legislation will be co-ordinated with their designated Interpol National Central Bureau (NCB). Parties are required to



exchange information relevant to the effective enforcement of the law. State parties may request assistance from the Interpol NCB in other states or other state parties. Paragraph 5 requires state parties to provide to the designated Interpol NCB in their state with all available data. This information shall include the location and movements of illegal takers and traders as well as transfrontier routes of illegal trade.

Member states have agreed under Article 10 to co-operate in capacity building for effective wildlife management. State parties are required under Paragraph 3 to identify aspects of wildlife management and law enforcement for which adequate training programmes are not available within the SADC region and to establish such programmes. The Wildlife Sector Technical Co-ordinating Unit shall co-ordinate initiatives of state parties to standardise and initiate training programmes.

Conflict resolution is provided for under Article 13. In terms of this Article disputes that can not be settled amicably shall be referred to the Tribunal established under the SADC Treaty. In addition Article 12 makes provision for the imposition of sanctions against state parties who either fail, without good reason, to fulfil obligations assumed under the Protocol or who implement policies that undermine the objectives and principles of this Protocol. The SADC Council determines whether or not to impose a sanction and then makes a recommendation to the Summit. The Summit decides whether or not to impose a sanction.

3 Southern African Convention for Wildlife Management (SACWM)

In 1991 five southern African countries (Botswana, Malawi, Namibia, Zambia and Zimbabwe) formed the Southern African Centre for Ivory Marketing (SACIM). In 1992, Zambia withdrew, following a change in government and strong pressure from British NGOs to withdraw.¹⁵¹ SACIM was formed to market legally acquired ivory to non-CITES countries. Since then, SACIM has broadened into a forum for the discussion of a wide range of wildlife management issues between neighbouring countries. Consequently the name was changed to the Southern African Convention for Wildlife Management (SACWM) seeks to:¹⁵²

- Establish a regional framework for the conservation and management of southern African wildlife populations;
- Establish links with range states outside southern Africa with a view to reach consensus on wildlife issues across the African continent;
- Develop a computerised database on wildlife populations, their trends, movement, translocation and/or culling procedures, and to act as a repository for information on other aspects of wildlife management, including relationships between wildlife and their habitats, and disseminate such information;
- Advise on appropriate action to mitigate the effects of wildlife populations where they conflict with holistic management objectives for a particular area, or where they come into conflict with human interests;

¹⁵¹ IMERCSA website.

¹⁵² <http://www.sadcreview.com/Sectorial%20Reports%202000/wildlife.htm>

- Advise on appropriate marketing strategies for wildlife products, including manufacturing and processing industries and promotion of markets to secure optimum benefits from the sales of wildlife products;
- Establish, monitor and control a system for marketing of wildlife products;
- Assist in determining optimum wildlife populations in the member countries and advise, or assist them in carrying out the management of wildlife to achieve such optimum populations;
- Make recommendations for the conservation of wildlife and wildlife habitats, and where necessary, advise and assist in carrying out such recommendations; and
- Encourage and support the implementation of protocols, such as the SADC Wildlife and Law Enforcement Protocol designed to enhance the application of law enforcement procedures that benefit the conservation and management of the region's elephant population and other key wildlife populations, such as Black and White Rhinos and others.

The Southern African Convention for Wildlife Management is designed to improve management of wildlife and maximise revenues from sustainable use of wildlife and wildlife products and to strictly control such use. Surplus funds from sustainable use will be used to support wildlife conservation projects in the region. Consequently, SACWM forms a useful forum for dialogue around transboundary management issues.

4 Transfrontier Conservation Areas

A Transfrontier Conservation Area (TFCA) may be thought of as a cross-border region, irrespective of whether the different component areas have the same conservation status or not. Component areas may include areas such as Private Game Reserves, communal natural resource management areas, hunting concession areas, national parks. These areas are managed for long-term sustainable use of natural resources.¹⁵³ These areas have also been labelled as TBNRM Areas.¹⁵⁴ A Transfrontier Park may be thought of as a sub-category of a Transfrontier Conservation Area and is considered as such here. Transfrontier Parks are areas in which the primary focus is wildlife conservation, and which border each other across international boundaries. The respective authorities formally agree to manage those areas as one integrated unit according to a streamlined management plan. These authorities also undertake to remove all human barriers within the Transfrontier Park so that animals can roam freely and in this sense it is a special form of transboundary arrangement. Human barriers include fences, major road highways or railway lines.

There are a growing number of transfrontier conservation area initiatives. Many of these are simply collaborative management initiatives that have not as yet been formalised as agreements between states. The first formalised agreement was the bi-lateral Kgalagadi Agreement between Botswana and South Africa establishing the Kgalagadi Transfrontier National Park. Mozambique, South Africa and Zimbabwe in November 2000 signed a Protocol establishing a TFCA that will bring

¹⁵³ <http://www.environment.gov.za/projects/gkg/traansfrontier/background.htm>

¹⁵⁴ Griffen *et al*

the parks of Gaza in Mozambique, Kruger National Park in South Africa and Gonarezhou in Zimbabwe as well as some communal land together under joint management, creating one of the biggest conservation areas in the world. An agreement establishing the Lubombo TFCA was signed on 22 June 2000 in Durban at the World Economic Summit by Swaziland, South Africa and Mozambique. Other initiatives include a GEF funded transboundary project including Lesotho and South Africa for the management of a shared mountain range (Maluti / Ukhahlamba-Drakensberg Mountains) and an IUCN facilitated collaborative project between Mozambique, Zambia and Zimbabwe (ZIMOZA) to manage an area upstream from the Cabora Bassa Dam.

The Kgalagadi Agreement

This agreement formalises existing collaboration between Park's authorities in Botswana's Gemsbok National Park and those in the Kalahari Gemsbok National Park in South Africa. The shared border is approximately 300km long. Although, the bilateral Agreement between Botswana and South Africa was signed on 7th April 1999, the Transfrontier Park was only officially launched on 12th May 2000.

The agreement seeks to ensure management as a single ecological unit.¹⁵⁵ As a result of the establishment of this Park, no barriers to wildlife movement exist along the international boundary that separates the 9,591 km² Kalahari Gemsbok National Park in South Africa and the 28,400km² Gemsbok National Park in Botswana. Nevertheless, the agreement is premised upon the recognition of each country's sovereignty and the territorial integrity of each. The management of the area is based therefore on recognising the respective legal regimes of the parties. Indeed Article 7 specifically requires respect for domestic law.

Article 3 of the agreement establishes management objectives that set the framework for co-operation. These objectives include the sharing and pooling of expertise and experience of the respective wildlife authorities and to integrate managerial, reservation, marketing and other systems. Article 2.2.4 commits parties to achieving an equitable apportionment of revenues generated by the parks. The Article provides that this means that "gate takings shall be shared equally while all other tourism and commercial revenues shall accrue to the park generating such revenue unless otherwise agreed."

Importantly conservation is linked to key economic objectives. These are:

- To increase the local and international profile of the area and consequently to increase its potential as a tourist destination, and
- To encourage the full realisation of the economic potential of the Parks and surrounding areas and in particular to bring the benefits thereof to local communities adjacent to the Parks.

Pursuant to the objective of integrating management joint conservation management plans have now been put in place, as have strategies to upgrade and develop the park's tourism potential, based on a unified set of regulations to govern visitor behaviour.

¹⁵⁵ Article 1.

The agreement, in Article 4, makes provision for the management of the area by the respective wildlife authorities and gives them full power and authority to act as the agent of their respective states. Article 5 establishes the Kgalagadi Transfrontier Park Foundation which is designed to provide the representatives of Botswana and South Africa with the opportunity to share ideas, develop proposals and to provide general guidance to facilitate the integration and joint management of the Parks. Provision is made for the Kgalagadi Transfrontier Park Foundation to be incorporated as a company under South African law. The South African National Parks provides secretarial services to the Foundation. The Foundation also has a monitoring function in respect of the implementation of the Management Plan. The chair rotates annually between the parties. Article 8 establishes a dispute settlement process and makes provision for the establishment of an arbitration tribunal. This is restricted to disputes between states and does not include disputes between affected citizens and the parties. The traditional resource rights of affected communities have not been directly provided for in the agreement. These are dealt with strictly from a management perspective in the management plan.

Gaza-Kruger-Gonarezhou Transfrontier Area

Following a memorandum of understanding in May 2000 between Mozambique, South Africa and Zimbabwe, these countries in November 2000 signed a protocol establishing the biggest transfrontier conservation area in the world, straddling 100 000 square kilometres, the Gaza-Kruger-Gonarezhou Transfrontier Area.¹⁵⁶

The agreement establishes both a transfrontier park between designated wildlife areas and a transfrontier conservation area that includes multiple land-use categories and hence stakeholders. This is perceived as an integral part of the Maputo Development Corridor.¹⁵⁷

The Preamble, although not a substantive part of the Agreement, sets the tone for interpretation. It begins by recognising the principle of sovereign equality and territorial integrity of the parties. This respect for sovereignty is restated in the articles of the Agreement. The Agreement is based on the recognition of the benefits to be derived from close co-operation and the maintenance of friendly relations with each other as well as the necessity to conserve the environment for the benefit of all the people of southern Africa. The Agreement acknowledges that it is been entered into in the context of other international agreements to which they are parties. These include the Convention on Biological Diversity, United Nations Convention to Combat Desertification, SADC Wildlife and Law Enforcement Protocol and the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES). Parties have agreed to abide by these.

¹⁵⁶ Article 2 provides that this name is transitional and that a new name will be chosen through a process of consultation and public participation.

¹⁵⁷ Jordan and Gordhan, 1996.

Article 3 sets out the objectives of the Transfrontier Park. These are to:

- foster trans-national collaboration and co-operation among the Parties in implementing ecosystem management through the establishment, development and management of the Transfrontier Park;
- promote alliances in the management of biological natural resources by encouraging social, economic and other partnerships among the parties, private sector, local communities and NGO's;
- enhance ecosystem integrity and natural ecological processes by harmonising environmental management procedures across international boundaries and striving to remove artificial barriers impeding the natural movement of animals;
- develop frameworks and strategies whereby local communities can participate in, and tangibly benefit from, the management and sustainable use of natural resources that occur within the Transfrontier Park; and
- facilitate the establishment and maintenance of a sub-regional economic base by way of appropriate development frameworks, strategies and work plans; and develop transborder ecotourism as a means for fostering regional socio-economic development.

As stated above procedures are based on respect for the sovereign rights of each party. Parties have agreed that no party shall impose decisions on another but decision-making shall be made jointly. Co-operation is enunciated as a key principle. Further each party has undertaken to ensure that full stakeholder participation is engaged in within their respective countries, so that broad social and political acceptance is achieved for the process. However no opportunities are created for citizens to enforce compliance with this.

Specific areas of co-operation that the parties have agreed to include:¹⁵⁸

- promoting integrated and coordinated management of the Transfrontier Park for their optimal benefit;
- harmonising legislation and policies to facilitate integrated and complementary conservation and socio-economic development activities;
- ensuring that during the development of the Transfrontier Park effective measures are implemented to address issues relating to customs and immigration, security and border control, public health, wildlife diseases and other matters which affect relations between the parties;
- synchronising, where possible, related development actions in areas bordering each other; and
- from time to time, enter into further agreements which may be required to give effect to the spirit and intent of this Agreement.

Parks' authorities in the respective countries are generally responsible for implementation. An institutional framework for international collaboration based on consensual decision-making and chaired on a rotational basis is established. It consists of a number of levels and the following bodies are established: the GKG Transfrontier Park Trilateral Ministerial Committee; the GKG Transfrontier Park Technical Committee; the GKG Transfrontier Park Co-ordinating Party and the GKG Transfrontier Park Working Group.

¹⁵⁸ Article 5.

The Trilateral Ministerial Committee consists of the designated Ministers. It is responsible for overall policy guidance in the development of the Transfrontier Park. It is to be chaired on a rotational basis. It is also responsible for monitoring progress in the implementation of the action plans for the Transfrontier Park. Decision-making is supposed to be by consensus. The Technical Committee consists of senior representatives of the competent authorities and/or the respective Ministries from Mozambique, South Africa and Zimbabwe. It is responsible for:

- interpreting the political directives of the Trilateral Ministerial Committee into a set of operational guidelines and policies;
- approving action plans for the development and management of the Transfrontier Park;
- harmonising the expectations and aims of the Parties with respect to the establishment, development and management of the Transfrontier Park;
- monitoring the implementation process of the establishment, development and management of the Transfrontier Park; and
- preparing reports and other appropriate documentation for the Trilateral Ministerial Committee.

Parties are designated on a rotational basis as the Co-ordinating Party in order to promote accountability and sustained momentum in the Transfrontier Park implementation process.

The Agreement establishes a Working Group composed of representatives appointed by the competent authorities of the parties and/or representatives delegated by the relevant Ministries of the parties. The Working Group is responsible for implementation of the Action Plan as developed and guided by the Technical Committee. They must ensure full participation by all appropriate stakeholders in the preparation of policy recommendations, resource management plans, and other relevant documents relating to the GKG Transfrontier Park. Despite the mandatory language used, no provision is made for citizens to ensure the parties abide by this commitment. Also it is their function to liaise and collaborate with other relevant regional initiatives, such as the Maputo Development Corridor, in the establishment, development and management of the Transfrontier Park. They must provide feedback and progress reports to the Technical Committee. The Working Group has no decision-making authority, but may make recommendations to and receive guidance and supervision from the Technical Committee regarding its activities.

In the event of a dispute arising between the parties as to the interpretation, application or performance of this Agreement including its existence, validity or termination, such dispute shall be settled amicably through consultation and negotiation or be referred for mediation. If the dispute is not resolved then any party may submit the dispute to final and binding arbitration in accordance with the rules of the Permanent Court of Arbitration, as in effect on the date of signature of this Agreement. The appointing authority is the Secretary General of the Permanent Court of Arbitration in The Hague. No provision is made for disputes between citizens. The agreement does not have a non-discrimination clause or recognise rights of subsidiarity.



Lubombo Transfrontier Conservation Area

The ministers responsible for the environment in Swaziland, South Africa and Mozambique signed an agreement establishing the Lubombo Transfrontier Conservation Area in 2000.

The transfrontier conservation area forms a crucial part of the Lubombo Spatial Development Initiative. The main objectives of this are to:¹⁵⁹

- Promote economic development through appropriate maximum use of opportunities presented by the three countries' natural assets.
- Achieve ecologically and financially sustainable development, the sustainable use of the natural resource base and the maintenance of ecosystem function through holistic and integrated environmental planning and management.
- Develop joint strategies for transfrontier ecological planning and resource management.

This agreement commits the three countries to the development of joint strategies for the planning and management of specific areas extending across the borders between them.¹⁶⁰ The conservation area brings together a number of different land use categories including state-protected areas, communal land and private land used for agricultural activities. Four specific areas targeted in the Protocol are:¹⁶¹

- The Lubombo Ponto do Ouro-Kosi Bay Marine and coastal area on the Mozambique-South African borders;
- The Ndumo-Tembe-Futi elephant reserves on the border of Mozambique;
- The Nsubane-Pongolo (Josini) area on the border with Swaziland; and
- The Lubombo Conservancy- Hlane-Mlawula/Goba area on the border of Mozambique and Swaziland.

Public statements have been made acknowledging the need for the involvement of communities in and adjacent to the Lubombo TFCA, through consultation, representation and participation in the management of the TFCA, as critical for the success of this initiative. The Minister responsible for environment in South Africa, Valli Moosa has asserted that, "The protocol will form a basis for a deliberate identification of opportunities to broaden ownership patterns in the TFCA through encouragement of local small businesses, of community -owned ventures, and joint ventures with domestic and global investors."

The Protocol lists objectives as well as makes clear undertakings by the parties. It also establishes a TFCA Conservation and Resource Area Commission responsible for joint review, supervision, and decision-making.

Through the SDI programme in South Africa, government has implemented a broad strategy that has resulted in over R530 million being invested in programmes such as road building and malaria control.

¹⁵⁹ <http://www.environment.gov.za/speeches/2000/22jun2000d.htm>

Mozambique Minister of Agriculture and Rural Development Mr Helder dos Santos Felix Monteiro Mutela.

¹⁶⁰ <http://www.environment.gov.za/speeches/2000/22jun2000d.htm>

¹⁶¹ <http://www.environment.gov.za/speeches/2000/22jun2000d.htm>

Maluti/Ukhahlamba - Drakensberg Mountain Range

Lesotho and South Africa have entered into a joint transboundary management project, funded by GEF, to manage the shared Maluti/Ukhahlamba - Drakensberg .

The Memorandum of Understanding¹⁶² makes a firm commitment to the national sovereignty of the parties but recognises that they each have a responsibility not to cause harm to the other. It states that the parties have:

“the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause harm to the environment of other states or of areas beyond the limits of national jurisdiction.”

The preambular statement recognises that broad participation is necessary for the effective implementation of the project. The agreement specifically states that participation from local communities, scientists, academic community, the private sector and non-governmental organisations should be encouraged. The parties have committed to promote local participation in the decision-making process, including access to information, concerning the policies and activities related to the project.

The key objective of the joint project is the conservation of biological diversity. Accordingly the parties seek to retain the area, as far as possible, in its natural state as an undivided ecosystem for the benefit of biological diversity, conservation, research, tourism and the larger community with particular focus on those communities located in the project area. The project seeks to institute integrated land use planning and management for the protected areas and their buffer zones; develop and expand an integrated community conservation and development programme; facilitate an economically sustainable nature conservation development and eco-tourism investment programme based on the natural, social and cultural resources of the area. The parties have also agreed to consider, within five years, adopting, through their respective internal procedures, a zoning plan for the project area.

Specifically at the transboundary level the parties have committed not to engage in any activity that may, directly or indirectly, generate transboundary environmental harm, and to provide prior and timely notification and relevant information on any activity that may have a significant transboundary environmental impact. Accordingly, it provides that environmental impact assessments should be used.

Overall responsibility lies with the respective ministries of the parties responsible for the management of the area in their countries. Additionally, a joint steering group has been established. Each party is required to establish an implementation committee.

¹⁶² <http://www.maloti.org.za>



ZIMOZA

Mozambique, Zambia and Zimbabwe are currently involved in an IUCN ROSA facilitated initiative to establish a Transboundary Natural Resource Management Area, for the Zumbu, Luangwa and the Guruve Districts, known as the Zimbabwe-Mozambique-Zambia (ZIMOZA) TBNRM. This agreement focuses on all natural resources and is not restricted to wildlife. It has not yet been finalized

The agreement is based on the recognition of sovereign equality and territorial integrity. The concept of territorial integrity is akin to that of riverian integrity. The principal of integrity entitles a state to an absolute right for its environment to be unimpaired in quality and quantity. The concept is antithetical to the modern notions of state responsibility. Despite this the Treaty's management principles includes the notion of state responsibility.

The motivation for this agreement as expressed in the Preamble is to promote tourism development, conservation and sustainable socio-economic development. It is felt that such an integrated conservation and development area will enhance environmental and political security and thus promote peace. It recognises that there is a need to promote public participation processes.

Management principles are identified;¹⁶³ these are:

- the sovereign rights to exploit resources and state responsibility not to cause harm beyond its borders;
- co-operation based on good faith, that ensures that natural resource use is a sustainable and benefits are shared equitably;
- policies, programmes, and activities that may have an adverse impact must be planned and conducted so as to avoid damage;
- Strategic, environmental and social impacts are based on prior consultation with parties, community-based organisations¹⁶⁴ and local communities; and
- Area managed so as to promote conservation that benefits sustainable rural and economic development.

The objectives of management include conservation, promotion of biological and cultural diversity, conflict prevention, share and pool expertise and information, increase the areas profile as a tourism destination and encourage the full realisation of economic potential, encourage community cross-border co-operation, comply with international law, harmonise policy, legislation and practice, develop integrate managerial approaches and encourage community-based management of natural resources.¹⁶⁵

¹⁶³ Article 3

¹⁶⁴ The definition restricts the notion of community-based organisations to registered organisations carrying out community-based environment, natural resources and development organisations and includes national and international organisations.

¹⁶⁵ Article 5.

Management is to be based on co-operation between the parties and also with local communities, community-based organisations and the private sector.¹⁶⁶

The agreement specifically recognises the rights of communities and commits parties to respect and promote these.¹⁶⁷ To this end parties shall:

- Ensure full and effective participation in the design, implementation, monitoring and evaluation of all projects and programmes;
- Consult and take into account the views and concerns of local communities;
- Promote equal and equitable access to and control of natural resources among local communities;
- Promote use of customary notions;
- Promote community management;
- Review and repeal any legislation that discriminates against or discourages use of local technologies; and
- Facilitate cross border community co-operation.

Community members are entitled to lodge a complaint to the arbitration tribunal where any party fails to address these rights.¹⁶⁸ Unfortunately the arbitration tribunal is stacked against communities and is composed entirely of state parties.

A hierarchical institutional system is established. At the highest level the Ministerial Committee, comprised of Ministers, is responsible for selected areas.¹⁶⁹ The responsibilities of this committee are not set out. The second institutional rung is a technical committee comprised primarily of technocrats but that includes some local level representatives is established.¹⁷⁰ This committee is responsible for:

- Co-ordination and harmonisation of the conservation and development of the area;
- Recommending policy and legislative changes and harmonisation to the Ministerial Committee;
- Promoting effective communication among the parties;
- Assessing the technical feasibility of action, plans and programmes; and
- Monitoring the implementation process of the establishment, development and management of the area.

The Technical Committee is to appoint one of the parties as co-ordinator.¹⁷¹ This post will be held for two years on a rotational basis provided that a party may renounce their appointment. The Programme Co-ordinator is to function as the secretariat to the Ministerial and Technical Committees. Finally, a Local Area Committee is established as the focal point for community participation.¹⁷² This committee is comprised of representatives of each local authority, traditional authorities and community-based organisations. The Local Area Committee generally has powers of recommendation. These include:

- Recommending to the Technical Committee natural resource and environment projects and programmes for approval and funding;

¹⁶⁶ Article 6.

¹⁶⁷ Article 4.

¹⁶⁸ See comment on conflict resolution mechanisms below.

¹⁶⁹ Article 8.

¹⁷⁰ Article 9.

¹⁷¹ Article 10.

¹⁷² Article 11.

- Identifying potential conflicts and recommending consensual cross-border solutions; and
- Identifying and recommending to the Technical Committee possible areas for legislative harmonisation.

Despite this lack of authority they have responsibility for project implementation.

Article 13 provides that the agreement shall not be construed as derogating from the provisions of domestic law.

Disputes are in the first instance to be settled by consultation, negotiation and mediation. Failing that they will be referred to arbitration. Decisions of the Arbitration Tribunal are reviewable by the Tribunal under the SADC Treaty.

Community-Based Wildlife Management

In 1995 the SADC WSTCU entered into a collaborative partnership with a USAID-funded consortium consisting of IUCN ROSA, ART, WWF-Zimbabwe and five community-based natural resource management (CBNRM) projects in Botswana, Malawi, Namibia, Zambia and Zimbabwe. The partnership was developed to function as a synergistic mechanism to stimulate the growth of CBNRM throughout the region. It has recently been extended to include Tanzania, Mozambique and South Africa in its activities.¹⁷³ Although it is not a transboundary management agreement in the sense that it creates a physical area of management that straddles international boundaries, it does establish multi-lateral co-operation in developing community-based approaches to Natural Resource Management.

The specific objectives of the SADC Natural Resource Management Project are to:¹⁷⁴

- demonstrate that the sustainable use and management of wildlife resources is a viable economic alternative for rural communities farming marginal land, by increasing local employment and income generating opportunities through community-managed natural resources;
- expand the role of women in decision-making processes in local economies throughout the region through CBNRM processes; and
- improve the exchange of CBNRM information.

The CBNRM initiatives in the SADC region are the Communal Areas Management Programme for Indigenous Resources (CAMPFIRE) in Zimbabwe; Administrative Management and Design for Game Management Areas (ADMAGE) in Zambia; Living In Finite Environments (LIFE) in Namibia; Natural Resource Management (BNRMP) in Botswana; The Chuma Tchatto programme in Mozambique. Although South Africa does not have a comprehensive programme for CBNRM, it does have policies in place to restore land rights to the disenfranchised. An important CBNRM development in this regard is the Makuleke land claim, in which 25 000 hectares of land was returned to the Makuleke people. The Makuleke have entered into a natural resource management agreement with the Kruger National Park authorities.¹⁷⁵

¹⁷³ Jiah in Rihoy, 1998, 20.

¹⁷⁴ Jiah in Rihoy, 1998, 20.

¹⁷⁵ Hanekom in Rihoy, 1998, 14.

Wetlands Management Projects

Twenty-seven sites have been designated under RAMSAR in the SADC region.¹⁷⁶ Transboundary RAMSAR sites in the region include the Orange River Delta. Additionally there are several transboundary wetlands management projects in the region.

SADC states in collaboration with IUCN ROSA initiated the Zambezi Basin Wetlands Conservation and Resource Utilisation Project. This project seeks to articulate the true value and importance of goods and services provided by wetlands at the local, national and regional levels and to effectively communicate the true value of wetlands to the region's people and key decision-makers. Also it is intended to help alleviate poverty in the local wetland communities and thereby assist these communities to participate fully in the conservation of natural resources that form the base of their livelihoods.¹⁷⁷ Some of the sites are transboundary including the Lower Shire wetlands in Malawi and Mozambique and the Chobe-Capri area in Namibia and Botswana. Their respective themes are wetlands conservation and food security and diversified sustainable use through capacity building and resource use conflict resolution.¹⁷⁸

The mouth of the Orange River located on the Atlantic coast forms the border between South Africa and Namibia. As a result of its transborder position, and the fact that Namibia has also designated its part of the mouth as a RAMSAR site, processes are underway to declare a jointly managed transboundary RAMSAR site.

5 National Legislation

All the countries of the region have laws to protect and conserve their biological diversity. The main features are considered here. The implications of the national legal system are considered in the concluding comment of this section.

Sustainable Use

Although all countries now promote the sustainable utilisation of wildlife resources (outside of protected areas) much of wildlife law remains focussed on protection of species. Many have adopted wildlife policies that recognise the value of sustainable use. The Wildlife Conservation Policy (1986) of Botswana, for example, prescribes that the utilisation of wildlife resources be on a sustainable basis. However it is only in a few countries that this objective is incorporated into legislation or draft legislation.

Wildlife management is increasingly being put in the context of other national objectives such as poverty alleviation and economic growth. Consequently a key policy objective is that wildlife management should boost the national economy for the benefit of citizens.

¹⁷⁶ Listed sites do not necessarily require protected area status, provided their ecological character is maintained through a wise use management approach.

¹⁷⁷ <http://www.iucnrosa.org.zw/zbwcrup.htm>

¹⁷⁸ <http://www.iucnrosa.org.zw/zbwcrup.htm>

All states have laws regulating hunting and other activities harvesting species. These laws vary and will need to be harmonised where wildlife land is managed across boundaries.

Ecosystem Management

A key focus of wildlife management in the region is on mega fauna. To this end systems of land classification for fauna use and species protection regimes have been established. There is, however, a shift in respect of such wildlife land away from species conservation to habitat protection and a more holistic management approach. Most countries establish a separate regime for forest management. Forests are generally protected for commercial exploitation by the state and not as ecosystems, although legislative regimes do exist for the establishment of such approaches.

Systems for resource assessment and monitoring vary considerably across the region. Approaches need to be harmonised, as this must be the basis for sustainable management.

Institutional systems for such holistic management have, until recently, been poorly developed. Institutional systems are often highly sectoralised contributing to a fragmented as opposed to a holistic management regime. For example, in Zambia the Department of National Parks and Wildlife Services is mandated through an Act of Parliament to manage all wildlife resources in the country including wetlands. However, until 1999 when Act No 12 of 1998, establishing the Zambia Wildlife Authority came into effect, the Department was unable to give effect to this as the previous Act¹⁷⁹ only allowed the Department to manage the animals but not the habitats.

Tenure and Managerial Rights to Wildlife Resources

The regional trend is to treat wildlife as “res nullius” in their wild state but capable of private ownership or control. Historically this right of private control was restricted to state agencies and private landowners. Wildlife regimes tend to overlap with land tenure systems and can be broadly divided into state ownership, freehold, and communal. State and freehold land enjoy the strongest rights (and benefits) and communal areas the weakest.

Throughout the region there have been attempts to deal with this dicotomy. The predominant approach has been through the establishment of CBNRM. However, most legal systems have not addressed the disenfranchisement of rural communities, thus throughout the region communal areas inhabitants continue to only have rights to the benefits of wildlife management through local government agencies or through some other government body. Community rights of management vary. In many countries rules of use and management are centrally defined. Even where communities have increased responsibility for wildlife

¹⁷⁹ The National Parks and Wildlife Act No 10 1991.

management, final authority is often placed elsewhere. For example in Zimbabwe the rural district council is the de jure and de facto owner of wildlife resources in the communal areas.

Namibia is one country that has tried to establish a legislative regime that addresses this historical dispossession. The Nature Conservation Ordinance Amendment Act, 1996 provides for the establishment of local level wildlife management institutions with legal rights of management and control. These institutions must be registered. The rights acquired may, however, be extinguished by the state; thus in effect remaining fundamentally distinct from rights enjoyed by private landowners.

Increasingly community rights are also being addressed in respect of forest resources. In some countries, such as Lesotho and Malawi, tenure rights to trees can be obtained through planting, maintenance or protection. Zambia's Forest Act allows for control and management of a local forest to be transferred from the state to a local community, traditional authority or joint Forest Management Committee.¹⁸⁰ A key objective expressed in the Namibia's draft Forest Policy is to reconcile rural development with biodiversity conservation through empowering farmers and communities to manage forest resources. The draft Forest Act, 1998 makes provision for the establishment of community forests.

State-controlled protected areas are an important feature of most wildlife management regimes and include national parks and state forests. Most countries in the region have legislation establishing some form of protected areas. Many have set aside significant areas as protected. For example protected areas in Botswana cover 18% of the land area, while an additional 22% of the land is designated as wildlife management areas. The latter form buffers between protected area and areas of intensive agricultural activities. Similarly Zambia has a total of 6.4 million hectares (of 752,000 km²) reserved as protected areas in the form of nineteen national parks.

Classification systems for protected areas vary from country to country and it is clearly important that these be rationalised in respect of management objectives and systems. Many countries have more than one legal instrument establishing protected areas and in some, such as Zimbabwe, classification systems may not be consistent with internationally accepted classification systems. Nevertheless, certain categories, such as national parks, are common to most. In Zimbabwe and South Africa a protected area system establishes national parks, wilderness areas and natural and cultural monuments. However other categories, such as habitat and wildlife management areas, are not shared. This is not necessarily an impediment to collaborative transboundary management provided that at the regional-level consensus can be reached on the purpose of management.

Many protected areas, including most in Zimbabwe, South Africa, Botswana and Namibia, were gazetted in the colonial period. Generally such areas have been set aside for strict conservation and thus communities residing within these areas were removed and denied rights to the resources. There has been virtually no

¹⁸⁰ Section 22.

attempt to include local populations bordering these areas in the management of these parks and to share in the benefits of management. Consequently many communities assert what they perceive as their rights to use, without official sanction, consequently undermining state management practice. Proprietary rights to resources in the Parks remain contested. From an environmental justice perspective it is important that the creation of transboundary management initiatives do not result in a failure to redress these issues. Additionally the creation of some transfrontier parks such as the GKG and the Kgalagadi Transfrontier Park are likely to displace communities.¹⁸¹

Command and Control

Command and control type legislation remains a feature of most legal systems notwithstanding the increased use of incentives in legislation and management. Both Zimbabwe's Parks and Wildlife Act and Botswana's Fauna Conservation Act manage wildlife primarily through the imposition of command and control types strategies. This remains the case despite a policy shift towards the recognition that mechanisms for public participation in management need to be established if conservation is to be successful. Unfortunately at the legal level public participation in wildlife management has been directly linked to tenure regimes – those with secure property rights are given a role in management.

6 Comment: Constraints and Opportunities

This comment has two main focuses. Firstly, it considers the constraints and opportunities for TBNRM created by the existing wildlife management legal regime, at the national, regional and global levels. Existing multi-lateral environmental and development agreements set the basis for regional co-operation. These establish the general framework for developing TBNRM initiatives. Additionally, the Wildlife Protocol specifically mandates states to develop transfrontier parks. Harmonisation of legislative approaches to wild life management will make TBNRM initiatives easier but is not a pre-requisite for such collaboration. Areas for harmonisation could include resource assessment and monitoring systems, impact assessments, common systems for classification of wildlife land based on common objectives/criteria, law enforcement and management regimes. The Wildlife Protocol specifically requires the harmonisation of legislation. More important is the reform of national legislation so that it is able to support key objectives and approaches developed under the various TBNRM initiatives. Secondly, this comment assesses existing TBNRM initiatives against development and environmental objectives and other values articulated at the SADC and global level. These issues are considered in context of a number of key issues. These include state sovereignty and responsibility, community rights and interests, planning, issues of equity, and development objectives.

State Sovereignty and Responsibility

The SADC Treaty is based on the recognition of the sovereign equality between states. Today, at customary international law, the concept of sovereignty is not

¹⁸¹ For a further discussion of this see the comment section.

absolute but is limited by the principle of state responsibility. This principle restricts the enjoyment of sovereignty – no state is entitled to use its territory in a way that harms the rights of its neighbour. It is of course accepted that transborder impacts may be felt. This give-and-take vision of inter-state relationships has been recognised in multi-lateral environmental agreements since the 1970s. The Rio Declaration provides that, “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states or of areas beyond the limits of national jurisdiction.”¹⁸² This obligation is also recognised in the customary law principle of “good neighbourliness.” It is also expressed in the Wildlife Protocol. Notwithstanding this, it is not well articulated in the specific agreements establishing TBNRM or within national laws. Even where it does there is no obligation to amend national law to prohibit acts with a negative transboundary impact.

Community Rights and Opportunities

It is often asserted that these mega transboundary parks can extend benefits and improve conservation both nationally and locally. The ability of TBNRM initiatives to realise these goals may be linked to the status and role of communities in natural resource management within each national system. The recognition of human rights principles and support for managerial regimes that are based on notions of environmental justice at international law lays a firm foundation for developing TBNRM that can overcome the existing constraints posed by national tenure and rights regimes.

However establishing such a system means being able to build on national regimes and management processes. The benefits to communities should be assessed in a sober fashion and not simply assumed. The benefits of community-based natural resource management initiatives appear to be exaggerated by state agencies, interested NGOs and associated experts. Although community management has undoubtedly increased the income of communities, it is doubtful whether other rights have been adequately provided for. In particular CBNRM does not appear to have empowered communities or led to more democratic management regimes at the community level.

Transboundary natural resource management needs to face the issue of community rights squarely if it is to avoid perpetuating existing tenure-based conflicts or tensions and if it is to successfully address community level interests and rights. Transboundary initiatives that involve communities need to build on and move beyond management regimes established in the existing community natural resource management programmes. They must acknowledge the fact that for many communities the implementation of CBNRM has not always been a positive experience and that there is considerable difference in how the various stakeholders evaluate the livelihood improvements of these projects. For example,

¹⁸² Principle 2.



although CAMPFIRE in Zimbabwe has increased financial benefits to communities it has also meant less access to wildlife resources for subsistence,¹⁸³ the appropriation of land¹⁸⁴ as well as reduced access to thatching grass.

One possible consequence of these transfrontier conservation areas is that they will wrestle the last semblance of legal control from communities as authority is re-centralised and there is a move from the current focus on local government as agents of communities, to national parks authorities as agents of the state. Problems of representation necessarily become more acute as there are even fewer systems for downward accountability within this scenario. It is unclear for example how the issue of the rights of the San people will be addressed in the context of the Kgalagadi Transfrontier Park. The agreement makes no recognition of the need to redress these land claims both within South Africa and Botswana. The agreement establishing the GKG park attempts to incorporate the multiplicity of stakeholders institutionally through the creation of a working group as does the Lubombo TFCA. However neither of these agreements give communities the right to demand that they are consulted and included; participation effectively remains at the pleasure of the state. Therefore the extent to which these issues are addressed is simply a result of the goodwill of the state. The draft ZIMOZA agreement acknowledges the right of communities to demand that the state fulfil its obligations regarding community rights. However systems to assist communities to hold the state to this commitment are not well developed. Such systems are essential in the context of inadequate access to justice at the national level.

Regarding the establishment of the GKG Transfrontier Park, Mozambique is considering whether to designate Courtada 16 as a protected area. If this is done, communities currently residing in this area are likely to be moved and possibly fenced out. This could violate international law provisions regarding forced displacements discussed earlier¹⁸⁵ unless consent is obtained and provision made for compensation.

The lack of proprietary rights at the community level curtails community initiatives and the opportunity to enter into collaborative arrangements with other communities both within their country and across national borders. This right to act and make decisions needs to be recognised if communities are to take the initiative and define the forms of collaboration they wish to enter into. It is insufficient to simply provide, as the draft ZIMOZA agreement does, that communities are entitled to cross-border collaborative initiatives without removing other barriers to such interaction or at least requiring such legislative amendment.

Most TBNRM agreements cite community benefits as a key objective. The extent to which such rights exists varies from agreement to agreement. The ZIMOZA agreement makes the strongest provisions for community rights. It provides for consultation with communities; community participation in the design, implementation, monitoring and evaluation of all projects and programmes; support for indigenous and local technologies. The GKG agreement also recognises

¹⁸³ Zero *et al*, 1996.

¹⁸⁴ Mohamed-Katerere and Ncube, 2000.

¹⁸⁵ Part I.A.2.

that public participation must be provided for. In the ZIMOZA agreement, parties also undertake to promote equal and equitable access to, and control of, natural resources among local communities; the use of customary notions and community management. However, as with the other TBNRM initiatives, it specifically provides that the agreement shall not be construed as derogating from national law, parties must simply use their “best endeavours” to “harmonise conflicts that may arise between the parties’ respective legislation policy and other international obligations on the one hand and this agreement on the other hand.”¹⁸⁶ Parties are not specifically required to review their legislation with a view to recognising community rights. Given the weak national legal frameworks for community rights, the agreement does not significantly strengthen local rights. Participation and protecting community rights is more a matter of the good will of the state than an enforceable right as explained earlier. In most instances no new mechanisms for conflict resolution are created. Arbitration systems tend to focus on the state and are composed only of state appointed arbitrators. None of the TBNRM agreements dealing with wildlife management provide for rights of subsidiarity and non-discrimination in access to the judicial process. Consequently failing to provide for a scenario where conflicts exist between a state and the nationals of another state or between nationals of two different states.

Institutional systems need to be designed in such away that they are able to give form to the values expressed in law and contribute to the realisation of defined objectives. In the existing TBNRM agreements some contradictions are evident. Several of the agreements do not make provision for multi-stakeholder participation in the implementation of the initiatives. The Kgalagadi agreement vests authority for implementation in the respective state authorities responsible for parks’ management, thus perpetuating the practice that parks are the domain of the state and resident and neighbouring communities have no rights. The GKG agreement sets out a series of committees. A Ministerial Committee is responsible for policy; a technical committee, comprised of senior officials, is responsible for translating policy into a set of operational guidelines and approving development and management plans; and a Working Group is responsible for implementation, ensuring participation and liaising with other initiatives in the area. Although this agreement recognises the importance of participation no provision is made for the inclusion of stakeholders in the institutions. ZIMOZA differs slightly from this approach. Like GKG it sets up several committees with different responsibilities. It includes “community-level” representatives in the technical committee; however membership in this committee is heavily stacked in favour of technocrats in order to ensure that decisions are based on “sound science.” The implementing agency is made up of actors engaged at the local level and includes registered community-based organisations, nation NGOs and international NGOs; however these bodies have no authority – thus effectively failing to redress the well-established problem of separating responsibility and authority.

Traditional resource rights, community participation and conflict resolution mechanisms need to be addressed more thoroughly if TBNRM initiatives are to avoid perpetuating the injustices evident in many national regimes.

¹⁸⁶ Article 11.

Realising the SADC Objectives

Regional co-operation should contribute to the realisation of key regional objectives. These find expression not only in regional agreements but also within international law to which most of the regions states are party. The SADC Treaty seeks to promote regional economic integration on the basis of sovereign equality and equity, balance and mutual benefit.¹⁸⁷ Key objectives include the development, economic growth, alleviation of poverty and the enhancement of the standard and quality of life.¹⁸⁸ Such development must also be self-sustaining. This sets the general framework for co-operation. Additionally the objectives of sustainable use of natural resources, the promotion of complementarity between national and regional strategies, and the strengthening and consolidation of historical, social and cultural ties are particularly important for developing co-operation for TBNRM. Accordingly it should be asked whether or not the existing and proposed collaborative arrangements contribute to the realisation of these objectives.

Several multi-lateral agreements establishing specific transboundary management initiatives also focus on the potential contribution of wildlife conservation and management to sustainable economic development; others focus primarily on the economic benefits of conservation. Even where the issue of conservation is dealt with within the framework of sustainable use, the agreements do not clearly address poverty alleviation and development or create systems for management that will support the realisation of these objectives. There is, of course, the added problem that these regional level objectives are not adequately reflected in national legal systems. Many national wildlife policies in the region echo these sentiments. However in most cases national legislation fails to adequately contextualise wildlife conservation within a development framework. This needs to be redressed if it is to fully support effective TBNRM particular in the context where respect for domestic law is a key feature of the regional regime, as is the case with the Kgalakgadi, GKG and draft ZIMOZA agreements, and consequently does not change national law.

The impact of these transboundary initiatives on the rural poor is far from clear and no systems are created that ensure benefits accrue at the local level. Instead impact at the local level will be the result of independently developed national programmes, policies and approaches. The lack of real and tangible community rights in the agreements means that communities have few, if any, means to ensure access to benefits. Additionally the further centralisation of control or removal of control from the local level is problematic. It may be that through the commercialisation of resources, particularly wild foods, the poor are effectively denied access to products that were once an integral part of their livelihoods - effectively undermining the SADC objective of alleviating poverty.

How these initiatives will contribute to the SADC objective of strengthening and consolidating of historical, social and cultural affinities is not clear. It is only the ZIMOZA agreement that specifically commits the state parties to promoting cross-

¹⁸⁷ Article 4.

¹⁸⁸ This is also recognised in the CBD.

boundary community-community collaboration. Indeed for these links to be promoted laws regulating the movement of people and goods across boundaries need to be redressed.

Equity

Concerns around issues of equity and the distribution of benefits from the establishment of TBNRM initiatives are beginning to emerge. Equity issues arise at the inter-state level as well as within states.

While all agreements make formal statements of equity, the extent to which they are effectively able to realise such equity is questionable. There are broadly three concerns. Firstly, certain provisions may not promote equity. Secondly, political-economic relations may undermine equity. Thirdly given the imbalance in power, agreements need to move beyond formal statements of equity to create systems for its realisation.

Inequity may be reflected in the disproportional sharing of costs and benefits. For example, in respect of the establishment of the GKG, South Africa is likely to have a disproportionate share of the benefits given that Kruger National Park is more developed than either Gonarezhou or Gaza. Given the imbalances in tourist facilities and infrastructure it is likely that tourists visiting the parks covered by this agreement are likely to enter through South Africa and possibly reside in Kruger National Park, making only day trips into the other parks. This will mean that more tourism dollars will be spent in South Africa both inside and outside the Park. There is no attempt in the agreement to address the issue of the relationship between contribution (either through natural capital, tourism experience, management or other contribution) and benefits.

Agreements may be improved by actually considering how economic and political relations are likely to impact on equity.

Planning Regimes

Both the GKG agreement and the Lubombo SDI agreement recognise the need for trans-border land use planning. For this to be effectively implemented legislation must be adopted at the national level to support this kind of planning.

The regional tensions around veterinary fences,¹⁸⁹ both between states and within countries, is largely a result of unco-ordinated planning processes. It reveals attention around the most appropriate land use forms and in particular the value of wildlife conservation as against that of livestock production. Environmentalists for example report that some fences disrupt seasonal movement of wildlife, including rare and endangered species such as roan antelope, sable antelope, elephant and wild dog.¹⁹⁰ Additionally, they express concern that the fences result in death or the stressing of these animals due to entanglement, group fragmentation, isolation and denial of access to water and seasonal habitats.

¹⁸⁹ Some of these fences curtail wildlife movement as in Botswana others have been designed to increase wildlife land.

¹⁹⁰ Albertson, 1998



The tensions within states, particularly resulting from local community perceptions about their rights and access to resources, are also evidence of poor planning processes. In many cases there has simply been inadequate consultation.¹⁹¹ This reality brings into question issues of the relative roles of states and citizens and the relationship between them. Key, here, are issues of authority, representation and accountability, that must be addressed within planning and administrative processes.



¹⁹¹ See for example Mohamed Katerere and Ncube (2000)

This section focuses on the multi-lateral arrangements for the management of marine resources and the constraints and opportunities presented by the national law regimes.

Collaboration between southern Africa states in this area is poorly developed, notwithstanding a large number of globally applicable multi-lateral agreements. The focus is on marine living resources although non-living resources could emerge as an important area of collaboration.

1 International Law

At international law the following agreements are directly relevant:¹⁹²

- The Convention on Biological Diversity; and
- The United Nations Convention on the Law of the Sea.

The Convention on Biological Diversity is discussed under the section on terrestrial wildlife and is not considered again here.

There is no SADC Protocol dealing with Marine Fisheries, although a draft Protocol has been prepared.¹⁹³ The SADC marine sector has adopted a Marine Fisheries Policy and Strategy. Several SADC states have entered into bi-lateral agreements.

United Nations Convention on the Law of the Sea

This Convention was adopted in 1982 to establish a comprehensive new legal regime for the sea and oceans. It establishes rules governing all uses of the oceans and their resources. It entered into force in 1994. All fourteen SADC states are parties.

Two other agreements have been adopted under it. These are:

- Agreement Relating to the Implementation of Part XI of the United Nations Convention on the Law of the Sea; and
- Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea Relating to the Conservation and Management of Straddling Fish Stocks And Highly Migratory Fish Stocks.

The Convention categorises the seas and oceans into different zones and establishes the respective rights of parties to each of these. These zones include the territorial waters, the exclusive economic zone, the contiguous zone, the high seas and the area. The territorial seas is an area where the coastal states have exclusive sovereign powers. The contiguous zone is adjacent to the territorial seas. In this zone the coastal state may exercise the control necessary to prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations within its territory or territorial sea and punish infringement of the above laws and regulations committed within its territory or territorial sea.¹⁹⁴ The exclusive

¹⁹² Only agreements to which more than one SADC state is signatory and that apply in southern Africa are considered here. Tanzania and Seychelles are parties to conventions concerned with the east African coastal region.

¹⁹³ The SADC Marine Sector despite request did not verify what the status of the draft was. It seems that the existing draft has been modified extensively and hence is not discussed here.

¹⁹⁴ Article 33.



economic zone is an area beyond and adjacent to the territorial sea to which the coastal state has exclusive economic rights. All states have equal rights of access to the high seas and the area. The Area means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction.

This review focuses on areas of transboundary co-operation and hence is not concerned with co-operation in the high seas or the "Area" as these fall outside the jurisdiction of individual states. Only the Exclusive Economic Zone is discussed here.

Exclusive Economic Zone

In the exclusive economic zone, the coastal state has sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether living or non-living, of the waters superjacent to the seabed and of the seabed and its subsoil. It has jurisdiction regarding the establishment and use of artificial islands, installations and structures, marine scientific research, and the protection and preservation of the marine environment.

Article 61 allows the coastal state to determine the allowable catch of the living resources in its exclusive economic zone. This decision must take into account the best scientific evidence available to it. The state must ensure, through proper conservation and management measures, that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. The state also has the responsibility to adopt measures to maintain or restore populations of harvested species at levels, which can produce the maximum sustainable yield. In determining the maximum sustainable yield relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing states, fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global shall be taken into account.

Article 62 requires the coastal state to promote the objective of optimum utilisation of the living resources in the exclusive economic zone without prejudice to Article 61. States may, where they do not have the capacity to harvest the entire allowable catch, enter into arrangements with other states to fish the surplus of the allowable catch. In giving access to other states to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, inter alia, the significance of the living resources of the area to the economy of the coastal state concerned and its other national interests. In making this decision states must minimise economic dislocation in states whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.

The Convention seeks to promote collaborative arrangements between neighbouring coastal states in managing fish stocks¹⁹⁵ and the marine environment. Through such collaboration states should seek to agree on the

¹⁹⁵ Article 63.

measures necessary to co-ordinate and ensure the conservation and development of such stocks. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal state and the states fishing for such stocks shall seek, either directly or through appropriate sub-regional or regional organisations, to agree upon the measures necessary for the conservation of these stocks. Article 64 urges states to co-operate in the conservation of highly migratory species. It provides that the coastal state and other states whose nationals fish in the region for such species shall co-operate with a view to ensuring conservation and promoting the objective of optimum utilisation of such species throughout the region, both within and beyond the exclusive economic zone. States are also enjoined to co-operate in matters pertaining to fishing on the high seas.

2 SADC Marine Sector

Although there is no SADC protocol¹⁹⁶ dealing with sharing of marine resources, the marine sector has developed a Marine Fisheries Policy and Strategy.

It has key economic objectives of raising production and improving processing methods. It is concerned to increase marketing and distribution of fish products and the human consumption thereof. It hopes to maximise the foreign exchange value of fish exports. Additionally, it intends to strengthen and develop small-scale fisheries and the economies of coastal fishing communities in integrated sustainable ways and by involving the people in development programmes and in the decision-making process. A further objective is to undertake marine research, stock assessment, management, monitoring, control and surveillance. It recognises that all development projects for the marine fisheries sector must be based on sound, scientific analysis of resources and their sustainability. In addition it has the intention to educate fishers and coastal people at all levels of environmental resource awareness and to involve them in management systems and decision-making.

Conservation is also an important objective. SADC seeks to protect and enhance marine and coastal environments, control pollution and avoid harmful effects on other natural resources.

SADC Marine Fisheries Programme of Action¹⁹⁷ has five on going projects, which are:

- Monitoring, Control and Surveillance of Fishing Activities;
- Marine Fisheries Information Systems;
- Assessment of Marine Fisheries Resources of the SADC Region;
- Support to the SADC Fisheries Co-ordinating Unit;
- Benguela Current Large Marine Ecosystem (BCLME).

¹⁹⁶ A draft has nevertheless been produced for consultation.

¹⁹⁷ <http://www.sadcreview.com/Sectoral%20Reports%202000/marinefisheries.htm>

3 Co-operative Agreements

Angola-Namibia

In March 1994, Angola and Namibia entered into an collaborative marine agreement. The parties agreed to co-operate in:¹⁹⁸

- Research and assessment of the shared marine resources;
- Joint surveillance of shared borders of their exclusive economic zones;
- Harmonization of fishery legislation;
- Training of personnel in research, surveillance and legislation; and
- The establishment of joint ventures.

Integrated Management, Sustainable Development and Protection of the Benguela Current Large Marine Ecosystem

On the 1 November 1999, Angola, Namibia and South Africa entered into an agreement for the management of the Benguela Current Large Marine Ecosystem (BCLME).

The agreement was motivated¹⁹⁹ by concern over the fragmented nature of regional management and a perceived need to strengthen and jointly engage member states in the co-ordination and conservation of the resources of the Benguela Current as an integrated ecosystem. This need stems from an absence of co-ordinated planning and integration, poor legal frameworks and a lack of enforcement and implementation of existing regulatory instruments, insufficient public involvement, unbalanced regional capacity development and inadequate financial mechanisms of support. This has been manifested in declines of fish stocks and some unsustainable practices of harvesting of living resources, uncertainty regarding ecosystem status and yields, increasing pollution, habitat destruction and alteration, loss of biotic integrity and threats to biological diversity, harmful algal blooms, and inadequate capacity to monitor and assess ecosystems. All of these have significant transboundary implications. The challenge is to halt this changing state of the BCLME and, where possible, to reverse the process through co-operative regional action to manage the ecosystem on an integrated and sustainable basis.

Basis for Collaboration

The Strategic Action Plan articulates the basis for collaboration:

- The states have agreed that the concept of sustainable development shall be used in a way that does not destroy the integrity of the BCLME ecosystem, or otherwise foreclose options for use and enjoyment for future generations.²⁰⁰
- The precautionary principle is seen as the basis for all activity. Additionally preventative measures should be taken when there are reasonable grounds for concern that an activity may increase the potential hazards to human

¹⁹⁸ Chenje and Johnson, 1996, 179.

¹⁹⁹ Articles 1-7

²⁰⁰ Article 8.

health, living marine resources or marine ecosystems, damage amenities, or interfere with other legitimate uses of the sea. The absence of adequate scientific data is seen to merit a more cautionary approach.²⁰¹

- Anticipatory and co-operative actions, such as contingency planning, environmental impact assessment and strategic environmental assessment shall be taken.²⁰²
- The use of clean technologies which require the replacement or phasing-out of high waste and waste-generating technologies that remain in use shall be encouraged.²⁰³
- The use of economic and policy instruments that foster sustainable development shall be promoted through, inter alia, the implementation of economic incentives for introducing environmentally friendly technologies, activities and practices; the phasing-out of subsidies which encourage the continuation of non-environmentally friendly technologies, activities and practices; the introduction of user fees and the polluter pays principle; as well as the auditing of natural resources and environment.²⁰⁴
- Environmental, ecosystem and human health considerations shall be included into all relevant policies and sectoral plans, especially those concerning marine industrial development, fisheries, mariculture and marine transport.²⁰⁵
- Co-operation among member states shall be promoted especially in the area of transboundary issues and activities.²⁰⁶
- The participation and co-operation of the private sector shall be encouraged and is seen as integral to the successful management and implementation of the SAP.²⁰⁷
- Recognising the interests of other states in the BCLME, such states shall be encouraged to take part in, co-operate and jointly engage in activities.²⁰⁸
- Transparency, public participation and co-operation in the work of the BCLME shall be fostered through wide dissemination of information on the work undertaken to enhance the integrated and sustainable management of the BCLME, including environmental variability forecasting and protection.²⁰⁹

Institutional Framework

The BCLME programme is established as an international body in terms of the United Nations Convention on the Law of the Sea. The agreement seeks to strengthen existing regional mechanisms for co-operation among the member states.

201 Article 9.
202 Article 10.
203 Article 11.
204 Article 12.
205 Article 13.
206 Article 14.
207 Article 15.
208 Article 16.
209 Article 17.

The SAP establishes an Interim Benguela Current Commission (IBCC) to be supported by a Programme Co-ordinating Unit (PCU) and subsidiary bodies, such as Advisory Centres and Groups.²¹⁰ The IBCC should become a fully functional Benguela Current Commission (BCC) with a supporting Secretariat within a period of five years after formal commencement of the BCLME Programme. Its function is to implement the Strategic Action Programme.²¹¹ It is entitled to establish such other bodies as necessary to provide support for specific projects and processes related to its implementation. These include advisory groups²¹² on:

- Fisheries and other Living Marine Resources;
- Marine Environmental Variability and Ecosystem Health;
- Marine Pollution;
- Legal Affairs and Maritime Law; and
- Information and Data Exchange.

Areas of Collaboration

The following areas are established as immediate areas for collaboration:²¹³

- Sustainable management and utilisation of living marine resources;
- Management of Mining and Drilling Activities;
- Assessment of Environmental Variability, Ecosystem Impacts and Improvement of Predictability;
- Management of Pollution;
- Maintenance of Ecosystem Health and Protection of Biological Diversity; and
- Capacity Strengthening.

Parties have agreed that each member state shall prepare by June 2000 a national BCLME strategic action plan, which shall present details of national actions to implement this agreement.²¹⁴

Future Collaboration

This Strategic Action Programme is intended to be implemented over a five-year period. Member states however have committed themselves to continuing co-operation beyond this. In particular they have agreed to adopt appropriate legislation, implement economic instruments and establish a permanent Benguela Current Commission with a supporting Secretariat.

Member states envision that the BCLME Programme will continue to develop strong links with institutions, NGOs and the private sector within member states and the SADC region as a whole, so promoting the overall objective of closer economic integration.²¹⁵

²¹⁰ Article 19.

²¹¹ Article 20.

²¹² Article 22.

²¹³ Part III-Policy Actions.

²¹⁴ Article 35.

²¹⁵ Article 39.

4 National Legislation

It has not been possible to review all national legislation dealing with marine living resources. The Mozambican legislation is only available in Portuguese. The review is based on legislation in South Africa and Namibia.

Management Objectives and Principles

Legislation generally focuses on the control and regulation of fisheries rather than ecosystem management. However the need for ecosystem protection is explicitly recognised in both Namibia and South Africa. The South African 1998 Marine Living Resources Act's purpose, as per its long title, is to provide for the conservation of the marine ecosystem, the long term sustainable utilisation and protection of certain marine living resources and for these purposes, to provide for the exercise of control over marine living resources in a fair and equitable manner to the benefit of all its citizens. Both the South Africa and Namibia²¹⁶ legislation recognise inter-generational rights. South Africa also recognises that a precautionary approach, addressing issues of equity, good governance and controlling pollution are important for management. In South Africa the exploitation of marine resources is based not only on ecological sustainability but also on optimum utilisation.

Community Rights

South Africa's legislation specifically recognises that there is a need to address historical imbalances and to achieve equity in all areas of the fishing industry.²¹⁷ Pursuant to this a distinction is made between subsistence, recreational and commercial fishing.²¹⁸ Although fishing rights are generally based on application to the Minister and important exception is created. The Minister may declare a specified community or individual to be a fishing community, this presumably creates a right to fish.²¹⁹ Interestingly all fishing rights are restricted to South Africans.

Additionally the legislation establishes a Fisheries Transformation Council tasked with facilitating the achievement of fair and equitable access to fishing rights.²²⁰ This Council may lease rights to persons from historically disadvantaged sectors of society and to small and medium scale enterprises²²¹ including commercial fishing rights.²²² Additionally the council is authorised to assist in the development and capacity building of persons from historically disadvantaged sectors of society and small and medium size enterprises.²²³

²¹⁶ Sea Fisheries Act.

²¹⁷ Section 2(j).

²¹⁸ Parts 2 and 3.

²¹⁹ Section 19.

²²⁰ Section 31.

²²¹ Section 31.

²²² Section 32.

²²³ Section 32.



In Namibia no differentiation is made between different categories of rights to fisheries. All persons wishing to exploit marine resources are required to apply for license. While this does not formally discriminate against poor communities, this may well be the effect given that literacy, access to administrative structures, and poverty may all serve as constraints.

Marine Protected Areas

Chapter 4 of the South African Marine Resources Act provides for the establishment of Marine Protected Areas. Such area may be declared:²²⁴

- for the protection of fauna and flora species and the physical features on which they depend;
- to facilitate fishery management by protecting spawning stock, allowing stock to recover, enhancing stock abundance in adjacent areas, and providing pristine communities for research; and
- to diminish conflict that may arise from competing uses in that area.

Fishing, polluting activities, extraction of soils and gravel, building and all other activities with a negative impact are controlled.²²⁵

The Namibian legislation makes no such provision.

5 Comment

Marine resources are potentially a very important resource for southern Africa. The SADC coast line exceeds 10 000km. The Exclusive Economic Zone (EEZ) belonging to SADC coastal member states is approximately 5 million sq. km.²²⁶ However at the global and regional levels agreements dealing specifically with living marine resources have still not been adopted. International law clearly establishes the rights to different marine areas. Sovereign territorial rights are acknowledged in the exclusive economic zone setting the basis for national management and if states are so inclined, for transboundary management. At the regional level the Wildlife Protocol might apply. There is a draft Protocol and also a policy. Additionally there are several existing transboundary agreements in this area.

Although state rights are clearly provided for at international law, community rights are simply addressed as one factor that the state might take into consideration in determining maximum sustainable need. The SADC policy recognises the rights of coastal fishing communities and to involve them in planning and decision-making. However community rights-legislation is not well-developed at the national level. Existing multi-lateral co-operative agreements do not prioritise community rights. As with territorial wild natural resources this might mean that through multi-lateral management local rights might be further weakened. Collaborative management regimes will need to address community rights, if conflict is to be avoided. Additionally common approaches to reconciling commercial and subsistence rights should be developed.

²²⁴ Section 43(1).

²²⁵ Section 43(2).

²²⁶ <http://www.sadcreview.com/Sectoral%20Reports%202000/marinefisheries.htm>

Transboundary models will need to take into account the tenure and management regimes of adjacent areas. In the South African case at least three tenure categories could exist – EEZ; subsistence zones and protected areas.

Interestingly law at all levels focuses on precautionary approaches and inter-generational rights. It is not clear how the optimal utilisation and conservation objectives will be reconciled and what the implications will be for TBNRM.



D TRANSBOUNDARY DEVELOPMENT INITIATIVES

Transboundary development initiatives in the region that have direct implications for natural resources can be broadly categorised into three groups. The first are initiatives of what was then SADCC, prior to the end of minority rule in South Africa, designed to deal with the destabilisation of the region by South Africa. Examples include the Beira Transport Corridor and the TAZARA network from Tanzania to Zambia. The second are initiatives started by South Africa as a result of their Reconstruction and Development Programme as they attempt to deal with the legacy of apartheid development policies. Thirdly there are few transboundary initiatives that are not directly linked to South Africa; these include the Okavango Upper Zambezi Tourism Initiative. This part examines these agreements and the applicable national and regional frameworks.

It is divided into three sections:

- SADC Framework;
- Regional Development Agreements;
- National legislative and policy framework: The key consideration here is the implications of this framework for development initiatives.

1 The SADC Framework For Transfrontier Development Co-operation

Despite the origins of most of the transboundary development initiatives they are generally consistent with SADC's objective of regional integration. Indeed the SADC agreements establish the framework for such collaboration.

i Protocol on the Development of Tourism in SADC

This Protocol was adopted in September 1998 and was signed then by 13 of the 14 SADC states. It has not yet entered into force. However at a meeting of Committee of Ministers in 2000 members were urged to speed up their ratification processes.²²⁷

The Protocol is based on the recognition that tourism is the "world's largest and fastest growing industry" and that SADC countries share of the global takings are very low notwithstanding its "rich tourism potential." The Protocol seeks through collective action to "define policies and strategies for the development and promotion of the tourism industry region-wide." The Protocol recognises that this is dependent on co-operation in the related sectors of immigration, transport, aviation, information, trade and local government.

Specifically its objectives, as set out in Article 2, are to:

- use tourism as a vehicle to achieve sustainable social and economic development;
- ensure equitable, balanced and complimentary development region-wide;
- optimise resource usage and increase competitive advantage in the region vis-à-vis other destinations;

²²⁷ <http://www.environment.gov.za/speeches/2000/26may2000.htm>

- ensure the involvement of small and micro-enterprises, local communities, women and youth in the development of tourism;
- contribute towards human resource development;²²⁸
- create a favourable investment climate for tourism;
- improve the quality, competitiveness and standards of the tourism;²²⁹
- improve the standards of safety and security;
- make appropriate provision for disabled, handicapped and senior citizens;
- promote the region as a single but multi-faceted tourism destination capitalising on its common strengths and highlighting individual member state's unique tourist attraction;²³⁰
- facilitate intra-regional travel through the easing or removal of travel and visa restrictions and the harmonisation of immigration procedures;²³¹ and
- improve tourism service and infrastructure.

As a basis for achieving these objectives, Article 3 identifies basic principles. Firstly, the private sector is seen as a key player. Member states have agreed to facilitate private sector involvement through providing incentives, infrastructure and the appropriate legal and regulatory framework. Additionally they have agreed to consult with the private sector and other stakeholders in the formulation of tourism policies. Secondly, private-public sector co-operation is prioritised. Thirdly, parties have agreed to formulate and pursue policies and strategies that promote the involvement of local communities and local authorities in the planning and development of tourism. Fourthly, it is recognised that tourism must be environmentally and socially sustainable, and in particular, preserve and promote the natural, cultural and historical resources of the region. Finally, the need to promote a culture of human rights, gender sensitivity and responsiveness to disability is believed to be essential for promoting tourism.

In Article 4 member states undertake to bring their national laws and policies into harmony with the objectives of the Protocol. Interestingly this includes an obligation to refrain from taking any measures that hinder the implementation of the Protocol.

Additionally, states have agreed to establish regional quality and standards control mechanisms and to harmonise the standards for registration, classification, accreditation and grading of service providers and tourism facilities.

The development of investment incentives are provided for in Article 12.

The institutional system has 4 levels – the Committee of Tourism Ministers, the Committee of Senior Officials, the Tourism Co-ordinating Unit (TCU) and the Regional Tourism Organisation of Southern Africa (RETOSA). The Committee of Ministers is responsible for policy and development strategy formulation, amending the Protocol and implementing the Protocol. The Committee of Senior Officials is composed of administrative heads of the ministries responsible for tourism. They review and co-ordinate the activities of the various lower rungs

²²⁸ This is further provided for in Article 6.

²²⁹ This is also provided for in the improvement of transportation systems under Article 10.

²³⁰ This is further provided for in Article 7.

²³¹ This is further provided for in Article 5.



including sub-committees and the Tourism Co-ordinating Unit. They also function as advisers to the ministerial committee. They are tasked with liaising with the TCU, RETOSA, the private sector and other stakeholders. The TCU is essentially responsible for the implementation of the Protocol. The Regional Tourism Organisation of Southern Africa's function is to market and promote the region in close co-operation with the national tourist organisations and the private sector. The focus is to add value to the promotional activities of the stakeholders in southern Africa.

Dispute settlement in the first instance is through negotiation failing which disputes may be submitted for adjudication under the treaty.

SADC Protocol On Trade

This Protocol was adopted in 1996 and entered into force in September 2000.

Its object is to further liberalise intra-regional trade in goods and services on the basis of fair, mutually equitable and beneficial trade agreements. It seeks to contribute towards the improvement of the climate for domestic, cross-border and foreign investment.

Key features of the Protocol are:

- the elimination of tariffs and quantitative restrictions within a period of eight years;
- the imposition of no new subsidies that "threaten to distort competition;"
- the harmonisation of sanitary, phyto-sanitary measures, standards and technical regulations envisaged;
- infant industry protection and safe-guard clauses; and
- anti-dumping provisions in conformity with World Trade Organisation (WTO) rules and detailed specifications of rules of origins.

It seeks to enhance economic development, diversification and industrialisation of the region and to establish a Free Trade Area in the SADC region. The trade protocol, itself, does not spell out how member states are to phase in either their tariff or non-tariff barrier reductions over the specified period. Decisions on these issues are subject to separate negotiations among the member states; however the protocol spells out that these negotiations are to arrive at a tariff reduction schedule among the member states party to the agreement as well as a sensitive products list.²³²

The Trade Negotiation Forum agreement gives southern Africa its first trade block which paves the way for SADC to take its first concrete steps towards a free trade area.

Protocol on Transport, Communications and Meteorology in SADC

The objective of this Protocol, adopted in 1996 and entered into force in 1998, is to establish transport, communications and meteorological systems which provide

²³² <http://inforserv2.ita.doc.gov/ticwebsite/afweb>.

efficient, cost-effective and fully integrated infrastructure and operations which best meet the needs of customers and promote economic and social development.

The Protocol seeks to ensure the integration of transport and communication systems through the development of compatible rules, standards and procedures. Consistent with this, states have undertaken to eliminate or reduce hindrances and impediments to the movement of persons, goods, equipment and services.

The member states have also agreed to promote and facilitate broad-based investment to develop, preserve and improve viable strategic transport and communications infrastructure. Parties recognise the need for strategic partnerships between government and responsible and competent private sector.

2 Spatial Development Initiatives²³³

Spatial development initiatives (SDIs) refer to a linear geographic and economic region, which is planned as a contiguous region. The region, in this sense, can be understood nationally (as within countries) and internationally (where the region traverses more than one country).²³⁴ The SDIs seek to harness under-utilised potential for economic development and earmarked previously undeveloped areas for investment and development. Tourism and infrastructural development are key focuses of these initiatives.

There are several SDIs in the SADC region that are of a transboundary nature. These include the Maputo Development Corridor, the Lubombo Initiative, the Okavango Upper Zambezi Tourism Initiative, the Limpopo Spatial Initiative, the Beira Spatial initiative, the Zambezi River Basin Corridor, and the Tazara Development Corridor. Some of these are linked directly to TBNRM.

Key objectives include:²³⁵

- The generation of sustainable economic growth.
- The generation of long-term and sustainable employment for local inhabitants of SDIs.
- Maximising private sector investment and lending.
- Exploiting the spin-off opportunities from this investment for the development of small and micro enterprises and the empowerment of local communities.
- The exploitation of the defined areas for export orientated growth.

Economic justice is, purportedly, an important aim of the tourism and/or agricultural development initiatives – including the Lubombo initiative, the Maputo Corridor, Coast2Coast SDI and Okavango Upper Zambezi International Tourism initiative.

In many of these SDIs “community-public-private-partnership” is a key aspect. Many of these initiatives are driven by development banks and the private sector with governments being a key player. This partnership, it is hoped, will revitalise

²³³ This section is based on secondary sources as despite request to the relevant SDIs, I have been unable to obtain the relevant agreements.

²³⁴ Ostegaard, 1993 in Tevera and Chimhowu, 2000.

²³⁵ Jordan and Gordhan, 1996.



depressed rural economies through the linking of resource-rich communities with relevant state and private investors interested in the sustainable utilisation of natural assets.²³⁶

The Okavango Upper Zambezi International Tourism

The Okavango Upper Zambezi International Tourism (OUZIT) Spatial Development Initiative (SDI) involves 5 SADC countries, Angola, Namibia, Botswana, Zambia, Zimbabwe. Its objective is to stimulate economic growth in the region by developing its comparative advantage in ecotourism. The core project area, comprising some 260 000 km² incorporating game parks in: Angola, Namibia, Botswana, Zambia, Zimbabwe, and potentially coastal areas in Mozambique.

Specific objectives include:²³⁷

- Support local economic growth and social upliftment through tourism development.
- Develop, brand, and position the OUZIT area as an internationally significant multiple destination location for wildlife, eco- and adventure tourism.
- Broaden the base and capitalise on the existing well-developed and known tourist destinations and facilities by linking them to new tourist destinations in the project area.
- Link the OUZIT area with other tourist destinations and conservation areas in south, central and east Africa; thereby creating a network of tourist destinations and contributing towards integrated economic development and conservation management of the sub continent.

The Okavango Upper Zambezi International Tourism Development Initiative is advocating for the establishment of a southern African wildlife sanctuary in the wetlands associated with the source of the Zambezi basin.

ii Maputo Development Corridor

The Maputo Development Corridor (MDC) has infrastructural, industrial and agricultural components.

The Maputo Corridor Company (MCC), is a co-operative institutional venture between the South African and Mozambican governments. Its head office in Maputo is set to take over the work of the SDI. The objectives of the Company are:

- to strengthen the investment environment in the MCC area of operation;
- oversee the implementation and completion of key infrastructure projects; and
- to nurture new investments and initiate the creation of local industrial around them.

²³⁶ <http://www.sdi.org.za/>

²³⁷ <http://www.sdi.org.za/Profiles/okavango.htm>

Tracking initiatives are already in place to monitor the socio-economic impact of Corridor programmes and an environmental management framework is being piloted in the area in co-operation with provincial and national departments of Environmental Affairs.

The Corridor Company will continue to work closely with provincial and national investment facilitation agencies. A number of investment opportunities still exist for the provision of infrastructure through public-private-partnerships (PPPs) in agriculture, mining, energy, chemicals, tourism, agriculture and the manufacturing sectors.

3 National Policies and Laws

This section considers key policies and legislation at the national level that are important for the development of SDIs. It identifies common trends, gaps and opportunities.

Tourism Policies

A number of SADC states have adopted tourism policies. Key features of these policies are identified here.

Linking Tourism and Development

In most of these policies the link between tourism and development is emphasised. This approach is consistent with national development plans and also the SADC Treaty. For example in Namibia the current National Development Plan recognises tourism as an important contributor to the national development strategy. It links tourism development to the realisation of the overall development objectives of the National Development Plan. These objectives are:

- Reviving and sustaining national growth;
- Creating employment;
- Reducing inequalities in income distribution; and
- Eradicating poverty.

Similarly the Botswana 1990 policy links the issue of tourism and development as does South Africa's policy.

Previously Disadvantaged Groups

A recurring theme is the recognition that the benefits of tourism should be realised throughout society by increased local participation and equity. Many now link tourism development to facilitating better access and benefits for previously disadvantaged groups, and for women and to improve the enabling environment for the small scale and informal sector. Nevertheless, this has not been fully provided for in national law. Namibia is exceptional in this context. It has legislation designed to motivate communities to establish conservancies. This legislation gives communities the right to earn revenue from tourism on communal land, to the same extent as enjoyed by landowners on commercial land. Nevertheless if the law is to ensure that this takes place then communities need



encouragement and support in developing enterprises to take advantage of these new rights. Namibia seeks to promote community participation in tourism development projects.

In other countries, such as Mozambique, the focus is on regionally equitable development of the country²³⁸ as some provinces have historically been disadvantaged.

Private Sector Driven

It is widely accepted that the tourism sector requires competitive marketing, the attraction of international investment capital and the provision of quality services and appropriate infrastructure. Consequently these policies support private sector tourism. Existing legislative systems also tend to support the private sector over and above communities. The private sector faces some difficulties. These include problems of registration and legal personality that are recognised across boundaries.

The role of government is to provide the enabling framework for the industry to flourish.

Multi-Stakeholder Involvement

Despite the focus on the private sector it is accepted in most tourism policies that tourism development is dependent on the establishment of co-operation and close partnerships among key stakeholders, including communities. The South African tourism policy, for example, provides that responsible tourism must be all-embracing and create proactive participation and involvement by all stakeholders - private sector, government, local communities, previously neglected, consumers, NGOs, the media, employees and others.

Tourism and Conservation

Tourism policies in the region link tourism to the conservation of biological diversity. They promote economic utilisation of natural resources, to the extent possible for a sustainable use of these resources, for the creation of employment and income at both national and community levels.

Assessing environmental, social and economic impacts is a pre-requisite for tourism development.

Cultural Respect

The South African White Paper on Tourism seeks to redress historical cultural exploitation by encouraging sensitivity to the host culture and by involving the local community in planning and decision-making of tourism initiatives. Market tourism must therefore be that is responsible, respecting local, natural and cultural environments.

²³⁸ <http://www.mozambique.mz/turismo/politica/goals.htm>

Information

The creation of databases and the sharing of information between stakeholders is seen as important for tourism development and for monitoring its impacts.

Regional Co-operation

Most countries within southern Africa recognise in their policies that tourism development requires close co-operation with other states and commit themselves to working with RETOSA.

4 Comment

Region Tensions

Many of the SDIs in the region originated as part of a South African development initiative. Tevera and Chimhowu note that “the Maputo Development corridor is as much about easy and quicker access to the sea for South Africa from the Gauteng Province as it is about the development of the regional space economy.”²³⁹ The concentration of the SDIs around South Africa increases fears of South Africa domination and expansionism in the region. These fears have already been raised around the Lesotho Highlands Water Project, access to the waters of the Nkomati, and the export of white farmers to Zambia.²⁴⁰ Legally this goes to the issue of equality of the parties and also the equitable sharing of benefits. Clearly these issues require greater state intervention and the establishment of transparent systems.

Private vs. Public Development Interests

SDIs are essentially private sector driven co-operative arrangements with a primary purpose of stimulating economic activity. The real challenge facing these regimes is how to reconcile private sector interests and the objectives of broader-based development. In particular, the issue arises as how to ensure that these developments promote the realisation of SADC’s objective of poverty alleviation, improved livelihoods and development. The issue of equality between stakeholders and how to ensure the effective participation of communities given the existing inequalities is not addressed. Indeed many of these initiatives may increase opportunities for the existing private sector but not for local communities. In this context the participation of states in these initiatives may need to be increased. Again the legal regime needs to be modified to ensure a more equitable balance between the rights and interests of the various stakeholders.

Notwithstanding the lip-service paid to communities it is unclear how communities will benefit other than through increased employment and access to better developed infrastructure. Indeed the developments may raise costs for local people. Tevera writes about the MDC:²⁴¹

²³⁹ 2000, 197

²⁴⁰ See Gilbert Mudenda, 2000, 89-101

²⁴¹ 2000, 198

“If anything, by imposing social and infrastructural costs, once provided free of charge, the corridor might actually increase the cost of living of the ordinary people in these provinces who are currently mired in poverty. For example, the toll road being constructed between Witbank in South Africa and Maputo has cost implications for the peasant farmers who in future, will have to pay a toll fee.”

Environmental Justice

Additionally it is unclear how these developments will impact upon environmental conservation and the sustainable use of natural resources. In the absence of strong national laws that focus on conservation and environmental quality, these initiatives may well exacerbate pressure on the environment. Further these environmental burdens may be disproportionately distributed. For example, new dumpsites, industries and so on are more likely to be placed near poor neighbourhoods.

The poor may also face the burden of increasingly relaxed labour legislation to promote economic development.²⁴²

Given the disparate strength of the different national economies it is feared that the new development initiatives may also have negative consequences for the weaker party. South Africa accounts for 75% of the regional GDP. Indeed it is suggested that the MDC may have a polarising effect in Mozambique as the corridors emphasise southern development and increase poverty in the hinterland.²⁴³

²⁴² Tevera, 2000, 200.

²⁴³ Tevera, 2000-1.



PART THREE-FURTHER DEVELOPING THE FRAMEWORK FOR TBNRM

In the first instance this final part summarises the key issues and problems raised throughout the paper. Secondly, it considers the implications of the broad collaborative regime as discussed in Part I and the specific legal framework described in Part II, for reviewing and further developing the framework for TBNRM initiatives. It builds on the comments made throughout the paper and identifies:

- **Key issues** that must be addressed in developing TBNRM; and
- **Knowledge gaps** within the existing review that may form the basis for further research.

This discussion focuses on the three themes identified at the outset. These are:

- Whether TBNRM as developed in the region addresses **key international law principles** and is consistent with **human rights law**;
- Whether TBNRM as developed contributes to the realisation of **key SADC objectives** of poverty alleviation and development; and
- Whether **national legal systems** support TBNRM by creating a viable framework for addressing SADC objectives and promoting key environmental values.

A SUMMARY OF CONSTRAINTS AND OPPORTUNITIES

There are numerous TBNRM initiatives in the region with multiple focuses. Broadly these include biological diversity management and conservation objectives, the sharing of water resources and multi-or bi-lateral spatial development initiatives that focus on agriculture, tourism and infrastructural development. Despite this diversity, a number of key issues can be distilled that should be addressed in TBNRM management if they are to keep abreast with internationally recognised human rights as well as international environmental law and policy developments. And maybe more importantly, if such initiatives are able to face the challenge of sustainable management, poverty alleviation and development. For TBNRM to be a meaningful social and environmental tool, it must not only be capable of addressing needs but also contribute towards meeting aspirations.

Despite the many shortcomings of the legal regime at all levels, there are numerous other developments that bode well for TBNRM. SADC states have defined the framework for effective collaboration in natural resource management through the adoption of the SADC Treaty, a range of Protocols and through the revision of their national policies. The challenge now lies to developing this framework through co-operative agreements and also national legislation to give affect to the spirit of these agreements and to effectively move to a convergence between rhetoric and practice.

To better support TBNRM that is consistent with regional objectives, law development needs to focus on both inter-state relations and internal relations within a state, in particular the reconciliation of national and local interests. These two levels are, however, interlinked with inter-state approaches having implications at the national and local level and vice-versa. Areas that require further development include:

- Sovereignty and equality between states;
- Reconciliation of national approaches;
- Bringing national approaches in line with regional objectives;
- Making regional agreements a more effective tool for realising key objectives; and
- The relationship between the public and the state;

The current state of law at both these levels means that developing systems for conflict management and dispute resolution are important.



B DEVELOPING SYSTEMS THAT SUPPORT TBNRM

The development of transboundary approaches creates a new opportunity and incentive for states to engage in law development. Already some have programmes in place for law revision. Additionally it creates the opportunity for the development of approaches to natural resource management based on shared values and approaches.

1 Sovereign Equality

State sovereignty has implications for the success of TBNRM initiatives at both the inter-state level and the intra-state level. The issue, as it relates to internal relations, is discussed under the section on public-state relationships below.

Most prevailing TBNRM agreements recognise that sovereign rights are limited by the obligation not to cause transboundary harm. This is an important founding premise for co-operation. Management and decision-making systems need to be established in order to ensure its implementation in practice. Existing practice, particularly within the water sector, demonstrates that mere acknowledgement of such principles does not necessarily mean adherence in practice. Southern Africa states have been reluctant to re-negotiate their existing water rights to ensure that a downstream user suffers no harm even though, in principle, they accept that their practice should not harm another state.

The recognition of sovereignty in law implies equality; however the reality is that states are not equal. Patterns of inequality between states clearly influence how agreements are defined and the accrual of benefits and costs, in the long and short-term, are apportioned. A case in point is the Lesotho Highlands Water Project where no provision is made for re-negotiation on the basis of changing needs. The collaborating states may have different interests, priorities and understanding of the impacts of the proposed activity. At the end of the day, the desire to enter into agreements may have less to do with the agreed principles and more to do with other relationships and benefits. Both within and between states the issue arises as to whose agenda is realised through project design and objective. Similar problems of inequality are evident in the likely distribution of benefits arising from transfrontier parks and SDIs.

Additionally, the issue of who is included and excluded in TBNRM may be influenced by relationships of inequality. Some TBNRM agreements dealing with water allocation, including the Lesotho Highlands Water Projects and the Zambezi River Authority, exclude downstream states.

These inequalities between states and the uncertain way in which states implement principles, opens the way for conflict. Given the real inequalities between states, clear workable systems must be developed that can fairly resolve conflict. Additional agreements should probably establish clear systems for sharing of costs and benefits so as to minimise the opportunity for conflict. Most TBNRM only have statements of intent rather than clear systems and procedures.



2 State as Trustee

The relationship between the state and the public is key to the success of natural resource management, including TBNRM, with repercussions at a number of levels including the recognition of local rights, human rights, local benefits and sustainable conservation practices. Aspects of the state-public relationship that should be considered, include:

- Existing minimal public rights and the consequent alienation of local communities;
- Historical inequalities including inequitable tenure regimes; and
- National land use planning systems that create inadequate consultative mechanisms and that do not recognise the importance of partnership in planning.

The pre-dominant attitude among states in southern Africa, as reflected within regional TBNRM agreements, is to assert their authority. Other stakeholders are brought in as a matter of management as opposed to right. Thus they have few, if any, enforceable rights against the state. Systems of accountability, representation and inclusion are simply treated as domestic matters and not provided for in the agreements. This stems from a failure to appreciate that state sovereignty must be limited by the state's role as public trustee. There is clearly a policy shift at the international level to recognising that the state holds natural resources in trust for the nation. However, only lip service is paid to this within the southern African region and states continue to behave as if they are the owners of resources. Recognising that resources are held in public trust requires the location of dominium in society.

A strong argument may be made that sovereignty can be deconstructed into "internal" or domestic sovereignty and external sovereignty.²⁴⁴ Internal sovereignty refers to the relationship between representatives of the state and its population. External sovereignty refers to the relationship of one state to another state. The conceptualisation of sovereignty in this way is particularly important when dealing with issues of potential transboundary impact, whether such impact is direct or indirect, as it recognises that, for the state to act, it must have local sanction. Specifically addressing the issue of public trusteeship requires a process that is inclusive of communities and other stakeholders as a vetoing or defining power. This requires the development of planning and management systems where communities have appropriate levels of authority and responsibility.

The focus on development, at the national as opposed to the local level, may trivialise key human rights. There has been a failure by SADC states to renegotiate water agreements to take into account human rights to water for survival and subsistence purposes. Also TFCAs may be established at the expense of traditional resource rights. This situation calls into question the extent of convergence of values and priorities of people and state. A key question is the respective value placed by the state and communities on addressing historical inequalities particularly in title and authority. In the absence of clear public rights (either within national laws or the TBNRM agreements) no challenge can be made to these international agreements.

²⁴⁴ Green Cross International, 2000,8.



3 Multiple Stakeholders

Directly linked to the issue of trusteeship is the recognition of the full diversity of stakeholders.

Many of the agreements target a single resource or objective - water, large mammals, tourism or development and consequently, the inclusion of stakeholders may be skewed. For example the SDIs tend to focus on private sector inclusion and pay only rhetorical commitment to community interests. There are however an increasing number of agreements, such as the GKG agreement, that are complex and thus to be workable require integrated and multi-faceted management involving many stakeholders. Nevertheless how these multiple stakeholders are to be included and what their respective rights and status are, is far from clear.

4 Environmental Management

Several customary international law principles focus on environmental management. These principles include the Precautionary Principle, the Originator Principle (Polluter Pays Principle) and the principle of inter-generational equity. As principles of customary law these should be observed in the environmental management of all states. Therefore TBNRM initiatives should also incorporate these principles. Additionally consensus needs to be reached on other key values, management approaches and objectives. Meaningful – that is binding – provisions requiring that states amend their national systems are essential. The public must be able to challenge decisions of the state where its practice is inconsistent with these objectives, this may help to build consensus around meanings and avoid conflict. If so, it will help to address the problem that even where there are agreed principles and objectives agreement (in practice) on their meaning is often evasive. This suggests the need for Treaties to either provide for these matters more fully or to be complemented by added explanatory memoranda.

For environmental management to be successful, workable linkages between different stakeholders or levels of authority need to be created. Developing an institutional system that links transboundary planning, national planning and local planning is important. Systems of co-ordination are essential so that key actors are not left out; also mechanisms for incorporating multiple values and concerns are key. States must be obliged to revise their planning systems.

5 Human Rights Approaches

Although a framework for TBNRM has been developed at the regional level, this framework can be further enhanced through the express recognition of rights established at the international law level and in particular, those that pertain to human rights, good governance, participation and resources exist. For the most part these rights can only be classified as emerging rights. The agreements are largely rhetorical in that they place no enforceable obligations on the state. Consequently there is a schism in the commitments states have made at the international level and rights at the local level. These emerging rights should set the framework for developing TBNRM initiatives.

In particular, TBNRM needs to take local rights to resources into account in defining initiatives. It needs to create rights' regimes that address historical wrongs. In particular issues of title to land and natural resources, authority and the relationship between representation and accountability must be addressed. TBNRM needs to move beyond the rhetoric of participation to creating meaningful systems of participation. Such systems will need to encourage participation particularly of those who are socially disadvantaged – and move beyond involving communities as witnesses to the resource management process to being actors with real and enforceable rights. Unless inclusion of communities is based on equality, it will not succeed.

Where rights are extinguished, it is important that proper consultative procedures are followed and that persons are compensated for a loss of rights. Where TBNRM initiatives change local rights there should be full disclosure by the state authority of this. Where rights are affected, in keeping with international law, a right to a remedy must be provided. This would include the right to contest an administrative decision and the right to be compensated fully for any loss. None of the existing TBNRM agreements in the region recognise these rights of citizens as justiciable rights.

Governance and decision-making systems need to be based on “human dignity” and to recognise the full spectrum of human rights, including rights of participation, rights to social and cultural values and the right not to be subject to inhuman treatment.

6 Dispute Resolution

Dispute resolution is also influenced by patterns of inequality. Inequality may not just be economic and political but also in terms of human resources. For example, unless states have equal access to legal council and legal skills, they are unequal players in the field of litigation.

In any event, litigation is extremely limited as a mechanism for resolving conflict. Although at the inter-state level, states may have recourse to the International Court of Justice, virtually no litigation opportunities are available where the dispute is between citizens and their own state, citizens and another state and citizens from two different states. None of the regional TBNRM agreements recognise the right of non-discrimination as set out in the United Nations Convention on Water. This Principle creates new opportunities for resolving conflict. However the success of this as a tool for conflict resolution, is linked to the opportunities each national system creates for citizens to defend their rights both against the state and other citizens. TBNRM agreements should make provision for the principle of non-discrimination. Nevertheless, given the existing tensions, greater attention needs to be given to the issues of negotiation, mediation and arbitration.

At the state-citizen level, dispute resolution must be based increasingly on the restoration of justice rather than on strict legalities. Additionally, research is required to understand the full ambit of conflict resolution mechanisms used in practice. These would include traditional conflict resolution systems.



C CONCLUSION

The success or failure of TBNRM initiatives hinges on how the agreements are framed. The legal context (IL and national law) and the collaborative agreements, themselves, need to be enabling. Currently IL, at the regional and global level, provides important guidelines for such co-operation. The challenge for states, seeking to realise the agreed objectives of these agreements, is to refine national law systems and the actual TBNRM agreements to be consistent with these guidelines. Also important is that, states begin to implement the international agreements to which they are party. Particularly important for the region is the implementation of the SADC protocols. Box 4 sets out some preliminary ideas that forms the basis for developing a checklist for TBNRM agreements.

If transboundary natural resource management is to go beyond simply promoting better conservation systems and increased financial benefits at the national level, and create opportunities for improving local livelihoods, then collaboration, and the agreements, need to be based on a human rights approach. Human rights approaches must recognise existing rights, and re-establish historically lost rights, that people have over and to natural resources. People, in the area of the initiative, need to be at the centre of developing such initiatives not just through consultation but in defining and designing the programmes. This requires a conceptual and practical shift from the state as the owner of resources to the state as trustee. Consequently, it requires participation of communities and other stakeholders in such a way that they have control over the outcome of decision-making and planning processes. This could for example be achieved through the incorporation of “environmental justice” standards and thus the creation of administrative systems that are just, transparent and based on accountability to local stakeholders. Well established methods for achieving administrative justice is through the creation of “round-tables”, requiring the administrative authority to give reasons for decisions, free and open access to information and rights to challenge the decision. It may also require the revision of tenure laws; the position of women and children will need to be specifically considered. The actual design of these systems will depend on national and local systems and values. Nevertheless the obligation to develop or improve such systems should be a pre-requisite for TBNRM and provided for in agreements.

A key challenge is how to ensure benefits are realised at the local level and are not restricted to the private sector. This is particularly evident in, but not restricted to, SDIs. Issues of access and exploitation will need to be considered. For example, agreements that guarantee local benefits will need to be entered into;²⁴⁵ private sector involvement can no longer be based simply on the hope that benefits, such as employment and improved infrastructure, will trickle down. Benefits from economic development must contribute to a significant improvement in livelihoods and the creation of new opportunities for poor people. The experience of economic structural adjustment, and indeed the development of SDIs, demonstrates that such trickle down is not inevitable and that “economic development” may place unexpected costs and burdens on poor communities. For example, new expenses on toll roads, negative health impacts through pollution

²⁴⁵ Such approaches are already being developed in relation to the exploitation and use of genetic resources.

and dumping as well as decreased access to natural resources. Also it must be acknowledged that the rural poor are not a homogeneous group and thus impacts may be differently experienced; gender and age may be important considerations here.

For regional co-operation to effectively deliver benefits in terms of conservation and development systems for collaboration must be refined. At the economic level this requires liberalising laws that currently restrict the movement of goods and people and that undermine efficient business operation. For example, legal authority to engage in business activities will need to be rationalised. Situations where companies are required to register or meet other requirements in each country increases the costs of transboundary activities and consequently reduces potential benefits.

From a conservation perspective this means developing management approaches and standards through the region that are complementary and mutually supportive; they do not have to be identical. It is important at this level to recognise how national management and planning has transboundary impacts. The relationship between different natural resources must be acknowledged; this should set the basis for developing integrated management approaches. Although complementary EIA approaches are key, it is important to address overall planning systems. It is clear that integrated planning can not be based on simply increasing the size of planning bodies through representation of key sectors, as this makes institutions cumbersome, but will need to be based on revised planning decision-making processes. Approaches to harvesting of wild living natural resources must be reconciled. This would include reviewing the circumstances under which harvesting is allowed as well as the systems for manufacturing and marketing of wildlife products. Also important is the development of systems that recognise local values and approaches to management. In some, but not all, areas this may mean increased role of traditional institutions.

The form TBNRM agreements take needs to be critically assessed. The trend in the region has been to establish framework laws. The success of this kind of legal approach depends on the political will of the state to implement these values and the ability of the public to hold the state to these agreements. Throughout the region, at both the national and regional level systems for holding the state to book are extremely weak. For many poor rural people access to the judicial system is completely inadequate and restrained by poverty and knowledge. This can be addressed through a legislative approach that holds the state to implementing and providing a meaningful framework for realising key values. It must however be complemented with human rights education and the development of public interest litigation. It is clear that states must be obliged to reform national laws that are inconsistent with these regional agreements. Where the states are not legally required to do so regional agreements become nothing more than statements of good will. Opportunities for the public to ensure the realisation of key values articulated in these agreements must be created. Possibilities include the strengthening of the ombudsman's office and developing systems of alternative dispute resolution.

At the inter-state level the disparities in economic power and levels of development create special challenges for TBNRM. The adequacy of framework law



in this context must be questioned and the need for establishing systems and mechanisms for ensuring fair and just sharing of benefits and cost must be considered. The principles and basis for collaboration must be agreed upon and clearly articulated. Systems must be created where states are able to ensure that collaboration is consistent with national objectives.



BOX 4: CHECKLIST FOR DEVELOPING TBNRM AGREEMENTS

Public-State: Creating Good Governance Systems

- Authority and responsibility: redressing tenure systems and rights of the public; the nature of institutions; lines of authority.
- State as trustee not owner.
- Access to information.
- Administrative Accountability: obligation to give reasons.
- Rights to be heard.
- Right to object.
- Rights of participation.
- Systems for conflict resolution: between states and their own citizens; states and other citizens; between citizens.
- Obligation to review and amend national law.

Inter-State Relations

- Sovereignty.
- Equality.
- Principle of co-operation.
- Information sharing and disclosure.
- Fair sharing of costs and benefits.
- Conflict resolution.

Delivering Economic Benefits

- Movement of goods and people (locals and tourists).
- Movement of wild living natural resources.
- Legal status of enterprises.
- Tax rules.
- Customs.
- Capacity building and support to poor communities: strategic planning.
- Obligation to review and amend national law.
- Implement existing agreements especially SADC Protocols.

Conservation

- Recognition of management principles: sustainable use, precautionary principle, etc.
- Harmonisation of managerial approaches/ standards.
- Harmonisation of planning processes.
- Integrated management/planning approaches.
- Collaborative monitoring and assessment.
- Information sharing and establishing data bases.
- National strategic plans.
- Obligation to review and amend national law.
- Implement existing agreements especially SADC Protocols.
- Capacity building.



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