

**Straddling border and legal regimes: A legal framework for transfrontier  
biodiversity conservation in SADC**

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## Summary

Traditional conservation models focus on conservation within sovereign national borders and therefore ignores the fact that biodiversity extends beyond these political boundaries. Since the Southern African Development Community (SADC) region, as a whole, is rich in endemic and vulnerable biodiversity, a more holistic approach to the conservation of biodiversity is required. This thesis explores transfrontier biodiversity conservation (TFBC) in transfrontier conservation areas (TFCAs) as one method whereby a possible holistic conservation approach can be achieved. This thesis argues that sustainable TFBC depends on a legal framework facilitating specific legal principles according to which effect is given to the two main drivers behind TFBC: sustainable development and biodiversity conservation. From the foregoing the following question is answered by the thesis: which legal principles should facilitate TFBC in SADC, and to what extent does the current AU and SADC legal framework facilitate the implementation of these principles?

In answering the foregoing question this thesis distils TFBC legal principles by using two prominent soft law instruments relevant to the drivers of TFBC: the *New Delhi Declaration on the Principles of International Law Related to Sustainable Development, 2002* and the *UNEP Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 1978*. The TFBC principles are distilled with the purpose to serve as a guiding framework for TFBC governance in SADC. The principles are unique as they portray the diverse range of issues that is facilitated in TFCAs. The principles range from principles protecting biodiversity (such as sustainable use) to principles protecting the people dependent on the biodiversity (such as good governance and its elements). After the distillation of the TFBC principles this thesis analyses the African Union (AU) and SADC governance frameworks in order to establish to what extent the frameworks facilitate the TFBC principles. This thesis further explores the governance frameworks of two TFCAs, the Great Limpopo

Transfrontier Park and the Kavango-Zambezi TFCA. This is done to establish to what extent the TFBC principles are present at grass-roots level. The perusal of the governance frameworks of the TFCAs also provide important information informing the recommendations of the thesis. After establishing the TFBC principles and the extent to which the principles are found in the relevant frameworks, recommendations are made with a view of improving the chances of sustainable TFBC.

### **Key words**

**SADC, Transfrontier conservation, biodiversity, sustainable development, legal principles, sovereignty, TFCAs, Kavnggo-Zambezi TFCA, GLTP**

## Opsomming

Tradisionele bewaringsmodelle fokus hoofsaaklik op bewaring binne nasionale grense. Die gevolg hiervan is dat hierdie bewaringsmodelle nie rekenskap gee aan die feit dat biodiversiteit nie gebonde is of beperk word deur polities-vasgestelde grense nie. Die territoriale gebied wat onder die jurisdiksie van die Suider-Afrikaanse Ontwikkelings Gemeenskap (SAOG) val word gekenmerk aan besondere ryk en endemiese biodiversiteit en daarom vereis die gebied in geheel die bewaring van die biodiversiteit. Die proefskrif ondersoek die oorgrens bewaring van biodiversiteit (OBB) in oorgrensparke as een van die maniere waarop die besondere biodiversiteit in die SAOG op 'n meer holistiese wyse bewaar kan word. Die proefskrif voer aan dat volhoubare OBB afhanklik is van 'n regsraamwerk wat spesifieke regsbeginsels bevat. Welke regsbeginsels se doel is om uitvoer te gee aan die dryfvere agter OBB naamlik volhoubare ontwikkeling en die bewaring van biodiversiteit. Die voorafgaande gee aanleiding tot die volgende vraag: Watter regsbeginsels moet OBB in oorgrensparke fasiliteer, en tot watter mate voorsien die huidige Afrika Unie en SAOG raamwerke vir die implementering van die regsbeginsels?

In die beantwoording van die vraag stel die proefskrif eers vas wat die regsbeginsels van OBB moet wees deur dit op 'n teoretiese wyse te distilleer uit twee prominente “soft law” instrumente in die internasionale omgewingsreg: die *New Delhi Declaration on the Principles of International Law Related to Sustainable Development, 2002* en die *UNEP Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, 1978*. Die OBB beginsels se doel is om as 'n gids-raamwerk te dien vir OBB in die SAOG. Die beginsels is uniek omdat hulle uitvoer gee aan die diverse aard van OBB in oorgrensparke. Die beginsels strek van beginsel wat biodiversiteit beskerm (soos die beginsel van volhoubare gebruik) tot en met beginsels wat mense wat afhanklik is van biodiversiteit beskerm (soos die beginsel van goeie bestuur en al sy elemente). Na die regsbeginsels van OBB vasgestel is analiseer die proefskrif die bestuursraamwerke (bestaande uit relevante reg en beleid) van die Afrika Unie en die

SAOG om vas te stel tot watter mate die beginsels in die raamwerke voorkom en geïmplementeer word. Die proefskrif gaan verder en analiseer die bestuursraamwerke van twee spesifieke oorgrensparke (die Groot Limpopo Oorgrens Park en die Kavango-Zambezi Bewaringsgebied) ten einde vas te stel tot watter mate die beginsels op voetsoolvlak voorkom en geïmplementeer word. Die voorafgaande analise is belangrik ten einde die voorstelle van die proefskrif beter te begrond en so prakties moontlik te maak. Nadat die proefskrif die OBB beginsels vasgestel het en die analise op alle vlakke voltooi het, sluit die proefskrif af deur voorstelle te maak met die oog daarop om 'n bydrae te maak tot volhoubare OBB in die SAOG.

### **Sleutelwoorde**

**SAOG, oorgrens bewaring, biodiversiteit, volhoubare ontwikkeling, regsbeginsele, soewereiniteit, oorgrensparke, Kavango-Zambezi Bewaringsgebied, Groot Limpopo Oorgrens Park**

## Table of contents

List of abbreviations .....	i
Chapter 1 – Transfrontier Biodiversity Conservation in TFCAs in SADC .....	1
1 Introduction.....	1
1.1 Problem Statement.....	3
1.1.1 TFCAs as mechanisms for joint management .....	4
1.1.2 TFCAs and biodiversity conservation.....	7
1.1.3 The importance of law and legal principles in the context of governance .....	8
1.2 Research question .....	10
1.3 Hypotheses and assumptions .....	10
1.3.1 Assumptions.....	10
1.3.2 Hypotheses .....	11
1.4 Methodology and objectives of the study.....	11
1.4.1 Objectives.....	12
1.4.2 Structure of the thesis .....	12
Chapter 2 – Contextual and conceptual background.....	14
2. Introduction.....	14
2.1 Biodiversity conservation: a definition, the importance thereof and its relationship with PAs and TFCAs .....	16
2.1.1 Defining biodiversity in the context of TFBC .....	16
2.1.2 Importance of biodiversity conservation globally and in the SADC .....	19
2.1.3 Importance of biodiversity in the SADC .....	20
2.2 The need for TFBC.....	23
2.2.1 Colonialism.....	23
2.2.2 State sovereignty.....	26
2.2.2.1 Custodial sovereignty .....	29
2.2.3 Fragmentation: the legacy of colonialism and sovereignty .....	33
2.2.3.1 Harmonisation as a possible counter measure for fragmentation .....	35
2.2.3 Synopsis.....	37
2.3 Contextual background to PAs and the nature and scope of TFCAs .....	37
2.3.1 The evolution of PAs .....	38
2.3.1.1 Rationale behind the establishment of PAs .....	39
2.3.1.2 The purpose of PAs.....	39
2.3.1.3 The change in management purpose .....	42
2.3.1.4 Connecting jurisdictions and ecosystems: connectivity .....	43
2.3.1.5 Synopsis.....	46

2.3.2	Definitions of TFCAs .....	47
2.3.2.1	The IUCN definition of a TBPA .....	47
2.3.2.2	The SADC Wildlife Protocol definition .....	51
2.3.2.3	Synopsis .....	53
2.3.3	Guiding literature and regional documents relevant to the nature and scope of TFCAs .....	54
2.3.3.1	Peace and security .....	54
2.3.3.2	Regional economic integration and poverty alleviation .....	62
2.3.3.3	Synopsis .....	63
2.4	The main drivers behind TFBC: a critique .....	63
2.4.1	Sustainable development in the AU and SADC .....	64
2.4.2	Finding symbiosis between sustainable development and biodiversity in the TFBC context .....	70
2.5	Summary .....	72
Chapter 3 – The principles of TFBC in TFCAs .....		75
3	Introduction .....	75
3.1	Distilling the principles .....	75
3.1.1	The role of and reliance on soft law .....	75
3.1.2	Legal principles .....	79
3.1.3	Why New Delhi and UNEP .....	82
3.2	Sustainable development: the New Delhi Declaration .....	85
3.2.1	Principle 1: Sustainable use .....	85
3.2.2	Principle 2: Equity and poverty alleviation .....	89
3.2.3	Principle 3: Common but differentiated responsibility (CBDR) .....	93
3.2.4	Principle 4: Precautionary principle .....	96
3.2.5	Principle 5: Public participation and access to information and justice .....	99
3.2.6	Principle 6: Good governance .....	102
3.2.7	Principle 7: Integration .....	105
3.2.8	Synopsis .....	107
3.3	Shared natural resources: the UNEP Principles .....	108
3.3.1	Principle 1: Cooperation .....	108
3.3.2	Principle 2: Codification of principles .....	111
3.3.3	Principle 3: Sovereignty .....	114
3.3.4	Principles 4 and 8: Environmental assessments .....	116
3.3.5	Principles 5 to 14: Procedural aspects .....	117
3.3.6	Synopsis .....	124

3.4	A summary of the principles underlying sustainable development and biodiversity conservation .....	124
Chapter 4 –	An analysis of the regional legal framework .....	128
4	The current legal framework regulating TFBC in SADC .....	128
4.1	The AU legal and policy framework .....	128
4.1.1	African Charter .....	128
4.1.2	African Convention and its revision .....	131
4.1.3	Treaty of the African Economic Community .....	136
4.1.4	Cultural Charter .....	137
4.1.5	The Lusaka Agreement .....	139
4.1.6	NEPAD .....	140
4.1.7	A synopsis of the TFBC principles the AU framework .....	143
4.1.7.1	Sustainable use .....	145
4.1.7.2	Equity and poverty alleviation .....	148
4.1.7.3	CBDR .....	151
4.1.7.4	The precautionary principle .....	152
4.1.7.5	Good governance .....	152
4.1.7.6	Cooperation .....	155
4.1.7.7	Sovereignty, environmental assessments, and integration .....	159
4.1.7.8	The extent of facilitation .....	161
4.2	The SADC legal and policy framework .....	162
4.2.1	SADC Treaty .....	162
4.2.2	Wildlife Protocol .....	163
4.2.3	Forestry Protocol .....	166
4.2.4	Shared Watercourses Protocol .....	170
4.2.5	Fisheries Protocol .....	174
4.2.6	Protocol on Tourism .....	178
4.2.7	SADC RISDP .....	179
4.2.8	SADC Biodiversity Strategy .....	182
4.2.9	SADC Regional Biodiversity Action Plan .....	185
4.2.10	A synopsis of the TFBC principles in the SADC framework .....	188
4.2.10.1	Sustainable use .....	189
4.2.10.2	Equity and poverty alleviation .....	192
4.2.10.3	CBDR .....	198
4.2.10.4	The precautionary principle .....	201
4.2.10.5	Good governance .....	203

4.2.10.6	Cooperation.....	208
4.2.10.7	Sovereignty, environmental assessments, and integration .....	213
4.2.10.8	The extent of facilitation .....	216
4.3	Summary .....	218
Chapter 5 –	The principles in practice .....	222
5	TFBC in practice: The KAZA and GLTP .....	222
5.1	KAZA TFCA.....	223
5.1.1	Background .....	223
5.1.2	KAZA MoU .....	224
5.1.3	KAZA Treaty.....	227
5.1.4	KAZA SAP.....	236
5.1.5	KAZA SES.....	243
5.1.6	A synopsis of the TFBC principles in the KAZA framework .....	244
5.1.6.1	Sustainable use.....	245
5.1.6.2	Equity and poverty alleviation .....	245
5.1.6.3	CBDR .....	246
5.1.6.4	Precautionary principle.....	246
5.1.6.5	Good governance.....	246
5.1.6.6	Cooperation.....	248
5.1.6.7	Sovereignty, environmental assessments, and integration.....	249
5.1.6.8	The extent of facilitation .....	249
5.2	GLTP.....	251
5.2.1	Background .....	251
5.2.2	GLTP Treaty.....	252
5.2.3	The draft GLTP IDP.....	257
5.2.4	The MoU.....	263
5.2.5	A synopsis of the TFBC principles in the GLTP framework .....	265
5.2.5.1	Sustainable use.....	265
5.2.5.3	CBDR .....	267
5.2.5.4	Precautionary principle.....	267
5.2.5.5	Good governance.....	268
5.2.5.6	Cooperation.....	269
5.2.5.7	Sovereignty, environmental assessments, and integration.....	269
5.2.5.8	The extent of facilitation .....	269
5.3	Summary .....	271

Chapter 6 – Conclusion and recommendations.....	273
6 Conclusion.....	273
6.1 Overview of the problem statement, hypotheses, assumptions and research question.....	273
6.2 Key concepts and aspects .....	276
6.2.1 Biodiversity .....	276
6.2.2 Sustainable development.....	276
6.2.3 The need for TFBC.....	277
6.2.4 Legal principles .....	278
6.3 Summary of the analysis in each chapter .....	279
6.4 Recommendations .....	287
6.4.1 Short term.....	288
6.4.2 Medium term .....	291
6.4.3 Long term .....	292
6.5 Conclusion.....	299
Bibliography .....	300

## List of abbreviations

AEC	African Economic Community
AMU	Arab Maghreb Union
AU	African Union
BCC	Benguela Current Commission
BCLME	Benguela Current Large Marine Ecosystem
CBD	Convention of Biological Diversity
CBDR	Common But Differentiated Responsibilities
CBNRM	Community-Based Natural Resource Management
CICOS	International Commission of Congo-Oubangui-Sangha
CILSA	Comparative and International Law Journal of Southern Africa
COMESA	Common Market for East and Southern Africa
ECCAS	Economic Community of Central African States in the Central
ECOWAS	Economic Community of West African States
FANR	Food, Agriculture and Natural Resources Directorate
GBO	Global Biodiversity Outlook
GDP	Gross Domestic Product
GIZ	Deutsche Gesellschaft für Internationale Zusammenarbeit
GLTP	Great Limpopo Transfrontier Park
ICJ	International Court of Justice
ILA	International Law Association
JC	Joint Committee
JCP	Joint Conservation Plan
JCP	Joint Conservation Plan
JDSD	Johannesburg Declaration on Sustainable Development
JMAS	Journal of Modern African Studies
JMB	Joint Management Board

JPOI	Johannesburg Plan of Implementation
JWC	Joint Water Commission (
KAZA	Kavango-Zambezi
KPA	Key Performance Area
LIMCOM	the Limpopo Water Course Commission
LTA	the Lake Tanganyika Authority
MDTP	Maloti-Drakensberg Transfrontier Park
MEA	Multilateral Environmental Agreement
MIDP	Master Integrated Development Plan
MqJICL	Macquarie Journal of International and Comparative Environmental Law
NBI	Nile Basin Initiative
NBSAP	National Biodiversity Strategic Action Plan
NEPAD	New Partnership for Africa's Development
NGO	Non-Governmental Organisation
NIA	National Implementing Agency
NIEO	New International Economic Order
OAU	Organisation for African Unity
OHCHR	United Nations High Commissioner for Human Rights
OKACOM	Permanent Okavango River Basin Water Commission
ORASECOM	Orange-Senqu River Commission (
PA	Protected Area
PELJ	Potchefstroom Electronic Law Journal
PJTC	Kunene Permanent Joint Technical Commission (
PPC	Preservation and Protection Commission
PPP	Polluter Pays Principle
RBAP	Regional Biodiversity Action Plan
RBO	River Basin Organisation
RBS	Regional Biodiversity Strategy

RISDP	Regional Indicative Strategic Development Plan
SADC	Southern African Development Community
SAHRA	South African Heritage Resources Agency
SAJELP	South African Journal for Environmental Law and Policy
SALJ	South African Law Journal
SAPL	South African Journal of Public Law
SIPO	Harmonised Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation
SWI	Share Watercourse Institutions
TFCA	Transfrontier Conservation Area
THRHR	Tydskrif vir die Hedendaagse Romeins-Hollandse Reg
UDEAC	Customs and Economic Union of Central Africa
UEMOA	Economic and Monetary Union of West Africa
UN	United Nations
UNEP	United Nations Environmental Programme
UNGA	United Nations General Assembly
WSSD	World Summit on Sustainable Development
WSTCU	Wildlife Sector Technical Coordinating Unit
ZAMCOM	Zambezi Watercourse Commission

## Chapter 1 – Transfrontier Biodiversity Conservation in TFCAs in SADC

### 1 Introduction

This thesis examines biodiversity conservation at a supra-national level in the SADC. As will be seen below, the Southern African Development Community (SADC) region presents various opportunities for what this thesis terms “transfrontier biodiversity conservation” (TFBC) in Transfrontier Conservation Areas (TFCAs). In TFCAs, SADC member states as well as other interested and affected stakeholders jointly manage the biodiversity in the TFCA. As will be shown below, one of the primary goals of TFCAs is to conserve biodiversity.<sup>1</sup> This goal is important in the SADC as biodiversity plays an important role in the day-to-day survival of the SADC citizenry, especially those in rural areas.<sup>2</sup> The goal of joint management is, however, plagued by various challenges. These include: different law and policies, rigid approaches to sovereignty, and a lack of an enabling legal framework at supra-national level. In order for TFBC to truly succeed in TFCAs and furthermore to facilitate holistic biodiversity conservation, a holistic and integrated approach to the governance of TFBC in TFCAs is necessary. Reports indicate that biodiversity is lost at an alarming pace despite the exponential rise of areas earmarked for the protection thereof.<sup>3</sup> These reports further indicate that the loss of biodiversity is in part due to decision-making challenges and policy constraints within the areas earmarked for biodiversity conservation.<sup>4</sup> The question then should turn to where decision-making challenges and policy constraints can be addressed. This is the point where governance becomes important.

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<sup>1</sup> See para 1.1.2 below.

<sup>2</sup> SADC *Regional Biodiversity Strategy* (SADC RBS) 42 and SADC *Food, Agriculture and Natural Resources Directorate Report* 20. Also see Hanks 2003 *Journal of Sustainable Forestry* 127-148. Also see Munthali 2007 *Natural Resources Forum* 51; Webster and Suich “Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area” 376; and Suich *et al* 2005 *Conservation International South Africa* 1-69.

<sup>3</sup> See para 1.1.2 below.

<sup>4</sup> See para 1.1.2 below.

Paterson describes governance as follows:<sup>5</sup>

[governance is] basically concerned with the exercise of authority and specifically with who exercises such authority, how such authority is exercised, and the outcome of the exercise of such authority.

From this definition it can be seen that the dominant aspect of governance is authority. The question should then be where the authority originates. Paterson answers this question by stating that: “The source of authority can be based in statute, custom and tradition.”<sup>6</sup> This thesis makes the argument that governance is facilitated by law and policy. Paterson explains that governance is “more often than not ... underpinned by law.”<sup>7</sup> Scoping the generic description of governance to apply to Protected Areas (PAs) and confirming the role of law and policy, Borrini-Feyerabend *et al* acknowledge the role of law by describing the concept of *de jure* conservation.<sup>8</sup> They give content to this concept by asking various questions, the most prominent being: “What legal framework (legislation as well as policy derived from legislation) regulates the governance of the protected area system and of individual sites?”<sup>9</sup> An answer to this question might suggest that law and policy enables governance in PAs. Accordingly, a clear interplay between law and policy and governance is observed and it is argued that law and policy (in enabling governance) can address the decision-making challenges and policy constraints referred to above. The foregoing description of the importance of law and policy in addressing biodiversity loss (specifically in the context of TFBC) in the SADC sets the scene for the need for an integrated legal framework to enable TFBC. The purpose of this legal framework will be to enable and support governance in the TFBC context in TFCAs. Accordingly, the main legal problem presented in this thesis is centred on a legal framework for TFBC and more specifically, what the content of such a framework could or should be.

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<sup>5</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 168-169.

<sup>6</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 169.

<sup>7</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 170.

<sup>8</sup> Borrini-Feyerabend *et al* Governance of Protected Areas 76.

<sup>9</sup> Borrini-Feyerabend *et al* Governance of Protected Areas 76.

## 1.1 Problem Statement

Biodiversity is central to human survival<sup>10</sup> as, among other things, it provides the natural capital essential to the daily survival of people on the African continent.<sup>11</sup> This is especially true for the poor, as they use this natural capital to sustain their livelihoods. Africa has long been known to play host to rich biodiversity:<sup>12</sup> the SADC region contains five of the eight biodiversity hotspots in Africa, the importance of which will be discussed in chapter 2.<sup>13</sup>

This thesis is written from the viewpoint that the environment (and therefore biodiversity as a component of the environment)<sup>14</sup> is a single integrated and interdependent unit and does not recognise politically imposed boundaries. As a consequence the conservation of biodiversity necessitates a holistic and integrated approach stretching beyond traditional notions of sovereignty that only work to fragment ecosystems and the biodiversity inherent in them. In other words, the governance institutions and processes as well as the laws regulating the governance of biodiversity resources need to be holistic and integrated in order to be effective. This need to conserve biodiversity across sovereign borders is confirmed by Bowman and Redgwell,<sup>15</sup> who observe that:

[i]t has become common to observe that the natural environment knows no political boundaries and that the traditional regime of resource exploitation, grounded primarily in the notion of national territorial sovereignty, requires to be replaced by more overtly collectivist approaches.

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<sup>10</sup> Secretariat of the Convention of Biological Diversity *Global Biodiversity Outlook 4* 24 (the 2014 Outlook confirms this finding, which was reported in the 2010 3<sup>rd</sup> Outlook); WWF *Living Planet Report 2013* 1-10; UNEP *African Environmental Outlook 2: Our Environment, Our Wealth* (AEO 2) 226-295 as well as UNEP *African Environmental Outlook 3: Summary for Policy Makers 2013* (AEO 3) 10-11 and the SADC *RBS* 1-122.

<sup>11</sup> UNEP *AEO 2* 226-295 and SADC *RBS* 1-122. Also see UNEP *AEO 3* 10

<sup>12</sup> UNEP *AEO 2* 1-10 and 226-295 and UNEP *AEO 3* 10.

<sup>13</sup> See para 2.1 below. See UNEP *AEO 3* 10 and also Conservation International *Hotspots* [http://www.conservation.org/where/priority\\_areas/hotspots/Pages/hotspots\\_main.aspx](http://www.conservation.org/where/priority_areas/hotspots/Pages/hotspots_main.aspx) [date of use 20 October 2014]. Also see Lubbe "A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas" 204-205 and Lubbe 2007 *YbIEL* 129-131.

<sup>14</sup> This is explained in para 2.1 below.

<sup>15</sup> Bowman and Redgwell *International Law and Biodiversity* 12.

One of the mechanisms giving direct effect to the need for TFBC is found in the form of a TFCA.<sup>16</sup>

### 1.1.1 TFCAs as mechanisms for joint management

The main purpose of TFCAs is to conserve biodiversity,<sup>17</sup> and in essence, they constitute a highly evolved model of traditional Protected Areas (PAs).<sup>18</sup> PAs have long been accepted to be the cornerstone of biodiversity conservation.<sup>19</sup> The term PAs is used in the present context as an umbrella term to include all forms of PAs.<sup>20</sup> The official definition of a PA is:<sup>21</sup>

A clearly defined geographical space, recognised, dedicated and managed, through legal or other effective means, to achieve the long-term conservation of nature with associated ecosystem services and cultural values.

The SADC *Protocol on Wildlife Conservation and Law Enforcement*, 1999 (Wildlife Protocol) defines a TFCA as:<sup>22</sup>

the area or component of a large ecological region that straddles the boundaries of two or more countries encompassing one or more protected areas as well as multiple resources use areas.

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<sup>16</sup> The thesis uses the term TFCA(s) as a preferred term (as opposed to transboundary protected area(s) (TBPA(s)) as this is the term most commonly found in SADC literature and legal documents.

<sup>17</sup> Global Transboundary Conservation Network [www.tbpa.net](http://www.tbpa.net) [date of use 20 September 2014]. Also see article 3(a) of the *Bilateral Agreement between the Government of the Republic of Botswana and the Government of the Republic of South Africa on the Recognition of the Kgalagadi Transfrontier Park*, 1999; article 4 of the *Treaty between the Government of the Republic of Mozambique, the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe on the Establishment of the Great Limpopo Transfrontier Park*, 2002 and the Preamble of the *Treaty between the Government of the Republic of South Africa and the Government of the Republic of Namibia on the Establishment of the Ai-Ais/Richtersveld Transfrontier Park*, 2003.

<sup>18</sup> See para 2.3 below. See Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 9-11; and Dudley *Guidelines for Applying Protected Area Management Categories* 8.

<sup>19</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 8.

<sup>20</sup> This includes all categories of PAs as defined by the IUCN and all other initiatives geared towards biodiversity conservation. These are: Ia strict nature reserve; Ib wilderness area; II national park; III natural monument; IV habitat/species management; V protected landscape/seascape; and VI PA with the sustainable use of natural resources. For a discussion and explanation of the IUCN categories see Dudley and Stolton *Defining protected areas: An international conference in Almeria, Spain* 1-220.

<sup>21</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 8.

<sup>22</sup> Article 1 of the Wildlife Protocol. This definition is elaborated upon in chapter 2.

This definition indicates that a TFCA is an area that transcends national borders and therefore transcends traditional notions (such as “fortress conservation”) in conservation.<sup>23</sup> The definition accords with the collectivist approach prescribed by Bowman and Redgwell,<sup>24</sup> as it incorporates more than one political jurisdiction and may also incorporate more than one conservation model. In short, a TFCA is described as a joint or collective project to manage shared/adjacent natural resources. The exact nature and scope of TFBC in TFCAs will be elaborated upon in chapter 2 below.<sup>25</sup>

TFCAs are well-recognised and well-established phenomena in the SADC region. This is evident from the fact that there are already 20 TFCAs in the region.<sup>26</sup> These include:

- the Richtersveld TFCA (South Africa and Namibia);
- the Kgalagadi TFCA (South Africa and Botswana);
- the Greater Mapungubwe TFCA (South Africa, Botswana and Zimbabwe);
- the Great Limpopo TFCA (South Africa, Mozambique and Zimbabwe);
- the Maloti--Drakensberg TFCA (MDTP) (South Africa and Lesotho);
- Lubombo TFCA (Mozambique, South Africa and Swaziland);
- Iona-Skeleton Coast TFCA (Angola and Namibia);
- Kavango-Zambezi TFCA (KAZA) (Angola, Botswana, Namibia, Zambia and Zimbabwe);
- Malawi-Zambia TFCA (Malawi and Zambia);
- Chimanimani TFCA (Mozambique and Zimbabwe).
- Liuwa Plain-Kameia TFCA (Angola and Zambia);
- Lower Zambezi – Mana Pools TFCA (Zambia and Zimbabwe);
- Niassa-Selous TFCA (Mozambique and Tanzania); and

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<sup>23</sup> See para 2.3.1 below.

<sup>24</sup> Bowman and Redgwell *International Law and Biodiversity* 12. See para 1.1 above.

<sup>25</sup> See paras 2.2 and 2.3 below.

<sup>26</sup> See Zunckel *SADC TFCA Guidelines* 19 This document is a final draft and not yet in the public domain. It was used with the permission of the editor as the author of the thesis contributed to the Guidelines. Also see Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 163-203.

- Mnazi Bay – Guirimbas Transfrontier Marine Conservation Area (Mozambique and Tanzania)

As already stated, the main rationale for the establishment of TFCAs is the conservation and protection of biodiversity.<sup>27</sup> The sheer number of TFCAs in the SADC may hint at the importance of biodiversity and its protection in the region.<sup>28</sup> The establishment of TFCAs is not the only mechanism in the SADC geared towards the issue of the joint management of natural resources. The SADC *Revised Protocol on Shared Watercourses*, 2000 (Watercourse Protocol) aims to manage, protect and utilise the joint watercourses in the SADC region in a coordinated fashion, for example.<sup>29</sup> Shared watercourse management is defined as:<sup>30</sup>

- (i) planning the sustainable development of a shared watercourse and providing for the implementation of any plans adopted; and
- (ii) otherwise promoting the rational, equitable and optimal utilisation, protection, and control of the watercourse.

Shared watercourses are the common denominator between two or more states and the subject of joint management. Shared watercourses are also identified by the various River Basin Organisations (RBOs)<sup>31</sup> in the SADC.<sup>32</sup> In TFCAs, biodiversity is the common denominator and the subject of joint management.<sup>33</sup>

<sup>27</sup> See Lausche *Guidelines for Protected Areas Legislation* 11-12 and Global Transboundary Conservation Network [www.tbpa.net](http://www.tbpa.net) [date of use 20 September 2014]. Also see article 3(a) of the Bilateral Agreement between the Government of the Republic of Botswana and the Government of the Republic of South Africa on the Recognition of the Kgalagadi Transfrontier Park; article 4 of the Treaty between the Government of the Republic of Mozambique, the Government of the Republic of South Africa and the Government of the Republic of Zimbabwe on the Establishment of the Great Limpopo Transfrontier Park and the Preamble of the Treaty between the Government of the Republic of South Africa and the Government of the Republic of Namibia on the Establishment of the Ai-Ais/Richtersveld Transfrontier Park. IUCN *A typology of Transboundary Protected Areas* 1.

<sup>28</sup> See the discussion on “biodiversity hotspots” in para 2.1.3 below.

<sup>29</sup> Article 2 of the Protocol.

<sup>30</sup> Article 1 of the Protocol.

<sup>31</sup> These are also referred to as Shared Watercourse Institutions. See article 5 of the Protocol as well as <http://www.icp-confluence-sadc.org/rbosummary> [date of use 25 July 2014].

<sup>32</sup> The RBOs include: the International Commission of Congo-Oubangui-Sangha (CICOS); the Kunene Permanent Joint Technical Commission (PJTC); the Lake Tanganyika Authority (LTA); the Limpopo Water Course Commission (LIMCOM); the Nile Basin Initiative (NBI); the Orange-Senqu River Commission (ORASECOM); the Permanent Okavango River Basin Water Commission (OKACOM); the Ruvuma Joint Water Commission (Ruvuma JWC); the Zambezi Watercourse Commission (ZAMCOM) and the Inco-Maputo Tripartite Permanent Technical Committee. On the Inco-Maputo Tripartite Permanent Technical Committee see: Barnard and Lubbe “Sustainable Development of SADCs’ Watercourses: The Inco-Maputo River Basin Agreement of 2002” 72-101.

<sup>33</sup> The concept of biodiversity is defined in para 2.1 below.

### 1.1.2 TFCAs and biodiversity conservation

Like RBOs, TFCAs share the notion of supra-national joint management, which is in line with key biodiversity conservation concepts such as connectivity,<sup>34</sup> bioregionalism<sup>35</sup> and ecological integrity,<sup>36</sup> as well as the integration principle and the requirements of sustainable development (even though the latter is not considered a conservation concept *per se*).<sup>37</sup>

The synergy between TFCAs and biodiversity conservation is reflected through the *Aichi Targets*<sup>38</sup> agreed to under the *Convention on Biological Diversity*, 1992 (CBD).<sup>39</sup> The synergy is twofold: first through Aichi Target 11, which calls for greater conservation of biodiversity and ecosystem services<sup>40</sup> through well-connected PAs,<sup>41</sup> and second, through Aichi Target 12, which relates directly to TFCAs and biodiversity hotspots in stating that by 2020 “the extinction of known threatened species [should have been] prevented and their conservation status, particularly of those most in decline, [should be] improved and sustained”. Accordingly, TFCAs

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<sup>34</sup> See in general para 2.3 below. Also see specifically para 2.3.1.4 below. Connectivity conservation “is inherently about the degree of movement of organisms or processes.” This movement may include fire, wind, soil, plants, water and animals. Crooks and Sanjayan *Connectivity Conservation* 3.

<sup>35</sup> A bioregion is “a unique region definable by natural (rather than political) boundaries with a geographic, climatic, hydrological and ecological character capable of supporting unique human and nonhuman living communities.” Thayer *LifePlace Bioregional Thought and Practice* 3.

<sup>36</sup> Ecological integrity is defined as “the summation of chemical, physical and biological integrity.” James and Chu *Restoring Life in Running Waters: Better Biological Monitoring* 51.

<sup>37</sup> See para 3.2.7 below. See in general Young 2000 *Landscape Journal* 46; Naess “The Shallow and the Deep, Long-Range Ecology Movement: A Summary” 343-347; Foreman “Putting Earth First” 348-354; Dodge “Living By Life: Some Bioregional Theory and Practice” 355-363; and Karr “Ecological Integrity: An Essential Ingredient for Humans’ Long-term Success” 8-26.

<sup>38</sup> COP 10 Decision X/2 Strategic Plan for Biodiversity 2011-2020.

<sup>39</sup> Convention on Biological Diversity (1992) 31 *ILM* 818.

<sup>40</sup> The term “ecosystem services” will be used throughout this thesis and forms an important element in biodiversity governance, as will be seen. The full discussion and definition of ecosystem services falls outside the scope of this thesis. However, as this term is important I give two accepted definitions to guide the reader as to what exactly the term denotes. The first, as formulated by Boyd and Banzhaf, is “Final ecosystem services are components of nature, directly enjoyed, consumed, or used to yield human well-being.” Boyd and Banzhaf 2007 *Ecological Economics* 616-626. The second, which differs very subtly, was formulated by Fisher, Turner and Morling: “Ecosystem services are the aspects of ecosystems utilized (actively or passively) to produce human well-being. Fisher, Turner and Morling 2009 *Ecological Economics* 643-653. From these definitions the value of nature to human well-being is seen as services rendered or derived from ecosystems.

<sup>41</sup> See in general Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 163-166.

may play a critical role in biodiversity conservation while contributing to achieve the Aichi Target and ultimately the targets of the CBD.

### 1.1.3 *The importance of law and legal principles in the context of governance*

The mere existence and/or establishment of TFCAs will not necessarily lead to better transfrontier biodiversity conservation (TFBC).<sup>42</sup> In fact, evidence suggests that although the PAs coverage (including TFCAs) has risen tremendously during the past decades, biodiversity is still being lost at an alarming rate.<sup>43</sup> It is indicated that in 1970 the total coverage of PAs was 2 million sq km.<sup>44</sup> In 2010 the coverage was estimated to be 18 million sq km.<sup>45</sup> These figures indicate a significant rise in the establishment of PAs. Notwithstanding, the loss of biodiversity continues at a thousand times the background/natural rate.<sup>46</sup> Globally, it is estimated that there are 130 000 PAs worldwide (this figure includes 225 established TFCAs globally).<sup>47</sup> This figure may be put into context by comparing it with two icons in the global economy – McDonalds and Walmart stores. It is indicated that there are three times as many PAs as there are McDonalds and Walmart stores combined.<sup>48</sup> One thus wonders why, with the increase in the number of PAs – the cornerstone of biodiversity conservation – the loss of biodiversity continues at such an alarming rate.<sup>49</sup> Judging from the literature, the answer seems, in part, to lie with problems in decision making and policy constraints,<sup>50</sup> as well as a lack of management plans<sup>51</sup> regulating PAs.<sup>52</sup>

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<sup>42</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 163.

<sup>43</sup> Ervin J *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF’s Portfolio* (UNDP 2010) 11. Also see Living Planet Report (2012) 128 and Global Biodiversity Outlook 3 (2012) 17.

<sup>44</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF’s Portfolio* 9.

<sup>45</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF’s Portfolio* 9.

<sup>46</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF’s Portfolio* 8. Also see Butchart *et al* 2010 *Science Magazine* 1164-1168.

<sup>47</sup> TFCAs and TPBAs are seen as the same for the purposes of this statistic. Global Transboundary Conservation Network [www.tbpa.net](http://www.tbpa.net) [date of use 20 September 2014].

<sup>48</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF’s Portfolio* 6.

<sup>49</sup> Rockström *et al* argue that the planetary boundary for biodiversity loss has been crossed and therefore biodiversity loss will continue at an exponential and irreversible biodiversity loss. The authors blame this loss of biodiversity on anthropogenic influence and describe biodiversity loss as the sixth major extinction event in the history of life on Earth. The last mentioned statement (the sixth major extinction event) is described by Chapin *et al* 2000 *Nature* 234-242. See in general Rockström *et al* 2009 *Ecology and Society* 1-35.

<sup>50</sup> CBD GBO 3 16.

<sup>51</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF’s Portfolio* 7-9.

<sup>52</sup> For the importance of legal frameworks in PA governance also see Asian Development Bank *Transfrontier Conservation Areas and Tourism Development Project Mozambique: Process Framework* 27 and Lausche *Guidelines for Protected Areas Legislation* 1-3.

This inference is supported by the findings of the SADC *Regional Biodiversity Strategy*, 2006 (RBS). The Biodiversity Strategy indicates that weak regional and institutional legal frameworks are the primary constraints in implementing biodiversity initiatives.<sup>53</sup> With a regional legal framework being described as “weak,” one may suggest that the transfrontier governance of biodiversity is likely to be “weak” as well. This is because decisions, policies and management plans find their authority in legal frameworks. That law is important in this context is a central notion in this thesis, and it will be further explained and researched below.<sup>54</sup>

A brief description of law and governance now aims to indicate the link between law (including policy) and governance. It is not the purpose of this thesis to discuss either law and/or governance at a theoretical level. The following discussion merely aims to indicate the link between law and governance and eventually to biodiversity conservation in TFCAs. Law and governance will first be described in a generic context and thereafter in the context of PA governance.

Kotzé<sup>55</sup> argues that law presupposes governance and *vice versa*:

... law also provides mechanisms by means of which governance is executed; it justifies governance, legitimizes it; creates and controls the systems of rule inherent in governance; and it provides the means to achieve the objectives of governance.<sup>56</sup>

From this description it is clear that law plays an important if not crucial role in governance. Moreover, governance is mainly concerned with regulation, and law may be seen as the primary source of the said regulation.<sup>57</sup> Law is furthermore created by “governance actors and process...and law is therefore as much a product of governance as it is a source of governance.”<sup>58</sup> From the foregoing it is clear that a deliberate link exists between law and governance. Similarly, Paterson explains that

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<sup>53</sup> SADC *RBS* vii and 12.

<sup>54</sup> See paras 2.3.2; 2.4.1 and in general para 3 below.

<sup>55</sup> Kotzé *Global Environmental Governance Law and Regulation for the 21<sup>st</sup> Century* 51-99.

<sup>56</sup> Kotzé *Global Environmental Governance Law and Regulation for the 21<sup>st</sup> Century* 52.

<sup>57</sup> Kotzé *Global Environmental Governance Law and Regulation for the 21<sup>st</sup> Century* 52.

<sup>58</sup> Kotzé *Global Environmental Governance Law and Regulation for the 21<sup>st</sup> Century* 52.

governance is “more often than not ... underpinned by law.”<sup>59</sup> It would seem that, in most cases, a clear link is present between law and governance.

From the foregoing it is derived that the existence of a legal framework in order to guide and facilitate the governance of TFBC in TFCAs is important in the SADC context. This thesis will distil the legal principles complementing the nature and scope of TFBC in the SADC in order to form the basis or guiding elements of a legal framework for TFBC in the SADC. This leads to the central research question of this thesis. When considering a legal framework for TFBC at the supra-national level, this thesis argues that legal principles (and not legal rules) will play an important role. Legal principles and their suitability to TFBC will be elaborated upon in chapter 3 below.<sup>60</sup> It will be argued that principles, because of their nature and the possibility that they may be rigid (rule-like) or open-ended are the ideal content to facilitate TFBC in a transfrontier setting where diverse challenges will present themselves.

## **1.2 Research question**

Which legal principles should facilitate TFBC in SADC, and to what extent does the current AU and SADC legal framework facilitate the implementation of these principles?

## **1.3 Hypotheses and assumptions**

In answering the above research question, this thesis will be based on the assumptions and hypotheses listed below.

### **1.3.1 Assumptions**

- Biodiversity is threatened globally and there is a need for the conservation of these resources;
- Biodiversity is threatened in the SADC and must be protected through arrangements such as TFBC;

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<sup>59</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 170.

<sup>60</sup> See para 3.1 below. See specifically para 3.1.2.

- Biodiversity resources occur across national borders and are not restricted in any sense by political boundaries, although the latter politically circumscribe and determine their governance;
- Legal frameworks facilitate processes and procedures for governance in general and for biodiversity governance in particular; and
- Supra-national law, such as that in the SADC, plays an integral part in facilitating transfrontier biodiversity governance.<sup>61</sup>

### 1.3.2 Hypotheses

- Inadequate provision is made in the AU and SADC legal framework to facilitate TFBC;
- Sustainable TFBC depends on a supra-national legal framework containing legal principles facilitating TFBC; and
- Principles rather than rigid rules are better suited to supra-national governance efforts in the SADC.

## 1.4 Methodology and objectives of the study

This is a desktop study that does not contain any new empirical data or data gathered from field-work. This thesis is based on a literature analysis of primary and secondary sources of law, including treaties, protocols, case law, legislation, textbooks, academic journals and government and other reports and studies. The study has used some sources (such as academic journals and reports) that fall outside the traditional scope of legal texts and sources.<sup>62</sup> While this study is not multi-disciplinary, an investigation of these sources was necessitated as this topic ventures outside the confines of strict legal sources. It is noted that where these sources were used, no specific knowledge was required to interpret and use the information. The study also includes a case study consisting of a desktop survey of the management frameworks of two chosen TFCAs: the GLTP and KAZA. The purpose of this desktop study is to see to what extent the distilled TFBC principles

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<sup>61</sup> The role of national law is not negated or ignored here, but because of the limited jurisdictional scope of national law this thesis focuses on supra national law.

<sup>62</sup> See specifically the description of biodiversity in chapter 2 below for these documents.

are incorporated in the TFCA governance frameworks. The findings here will further inform and strengthen the recommendations of this thesis as strong and / or weak points can be identified in the TFCA governance frameworks.

#### *1.4.1 Objectives*

- 1 The first objective is to clarify the contextual and conceptual background of the research topic by illustrating the importance of transfrontier biodiversity resources in the SADC region.
- 2 The study also aims to identify the basis for TFBC in the SADC by identifying the main drivers behind TFBC in TFCAs.
- 3 The study distils the legal principles argued to be required in a legal framework that should enable the drivers of TFBC. In so doing, the TFBC principles will be argued to facilitate TFBC in TFCAs.
- 4 The study aims to test and evaluate the current AU and SADC legal framework against these distilled legal principles in order to establish the extent to which the AU and SADC legal frameworks facilitate TFBC in TFCAs.
- 5 The study concludes by making recommendations based on the findings.

#### *1.4.2 Structure of the thesis*

Chapter 2 provides the contextual and conceptual background of the study. Important concepts are defined in order to scope and focus the thesis, and the need of TFBC in SADC is explained. After explaining the evolution of PAs and unpacking what TFCAs entail, chapter 2 identifies two main drivers behind TFBC in SADC, which are sustainable development and biodiversity conservation.<sup>63</sup> These drivers are used as a basis from which the legal principles will be distilled in chapter 3.<sup>64</sup>

Chapter 3 focuses on the distillation of legal principles for TFBC, which will inform the legal framework facilitating TFBC in TFCAs. This is performed by

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<sup>63</sup> See para 2.1-2.5 below.

<sup>64</sup> See para 3 below.

using two specific international soft-law instruments – the *New Delhi Declaration on the Principles of International Law Related to Sustainable Development*, 2002 (New Delhi Declaration)<sup>65</sup> and the *UNEP Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States*, 1978 (UNEP Principles).<sup>66</sup> The exact method of the distillation, why it is necessary to do this, and why there is a reliance on soft-law are explained in detail in chapter 3.<sup>67</sup>

After the legal principles have been distilled in chapter 3, chapter 4 will employ them to examine the existing AU and SADC legal and policy framework to establish the extent to which the framework facilitates TFBC. The AU framework is relevant as it informs the SADC legal and policy framework. This analysis will provide insight into possible strengths and weaknesses in the current legal framework relating to TFBC.

In chapter 5 a desktop case study is undertaken of two selected TFCAs: the GLTP and the KAZA TFCA.<sup>68</sup> The case study investigates whether or not the distilled principles find application in the founding and operational documents of the chosen TFCAs. This is done in order to draw possible conclusions as to the necessity and role of legal principles in a supra-national legal framework and/or whether the current legal framework influences TFCAs at grass-roots level (either positively or negatively).

Chapter 6 concludes the study by summarising all of the relevant arguments and important content of the thesis. Based on this summary, chapter 6 will present recommendations as to the current legal position regarding TFBC in TFCAs.

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<sup>65</sup> Adopted in the 2002 International Law Association resolution 3/2002. The New Delhi Principles are chosen as they provide the best normative guidance as to what the content of sustainable development should be in order to fulfil the ideology behind sustainable development. See in general Goepel 2010 *Sustainability* 1694 – 1718.

<sup>66</sup> UNEP/IG -7/3.

<sup>67</sup> See para 3.1 below.

<sup>68</sup> The choice is explained and justified in para 5 below.

## Chapter 2 – Contextual and conceptual background

### 2. Introduction

The concept of TFBC is, in itself, a departure from a traditional conservation approach in PAs. Moreover, TFBC challenges one very important matter held in high regard by SADC member states: sovereignty. TFBC requires cooperation beyond sovereignty and requires a change in traditional thinking in resource exploitation, conservation and governance. TFCAs, as a transformed form of traditional PA governance, embrace the concept of TFBC and challenge traditional paradigms of biodiversity conservation and PA governance within sovereign borders.<sup>1</sup> TFCAs are highly complex arrangements including (in most cases) a wide range of stakeholders.<sup>2</sup>

To briefly illustrate the complexity of the TFCA domain, a discussion of the so-called “protected areas matrix” is required. In 2008 the International Union for the Conservation of Nature (IUCN) issued the IUCN Management Guidelines to assist the international community and domestic policy makers to understand and improve PA governance.<sup>3</sup> The Guidelines identify four basic governance types: a) governance by government; b) shared governance; c) private governance; and d) governance by indigenous people and local communities.<sup>4</sup> The Management Guidelines link the four governance types with the six protected area categories to form the protected areas matrix.<sup>5</sup> The idea is to take a specific PA and then plot it within a matrix in order to understand and improve the governance in that particular PA.

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<sup>1</sup> See para 2.3.1 below.

<sup>2</sup> See Erg *et al* *Initiating Effective Transboundary Conservation: A Practitioners’ Guideline Based on the Experience from the Dinaric Arc* 8-10. Also see paras 4 and 5 below.

<sup>3</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 7-33. Also see Paterson ‘Protected Areas Governance in a Southern African Transfrontier Context’ 163-203 and Paterson 2010 *SALJ* 490-514.

<sup>4</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 26. These four main categories are further sub-divided. See Dudley *Guidelines for Applying Protected Area Management Categories* 27. Also see Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 163-203.

<sup>5</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 27.

However, when a TFCA is plotted within the matrix it becomes clear that the matrix does not cater for its complexity. Evidence of this is found in the analysis done by Paterson, when he plotted the IAIs- IAIs/Richtersveld Transfrontier Park.<sup>6</sup> He illustrates the “theoretical fragility” of the governance typology and questions the practical applicability of the matrix in the transboundary context.<sup>7</sup> He further emphasises the Global Transboundary Protected Areas Network statement that “there can be no ‘cookbook’ approach to transboundary conservation”.<sup>8</sup> Paterson takes a critical view of the foregoing statement and asks if the development of governance typologies and matrices is not indeed an attempt to create such a “cookbook”.<sup>9</sup> Accordingly, Paterson suggests that scholars should step back and reflect critically on which ingredients are needed in the recipes with a view to:<sup>10</sup>

ensuring that the recipes are “effective”, that they produce a balanced “connection” between the vast array of available flavours, and ultimately produce an “equitable” array of dishes which are palatable to the diverse eventual consumers.

This thesis proposes to step back and reflect critically on one crucial aspect of TFCA governance: within this highly complex TFCA milieu, which legal principles should inform a legal framework that must facilitate sustainable TFBC in the context of TFCAs in the SADC? In so doing, there will be an attempt first to determine *what* needs to be governed / regulated in the TFBC environment. The answer to this question is thought to lie in the drivers (the driving factors behind the TFBC ideology) behind TFBC.<sup>11</sup> The drivers behind TFBC provide the scope and ambit of what needs to be governed. Accordingly, the question to be answered in this chapter is: What are the drivers behind TFBC? Responding to this question will provide this thesis with a list of drivers behind TFBC so that it is able in subsequent chapters to establish which legal principles could facilitate the drivers of TFBC.

This chapter relies on a desktop study in order to ascertain what the drivers behind TFBC are. The chapter accordingly:

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<sup>6</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 163-203.

<sup>7</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 202.

<sup>8</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 202. The original source of this quotation is Lausche *Guidelines for Applying Protected Areas Legislation* 267.

<sup>9</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 202.

<sup>10</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 203.

<sup>11</sup> See para 2.4 below.

- Explains the importance of biodiversity both globally and in the SADC<sup>12</sup> to contextually link biodiversity and TFCAs;
- Provides a brief overview of the evolution of PAs to explain the place of TFCAs in the larger PA paradigm;
- Discusses the need for TFBC, specifically in the SADC; and
- Provides a theoretical basis for TFBC in TFCAs by identifying the main drivers of TFBC.

## **2.1 Biodiversity conservation: a definition, the importance thereof and its relationship with PAs and TFCAs**

### *2.1.1 Defining biodiversity in the context of TFBC*

Biodiversity is defined by the *Convention on Biological Diversity* (CBD) as:<sup>13</sup>

the variability among living organisms from all sources including, *inter alia*, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems.

As seen from this definition, biodiversity is an extremely comprehensive and all-encompassing term consisting of three main elements: genetic diversity, species diversity and ecosystem diversity.<sup>14</sup> To simplify, biodiversity may be viewed as the multiplicity of all of nature. When considering that biodiversity conservation is one of the primary goals of TFCAs and furthermore that local communities or other stakeholders play a central role in TFCAs, it becomes important to consider whether people are themselves subject to biodiversity.<sup>15</sup> In other words, are people a factor that needs to be considered in biodiversity conservation or is biodiversity a concept restricted to the confines of other natural resources?<sup>16</sup> This question is of particular

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<sup>12</sup> This will exclude a specific overview of biodiversity on the African Continent as a whole as the research will focus on TFBC in SADC specifically.

<sup>13</sup> Article 2 of the CBD.

<sup>14</sup> Scholtz 2005 *MqJICL* 11; Birnie *et al International Law and the Environment* 583-649 and Sands and Peel *Principles of International Environmental Law* 499.

<sup>15</sup> See paras 1 and 2 above.

<sup>16</sup> The answer is implicitly given in various other definitions in article 2 of the CBD. "Sustainable use," for instance, is described as: "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its

importance in TFCAs, as these areas aim to accommodate social, environmental and economic concerns (the full spectrum of sustainable development) through biodiversity conservation.<sup>17</sup> The influence of people on biodiversity, and vice versa, cannot be ignored, as we live as part of ecosystems and are dependent on the resources ecosystems provide for our survival. This is confirmed by the 2014 *Living Planet Report* (LPR), the *Global Environmental Outlook 5* (GEO 5), the *Global Biodiversity Outlook 3* (GBO 3), and the RBS, among other studies.<sup>18</sup> For these reasons some authors consider people to be a part of biodiversity.<sup>19</sup>

For present purposes, it is argued that a definition that includes people in biodiversity is best suited to TFCAs in a post-modern context. A purely ecocentric<sup>20</sup> definition would not recognise the many complexities and interactions between people and the world and would exclude them from TFBC in TFCAs.<sup>21</sup> Such a definition would also be at odds with a post-modern approach to the governance of biodiversity conservation, as it might potentially ignore some of the relevant goals and indeed interests of the diverse and multiple stakeholders in TFCAs. Accordingly, employing an ecocentric definition might lead to a deficient concept of TFBC that does not recognise all the necessary goals thereof. The study would also be blind to reality if it excluded the impact (both positive and negative) of people on natural resources. This is evident from the recent discussions of the “Anthropocene,” a notion which suggests that people are changing/have irrevocably changed the functioning of Earth

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potential to meet the needs and aspirations of present and future generations”; and “domesticated or cultivated species” are described as “species in which the evolutionary process has been influenced by humans to meet their needs.” The CBD thus clearly recognises the influence of people on biodiversity.

<sup>17</sup> The definition of TFCAs, as will be discussed below in para 2.3.2, provides for TFCAs to encompass different land-uses. As a result human settlements can be found within and/or adjacent to a TFCA. See, for example, the two selected TFCAs selected for analysis in chapter 5 below. See also chapter 3, where the principles of TFBC will be distilled in the context of TFCAs.

<sup>18</sup> CBD GBO 3 94; WWF LPR 2014 86-87; UNEP African Environmental Outlook 2 226-295 as well as UNEP AEO 3 10-11 and SADC RBS 1-122.

<sup>19</sup> See Hunter 1996 *Conservation Biology* 695-697, Angermeier 2000 *Conservation Biology* 373-381 and Sanderson 2002 *et al BioScience* 891-904.

<sup>20</sup> Ecocentrism values nature for the intrinsic value of nature in itself. It largely ignores the value of nature for people as well as the interactions between people and nature. See in general Thompson *et al* 1994 *Journal of Environmental Psychology* 149-157.

<sup>21</sup> See in general Hunter 1996 *Conservation Biology* 695-697, Angermeier 2000 *Conservation Biology* 373-381 and Sanderson 2002 *et al BioScience* 891-904.

system processes in the sense that they have become a geological force of nature that is able to change Earth and its systems.<sup>22</sup>

Further strengthening the argument (recognising the human-environment interconnectedness) is the fact that the CBD itself recognises sustainable use, *ex-situ* conservation, and access to genetic resources.<sup>23</sup> The CBD is further strengthened by the adoption of the 2010 *Nagoya Protocol on Access and Benefit-sharing* (Nagoya Protocol).<sup>24</sup> The Protocol emphasises the connection between people and biodiversity in providing for the utilisation of the benefits derived from biodiversity.<sup>25</sup> Biodiversity should thus be defined in a broad perspective and viewed from an anthropocentric<sup>26</sup> viewpoint in TFCAs, especially in a post-modern developmental context.<sup>27</sup>

As biodiversity conservation is one of the primary goals of TFCAs globally and in the SADC, it is important to revisit the importance of biodiversity in order to illustrate the important role of TFCAs as vehicles for biodiversity conservation.

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<sup>22</sup> See in general Crutzen "The 'anthropocene'" 14-18; Brown "Environmental Policy in the Anthropocene" 104-105; Steffen *et al* 2011 *Philosophical Transactions of the Royal Society* 842. Also see Kotzé 2013 *Litnet Akademies* and Kotzé "Transboundary Environmental Governance of Biodiversity in the Anthropocene" 12-33.

<sup>23</sup> See articles 6, 9 and 15 respectively. *Ex-situ* conservation relates to conservation of the components of biodiversity outside their natural habitat. This implies human intervention and influence.

<sup>24</sup> CBD COP 10 *Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from Their Utilization to the Convention on Biological Diversity* Nagoya 29 October 2010. The Protocol is, at the time of writing, not yet in force.

<sup>25</sup> See article 1 of the Nagoya Protocol.

<sup>26</sup> Thompson *et al* 1994 *Journal of Environmental Psychology* 149-157.

<sup>27</sup> This statement is not meant to be all-inclusive or applicable at all levels. Where, for instance, biodiversity conservation is to be defined in the context of IUCN Ia or Ib categories, an ecocentric definition may be applied, although one would still have to factor in the surrounding human influences.

### 2.1.2 Importance of biodiversity conservation globally and in the SADC

In terms of the CBD, Member States agreed to set national and regional targets for the creation of new PAs that should lead to greater protection, in their effort to counter biodiversity loss. The CBD acknowledges that the conservation of biodiversity is a common concern of mankind.<sup>28</sup> This makes the conservation of biodiversity not only a sovereign affair, but also acknowledges that a more collectivist global approach to the conservation of biodiversity needs to be facilitated. The importance of this global recognition can be deduced, *inter alia*, from the findings of the LPR,<sup>29</sup> the GEO 5;<sup>30</sup> and the GBO 3.<sup>31</sup> The two measures that are used in the reports to indicate the status of biodiversity are the Living Planet Index (LPI) and the Ecological Footprint (EF). The LPI can broadly be described as a biodiversity indicator.<sup>32</sup> The EF is described by the Report as a measure of environmental sustainability.<sup>33</sup> The LPR indicates that from 1970 to 2008 there has been a 28% decrease in the earth's biodiversity.<sup>34</sup> Furthermore, the EF indicates that humanity currently exceeds the ecological carrying capacity of the earth by 50%, which directly contributes to the loss of biodiversity.<sup>35</sup> Perhaps the most important findings of all are contained in the GBO 3.<sup>36</sup> The GBO 3 indicates that the targets set in terms of the CBD for the reduction of biodiversity-loss by 2010 have not been met.<sup>37</sup> The overall target was to significantly reduce biodiversity loss by 2010. Apart from this overarching goal, 21 sub-targets were set.<sup>38</sup> The GBO 3 indicates that none of these targets have been met at global or regional level.<sup>39</sup> It seems to be clear that biodiversity faces critical threats and accordingly there is a need for sustainable conservation thereof.<sup>40</sup> This loss of biodiversity is counter-intuitive given the fact that the number of PAs, argued to be the cornerstones of biodiversity conservation, has

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<sup>28</sup> Preamble to the CBD. See a discussion of the concept by Brunée "Common Areas, Common Heritage, and Common Concern" 564-567.

<sup>29</sup> WWF *LPR 2014* 1-10.

<sup>30</sup> UNEP *GEO 5* 134-166.

<sup>31</sup> CBD *GBO 3* 94.

<sup>32</sup> WWF *LPR 2014* 128.

<sup>33</sup> WWF *LPR 2014* 41.

<sup>34</sup> WWF *LPR 2014*. Also see Rockström *et al* 2009 *Ecology and Society* 32.

<sup>35</sup> WWF *LPR 2014* 8.

<sup>36</sup> UNEP *GBO 3* 17.

<sup>37</sup> UNEP *GBO 3* 17.

<sup>38</sup> UNEP *GBO 3* 17.

<sup>39</sup> UNEP *GBO 3* 17.

<sup>40</sup> See in general Bodansky *The Art and Craft of International Environmental Law* 37-55 and Rayfuse "Biological Resources" 363-391.

exponentially risen in recent decades. Again, reference to the reasons for the continued loss against the growth of PAs is made: weak law and policy, and a lack of management plans.<sup>41</sup> To focus on the importance of biodiversity at the local level, an investigation into the biodiversity of the SADC region is undertaken in the following section.

### 2.1.3 Importance of biodiversity in the SADC

In order to illustrate the importance of biodiversity in the SADC, an investigation into so-called “biodiversity hotspots” is necessary, as these areas are indicative of the needs and importance of conservation in a region.<sup>42</sup> Moreover, hotspots contain biodiversity found nowhere else on the planet, and the biodiversity in hotspots is therefore irreplaceable.<sup>43</sup> Generally, hotspots are selected according to strict criteria. To qualify as a hotspot, a region must hold an exceptional number of endemic species and must face critical threats. Each of the 35 selected hotspots worldwide has already lost 70% of its original vegetation.<sup>44</sup> Another significant indicator of the importance of hotspots is that they collectively host 50% of the world’s plant species.<sup>45</sup> Moreover, 42% of all terrestrial vertebrate species are endemic to the identified hotspots. Simply put, hotspots host the highest concentrations of endemic biodiversity in the world and consequently also face the most critical threats, such as climate change, pollution, unsustainable use and over exploitation, and habitat

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<sup>41</sup> See para 1.1.2 above.

<sup>42</sup> Conservation International *Hotspots* [www.conservation.org/how/pages/hotspots.asp](http://www.conservation.org/how/pages/hotspots.asp) [date of use 11 September 2014]. Also see Sloan *et al* 2014 *Biological Conservation* 12-24 and SADC News Today (14 July 2014) available at [http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B\\_rCO](http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B_rCO) [date of use 11 September 2014].

<sup>43</sup> Conservation International *Hotspots* [www.conservation.org/how/pages/hotspots.asp](http://www.conservation.org/how/pages/hotspots.asp) [date of use 11 September 2014]. Also see Sloan *et al* 2014 *Biological Conservation* 12-24 and SADC News Today (14 July 2014) available at [http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B\\_rCO](http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B_rCO) [date of use 11 September 2014].

<sup>44</sup> Conservation International *Hotspots* [www.conservation.org/how/pages/hotspots.asp](http://www.conservation.org/how/pages/hotspots.asp) [date of use 11 September 2014]. Also see Sloan *et al* 2014 *Biological Conservation* 12-24 and SADC News Today (14 July 2014) available at [http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B\\_rCO](http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B_rCO) [date of use 11 September 2014].

<sup>45</sup> Conservation International *Hotspots* [www.conservation.org/how/pages/hotspots.asp](http://www.conservation.org/how/pages/hotspots.asp) [date of use 11 September 2014]. Also see Sloan *et al* 2014 *Biological Conservation* 12-24 and SADC News Today (14 July 2014) available at [http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B\\_rCO](http://sadc.einnews.com/article/214707265/CtlPRx0bpE7B_rCO) [date of use 11 September 2014].

fragmentation and transformation, among other things. The SADC is host to six of the eight hotspots in Africa. The following figure plots the world's hotspots and places the hotspots in the SADC in context:

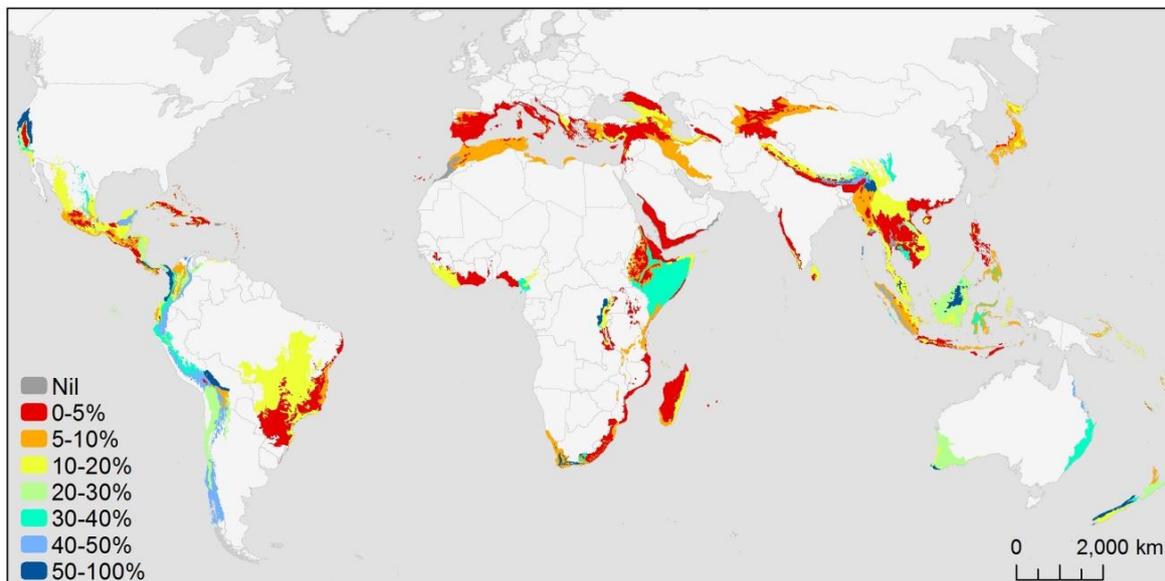


Figure 1: Map of global biodiversity hotspots showing percentage of natural vegetation intact<sup>46</sup>

The six hotspots in SADC include: the Cape floristic region; the coastal forests of eastern Africa; the Maputaland-Pondoland-Albany region; the succulent Karoo region; Madagascar and the Indian Ocean islands; and the eastern Afromontane. Apart from the Cape floristic region, Madagascar and the Indian Ocean Islands, all of the regions reach across borders within SADC. Considering the map above, it is worth breaking down the data into percentages in order to further illustrate the importance of biodiversity conservation in the hotspots. The Cape floristic region consists of 78.731 km<sup>2</sup> of which only 25.901 km<sup>2</sup> is considered as remaining natural, intact vegetation.<sup>47</sup> This means that only 32.9% of this area as a whole is still seen as naturally intact as far as vegetation is concerned. The eastern Afromontane region covering 1.020.095 km<sup>2</sup> has only 92.406 km<sup>2</sup> of naturally intact vegetation left,

<sup>46</sup> The map used is provided in supplementary data by Sloan *et al* 2014 *Biological Conservation* 15. Supplementary data was found at [www.sciencedirect.com/science/article/pii/S0006320714002237](http://www.sciencedirect.com/science/article/pii/S0006320714002237) [date of use 15 September 2014].

<sup>47</sup> Sloan *et al* 2014 *Biological Conservation* 15. Supplementary data found at [www.sciencedirect.com/science/article/pii/S0006320714002237](http://www.sciencedirect.com/science/article/pii/S0006320714002237) [date of use 15 September 2014].

equating to 9%.<sup>48</sup> The Maputaland-Pondoland-Albany and Succulent Karoo regions have only 6.4% and 6.9% of natural vegetation left intact, respectively.<sup>49</sup> Finally, Madagascar and the Indian Ocean islands have only 4.4% left and the coastal forests of eastern Africa only 3.8%.<sup>50</sup> In the light of the all-encompassing definition of biodiversity given above, where all living organisms are included as part thereof, one may ask why the focus of these figures is on vegetation. The answer is found in the definition of biodiversity itself and the fact that there is a causal relationship between all of the elements of biodiversity: ecosystems, species, and genetics.<sup>51</sup> Biodiversity retention (the species element, for example) is therefore causally linked to the existence of intact natural habitat (the ecosystem element).<sup>52</sup> The figures alarmingly indicate that very little natural vegetation is left intact in the SADC, rendering the conservation of biodiversity of critical importance in the region. The conservation of naturally intact vegetation (as the ecosystem element) is therefore crucial to conserve, as both the species and genetic elements rely on its existence. Moreover, as most of the identified hotspots in the SADC traverse sovereign borders, mechanisms like TFCA's facilitating TFBC become crucial to holistic efforts for biodiversity conservation.

Apart from the ecological value of biodiversity, the economic or monetary importance of biodiversity in the SADC cannot be ignored. It is estimated that wildlife-based tourism ranks among the top three contributors to the gross domestic product of most SADC member states, and therefore biodiversity significantly contributes to the economic welfare and growth of the region.<sup>53</sup>

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<sup>48</sup> Sloan *et al* 2014 *Biological Conservation* 15. Supplementary data found at [www.sciencedirect.com/science/article/pii/S0006320714002237](http://www.sciencedirect.com/science/article/pii/S0006320714002237) [date of use 15 September 2014].

<sup>49</sup> Sloan *et al* 2014 *Biological Conservation* 15. Supplementary data found at [www.sciencedirect.com/science/article/pii/S0006320714002237](http://www.sciencedirect.com/science/article/pii/S0006320714002237) [date of use 15 September 2014].

<sup>50</sup> Sloan *et al* 2014 *Biological Conservation* 15. Supplementary data found at [www.sciencedirect.com/science/article/pii/S0006320714002237](http://www.sciencedirect.com/science/article/pii/S0006320714002237) [date of use 15 September 2014].

<sup>51</sup> See para 2.1.1 above.

<sup>52</sup> Brook *et al* 2006 *Biotropica* 302-305; Brooks *et al* 2002 *Conservation Biology* 909-923; and He F and Legendre 1996 *American Naturalist* 719-737.

<sup>53</sup> SADC RBS 42 and SADC *Food, Agriculture and Natural Resources Directorate Report* 20. Also see Hanks 2003 *Journal of Sustainable Forestry* 127-148. Also see Munthali 2007 *Natural Resources Forum* 51; Webster and Suich "Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area" 376; and Suich *et al Conservation International South Africa* 1-69. Certain specific policy approaches also favour

In summary, it is argued that TFCAs are potential mechanisms (and currently the only mechanisms)<sup>54</sup> in the SADC to facilitate the overtly collectivist approaches called for by Bowman and Redgwell.<sup>55</sup> In order to fully understand the role of TFCAs in modern conservation as opposed to the “traditional regime of resource exploitation” alluded to by Bowman and Redgwell, this thesis turns to unpack the need for TFBC, specifically in the African context.

## **2.2 The need for TFBC**

Loss of biodiversity and the need for conservation aside, the history of the African continent also shines some light on the importance of and need for TFBC in the region. This need finds its roots in colonialism, rigid approaches to sovereignty, and fragmented approaches towards conservation. These are the causes of the specific need for a holistic approach towards biodiversity conservation in the SADC. They are discussed below.

### *2.2.1 Colonialism*

From a legal point of view, environmental conservation can be divided *inter alia* into five geo-jurisdictional levels, namely international, regional, sub-regional and national.<sup>56</sup> Conservation at a regional and sub-regional level in Africa has always been problematic since colonialism led to a geographical and jurisdictional fragmentation of Africa. The Berlin Conference held in 1884 resulted in Africa being divided into 50 countries.<sup>57</sup> After 1950, colonial rule in Africa began to fail. By 1960

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sustainable use to be implemented in order to gain economic benefits. See Moore 2011 *Geoforum* 51-60.

<sup>54</sup> The management of shared watercourses also serves as an example. See para 4.2.4 below.

<sup>55</sup> See para 1.1 above. Bowman and Redgwell *International Law and Biodiversity* 12.

<sup>56</sup> Bodansky *The Art and Craft of International Environmental Law* 11-13.

<sup>57</sup> Rajan “The Colonial Eco-Drama: Resonant themes in the environmental history of Southern Africa and South Asia” 259-260. See Kalima “Environment and development in Malawi – any balancing of interests?” 219-220; Murombo “Balancing of interests through framework environmental legislation in Zimbabwe” 557-571; and Kennedy “The environmental law framework of the Democratic Republic of the Congo and the balancing of interests” 95-112. Also see Maluwa *International Law in Post-Colonial Africa* 1-82; 259-283; and specifically 307-332 for a discussion of the position of international law in post-colonial Africa. See in general Táíwò *How Colonialism preempted Modernity in Africa* 1-274.

much of Africa had once again regained its independence, and after the colonial powers left there was a mutual need for unity in Africa.<sup>58</sup>

Even before the establishment of the Organisation for African Unity<sup>59</sup> (OAU), African heads of state realised that there was a need for the integration of their economies. Combining national economies into sub-regional markets was essential to forming an integrated economic structure. In 1963, with the establishment of the OAU, a unified organ was formed to holistically address the concerns of Africa. The OAU strove to rid the continent of the remaining traces of colonialism, promote unity and solidarity, and promote international relations within the framework of the United Nations.<sup>60</sup>

In 1980 the OAU Extraordinary Summit adopted the Lagos Plan of Action to address the need for economic cohesiveness in Africa - a lack of cohesion being a direct result of Africa's being geographically and jurisdictionally fragmented by colonialism. Form was given to the Lagos Plan of Action in 1991 when the OAU heads of state signed the *Treaty establishing the African Economic Community*, 1991.<sup>61</sup> The Treaty establishing the African Economic Community provides for the establishment of new Regional Economic Communities (RECs) and the strengthening of existing RECs.<sup>62</sup> The RECs provide sub-regional governance units to foster cooperation between regional communities and to promote the coordination of the activities between them.<sup>63</sup> RECs can be seen as mechanisms of integration as they provide sub-regional units that create harmonised laws and policies for each sub-region. Being a REC, the SADC plays a pivotal role in providing cohesive sub-regional guidance in

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<sup>58</sup> Maluwa *International Law in Post-Colonial Africa* 1-82 and 259-283.

<sup>59</sup> In 1999 the Sirte Extraordinary Session decided to establish the African Union. The Durban Summit in 2002 officially launched the African Union (AU), thus replacing the OAU. Also see the *AU NEPAD Framework Document* 4-6 (AU 2001).

<sup>60</sup> [www.au.int](http://www.au.int) [date of use 8 July 2013].

<sup>61</sup> Signed in Abuja, Nigeria June 1991 at the 27th ordinary session of the Assembly. The Treaty entered into force on 12 May 1994. At the time of writing, a total of 52 countries had signed the treaty and 48 countries had signed and ratified it.

<sup>62</sup> Article 28 of the Treaty establishing the African Economic Community. Existing communities, when the Treaty was signed in 1991, included: The Economic Community of West African States (ECOWAS) in the West African region, the Economic Community of Central African States (ECCAS) in the Central region, and in the East and Southern region, the Common Market for East and Southern Africa (COMESA), and in the Southern Region, the SADC. In North Africa, there is the Arab Maghreb Union (AMU). RECs there are the Economic and Monetary Union of West Africa (UEMOA) and the Customs and Economic Union of Central Africa (UDEAC). See [www.panafricanperspective.com/aec.htm](http://www.panafricanperspective.com/aec.htm) [date of use 8 July 2013].

<sup>63</sup> Article 28(2) of the Treaty establishing the African Economic Community.

all matters important to local supra-national governance. In this particular thesis the matter requiring guidance is TFBC. As a governance structure creating law and policy, the SADC may provide guidance for the fragmented and destructive legacy of colonialism in the region.

The negative effects of colonialism on biodiversity can be explained in two ways.<sup>64</sup> The first is that colonialism led to a geographical and jurisdictional fragmentation of Africa. This fragmentation hampers a uniform and integrated approach to the management of biodiversity and negatively affects efforts to collectively and holistically manage biodiversity. This is because the management efforts are, in most cases exclusively, grounded in sovereignty and the notion that biodiversity is a sovereign asset.<sup>65</sup> Such management efforts do not acknowledge the fact that biodiversity is a common concern and they consequently fail to acknowledge the fact that biodiversity traverses borders.<sup>66</sup> This non recognition of the connectivity of biodiversity across political borders is directly in contrast to the very essence of TFBC in TFCAs – namely that it seeks to cross political borders and connect fragmented ecosystems.

Secondly, states hold in high regard the principle of state sovereignty, which constrains uniform and integrated approaches towards the management of shared resources. This is perhaps most visible in the fact that the revised *African Convention on the Conservation of Nature and Natural Resources*, 2003 (revised Convention)<sup>67</sup> has been ratified and deposited by nine African states since its adoption.<sup>68</sup> The revised Convention needs 15 deposits before it can enter into force. This shows a lack of political will or at least some reluctance to depose, for fear of post-colonial external impacts. This leaves regional environmental governance in the regulatory remit of the out-dated *African Convention on the Conservation of*

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<sup>64</sup> Many other effects (both positive and negative) can be ascribed to colonialism. This thesis, however, focuses only on those relevant to biodiversity conservation within the scope of the thesis.

<sup>65</sup> See para 2.1 above.

<sup>66</sup> See para 2.1 above.

<sup>67</sup> Adopted in Maputo, Mozambique on the 11<sup>th</sup> of July 2003.

<sup>68</sup> For a general discussion of the Convention see Gillespie *Conservation, Biodiversity and International Law* 42 and 52.

*Nature and Natural Resources*, 1968 (African Convention).<sup>69</sup> This African Convention is perhaps suitable for most nation states in Africa, as the latter Convention was established without a Conference of Parties or any other mechanism to ensure compliance with it, its enforcement, or it's ever being updated.<sup>70</sup> It is suitable in the sense that the African Convention, as it currently exists, does not create accountability for AU states.<sup>71</sup> Africa is thus left with a framework Convention that is out of pace with current environmental challenges and conservation practice.<sup>72</sup> The out-dated Convention places particular emphasis on the rigid notion of permanent sovereignty, which is not suited to facilitating TFBC. Although sovereignty is crucially important to statehood in the international community and it should not be dismissed, this thesis proposes that a different form of sovereignty should be applied to TFBC in TFCAs.<sup>73</sup> Rather than opposing the important principle of sovereignty this thesis argues that, given the current global environmental challenges and specifically the fact that biodiversity is seen as a "common concern of mankind",<sup>74</sup> a more suitable approach may be found in the concept of "custodial sovereignty." This will be discussed below.<sup>75</sup>

### 2.2.2 State sovereignty

One of the central barriers to be overcome in order to successfully establish TFBC is the prevailing rigid approach to sovereignty. The principle of state sovereignty implies that states can govern their respective jurisdictions according to their

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<sup>69</sup> Adopted in Algiers, Algeria on the 15<sup>th</sup> September 1968. For a general discussion of the 1968 Convention see Gillespie *Conservation, Biodiversity and International Law* 80-81.

<sup>70</sup> See in general Van der Linde and Louw 2003 *African Human Rights Law Journal* 167-187 and Ebeku 2003 *African Human Rights Law Journal* 149-166

<sup>71</sup> See the discussion on the African Convention and the revised African Convention in para 4.1.2 below for a more detailed discussion of this issue.

<sup>72</sup> See para 4 below.

<sup>73</sup> In recent developments, transboundary protected areas have been used to further good relations between countries on a level different from traditional economic relations, namely the sustainable management of shared natural resources. These areas are thus also referred to as "peace parks". See <http://www.peaceparks.org> [date of use 8 July 2013]. Also see Büscher 2005 *PLAAS Policy Brief 1* and Workman *Forging Linkages* 23. Peace parks have been identified as key instruments in the realisation of the so-called African Renaissance Dream. See Van Amerom and Büscher 2005 *JMAS* 159 and Hamilton "Transborder Protected Area Cooperation" 9-18.

<sup>74</sup> Preamble to the CBD. See a discussion of the concept by Brunée "Common Areas, Common Heritage, and Common Concern" 564-567.

<sup>75</sup> See para 2.2.2.1 below.

domestic legislation and policies.<sup>76</sup> In the environmental context, this principle is diluted by the condition that territories must be used in a way that does not harm neighbouring states.<sup>77</sup> This places a *prima facie* limitation on the concept of permanent sovereignty. The interpretation of permanent sovereignty has long been debated in international law. Previously, from a developing country perspective, interpretations were in favour of absolute sovereignty over natural resources. An example of this is found in the establishment of the *Declaration on the Establishment of the New International Economic Order* (NIEO),<sup>78</sup> that seeks to establish full permanent sovereignty and nationalisation of natural resources. However, this notion of absolute permanent sovereignty, in the light of the growing awareness of the earth's dwindling natural resources, has been interpreted somewhat differently in an environmental law context.<sup>79</sup> In 1972 the *Declaration of the United Nations Conference on the Human Environment*<sup>80</sup> (Stockholm Declaration) formulated a definition of sovereignty as follows in principle 21:

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 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.

Already, here, an implicit reference to restrictive (or potentially restrictive) principles of international law has been made. Examples of restrictive principles are also found in the CBD. Article 3 of the CBD contains the notion of permanent sovereignty,

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<sup>76</sup> See Birnie *et al* *International Law and the Environment* 190-192 and Benvenisti *Sharing Resources* 22. Also see article 3 of the CBD. The Memorandum of Understanding (MoU) concluded between South Africa and Lesotho for the MDTP guarantees that the two states 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." Also see Benvenisti *Sharing Resources* 22 and Devine "International Environmental Law" 133-134 in this regard.

<sup>77</sup> Trail Smelter Arbitration US v Canada *Rob International Environmental Law Reports* 231. This case was the origin of the no-harm / polluter pays principle. Also see Harris *International Law* 537 and Benvenisti *Sharing Resources* 22. This principle was adopted in article 3 of the CBD. Article 3 of the CBD reads as follows: "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 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." See Dugard *International Law A South African Perspective* 126-134 for further reading.

<sup>78</sup> UNGA A/RES/3201 (S-VI).

<sup>79</sup> See Venter "Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty" 67.

<sup>80</sup> 11 ILM 1416 (1972).

stating that it is the right of states to exploit their resources according to their own environmental laws. This must be done in a way which will not cause harm to other states.<sup>81</sup> In contrast to the notion of sovereignty contained in article 3, article 15(2) states that:

Each Contracting Party shall endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of this Convention.

The use of the word “shall” may counter the notion of absolute sovereignty as article 15(2), in theory, requires states to allow other contracting parties access to “their” genetic resources.<sup>82</sup> The use of the word “endeavour” following the word “shall” may, however, be argued to dilute the command in that parties are commanded to try / attempt or make an effort to facilitate access to genetic resources. Given the high regard for sovereignty in Africa and the SADC, it is likely that states will use the word “endeavour” to protect “their” sovereign resources. Notwithstanding, biodiversity and the conservation thereof cannot be confined to national borders and thus the notion of state sovereignty cannot be absolute in this case.<sup>83</sup> This idea is further substantiated by article 4. Article 4 defines the jurisdictional scope of the CBD and stipulates that the provisions thereof can apply “beyond the limits of national jurisdiction”. This provision is especially important in the TFBC context, as it allows the CBD to be applied beyond sovereign borders.

A common trait among PAs sharing the same borders is that they often share common challenges.<sup>84</sup> These PAs can share the same objectives and values even while being divided by international borders.<sup>85</sup> Accordingly, a high level of cooperation between PAs and joint governance makes sense to ensure TFBC.<sup>86</sup> It follows logically that the concept of TFBC should transcend politically imposed

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<sup>81</sup> Article 3 of the CBD.

<sup>82</sup> Genetic resources are a component of biodiversity.

<sup>83</sup> Bowman and Redgwell *International Law and Biodiversity* 12.

<sup>84</sup> Hamilton “Transborder Protected Area Cooperation” 9-18. Also see Sandwith *et al Transboundary Protected Areas for Peace and Cooperation* 14. Hamilton describes the challenges as including: difficult terrain and a lack of roads; different laws hindering cooperation; religious and cultural differences; language barriers; differential commitment and resources between stakeholders on each side of the border; different approaches to governance and the devolution of authority; a lack of parity regarding the ratification of relevant international legal instruments; and armed conflict.

<sup>85</sup> Hamilton “Transborder Protected Area Cooperation” 9-18 and Sandwith *Transboundary Protected Areas for Peace and Cooperation* 7.

<sup>86</sup> Hamilton “Transborder Protected Area Cooperation” -18.

boundaries.<sup>87</sup> It is ironic to note that, as biodiversity is a holistic concept, for states to use and conserve their own biodiversity they should not foster the principle of independence and non-intervention but instead of cooperation.<sup>88</sup> Venter elaborates on this irony in describing the relationship between sovereignty, environmental challenges (specifically climate change) and the need emerging from environmental challenges for inter-state cooperation to keep sovereignty intact.<sup>89</sup> He describes sovereignty as a “power, and a threat to such power will move governors.”<sup>90</sup> He is of the opinion that the current threat of environmental catastrophe is such that, in the long term, it may indeed threaten the power regimes of governments, moving them to govern more effectively to remain in power.<sup>91</sup> Venter suggests that:<sup>92</sup>

States and their governments should, instead of awaiting the uncontrolled reduction of their sovereignty through the vagaries of climate change, urgently attend to the development of cooperative solutions, even at the cost, where necessary, of elements of their sovereignty.

From the foregoing it seems that a clear sense of symbiosis is emerging between sovereignty and inter-state cooperation in the context of the existence of various environmental challenges. In this context, the emergence of a new view on sovereignty called “custodial sovereignty” stands central to sustainable TFBC.

#### 2.2.2.1 Custodial sovereignty

Principle 3 of the UNEP Principles contains the traditional notion of sovereignty referred to above.<sup>93</sup> This traditional notion is also referred to as permanent

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<sup>87</sup> Büscher 2005 *PLAAS Policy Brief* 1. Also see Mayoral-Phillips *Transboundary Areas in Southern Africa* 2 paper delivered at the Ninth Conference of the International Association for the Study of Common Property Victoria Falls, Zimbabwe June 17-21 2002 and Workman *Forging Linkages* 23.

<sup>88</sup> Scholtz states that: “The establishment of transfrontier parks will restore the integrity of the ecosystem which was artificially carved up by colonial borders.” Scholtz 2005 *MqJICEL* 30. Transfrontier parks may serve as one of the main mechanisms for establishing this co-operation across political boundaries.

<sup>89</sup> Venter “Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty” 85.

<sup>90</sup> Venter “Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty” 85.

<sup>91</sup> Venter “Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty” 85.

<sup>92</sup> Venter “Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty” 86.

<sup>93</sup> See para 2.2.2 above. The UNEP Principles are also discussed in para 3.3 below.

sovereignty.<sup>94</sup> Permanent sovereignty is defined as the right of states to freely decide on the use and exploitation of their natural resources.<sup>95</sup> This freedom is not absolute, however, as the resources may not be used in such a way as to cause transfrontier harm.<sup>96</sup> In international environmental law, permanent sovereignty has been used by developing countries to curtail interference from developed countries with their domestic exploitation of natural resources.<sup>97</sup> Attempts by developed countries to curb deforestation in developing countries is an example of external interference, and is seen by developing countries as an attempt to curtail their economic growth and development.<sup>98</sup> The revised African Convention is a further example of the influence sovereignty has on conservation efforts. Accordingly, in the context of the AU and the SADC, the notion of permanent sovereignty is held in high regard by developing states and frequently used as a justification for the unsustainable exploitation of natural resources.<sup>99</sup> As stated earlier, this approach to sovereignty poses significant threats to TFBC. It is further detrimental to efforts towards regional environmental governance. Should sovereignty be interpreted in the strict sense, any attempt to develop supra-national governance to facilitate TFBC would be to no avail as the very idea of TFBC is to transcend sovereign borders. From the foregoing it should be clear that a traditional notion of permanent sovereignty is not suitable for TFBC. One thus needs to find an alternative or adapted concept reconciling politically imposed boundaries with current environmental needs.

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<sup>94</sup> Scholtz 2008 *Netherlands International Law Review* 328. For an explanation of the challenges to international cooperation see Bodansky *The Art and Craft of International Environmental Law* 137-149.

<sup>95</sup> Scholtz 2008 *Netherlands International Law Review* 329. For an explanation of the challenges to international cooperation see Bodansky *The Art and Craft of International Environmental Law* 137-149.

<sup>96</sup> Scholtz 2008 *Netherlands International Law Review* 329. Perrez *Cooperative Sovereignty* 69. See further Trail Smelter Arbitration US v Canada *International Environmental Law Reports* 231. Also see Harris *International Law* 537 and Benvenisti *Sharing Transboundary Resources* 22. This principle has been adopted in article 3 of the CBD. Article 3 of the CBD reads as follows: "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 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." See Dugard *International Law A South African Perspective* 126-134 for further reading.

<sup>97</sup> Scholtz 2008 *Netherlands International Law Review* 328-329.

<sup>98</sup> Camilleri and Falk *The Politics of a Shrinking Fragmenting World* 193-194 and Scholtz 2008 *Netherlands International Law Review* 328-329.

<sup>99</sup> See para 2.2.2 above. This is notwithstanding the fact that developed states also use their sovereignty to justify non-participation in treaties. The non-participation of the United States in the *United Nations Framework Convention on Climate Change*, 1992 is a prominent example.

Scholtz<sup>100</sup> argues that two factors need to be taken into account when developing the concept of sovereignty away from its absolute sense. Firstly, he argues that some form of permanent sovereignty is needed in order to protect developing states from practices such as toxic dumping and to allow them the freedom to choose sustainable development.<sup>101</sup> Secondly, he emphasises the need for cooperation in a communal effort in promoting ecological security.<sup>102</sup> Scholtz further reiterates the preamble of the CBD with the notion that biodiversity is the common concern of humankind<sup>103</sup> and argues that the notion of a common concern indicates that the global environment is the responsibility of all states.<sup>104</sup> In agreement with Scholtz, it is argued that the conservation of biodiversity (and thus the conservation of the global environment, as biodiversity is a common concern of mankind)<sup>105</sup> is not a sovereign affair and needs a collaborative approach.<sup>106</sup> This argument is *ad idem* with a statement in the first chapter of the seminal work of the Brundtland Commission, *Our Common Future*. It states:<sup>107</sup>

The Earth is one but the world is not. We all depend on one biosphere for sustaining our lives. Yet each community, each country, strives for survival and prosperity with little regard for its impact on others.

Within the foregoing context Scholtz develops a concept called “custodial sovereignty”. This concept is a progressive reflection of the changes permanent sovereignty has undergone at the hands of international environmental law.<sup>108</sup> Scholtz explains:<sup>109</sup>

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<sup>100</sup> Scholtz 2008 *Netherlands International Law Review* 333.

<sup>101</sup> Scholtz 2008 *Netherlands International Law Review* 330. The SADC has adopted and implemented sustainable development in all of its environmental protocols.

<sup>102</sup> Scholtz 2008 *Netherlands International Law Review* 330.

<sup>103</sup> Preamble to the CBD. See a discussion of the concept by Brunée “Common Areas, Common Heritage, and Common Concern” 564-567 and Scholtz 2008 *Netherlands International Law Review* 334.

<sup>104</sup> Scholtz 2008 *Netherlands International Law Review* 335.

<sup>105</sup> This statement employs the broadest definition of biodiversity. See the definition in para 2.1.1 above.

<sup>106</sup> This also reflects the statement of Bowman and Redgwell. See Bowman and Redgwell *International Law and Biodiversity* 12 and para 1.1 above.

<sup>107</sup> World Commission on Environment and Development *Our Common Future* 1.

<sup>108</sup> Scholtz 2008 *Netherlands International Law Review* 330. The concept was first introduced by Scholtz in relation to a specific part of biodiversity: elephants. The argument was made in the context of the global outrage against elephant culling in the SADC region. See Scholtz 2005 *MqJICEL* 9-30.

<sup>109</sup> Scholtz 2008 *Netherlands International Law Review* 336-337.

Custodial sovereignty accordingly implies that a state is the custodian of its global environmental resources and that other states have an expectation that the relevant state will protect these resources for the whole of mankind.

Custodial sovereignty theoretically limits the exploitation and use of natural resources within a nation state, as it expects states to act in the best interest of the whole of mankind. This concept is notionally accommodative of the concept of biodiversity, as biodiversity is already described in international environmental law as a common concern of humankind.<sup>110</sup> Given the fact that one of the main aspects of TFBC in TFCAs is to conserve beyond sovereign borders, the concept of custodial sovereignty may provide important theoretical guidance in establishing a legal framework for TFBC. When approaching sovereignty from the perspective of custodial sovereignty, the state is still endowed with its original sovereignty and the state does not lose sovereignty *per se*. The state does, however, become the custodian as opposed to the sole owner of the biodiversity in question. This is very important in the SADC context, as sovereignty is held in high regard, as stated above.<sup>111</sup> Custodial sovereignty recognises that biodiversity is held in trust by the state in whose sovereign jurisdiction the biodiversity is located. This entails that other states (particularly the neighbouring states, when considering TFBC) can expect the state to protect and govern the biodiversity for the benefit not only of that state, but for the benefit of whole mankind. Accordingly, the concept of custodial sovereignty as it is embedded in the notion of common concern may counter the sovereign unsustainable exploitation of biodiversity, especially in the context of TFBC in TFCAs. The concept may further serve as a motivation for harmonisation to align approaches within sub-regions such as SADC for biodiversity governance. In so doing, custodial sovereignty may potentially remedy legal and geographical fragmentation, as explained below. In essence, applying custodial sovereignty to TFBC would mean that a state would act as a custodian and hold its sovereign natural resources in trust. Although this concept may be *de lege ferenda*, Brown-Weiss<sup>112</sup> argues that such a fiduciary duty should be an obligation *erga omnes*.<sup>113</sup>

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<sup>110</sup> Preamble to the CBD. See a discussion of the concept by Brunée “Common Areas, Common Heritage, and Common Concern” 564-567

<sup>111</sup> See paras 2.2.1 and 2.2.2 above.

<sup>112</sup> Brown-Weiss 1984 *Ecology Law Quarterly* 540-541.

<sup>113</sup> The fiduciary duty spoken of by Brown-Weiss is not described in relation to the concept of custodial sovereignty but to a duty which she describes as the “Planetary Trust”. This concept is similar to the concept of custodial sovereignty but inclines more specifically towards the

Although custodial sovereignty is certainly not an obligation *erga omnes*, certain developments like the acknowledgement of biodiversity as a common concern of mankind, the establishment of TFCAs, and the development of regional biodiversity strategies<sup>114</sup> indicate that international environmental law is denting the rigid contours of permanent sovereignty; an occurrence which is also steadily observed in the TFCA / TFBC paradigm.

The question is how to apply the concept of custodial sovereignty in a legal framework facilitating TFBC. One option could be to legislate the concept in SADC law. By doing so, a state will in effect lose a part of its sovereign “assets”. Given the current high regard for sovereignty this option is not likely to succeed. It furthermore poses the problem of who will be the custodian and to whom this custodian will be liable should the fiduciary duties not be carried out. A further question arises from this: who is to determine the nature and scope of the fiduciary duties and note when these duties are not being carried out in the correct manner? From a pragmatic angle then, it may not be possible to codify the concept of custodial sovereignty in a SADC legal framework. It may, however, be possible, when interpreting and applying the legal framework, to implicitly apply the concept, especially where the duties of management authorities of TFCAs are described in operational documents.

### 2.2.3 *Fragmentation: the legacy of colonialism and sovereignty*

Colonialism and state sovereignty have led countries to develop and exist in isolation from one another.<sup>115</sup> Policies, legislation and structures for implementation and governance have therefore developed in isolated spaces with few similarities to be found among different countries. This has resulted in a cumulative central problematic phenomenon: geographical and regulatory fragmentation.

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protection of natural resources in the light of the need for intergenerational equity. See Brown-Weiss 1984 *Ecology Law Quarterly* 495-581.

<sup>114</sup> The SADC RBS being an example.

<sup>115</sup> Du Plessis 2001 *THRHR* 458.

Fragmentation is a phenomenon constraining holistic or integrated efforts at governance.<sup>116</sup> Fragmentation can be identified in different spheres of government, legislation, departments of government, and processes and mechanisms (internal fragmentation). When all of the above governs (or attempts to govern) a single substantive issue such as biodiversity, legal uncertainty and unsustainable environmental governance are bound to be some of the repercussions. On a cross-border scale, fragmentation is amplified when another fragmented national governance structure comes into the mix and external fragmentation is observed. This is referred to as geographical / external fragmentation. The essence of this fragmentation, at cross-border level lies in the existence of different policies, legislation, ideals and goals among the countries concerned.<sup>117</sup> In other words, law and governance regimes are fragmented among countries. This is one of the major stumbling blocks in TFBC in TFCAs and one of the reasons that a need for a guiding supra-national legal framework exists. An example is given to illustrate this point. When a new development is proposed inside the Maloti Drakensberg Transfrontier Park (MDTP), certain processes need to be followed in terms of various national laws. Should the development pose a potential threat to cultural heritage, a heritage impact assessment must be performed under the *National Heritage Resources Act* 25 of 1999 of South Africa.<sup>118</sup> The evaluation of the assessment is done by the South African Heritage Resources Agency (SAHRA). However, as this is a cross-border area, the laws of Lesotho pertaining to cultural heritage also have equal standing in the matter; in this case, the Lesotho *Historical Monuments, Relics, Fauna*

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<sup>116</sup> With regard to the South African legal system, Bray identifies some stumbling blocks hampering the development of an integrated national environmental management system: i) “The uncoordinated and piecemeal development of environmental conservation which resulted in an unwieldy mass of environmental legislation without an overall planning and management strategy.” ii) “The fragmentation of environmental administration horizontally (with various state departments involved) which led to different, and often conflicting, norms and standards for environmental protection.” iii) “The poor enforcement of environmental laws as a result of a shortage of qualified and experienced human resources, the low priority of environmental issues compared to other socio-economic demands, a general lack of environmental awareness in society and the problems encountered by concerned individuals or groups to fight environmental degradation” and iv) “The evolution of environmental law as a vast, cross-divisional branch of the law (national and international) which is rapidly growing but with many of its basic concepts and principles still uncertain”. Bray 1995 *SAPL* 173-174. Also see Kotzé *Integrated Environmental Governance* 23.

<sup>117</sup> For a comprehensive discussion of fragmentation and the disadvantages thereof in the South African legal system see Kotzé *Integrated Environmental Governance* 23-26 and 73-95. This study argues that this explanation of fragmentation within the national sphere applies, *mutatis mutandis*, to the transboundary scene set by this paper.

<sup>118</sup> Section 38 of the Act.

*and Flora Act* 41 of 1967. In terms of this Act, written consent must be obtained from the Preservation and Protection Commission (PPC) that is established under the Act.<sup>119</sup> The challenge: one shared cross-border issue is governed by two different processes (the aforementioned laws) and the outcome lies in the hands of two different authorities in two different countries (SAHRA and PPC). The matter is further complicated when both internal and external fragmentation comes into play.

The negative effects specifically related to cross-border conservation are, amongst other things, the potential incompatibility or different policies towards conservation, the absence of specific provision for integrated cross-border conservation, mismatched legislation, the duplication of regulatory processes, time delays and costly and uncertain governance processes within and between countries.<sup>120</sup> These negative effects hamper cooperation and make cross-border conservation extremely difficult, if not impossible. The promotion of “biodiversity” entails taking a holistic and integrated approach towards conservation, and the existence of such fragmentation can be seen as a major stumbling block in the way of cross-border biodiversity conservation.<sup>121</sup>

#### 2.2.3.1 Harmonisation as a possible counter measure for fragmentation

As will be seen in this thesis, harmonisation is mentioned in various legal instruments in both the AU and SADC context.<sup>122</sup> Importantly, in the context of this thesis, a general mandate for harmonisation is found in the *Treaty of the Southern African Development Community*, 1992 (SADC Treaty).<sup>123</sup> Furthermore, harmonisation is emphasised in the documents, treaties and MoUs discussed in chapter 5 below. As none of the foregoing instruments describe harmonisation, it is important to briefly explain what it is, as it will play a central role in achieving a holistic approach, especially where different externally fragmented national jurisdictions jointly manage TFBC.

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<sup>119</sup> Section 9 of the Act.

<sup>120</sup> See also Kotzé 2006 *PELJ* 1-36.

<sup>121</sup> For further reading see Scholtz 2005 *MqJICEL* 11; Birnie *et al International Law and the Environment* 583-649; and Sands and Peel *Principles of International Environmental Law* 499.

<sup>122</sup> See para 4 below.

<sup>123</sup> Adopted in Windhoek, Namibia August 1992 (as revised in 2009). See article 5(2)(b) stating that states shall “harmonise political and socio-economic policies and plans”.

The importance of harmonisation is derived not only from the SADC mandate but also from the very essence of TFBC, which is a holistic approach towards biodiversity conservation. It is important to pause and consider the meaning of harmonisation in the legal context, which is not done by the Treaty or the SADC legal framework. Nicholson describes harmonisation as a process that is:<sup>124</sup> “directed towards the elimination of discord with a view to avoiding incompatible outcomes associated with the application of the rules of different legal systems.”

This description suggests that harmonisation seeks to eliminate incompatible outcomes when the rules of different legal systems are applied to a specific set of facts. Nicholson further argues that harmonisation does not require uniformity of rules but rather harmony of rules, with the different legal systems still remaining distinct.<sup>125</sup> Allot defines legal harmonisation as<sup>126</sup> “the removal of discord, the reconciliation of contradictory elements, between the rules and effects of two legal systems which continue in force as self-sufficient bodies of law.”

Allot’s view complements Nicholson’s definition, and it is clear that harmonisation does not have the goal of creating complete similarity between unique legal systems. Its purpose is rather to align the ideological outcomes of different legal systems. In this regard Ruppel describes harmonisation as:<sup>127</sup>

...the implementation and transformation of legally binding instruments aiming to reduce or eliminate the differences among national legal systems by inducing them to adopt common legal principles.

In the context of this thesis, it is important to note that Ruppel speaks of adopting common legal principles as opposed to rules.<sup>128</sup> Ideological outcomes are thus preferably contained in principles rather than rules and it is in this regard that the definition proposed by Ruppel aligns with that of Allot and Nicholson. From these definitions, all formulated in the African context, it is clear that harmonisation seeks

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<sup>124</sup> Nicholson 2008 *Fundamina* 51.

<sup>125</sup> Nicholson 2008 *Fundamina* 52.

<sup>126</sup> Allot 1965 *The International and Comparative Law Quarterly* 377.

<sup>127</sup> Ruppel “Regional Economic Communities and Human Rights in East and Southern Africa” 280.

<sup>128</sup> As will be argued below, this thesis will rely on principles rather than rules to be contained in a framework facilitating sustainable TFBC in TFCAs. See para 3.1.2 below.

to align the ideological outcomes of different legal systems.<sup>129</sup> The word “align” is of importance as “alignment” will be used synonymously with harmonisation henceforth in this study.<sup>130</sup>

### 2.2.3 *Synopsis*

A clear need for TFBC in SADC does exist. It is clear, however, that the SADC legal and political landscape will require a nuanced approach (cognisant of the relevant historical and current challenges) to instil a collectivist attitude towards the facilitation of TFBC in TFCAs. This nuanced approach will need to factor in approaches to state sovereignty, external and internal fragmentation, differences in capacity among different countries, political stability, and any other factors that may influence cooperation.

This thesis now proceeds to investigate the nature of TFCAs by defining them and by explaining them in the context of PAs in general, as well as by investigating literature on TFCAs and PAs.

## **2.3 *Contextual background to PAs and the nature and scope of TFCAs***

This section will answer two main questions: how do TFCAs fit into the broader theoretical network of PAs, and what is the nature and scope of TFCAs? To answer the first question, an investigation into the evolution of TFCAs will be performed with a specific focus on the rationale behind the establishment, the purpose of PAs, their management purpose, and connectivity as a new and emerging aspect of PAs. The second question will be answered by investigating the two most prominent definitions of TFCAs and furthermore by analysis of the most relevant literature on TFCAs. In answering these two questions this section will provide scope and content to inform the development of a theoretical basis for TFBC, and in so doing will identify the

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<sup>129</sup> Harmonisation is even more complicated, however, as it may be asked to what extent harmonisation should be achieved. It may range from minimal to comprehensive harmonisation. For a comprehensive discussion see Ferreira-Snyman and Ferreira 2010 *THRHR* 608-628.

<sup>130</sup> This reasoning is followed partly because of the inconsistent use of alignment and harmonisation in some of the documents examined in chapter 5.

main drivers behind TFBC. The drivers will then form the basis from which the legal principles for TFBC will be distilled.

### 2.3.1 *The evolution of PAs*

As PAs form the cornerstones of biodiversity conservation, the evolution of PAs provides valuable insight into the governance landscape of PAs in general and TFCAs specifically.<sup>131</sup> A distinction is made between three main models of PAs, namely the classical,<sup>132</sup> modern<sup>133</sup> and emerging models.<sup>134</sup> Traditionally PAs have been seen as fortresses for conservation and conservation only.<sup>135</sup> TFCAs, however, entail taking a more holistic approach towards conservation.<sup>136</sup> The inclusion of multiple resource uses and users also indicates that TFCAs have evolved to extend beyond the notion of fenced parks that only play host to *fauna* and *flora*. The notion of resource use that is embedded in TFCAs indicates the important role of people as well,<sup>137</sup> which means that TFCAs could be classified under the modern and/or emerging models of PAs.<sup>138</sup> The classification of these models is based, among other factors, on the rationale behind the establishment of PAs, the purpose of PAs, the management purpose and the idea of connectivity.<sup>139</sup> These factors provide a contemporary viewpoint from which an understanding of TFCAs as a modern form of a PA could be obtained, and therefore this thesis will confine itself to those factors.

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<sup>131</sup> See para 2.1.2 above.

<sup>132</sup> Classic models existed in isolation from the surrounding land and seascape. Often government run, these PAs were managed by tax funds. See Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 9.

<sup>133</sup> Modern models emerged in the 1970s. Notably, they began focusing on management effectiveness, PA network design, governance and sustainable finance as well as the importance of local communities. See Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 10.

<sup>134</sup> Emerging models started gaining traction from the mid-2000s. Their focus is on the maintenance of ecosystem services and the promotion of climate change adaptation. They are managed by many partners with many governance models and they are often managed by multi-disciplinary professionals over long-term planning horizons. See Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 9-11.

<sup>135</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 10. Also see Dudley *Guidelines for Applying Protected Area Management Categories* 11-24 and specifically at 8.

<sup>136</sup> See para 2.2 above in general and specifically the definitions of TFCAs in para 2.3.2 below.

<sup>137</sup> This is in line with the definition of "biological resources" in article 2 of the CBD.

<sup>138</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 9. Also see para 2.1.1 above for the discussion on an anthropocentric approach to biodiversity conservation.

<sup>139</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

### 2.3.1.1 Rationale behind the establishment of PAs

Traditional or classical PA models had the objective of setting aside land as areas for exclusive conservation.<sup>140</sup> No resource use was allowed under classical models. Under modern and emerging models the focus has shifted from exclusive conservation towards a more holistic approach based equally on social, ecological and economic objectives that seek to maintain critical life support systems.<sup>141</sup> Such an approach gives effect to the objectives of sustainable development and biodiversity conservation and is in line with the scope and ambit of TFBC in TFCAs.<sup>142</sup> TFCAs further strive to alleviate poverty and secure ecological integrity for present and future generations through biodiversity conservation – highlighting sustainable development and biodiversity conservation as drivers behind TFBC in TFCAs.<sup>143</sup> Securing ecological integrity<sup>144</sup> and a balance between social, economic and environmental concerns thus seems to be central to the establishment of TFCAs, and conforms to the characteristics of modern and emerging models of PAs. Accordingly, it is put forward that sustainable development and biodiversity conservation are critical drivers behind TFBC in TFCAs. This deduction will be further strengthened as the argument in this chapter progresses.

### 2.3.1.2 The purpose of PAs

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<sup>140</sup> Ervin *et al* *Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

<sup>141</sup> Ervin *et al* *Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

<sup>142</sup> See para 2.3.2 below.

<sup>143</sup> Peace Parks Foundation [www.peaceparks.org](http://www.peaceparks.org) [date of use 22 January 2014]. Also see *Global Transboundary Conservation Network* [www.tbpa.net](http://www.tbpa.net) [date of use 22 January 2014].

<sup>144</sup> Uncertainty as to the exact definition of ecological integrity exists, although most authors agree that ecosystems are (as argued by Westra) said to have ecological integrity when they can maintain operations under their own conditions and have the ability to withstand anthropocentric changes in environmental conditions and the ability to continue the process of self-organization on an ongoing basis. See in general Westra *An Environmental Proposal for Ethics: The Principle of Integrity*. Also see Cuff and Goudie *The Oxford Companion to Global Change 2009* [www.oxfordreference.com](http://www.oxfordreference.com) [date of use 22 January 2015]. Ecological integrity is closely related to connectivity, as explained below. It should be emphasised that this thesis will not attempt to explain or investigate the complexities of concepts related to the natural sciences. However, the thesis does acknowledge them where they should be included and mention them as factors to be considered in a legal framework. See further: Maano and Noe 2012 *Singapore Journal of Tropical Geography* 137-151.

The purpose of PAs has shifted from their being established for purely aesthetic reasons towards their being established for reasons of scientific, economic, and cultural importance, and for securing ecosystem services.<sup>145</sup> TFCAs fall within this modern paradigm as they aim to provide more benefits than traditional forms of conservation.<sup>146</sup> Most importantly, TFCAs acknowledge the complex interaction between people and nature and aim to achieve harmony between all relevant aspects by following a holistic approach to biodiversity conservation.<sup>147</sup> This includes using traditional knowledge and traditional measures in biodiversity conservation.<sup>148</sup> This approach to biodiversity conservation further strengthens the argument for the preference of an anthropocentric definition of biodiversity as described above.<sup>149</sup> The purpose of TFCAs has thus shifted from fortress conservation to a more overtly inclusive approach, where the needs and knowledge of local communities are incorporated into biodiversity conservation, which also gives effect to poverty alleviation and economic integration.<sup>150</sup> This holistic approach is laudable to the extent that it integrates and recognises the importance of the relationship between man and the environment, especially regarding its recognition of ecosystem services. In essence, nature is valued not only in a purely monetary sense but for the intrinsic value it holds as a source of life.<sup>151</sup> Boyd and Banzhaf define ecosystem services as: “components of nature, directly enjoyed, consumed, or used to yield human well-being.”<sup>152</sup> Closely tied in with ecosystem services are local communities, as they should reap the benefits of the health and well-being provided by these ecosystem services. Local communities form an essential part of TFCAs, as will be seen in chapter 5. Furthermore, as ecosystem services demand a

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<sup>145</sup> Ervin *et al* *Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

<sup>146</sup> IUCN Transboundary Conservation Specialist Group *Strategic Directions 2009-2012* available at [www.tbpa.net/docs](http://www.tbpa.net/docs) [date of use 22 January 2014] as well as Regional Tourism Organization of Southern Africa [www.retosa.co.za](http://www.retosa.co.za) [date of use 22 January 2014] and Boundless Southern Africa [www.boundlessa.com](http://www.boundlessa.com) [date of use 22 January 2014].

<sup>147</sup> IUCN Transboundary Conservation Specialist Group *Strategic Directions 2009-2012* [www.tbpa.net/docs](http://www.tbpa.net/docs) [date of use 22 January 2014] as well as Regional Tourism Organization of Southern Africa [www.retosa.co.za](http://www.retosa.co.za) [date of use 22 January 2014] and Boundless Southern Africa [www.boundlessa.com](http://www.boundlessa.com) [date of use 22 January 2014].

<sup>148</sup> Sobrevila *The Role of Indigenous Peoples in Biodiversity Conservation The Natural but Often Forgotten Partners* 1-102. Also see IUCN Transboundary Conservation Specialist Group *Strategic Directions 2009-2012* [www.tbpa.net/docs](http://www.tbpa.net/docs) [date of use 22 January 2014] as well as Regional Tourism Organization of Southern Africa [www.retosa.co.za](http://www.retosa.co.za) [date of use 22 January 2014] and Boundless Southern Africa [www.boundlessa.com](http://www.boundlessa.com) [date of use 22 January 2014].

<sup>149</sup> See para 2.1.1 above.

<sup>150</sup> This effect depends on rewarding local communities for their participation and knowledge.

<sup>151</sup> See in general Büscher 2010 *Development and Change* 29.

<sup>152</sup> Boyd and Banzhaf 2007 *Ecological Economics* 616-626.

close link between mankind and nature, it is argued that the principles of inter- and intragenerational equity must also form an important and integral part of biodiversity conservation within TFCAs.<sup>153</sup> Apart from the obvious integral connection with sustainable development, the reason for this proposition is twofold.<sup>154</sup> Firstly intergenerational equity provides a temporal aspect important in management planning and securing ecosystem integrity.<sup>155</sup> The importance is derived from the fact that future generations' interests should be considered in current conservation efforts, thus in theory providing a safeguard for access to ecosystem services for generations to come. Secondly, intragenerational equity strives to reach equity amongst and between members of the present generation.<sup>156</sup> In the SADC context this is critically important, because various disparities exist between the peoples in different SADC member states.<sup>157</sup> Disparities apart, biodiversity is a common concern for all, because human existence everywhere depends on the utilisation of the ecosystem services that biodiversity provides, especially in the SADC.<sup>158</sup> Accordingly, a legal framework facilitating TFBC needs to recognise and provide for the sustainable use of ecosystem services to benefit both present and future generations.

Traditional knowledge and traditional conservation measures are also considered to form part of the new governance paradigm of PAs and TFCAs.<sup>159</sup> Although traditional knowledge and traditional conservation practices are described as positive attributes of biodiversity conservation, one must keep in mind that TFCAs bring a specific challenge into play, namely that they traverse sovereign borders. Although this characteristic is one of the main incentives as well as benefits associated with TFCAs, in the specific context of traditional knowledge and traditional conservation measures it brings the challenge of *difference*. This is because differences (broadly

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<sup>153</sup> See for example Brown-Weiss 1984 *Ecology Law Quarterly* 495-582. Also see Bodansky *The Art and Craft of International Environmental Law* 31-33.

<sup>154</sup> See paras 2.3, 3.1 and 3.2 above.

<sup>155</sup> Maano and Noe 2012 *Singapore Journal of Tropical Geography* 137-151.

<sup>156</sup> Bodansky *The Art and Craft of International Environmental Law* 31-33.

<sup>157</sup> These disparities range, for example, from differing gross domestic product, (GDP), differences in political stability, different forms of government, socio-economic circumstances, education and literacy, and different legal systems. Gibb 1998 *JMAS* 287-306 and Balefi 1996 *JMAS* 75-98.

<sup>158</sup> See para 2.1.2 above.

<sup>159</sup> Also see paras 2.3.2 and 2.3.3 below. Also see chapter 5 below.

considered) between cultures have been known to create conflict in the SADC.<sup>160</sup> Such conflict could hinder the integration of traditional conservation measures and traditional knowledge in securing, managing and utilising ecosystem services and ultimately TFBC. As a consequence, biodiversity conservation is negatively affected and these differences could lead to conflicts that impact on peace and security. For these reasons measures that could be important to help facilitate this important component of biodiversity conservation might include: the recognition of traditional knowledge and conservation measures (as part of biodiversity conservation); the harmonisation of relevant laws; provision for conflict resolution; and ensuring equality and procedural fairness (arising from disparities between member states).<sup>161</sup>

### 2.3.1.3 The change in management purpose

As the rationale behind the establishment and the purpose of PAs has changed drastically from the classical to the modern and / or emerging models, a change in the management purpose follows, by implication. Perhaps the single biggest change is the fact that PAs are not being managed exclusively for tourists, but also for and by local people,<sup>162</sup> and they are being managed with the broader benefits of ecosystem services in mind.<sup>163</sup> Unfortunately, the participation and beneficiation of local people is not always realised, although this goal is especially important in TFCAs.<sup>164</sup> Thus, the importance of balancing social, economic and environmental concerns is again emphasised (in the context of sustainable development),<sup>165</sup> and it should occur by recognising traditional knowledge and conservation measures, by harmonising laws, resolving conflict and recognising equality and procedural

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<sup>160</sup> See for instance Wolmer 2003 *JMAS* 261-278.

<sup>161</sup> See paras 3.1 and 3.2 above. Local communities have long survived on their cultural traditions and conservation methods and in many ways may be more sustainable than modern urban communities. See Sobrevila *The Role of Indigenous Peoples in Biodiversity Conservation The Natural but Often Forgotten Partners* 1-102.

<sup>162</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

<sup>163</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

<sup>164</sup> Suich *et al 2005 Conservation International South Africa* 1-69 and Hanks 2003 *Journal of Sustainable Forestry* 133-134. On the importance and relevance of including local people see Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11; IUCN Transboundary Conservation Specialist Group *Strategic Directions 2009-2012* available at [www.tbpa.net/docs](http://www.tbpa.net/docs) [date of use 22 January 2014] as well as Regional Tourism Organization of Southern Africa [www.retosa.co.za](http://www.retosa.co.za) [date of use 22 January 2014] 2012 and Boundless Southern Africa [www.boundlessa.com](http://www.boundlessa.com) [date of use 22 January 2014].

<sup>165</sup> Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

fairness. All of the aforesaid should thus be facilitated by legal principles in a legal framework facilitating TFBC in TFCAs.

#### 2.3.1.4 Connecting jurisdictions and ecosystems: connectivity<sup>166</sup>

The IUCN makes it clear that connectivity is an important element to be contained in new legal frameworks. The IUCN suggest that:<sup>167</sup>

Where feasible, legal instruments should provide explicit authority to take into account connectivity conservation.

Connectivity conservation is described by Worboys *et al* as:<sup>168</sup>

...actions taken to conserve landscape connectivity, habitat connectivity, ecological connectivity or evolutionary process connectivity for natural and semi-natural lands that interconnect and embed established protected areas. It may be represented by direct interconnections or by the ecological interconnectedness of disjunct conservation areas. The strong connectedness of people to natural and semi-natural connectivity lands is also recognized.

From the above description it seems that TFCAs serve as a potentially useful mechanism to cater for the concept of connectivity conservation, as TFCAs facilitate the connectivity of biodiversity (habitat and ecological processes), PAs, people and biodiversity.<sup>169</sup> Accordingly, the inclusion of connectivity conservation in a legal framework as a foundational notion or premise, as suggested by the IUCN, becomes critical when investigating TFBC in TFCAs.

Before the rise of connectivity conservation, classical models of PAs were seen as islands of conservation, isolated from the surrounding landscape and human use.<sup>170</sup> Modern and emerging models acknowledge the interdependence of ecosystems as well as the interdependence and interrelationship between people and nature.<sup>171</sup> Moreover, PAs are seen as an integral part of national economies, land use plans,

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<sup>166</sup> See Kotzé and Maruhn "A New Paradigm for Biodiversity Governance in a Transnational World" 3-11, Marcantonio and Rocchini *et al* 2013 *Applied Geography* 63-72 and Bennet *Linkages in the Landscape* 1-262 as well as [www.connectivityconservation.net](http://www.connectivityconservation.net) [date of use 23 January 2014].

<sup>167</sup> Lausche *et al* *The Legal Aspects of Connectivity Conservation. A Concept Paper* 175.

<sup>168</sup> Worboys *et al* *Connectivity Conservation Management: A Global Guide* xxxi. Also see Lausche *et al* *The Legal Aspects of Connectivity Conservation. A Concept Paper* 16.

<sup>169</sup> See again the definition of biodiversity in para 2.1.1 above.

<sup>170</sup> Ervin *et al* *Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

<sup>171</sup> Ervin *et al* *Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11. Also see Brown "Environmental Policy in the Anthropocene" 104-105.

climate adaptation, energy, and social development, among other things.<sup>172</sup> TFCAs embody this new vision by straddling national borders and connecting ecological networks that have long been divided by political borders. In essence, TFCAs seek to facilitate and cater for all four of the connectivity types as described above by the definition of Worboys *et al.*<sup>173</sup>

Also, in line with the definition of connectivity conservation, TFCAs recognise the interrelationship between people and nature by aiming to conserve biodiversity in a holistic and connected manner.<sup>174</sup> The concept of connectivity is therefore overarching and extends beyond the realm of sovereign borders, economies and social paradigms by requiring cooperation traditionally unfamiliar to conservation entities and national governments.<sup>175</sup> For biodiversity conservation to be truly effective and holistic in TFCAs, the concept of connectivity becomes one of the core elements of biodiversity conservation by giving effect to both ecological integrity and ecosystem services.<sup>176</sup> Although connectivity is already achieved on paper by the mere establishment of a TFCA, the implementation of the concept in practice is not so simple. As was seen in the foregoing paragraphs, many elements constitute biodiversity governance in TFCAs. Connectivity should thus be a “bonding” instrument in two ways: first (and in the scientific meaning of the concept) by connecting fragmented ecosystems and restoring ecological networks divided by political borders; and second, by acting as a guiding principle similar to that of harmonisation. From a legal perspective, connectivity should ensure that instruments and elements exist in the governance framework to allow for compatibility, harmonisation and alignment to ensure proper and effective

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<sup>172</sup> Ervin *et al* *Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 11.

<sup>173</sup> The four types are: landscape connectivity, habitat connectivity, ecological connectivity or evolutionary process connectivity. See Lausche *et al* *The Legal Aspects of Connectivity Conservation. A Concept Paper* 16 and Worboys *et al* *Connectivity Conservation Management: A Global Guide* xxxi.

<sup>174</sup> See in general Karr “Ecological Integrity: An Essential Ingredient for Humans’ Long-term Success” 10-22.

<sup>175</sup> This is clearly evident from the history of the establishment of the SADC. See Department of Foreign Affairs *SADC History and Present Status* <http://www.dfa.gov.za/foreign/Multilateral/africa/sadc.htm> [date of use 23 January 2014].

<sup>176</sup> See in general Morrison and Lockwood 2014 *Society and Natural Resources: An International Journal* 70-87 and Linke S 2012 *et al* “Merging connectivity rules and large-scale condition assessment improves conservation adequacy in river systems” *Journal of Applied Ecology* 1036-1045 and Cho Nam Ng, Yu Jing Xie and Xi Jun Yu 2013 “Integrating landscape connectivity into the evaluation of ecosystem services for biodiversity conservation and its implications for landscape planning” *Applied Geography* 1-12.

implementation of all the elements distilled from the evolution of PAs. Connectivity could be viewed as being similar to the integration principle embodied in Principle 7 of the New Delhi Declaration,<sup>177</sup> with the difference that it is seen as the bonding / integrating factor in biodiversity conservation. Connectivity, in this sense, specifically concerns the scientific elements of biodiversity conservation in order to ensure ecosystem integrity and ecosystem services within TFCAs and to further TFBC.<sup>178</sup> Therefore, aspects that should be found in a legal framework giving effect to connectivity in its scientific guise (as opposed to mere geographical connectivity) should include: allowing bioregional planning beyond sovereignty; joint management of bioregional networks (possibly through joint management plans); mechanisms for the harmonisation of biodiversity legislation;<sup>179</sup> sharing expertise and scientific and management staff; mechanisms for dispute resolution; and capacity building with respect to scientific knowledge and skills. By connecting ecosystems, absolute approaches to sovereignty are transcended and biodiversity conservation is viewed in a holistic fashion.<sup>180</sup> Moreover, by endeavouring to restore ecosystem integrity and ensuring ecosystem services, connectivity provides an important “sustainable” element that may positively contribute to the livelihoods of people in SADC.

The principle of good governance should be applied in PAs (including TFCAs) facilitating connectivity conservation.<sup>181</sup> According to Lausche *et al* it is unlikely that traditional forms of PA governance, where the state is the primary owner/manager of the land, will contribute to the concept of connectivity conservation.<sup>182</sup> This brings about the challenge of applying good governance to a multiple stakeholder environment where connectivity conservation is implemented.<sup>183</sup> The challenge here lies in applying the principles of good governance: transparency and openness; participation; the rule of law; and effectiveness.<sup>184</sup> These principles should be

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<sup>177</sup> See chapter 3 below.

<sup>178</sup> Connecting ecosystems, species and genetic diversity to holistically conserve biodiversity.

<sup>179</sup> This should be done in order to apply the same conservation standards and practices beyond borders in order to holistically conserve biodiversity. Connecting ecosystems across borders and applying different conservation practices will defeat the purpose behind connectivity conservation.

<sup>180</sup> See para 2.2.2 above.

<sup>181</sup> Lausche *et al* *The Legal Aspects of Connectivity Conservation. A Concept Paper* 40.

<sup>182</sup> Lausche *et al* *The Legal Aspects of Connectivity Conservation. A Concept Paper* 51.

<sup>183</sup> Lausche *et al* *The Legal Aspects of Connectivity Conservation. A Concept Paper* 51.

<sup>184</sup> Lausche *et al* *The Legal Aspects of Connectivity Conservation. A Concept Paper* 40. Also see para 3.1.6 below.

encompassed in law to apply to all stakeholders and should thus stretch beyond state application. They have been further refined by the IUCN-World Commission on Protected Areas to constitute principles of good governance for PAs. The principles are: legitimacy and voice; subsidiarity; fairness; do no harm; direction; performance; accountability; transparency; and the protection of human rights.<sup>185</sup> These principles should be encompassed within the broader frame of good governance within a legal framework facilitating TFBC. The law plays an important supporting role in implementing the foregoing features of good governance in an area being governed by multiple stakeholders and ensuring that the quality of governance remains what is seen as “good”. Law plays a central role in connectivity conservation and should provide explicitly for the elements facilitating connectivity.<sup>186</sup> In the TFBC context this includes the harmonisation of law, as well as the application of the principles of good PA governance as discussed above.

#### 2.3.1.5 Synopsis

By exploring the evolution of PAs it has become clear that PAs have undergone changes that add to their complexity. This is also reflected in the “protected area matrix” discussed above.<sup>187</sup> What has become clear is that TFCAs are an evolved form of PAs which could be described as constituting the modern/emerging category of PAs. This classification suggests various issues that need to be considered in a legal framework facilitating TFBC. It is clear that both the promotion of sustainable development and biodiversity conservation form integral functions of TFCAs. These two functions are argued to be the main drivers behind TFBC in TFCAs. Deduced from the foregoing the following matters also need to be included in the legal framework in order to facilitate sustainable development and biodiversity and thus TFBC: the recognition of traditional knowledge and conservation measures; connectivity; the harmonisation of law; and the facilitation of the principles of good governance (as tailored for PAs) through law.

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<sup>185</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 28.

<sup>186</sup> Lausche *et al The Legal Aspects of Connectivity Conservation. A Concept Paper* 175.

<sup>187</sup> See para 2 above.

Delving further into the contextual background of TFCAs, this thesis now turns to the investigation of relevant definitions of TFCAs.

### 2.3.2 Definitions of TFCAs

This section will investigate the two most prominent definitions of TFCAs relevant for the study. The first definition is authoritative, as it is a definition developed by the world's foremost authority on conservation: the IUCN. The second definition is authoritative as it is the only definition in the AU and SADC of a TFCA, and it is embedded in the SADC Wildlife Protocol. When investigating a definition of any subject or activity, the investigation should provide important insight into the nature of the subject or activity. Accordingly, the definitions form an important part of locating the drivers of TFBC in TFCAs and should delimit the ambit of what a legal framework should facilitate.

#### 2.3.2.1 The IUCN definition of a TBPA

TBPAs are similar to TFCAs, although the latter term is specifically preferred in the SADC.<sup>188</sup> It is important to analyse the formal description of TBPAs because of their similarities and the value that this description may hold for the purposes of distilling the principles of a legal framework for TFBC in TFCAs.

The IUCN defines a TBPA as:<sup>189</sup>

Areas of land and/or sea that straddle one or more borders between states, sub-national units such as provinces and regions, autonomous areas and/or areas beyond the limit of national sovereignty or jurisdiction, whose constituent parts form a matrix that contributes to the protection and maintenance of biological diversity, and of natural and associated cultural resources, as well as the promotion of social and economic development, and which are managed co-operatively through legal or other effective means.

This definition caters for transfrontier conservation within national borders (with reference to sub-national units such as provinces), but this type of PA does not fall

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<sup>188</sup> See para 1 above.

<sup>189</sup> Sandwith *et al Transboundary Protected Areas for Peace and Cooperation* 3. Also see Global Transboundary Conservation Network [www.tbpa.net](http://www.tbpa.net) [date of use 22 January 2014].

within the scope of this thesis as the thesis specifically focuses on conservation transcending national borders. In the SADC context, transfrontier conservation further specifically refers to conservation across sovereign borders and does not refer to conservation within national jurisdictions.<sup>190</sup>

A matter central to the definition and central to this thesis is the notion that management should be achieved through *legal* or other effective means.<sup>191</sup> The definition seems to be clear that law is important or plays an important role in the management of TFBC. The importance of law in facilitating TFBC is also one of the central assumptions of this thesis.<sup>192</sup> This is further emphasised by the codification principle contained in the *UNEP Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States 1978* (UNEP Principles).<sup>193</sup> The codification principle recognises the importance of binding law where biodiversity is subjected to shared governance between two states. It does so in a way that proposes the codification of principles into binding agreements between the relevant states.<sup>194</sup>

Law is therefore the mechanism facilitating the guiding principles of TFBC. In other words, law creates the legitimate basis from which TFBC can be regulated or governed. Some important aspects related to TFBC and law should be noted at this stage. As the SADC operates under the auspices of the AU, relevant regional law and policy should be reflected in SADC legal instruments.<sup>195</sup> As TFBC in TFCAs strives to jointly manage resources traversing borders, measures and/or mechanisms, the harmonisation of national law and policy becomes crucially important. Finally, the reflection of the components of good governance in a legal framework as identified in chapter 1 of this thesis and as contained in principle 6 of

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<sup>190</sup> See para 2.2.2 above.

<sup>191</sup> Own emphasis. This thesis focuses specifically on elements and components to inform a legal framework. See the research question in chapter 1.

<sup>192</sup> See chapter 1 above. Also see Asian Development Bank *Transfrontier Conservation Areas and Tourism Development Project Mozambique: Process Framework* 27 and Lausche *Guidelines for Protected Areas Legislation* 1-3.

<sup>193</sup> UNEP/IG -7/3. The UNEP Principles are discussed in chapter 3 below.

<sup>194</sup> See para 3.2.2 below.

<sup>195</sup> This may include provisions acknowledging and incorporating AU and SADC law and policy, for example.

the New Delhi Declaration is of crucial importance, as Africa is seen to have a dire need for good governance.<sup>196</sup> It furthermore seems that a clear link between a generally satisfactory environment and good governance exists. Kenny states:<sup>197</sup>

The only way to save the African environment is to develop African economies, and the only way to do this is through honest, efficient, competent, limited government with the rule of law, an impartial judiciary and free enterprise and trade.

From the IUCN definition, it is difficult to establish what exactly is meant by “other effective means”. It may simply imply some form of written or oral agreement (although the latter is improbable)<sup>198</sup> between the relevant parties, in which case it would be difficult to see how such an agreement would differ from legal means, as one would be able to revert to law in order to enforce the agreement. It may also refer to the so-called management plans that are used in the day-to-day maintenance and management of TFCAs. In the SADC context, TFCAs are established by law in the form of MoUs and treaties in terms of which management is to be carried out. In some instances these establishing documents do refer to “other effective means” by stating that management plans should be drawn up. However, these management plans should be drawn up in accordance with regional and national law, meaning that legal means will again be employed.<sup>199</sup> It should therefore be clear that law or a legal framework plays a central role in the governance of TFBC in TFCAs. The importance of law is also emphasised by research projects on transfrontier conservation and should serve as an important basis grounding TFBC in TFCAs.<sup>200</sup>

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<sup>196</sup> Whitehead 2014 *Africa in Fact* 9-13 and Kenny 2014 *Africa in Fact* 43-47. Also see Conway 2012 *Africa in Fact* 14-17 and Lawson-Remmer and Greenstein 2012 *Africa in Fact* 21-24. See para 3.1.6 below.

<sup>197</sup> Kenny 2014 *Africa in Fact* 45.

<sup>198</sup> It is argued that it is improbable that the management of an important, large-scale TFCA where many stakeholders and sovereign rights are involved would be left to informal means such as an oral agreement. It may be that smaller parts of the management may not be formalised in writing, but overall it is argued that written management plans (or something similar) will be used. This argument holds true for the SADC region. See chapter 5 below for examples of these formal written management documents.

<sup>199</sup> See article 5(3) of the Treaty on the Establishment of the Great Limpopo Transfrontier Park, 2002, and article 6(3) of the Treaty on the Establishment of the Ai-Ais / Richtersveld Transfrontier Park, for example. It is possible that “other effective means” may also refer to other means such as sub-contracting and oral agreements etc. Notwithstanding, the management will still need to comply with the original Treaty/MoU and should therefore implicitly comply with regional law.

<sup>200</sup> See for example Asian Development Bank *Transfrontier Conservation Areas and Tourism Development Project Mozambique: Process Framework* 27 and Lausche *Guidelines for Protected Areas Legislation* 1-3; IUCN *Position Paper: Governance for Sustainable Development* 5. Also see para 4.1.6 below.

The IUCN definition further provides insight into the nature and scope of a TFCA. Several important elements can be identified from this definition.<sup>201</sup> These are: they cross sovereign borders; the maintenance and protection of biodiversity and cultural resources; the promotion of social and economic development; and cooperative management. All of the foregoing are taken from the definition of elements constituting the nature and scope of TFCAs. These elements require further consideration in order to explain their relevance in the context of TFCAs. Apart from the fact that they “cross sovereign borders”, which is self-explanatory and was also discussed above,<sup>202</sup> the maintenance and protection of biodiversity and cultural resources, the promotion of social and economic development, and cooperative management form part of the purpose of establishing TFCAs, and all of these should be facilitated via their inclusion in a legal framework relating to sustainable TFBC. By combining the maintenance and protection of biodiversity and cultural resources with social and economic development, the definition implicitly recognises all three spheres of sustainable development – economic, environmental, and social. Sustainable development therefore forms a central tenet in TFCAs, at least in terms of the IUCN definition. Accordingly, it is argued that sustainable development forms one of the main drivers of TFBC in TFCAs. The protection and maintenance of biodiversity and cultural resources in themselves promote biodiversity conservation as provided for in the CBD. Accordingly, biodiversity conservation may be seen as an independent driver of TFCAs although, as this thesis will argue below, a symbiotic relationship exists between biodiversity and sustainable development.<sup>203</sup> Importantly, and in line with the anthropocentric definition of biodiversity followed in this chapter,<sup>204</sup> the IUCN definition indicates that cultural resources form part of biodiversity.<sup>205</sup> The final element, cooperative management, further provides insight into the nature of TFCAs and also reiterates the transfrontier nature of TFCAs to the extent that cooperation is required.<sup>206</sup> Cooperation in the IUCN definition goes

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<sup>201</sup> For a description see Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio* 1-15.

<sup>202</sup> See para 2.2 above.

<sup>203</sup> See para 2.4.2 below.

<sup>204</sup> See para 2.1.1 above.

<sup>205</sup> This is supported by both the preamble and article 10(c) of the CBD.

<sup>206</sup> See again the argument of Venter as described in para 2.2.2 above. Venter “Transfrontier Protection of the Natural Environment, Globalization and State Sovereignty” 86.

beyond state-state cooperation, however. As was stated above, there are generally many stakeholders involved in TFBC. In the TFBC context cooperative management, as will later become clearer, will involve many other stakeholders (such as local communities, private enterprise, conservation authorities, and any other interested and affected stakeholders) and not just states. This is another characteristic of new and emerging conservation governance models.<sup>207</sup>

In sum, then, the scope and content of the matters that need to be facilitated in a legal framework for TFBC in TFCAs distilled from the IUCN definition are: the maintenance and protection of biodiversity; the maintenance and protection of cultural resources (as a component of biodiversity); and cooperative management. An overarching characteristic of the foregoing definition is that sovereign borders are transcended. It was further argued that sustainable development is implicitly recognised as one of the main drivers behind TFBC in TFCAs in the IUCN definition. Sustainable development, being a main driver, is of crucial theoretical importance for this thesis, as it will provide the foundation for distilling legal principles for the legal framework of TFBC in TFCAs in SADC.<sup>208</sup>

### 2.3.2.2 The SADC Wildlife Protocol definition

In addition to the IUCN definition, the Wildlife Protocol defines a TFCA as:<sup>209</sup>

the area or component of a large ecological region that straddles the boundaries of two or more countries encompassing one or more protected areas as well as multiple resource use areas.

Like the IUCN definition, the SADC definition provides for the complexities that may arise in TFCAs. Firstly, with reference to conservation terminology such as “a large ecological region” it is clear that conservation plays an important role. Secondly, by defining a TFCA as an area that “straddles the boundaries of two or more countries” complex issues such as sovereignty, conflicting law and policy, differential capacity, differential developmental state, and differential capacity arise. These issues are important when considering a legal framework for TFCAs as they may influence the

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<sup>207</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 163-203. See para 2.1.1 above. Also see paras 3 and 5 below.

<sup>208</sup> See para 3 below.

<sup>209</sup> Article 1 of the Protocol.

creation, interpretation and enforcement of sub-regional law. Thirdly, by including “one or more protected areas as well as multiple resource use areas”, the definition stretches the traditional understanding of conservation (that was previously confined to PAs) to the very limit, as was explained in the discussion of the evolution of PAs above.<sup>210</sup> The inclusion of “resource use areas” was also previously a foreign concept within a PA, and this adds to the new conservation dimension being entered into by TFCAs.<sup>211</sup>

The explicit recognition of resource use (or potential resource use) within a TFCA as a component of biodiversity conservation therefore necessitates the creation of a legal framework facilitating TFBC to provide for measures to balance the tensions between resource use and conservation.<sup>212</sup> Sustainable use forms an important part of sustainable development<sup>213</sup> and it is here that sustainable development, as an interstitial norm, may play a vital role in resolving conflicts between the three spheres (the environmental, the social and the economic) in order to ensure that a balanced (sustainable) solution is achieved. Lowe<sup>214</sup> describes an interstitial norm as: “a legal concept exercising a kind of interstitial normativity, pushing and pulling the boundaries of true primary norms when they threaten to overlap or conflict with each other.” In this sense, sustainable development serves as a failsafe mechanism resolving conflicts between the primary norms contained in the social, economic and environmental spheres.<sup>215</sup> As such, sustainable development is of the utmost importance to TFBC in TFCAs. The importance of sustainable development as an interstitial norm stems from the fact that sustainable development, in theory, should mediate tensions between social, economic and environmental concerns in the best interests of both the present and future generations.<sup>216</sup> However, the notion of

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<sup>210</sup> See para 2.3.1 above.

<sup>211</sup> See para 2.3.1 above.

<sup>212</sup> See in general Whitehead 2014 *Africa in Fact* 9-13; Kenny 2014 *Africa in Fact* 43-47; Conway 2012 *Africa in Fact* 14-17; and Lawson-Remmer and Greenstein 2012 *Africa in Fact* 21-24. Also see Barnard “Access to Bio-Energy vis-à-vis Biodiversity Conservation in SADC: Conflicting Objectives?” 335-339.

<sup>213</sup> See para 3.1.1 below.

<sup>214</sup> Lowe “Sustainable Development and Unsustainable Arguments” 31. Also see Barnard “Access to Bio-Energy vis-à-vis Biodiversity Conservation in SADC: Conflicting Objectives?” 335-339.

<sup>215</sup> Examples may include the balancing of interest and the reasonable man test. Lowe “Sustainable Development and Unsustainable Arguments” 33. Also see Barnard “Access to Bio-Energy vis-à-vis Biodiversity Conservation in SADC: Conflicting Objectives?” 335-339.

<sup>216</sup> Also see Barnard “Access to Bio-Energy vis-à-vis Biodiversity Conservation in SADC: Conflicting Objectives?” 335-339.

sustainable development may be argued to be too vague, and it may further be argued that it lacks the necessary normative character to serve as a mechanism, as described above.<sup>217</sup> Notwithstanding, this thesis will later argue that the aforesaid critique may not necessarily hold water when sustainable development is correctly incorporated and given normative content within a legal framework.

### 2.3.2.3 Synopsis

In summary, the SADC definition confirms the inclusion of sustainable development as an important driver of TFBC in TFCAs. It also directly refers to resource use that will form a component of biodiversity conservation, as described above.<sup>218</sup> Furthermore, by specifically focussing on the fact that a TFCA “straddles the boundaries of two or more countries,” another important issue relating to TFCAs is recognised, namely sovereignty. Sovereignty should again be interpreted understood in the political context described above, and in the context of the argument for custodial sovereignty.<sup>219</sup> The IUCN definition includes the following aspects: the maintenance and protection of biodiversity; the maintenance and protection of cultural resources; and cooperative management. It was further argued that sustainable development is implicitly recognised as one of the main drivers behind TFBC in TFCAs in the IUCN definition.

The legal principles in a legal framework regulating TFBC within a TFCA would thus have to facilitate the characteristics that have been identified in the two definitions thus far, these being: the main driver of sustainable development; the challenge to holistically govern while transcending sovereign borders; protecting biodiversity (with cultural diversity as a component thereof); and cooperative management.

Delving deeper into the scope and nature of TFCAs, this thesis now turns to literature on PAs in general and TFCAs specifically to further inform the study regarding what legal principles need to be incorporated in a legal framework facilitating TFBC.

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<sup>217</sup> See para 2.3.1 above

<sup>218</sup> See para 2.1.1 above.

<sup>219</sup> See para 2.2.2 above.

### 2.3.3 Guiding literature and regional documents relevant to the nature and scope of TFCAs

Sandwith and Besançon identify a range of general goals of transfrontier conservation that are important to the nature and scope of TFCAs.<sup>220</sup> While most of these goals overlap with the issues and components distilled from the IUCN and SADC definitions, some are not reflected in these definitions and are of particular importance in the SADC context. This is evident from the preamble to the *Treaty Establishing the Southern African Development Community*, 1992 (SADC Treaty). The SADC Treaty confirms the importance of peace and security, regional economic integration<sup>221</sup> and poverty alleviation in the SADC context.<sup>222</sup> As the foregoing form part of the goals of TFCAs, they contribute to the nature and scope of TFCAs and should be facilitated by legal principles in the legal framework catering for TFBC in TFCAs.

#### 2.3.3.1 Peace and security

The desire for peace and security was one of the main reasons for the formation of the SADC was, and it is also one of the most important components of sustainable development in the AU.<sup>223</sup> Accordingly, it is an important factor in TFCAs, since sustainable development is argued to be one of the main drivers behind TFBC in

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<sup>220</sup> These are: biodiversity conservation; cultural heritage and exchange; international cooperation; the maintenance of peace and security; the promotion of sustainable development; regional economic integration; the restitution of land tenure; local economic development; and poverty alleviation. Sandwith and Besançon *Trade-offs among multiple goals for transboundary conservation*. A draft is available at [http://www.wilsoncenter.org/sites/default/files/Besancon\\_Sandwith.pdf](http://www.wilsoncenter.org/sites/default/files/Besancon_Sandwith.pdf) [date of use 27 November 2013].

<sup>221</sup> One of the main purposes of the establishment of the SADC is regional harmonisation. See the preamble of the SADC Treaty.

<sup>222</sup> Another goal is the restitution of land tenure, which is not discussed for the purpose of this chapter. See generally De Villiers *Land Claims & National Parks: The Makuleke Experience* 1-208; Spenceley 2006 *Development Southern Africa* 650-667; Gladman, Shackleton and Muchapondwa 2011 *Environmental Research Letters* 1-12; and Madzwamuse *Improving Protected Areas Governance* (Workshop Report IUCN and SADC).

<sup>223</sup> See para 2.4.1 below for a description of the components of sustainable development as provided by NEPAD and subsequent documents. Also see Cilliers J "The SADC organ for defence, politics and security" Institute for Security Studies available at [http://dspace.cigilibrary.org/jspui/bitstream/123456789/31600/1/paper\\_10.pdf?1](http://dspace.cigilibrary.org/jspui/bitstream/123456789/31600/1/paper_10.pdf?1) [date of use 20 March 2013]; and Naison 2003 *African Security Studies* 17-28.

TFCAs. The achievement of peace and security is also an important goal in the SADC. This is confirmed by the reference to peace and security in the SADC Treaty. Although the SADC Treaty describes the achievement of peace and security as one of the main goals of the SADC,<sup>224</sup> the Treaty disappoints by not providing any guidance as to how these goals are to be achieved. The *Protocol on Politics, Defence and Security Cooperation*, 1999 (Defence Protocol) gives effect to the goal of peace and security. The Defence Protocol creates the supra-national institutional structures in order to promote peace and security in the region.<sup>225</sup> These include an inter-state politics and diplomacy committee and an inter-state defence and security committee.<sup>226</sup> The key implementation framework for the Defence Protocol is the revised edition of the *Harmonised Strategic Indicative Plan for the Organ on Politics, Defence and Security Cooperation*, 2010 (SIPO II).<sup>227</sup> SIPO II provides detailed guidance relating to attempts to achieve regional peace and security by identifying three substantive principles that are to inform such efforts. These principles are also relevant to TFBC in TFCAs.<sup>228</sup> They are the rule of law, good governance, and democracy.<sup>229</sup> All three of these principles overlap with the issues argued above as being important in connectivity conservation, which renders them even more important in the TFBC context.<sup>230</sup> SIPO II describes the foregoing as legal principles, yet fails to describe what a legal principle is. As will later be seen, different interpretations can accompany the term “legal principle” and it is therefore important to clarify what is meant by using the term “legal principle”.<sup>231</sup> This thesis will make claims about the nature of legal principles and about why legal principles, interpreted in a specific way, are important in the SADC context.<sup>232</sup>

Apart from these general overarching principles, SIPO II also provides operational or procedural guidance relevant to decision makers, and this guidance may further

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<sup>224</sup> See articles 5, 6 and 21 thereof.

<sup>225</sup> See in general article 2 of the Defence Protocol for the objectives thereof.

<sup>226</sup> See articles 6 and 7 of the Defence Protocol.

<sup>227</sup> SIPO II 28.

<sup>228</sup> Especially in the light of the AU perspective on the conditions favourable to sustainable development.

<sup>229</sup> SIPO II 28. These are again important components of sustainable development as described in NEPAD. See para 2.4.1 below.

<sup>230</sup> See para 2.3.1.4 above.

<sup>231</sup> See para 3.1.2 below.

<sup>232</sup> See para 3.1.2 below. On legal principles Verschuuren and Oudenaarden “The Role of Ideals in Legal Development” 231. Also see Verschuuren *The Ideal of Sustainable Development* 20-49.

contribute to a legal framework for TFCAs. These provisions include the exchange of information,<sup>233</sup> mechanisms to avert threats through diplomatic initiatives,<sup>234</sup> the coordination of customs and excise,<sup>235</sup> capacity building to assist in conflict management, prevention and resolution,<sup>236</sup> the involvement of civil society in capacity building, and effective border control.<sup>237</sup> All of the foregoing matters are of crucial importance to TFBC in TFCAs, as they directly address issues that need to be regulated on a day-to-day basis in a TFCA.<sup>238</sup>

As the matters pertaining to peace and security are part and parcel of TFBC in TFCAs, they must be facilitated in a legal framework for TFBC. One specific aspect of peace and security in the TFBC context is “effective border control,” as included in SIPO II. Strictly speaking, border control is a sovereign affair and is regulated by national legal frameworks. Effective border control involves an array of related practices, and in TFCAs border control faces specific challenges. For example, hot pursuit within TFCAs,<sup>239</sup> the smuggling of stolen / illegal goods, and using TFCAs as routes to smuggle stolen vehicles into other countries (especially the GLTP) are just some of the issues that arise in a transfrontier context.<sup>240</sup> The spread of veterinary

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<sup>233</sup> This could lead to clarity as well as to averting misunderstanding and conflict, amongst other things.

<sup>234</sup> Having diplomatic initiatives in place (such as measures for mediation or arbitration) may potentially solve conflicts more amicably.

<sup>235</sup> The coordination of customs and excise policy may avert conflict about material / goods travelling across borders within TFCAs. This is also important as it may contribute to lessening the effects of the cross-contamination of plant and animal species or the introduction of alien species harmful to neighbouring states.

<sup>236</sup> Capacity building is especially important, as the development of SADC member states differs greatly. See the discussion below.

<sup>237</sup> SIPO II 25,38,56,65 and 67.

<sup>238</sup> See the discussion on the research of Paterson in para 2 above as well as the case studies in chapter 5 below.

<sup>239</sup> Reports indicate that an agreement has been reached between the South African and Mozambican managing authorities in the GLTP to allow hot pursuits. This comes in the light of the current crisis with poaching in the GLTP area. SAPA SA *Moz agree to cross-border hot-pursuit operation against rhino poachers* News 24 (12 August 2014) available at <http://www.news24.com/Green/News/SA-Moz-agree-to-cross-border-hot-pursuit-operations-against-rhino-poachers-20140812> [date of use 11 September 2014].

<sup>240</sup> These challenges emanate from a presentation given by Colonel David Peddle in his capacity as the chairman of the International Working Group on Security in the GLTP. This presentation is available at [www.docstoc.com/docs/27823120/221-SECURITY-AND-BORDER-CONTROL-WITH-REGARD-TO-TFCAS](http://www.docstoc.com/docs/27823120/221-SECURITY-AND-BORDER-CONTROL-WITH-REGARD-TO-TFCAS) [date of use 26 November 2013]. Also see Bengis RG "Transfrontier conservation area initiatives in sub-Saharan Africa: some animal health challenges" 15-19.

disease across borders is also a major concern and needs to be addressed in a holistic fashion.<sup>241</sup>

The ideology behind TFCAs also suggests that tourists and local communities within a TFCA should be able to freely cross the borders of the states making up a TFCA. In other words, a tourist should be required to go through passport control once the TFCA is entered and then be allowed to roam freely within the borders of the TFCA.<sup>242</sup> This system would also provide for the free movement and re-integration of local communities that were previously segregated from their families by political borders.<sup>243</sup> This ideal is currently not being realised in all TFCAs, as certain capacity constraints exist.<sup>244</sup> Long-established border posts continue to exist, as the required infrastructure to regulate border control in this manner already exists. The GLTP serve as an example. Furthermore, the establishment of new border posts on the outskirts of some TFCAs would make little economic and political sense.<sup>245</sup> Again the GLTP serves as an example. Because of a devastating civil war lasting 15 years (from 1977 to 1992) Mozambique was left with and still has little institutional and economic capacity.<sup>246</sup> When establishing a TFCA like the GLTP, with one country having the upper-hand in relation to capacity (in this case South Africa), the idea of

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<sup>241</sup> See [www.wcs-ahead.org](http://www.wcs-ahead.org) [date of use 26 November 2013]. Also see the TFCA Veterinary Programme at [www.peaceparks.org/programme.php?pid=24&mid=1022](http://www.peaceparks.org/programme.php?pid=24&mid=1022) [date of use 26 November 2013]. This concern led to the adoption of the *Phakalane Declaration on the Adoption of Non-Geographic Approaches for Management of Foot and Mouth Disease*, 2012 to better regulate the spread of foot and mouth disease by the adoption of commodity-based trade and trade in animal products. See [www.wcs-ahead.org/phakalane\\_declaration.html](http://www.wcs-ahead.org/phakalane_declaration.html) [date of use 26 November 2013].

<sup>242</sup> Braack *et al* 2005 *Agriculture and Rural Development* 52. This is, however, not necessarily practicable in all TFCAs. One example where such a system would not work is the MDTP. This is a TFCA that is not perimeter-fenced, and such a fence would be required for the mechanism to be implemented. The KAZA TFCA referred to in the main text provides a good example of the complexities regarding this issue.

<sup>243</sup> Braack *et al* 2005 *Agriculture and Rural Development* 52. Also see Bocchino "Rural People in Southern African Transfrontier Conservation Areas: A Question of Governance" 291-319.

<sup>244</sup> Braack *et al* 2005 *Agriculture and Rural Development* 52 and in general Hanlon *Peace without profit: How the IMF blocks rebuilding in Mozambique* 1-192. See also Lunstrum 2013 *Political Geography* 1-11.

<sup>245</sup> One also needs to consider the current crisis regarding rhino horn smuggling. Making border control more lenient may worsen the problem as it may be easier to smuggle the horns across borders within TFCAs. This risk may cause countries to be hesitant about the idea of free roaming within TFCAs. This would be the case especially in the Kruger National Park, which forms part of the GLTP, and where access to Mozambique is regulated by the Pafuri and Giriyondo border posts within the TFCA. See Lunstrum 2013 *Political Geography* 1-11.

<sup>246</sup> On the economic challenges see, for example, Hanlon *Peace without profit: How the IMF blocks rebuilding in Mozambique* 1-192 and World Bank *Mozambique - Transfrontier Conservation Areas Pilot and Institutional Strengthening Project* para 42 and the full report in general.

having less stringent border controls becomes a political and economic threat to the state with more capacity.<sup>247</sup> This political threat comes in the form of intrusion (or potential intrusion) on a state's permanent sovereignty, as people may flock to the state with more capacity where there are likely to be more economic opportunities and political stability.<sup>248</sup> Where such a threat is realised or posed it is likely that it may negatively influence an important aspect of TFBC: cooperative management - or governance.

Where TFCAs are comprised not only of traditional PAs but also of other land-use types, border posts will still be in place in order to regulate access into national jurisdictions. In short, two kinds of TFCAs currently exist: those catering for free-roaming and those that do not, the latter being the form which is more popular. An example of a free-roaming policy is found in the Kgalagadi TFCA.<sup>249</sup> It is clearly indicated that once you enter the TFCA from one country no passport is required except when leaving the park into another country. Should you enter the TFCA from South Africa you will have access to Namibia and Botswana with no passport control. This is illustrated by the partial map (Figure 2) of the TFCA below. This access policy stands in contrast to that of the KAZA TFCA (Figure 3). The KAZA TFCA, which consists of various land uses<sup>250</sup> through Angola, Botswana, Namibia, Zambia, and Zimbabwe, provides various challenges to customs and immigration authorities. The ideal of free-roaming within the KAZA TFCA is yet to be realised, but may be impossible because of its size<sup>251</sup> and issues relating to sovereignty, because of the large number of countries involved, as illustrated in Figure 2 below.<sup>252</sup> Peace and security and effective border control, as described above, add value and contribute to the characteristics of TFBC in TFCAs. Yet, where peace and security and the practices associated with them do not exist, TFBC in TFCAs is likely to fail, as peace and security are integral parts of the ideology behind TFCAs. Accordingly,

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<sup>247</sup> The current and past xenophobic violence in South Africa is an example. See further Crush 2001 *International Migration* 103-133 and all the xenophobia-related articles at <http://www.news24.com/Tags/Topics/xenophobia> [date of use 29 May 2015].

<sup>248</sup> Lunstrum 2013 *Political Geography* 4.

<sup>249</sup> Map adopted from [www.sanparks.org](http://www.sanparks.org) [date of use 20 January 2014].

<sup>250</sup> In other words the area does not strictly contain PAs. National roads, towns, informal settlements, private PAs, and agricultural land may be found in this area, among other things.

<sup>251</sup> The TFCA spans an area of roughly 520 00 km<sup>2</sup>, which is similar to the size of France.

<sup>252</sup> See para 2.3.2 above and <http://www.kavangozambezi.org/immigration-customs> [date of use 20 January 2014].

the attainment of peace and security needs to be facilitated in a legal framework supporting TFBC in TFCAs: the rule of law; good governance and democracy; the exchange of information; mechanisms to avert threats through diplomatic initiatives; the coordination of customs and excise; capacity building to assist in conflict management, prevention and resolution; the involvement of civil society in capacity building; and effective border control.

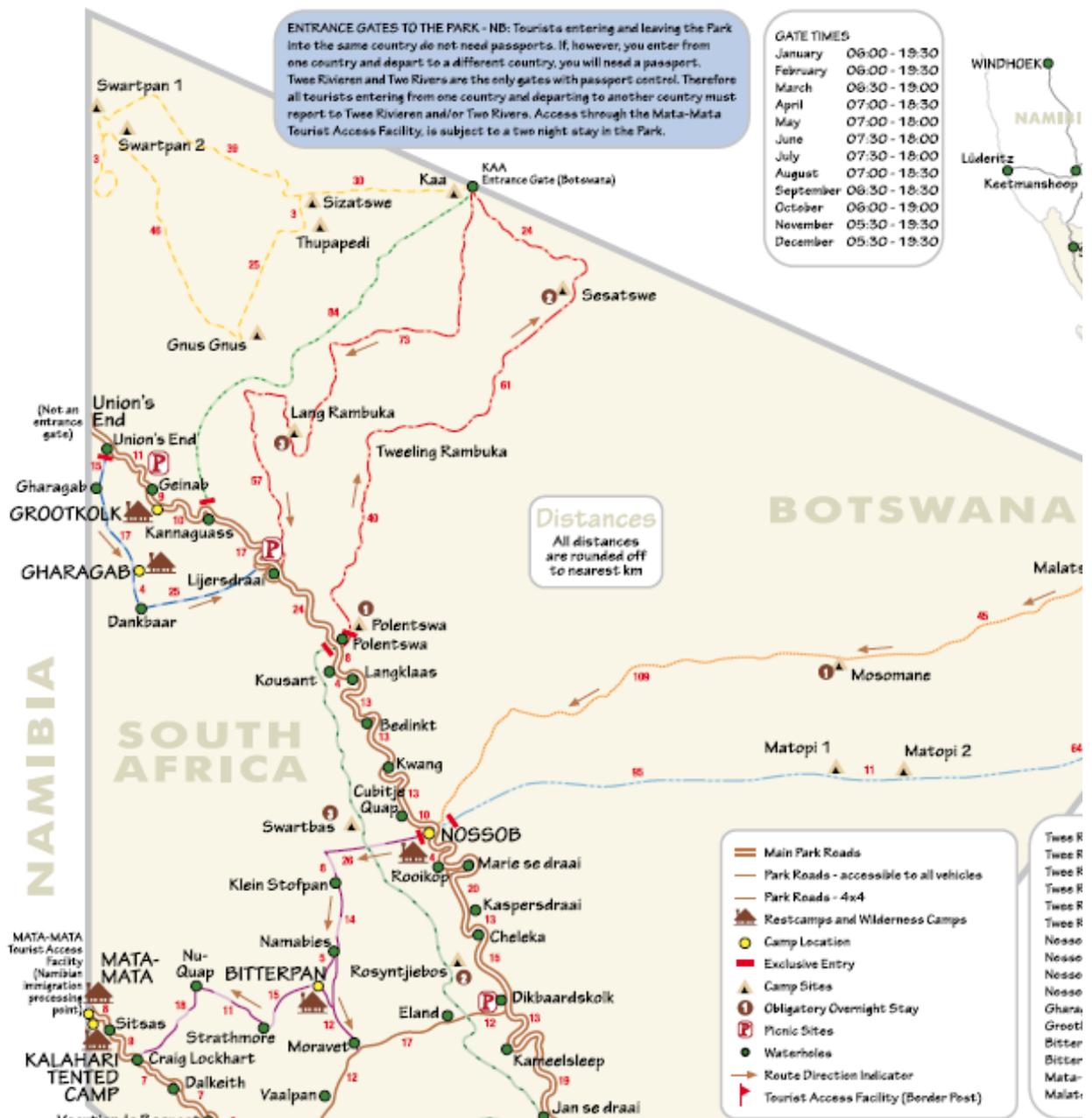


Figure 2: Partial map of the Kgalagadi TFCA<sup>253</sup>

<sup>253</sup> Map adopted from [www.sanparks.org](http://www.sanparks.org) [date of use 20 January 2014]. This is only a snapshot of the map as the map was too large to fit on this page. The map was chosen as opposed to the one available from the Peace Parks Foundation, as it includes the customs and immigration posts.

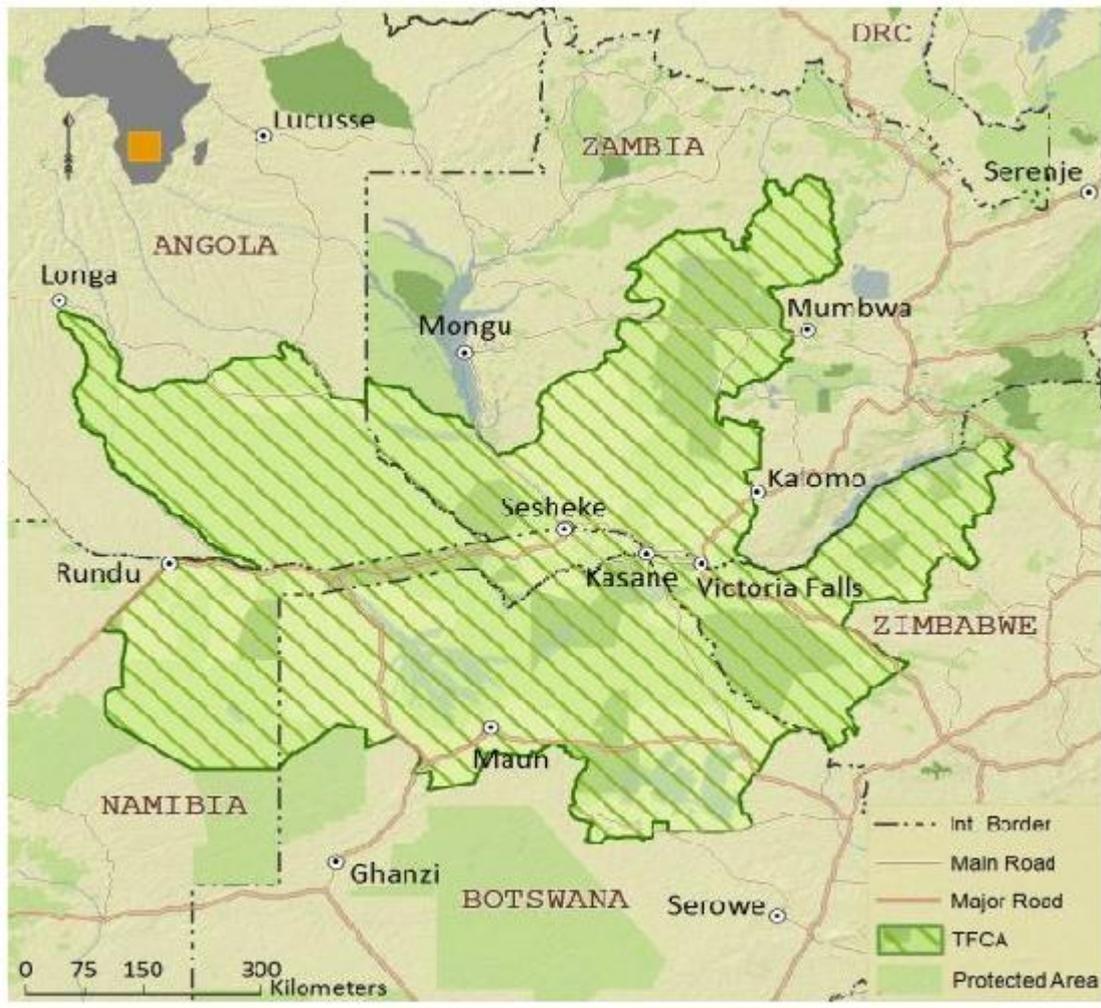


Figure 3: Map of KAZA TFCA<sup>254</sup>

<sup>254</sup> Map adopted from [www.peaceparks.org](http://www.peaceparks.org) [date of use 20 January 2014]

### 2.3.3.2 Regional economic integration and poverty alleviation

Regional economic integration and poverty alleviation are stated as objectives of the SADC in the SADC Treaty.<sup>255</sup> The SADC Treaty does not provide further guidance as to how economic integration or poverty alleviation should be achieved. It should nevertheless be noted that poverty alleviation is highly dependent on local economic development,<sup>256</sup> and a primary aim of regional economic integration is to encourage local economic activity.<sup>257</sup> Local communities should thus be allowed and enabled to take part in - and establish - economic activities resulting from the activities in and around TFCAs.<sup>258</sup> Accordingly, appropriate development frameworks, strategies and work plans should constitute a sustainable sub-regional economic base and should be facilitated in a legal framework enabling TFBC in TFCAs.<sup>259</sup> As previously stated, local community involvement and development are in theory components of TFCAs, but this does not necessarily reflect in practice.<sup>260</sup> It is important that both local and sub-regional economic development should be facilitated by a legal framework regulating TFBC in TFCAs in order to facilitate local community involvement, beneficiation and development. Activities that may contribute to this include the development of tourism, the use and sale of wildlife products, the sharing of equipment, the detailed administration of tourism, marketing,<sup>261</sup> and capacity building.<sup>262</sup>

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<sup>255</sup> Article 5.

<sup>256</sup> Munthali 2007 *Natural Resources Forum* 51. Also see Hanks *Journal of Sustainable Forestry* 127.

<sup>257</sup> Webster and Suich "Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area" 376.

<sup>258</sup> See generally Hanks 2003 *Journal of Sustainable Forestry* 132-135.

<sup>259</sup> Webster and Suich "Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area" 376.

<sup>260</sup> See para 2.3.1.2 above. It would seem that local communities and economies do not reap the potential benefits in TFCAs as effectively as should be the case. See for example Suich *et al* 2005 *Conservation International South Africa* 1-69 and Hanks 2003 *Journal of Sustainable Forestry* 133-134.

<sup>261</sup> Hanks 2003 *Journal of Sustainable Forestry* 135 and 144.

<sup>262</sup> This is especially important as SADC member states have varying developmental and economic capacities. Thus, in order for these areas to successfully grow a sustainable sub-regional economic base, capacity building is of crucial importance.

### 2.3.3.3 Synopsis

Two goals of TFCAs were identified: peace and security; and regional economic integration with the purpose of alleviating poverty. Through a study of the literature and relevant regional documents it was established that the following issues are relevant in supporting these two lofty goals. For peace and security : the rule of law; good governance; and democracy; the exchange of information; mechanisms to avert threats through diplomatic initiatives; the coordination of customs and excise; capacity building to assist in conflict management, prevention and resolution; the involvement of civil society in capacity building; and effective border control. For regional economic integration and poverty alleviation: the development of tourism; the use and sale of wildlife products; the sharing of equipment; the marketing and management of tourism; and capacity building. All of these matters must be facilitated in a legal framework supporting TFBC. The two main drivers identified - sustainable development and biodiversity conservation - will be supported and effected. It is noted that elements of good governance are seen throughout this discussion of the nature and scope of TFBC in TFCAs. Good governance is therefore argued to be an important aspect in TFBC in TFCAs and should be practised in order to further both sustainable development and biodiversity conservation as the main drivers behind TFBC. Good governance will later enjoy further attention in this thesis, when the legal principles for TFBC are distilled.<sup>263</sup>

## **2.4 *The main drivers behind TFBC: a critique***

From the foregoing it should be clear that the historical development and present status of the African continent does not lend itself particularly well to joint approaches to any form of governance.<sup>264</sup> Whatever the differences, sovereignty and fragmentation aside, biodiversity is common to all and can be seen as a shared common denominator.<sup>265</sup> In the context of the existence of biodiversity as a common denominator or concern, biodiversity conservation was identified in this chapter as one of the main drivers behind TFBC in TFCAs. Biodiversity will not be addressed

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<sup>263</sup> See para 3 below.

<sup>264</sup> See particularly the discussion on the need for TFBC above in para 2.2.

<sup>265</sup> See paras 2.1 and 2.2.2.1 above.

here again, as it has been thoroughly discussed above.<sup>266</sup> What this section will rather do is to link biodiversity and sustainable development as complementary drivers of TFBC. This will be done after a brief explanation of the relevance and importance of sustainable development in the AU and SADC context.

Sustainable development is an important concept in Africa and therefore in the SADC. This importance can be deduced from the recognition thereof in various legal and policy documents.<sup>267</sup> It is specifically indicated in the *SADC Regional Indicative Strategic Development Plan (RISDP)* of 2005, which states that one of the main goals of the SADC and the AU is to achieve sustainable development.<sup>268</sup> As sustainable development and biodiversity are argued to be the main drivers behind TFBC in TFCAs, it is necessary to further investigate whether a relationship can be found between them. The question may thus be asked whether sustainable development and biodiversity are complementary to each other or whether they promote or support goals that are mutually exclusive in relation to each other. This question is important to the nature and scope of TFBC, as an understanding of the drivers provides a basis from which the legal principles may be derived.

#### *2.4.1 Sustainable development in the AU and SADC*

Sustainable development is central to achieving the objectives of the SADC as a REC.<sup>269</sup> The emphasis on sustainable development stems from the *New Partnership for Africa's Development (NEPAD)* programme, which is driven by the AU. One of the goals of the NEPAD is to achieve sustainable development in the 21<sup>st</sup> century.<sup>270</sup> Although the NEPAD sets the achievement of sustainable development as a goal, it fails to define sustainable development as a concept. Defining and understanding the ambit of sustainable development is especially important when it forms the basis from which legal principles are derived for TFBC, as a definition provides scope for the development of the legal principles. Although

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<sup>266</sup> See paras 2 and 2.1 specifically and 2.3 in general.

<sup>267</sup> See the *SADC Progress Report on the Implementation of Agenda 21 and Sustainable Development* 12-49 and *SADC RBS 1* and the *SADC Food, Agriculture and Natural Resources Directorate Report 1*. Also see all SADC Protocols discussed in chapter 4 hereunder

<sup>268</sup> *SADC RISDP* 5.

<sup>269</sup> *SADC RISDP* 5.

<sup>270</sup> See in general *AU NEPAD Framework Document* 1-66.

the NEPAD fails to provide a definition, it does contribute to the understanding of sustainable development by providing the conditions thought to be conducive to sustainable development and sectoral priority areas crucial to its achievement.

The NEPAD lists the conditions conducive to sustainable development as peace, security,<sup>271</sup> democracy, good governance, human rights, and sound economic management.<sup>272</sup> The point of departure is that, if these conditions are present, sustainable development is more likely to be achieved. Complementing the conditions are the sectoral priority areas.<sup>273</sup> These are: bridging the infrastructure gap;<sup>274</sup> human resource development initiatives, including reversing the brain drain;<sup>275</sup> agriculture;<sup>276</sup> culture;<sup>277</sup> science and technology platforms;<sup>278</sup> and the environment initiative.<sup>279</sup> Of specific importance to this thesis is the environment initiative, as it speaks directly to sustainable development and the environmental

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<sup>271</sup> Armed conflict has a significant impact on the environment. See Jensen 2007 *Vanderbilt Journal of Transnational Law* 145; Robertson 2004 *European Journal of Communication* 457-482; Homer-Dixon 1994 *International Security* 5-40 and El-Baz *Natural Resources Forum* 71-75.

<sup>272</sup> *AU NEPAD Framework Document* 16.

<sup>273</sup> *AU NEPAD Framework Document* 22-36.

<sup>274</sup> This area focuses on improving access to infrastructure services as well as to improving these services and making them more affordable. It also aims to enhance regional cooperation and trade by expanding cross-border infrastructure development and to increase financial investment in infrastructure by lowering risks through better regulatory frameworks. This area furthermore places emphasis on the development of a sufficient information and communication technology infrastructure. Lastly, energy, transport, and water and sanitation are listed as areas that need to be addressed. The need to sustain ecosystems, biodiversity and wildlife is categorised under water and sanitation without reference to how this is to be achieved. *AU NEPAD Framework Document* 23 – 28.

<sup>275</sup> This area is divided into poverty reduction; bridging the educational gap; reversing the brain drain (the crux being to build and retain human capacity in Africa); and improving the state of health and health services in Africa. *AU NEPAD Framework Document* 28-33.

<sup>276</sup> This area stresses the important relationship between agrarian systems and food security. It calls for improved agrarian systems in order to raise food production and increase nutritional standards. The role of research centers, the establishment of support services, and the establishment of agricultural trade fairs are also envisaged as being able to boost the production of marketable surpluses. *AU NEPAD Framework Document* 33.

<sup>277</sup> Culture is included with special attention focused on indigenous knowledge. Such knowledge is described as being a major component of the continent's culture and it is to be protected for the benefit of humankind. Indigenous knowledge, in terms of the NEPAD description, is described as being of similar importance to the preservation of biodiversity, as described in article 2 of the CBD. Indigenous knowledge is very important to biodiversity conservation as will be indicated in chapter 3 below. See para 3.2.2 and chapter 5 below. *AU NEPAD Framework Document* 35.

<sup>278</sup> This area proposes to expand the current science and technology platforms. The objective is to expand these platforms beyond borders to promote cooperation and connectivity, the objective being to target growth in technological expertise in biotechnology and natural sciences. The aim of this is to develop biodiversity and indigenous knowledge to improve agricultural productivity, and to develop pharmaceutical products. *AU NEPAD Framework Document* 36. At first glance this might seem in contrast to traditional views of biodiversity conservation. Ironically, as will be explained in chapter, these objectives further biodiversity conservation.

<sup>279</sup> *AU NEPAD Framework Document* 22-36.

component thereof.<sup>280</sup> The premise of the environment initiative is that a healthy and productive environment is a prerequisite for attaining sustainable development.<sup>281</sup> Accordingly, the environment is described as the basis from which sustainable development is to be reached.<sup>282</sup> Again, it should be pointed out that no formal definition is given to sustainable development, nor is sustainable development linked to the traditional view of sustainable development by the NEPAD.<sup>283</sup>

The traditional view is that sustainable development is a concept consisting of three pillars (environmental, social and economic), which aims to achieve intra- and intergenerational equity.<sup>284</sup> It is generally accepted that sustainable development<sup>285</sup> is the equilibrium reached when integrating<sup>286</sup> environmental, social and economic concerns.<sup>287</sup> The focus of this definition is on the integration of the three so-called “pillars.” The definition is seen as flexible as it does not presuppose that every pillar always carries the same weight.<sup>288</sup> Sustainable development is to be facilitated and

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<sup>280</sup> AU NEPAD Framework Document 34.

<sup>281</sup> AU NEPAD Framework Document 34.

<sup>282</sup> AU NEPAD Framework Document 34.

<sup>283</sup> The definition and normative content of sustainable development have long been the source of discussion. As will be pointed out later, the general focus when defining sustainable development falls on the integration of social, environmental and economic development. For a discussion see: Voigt *Sustainable Development as a Principle of International Law* 14-16; Field 2006 *SALJ* 413-414; Feris 2010 *PELJ* 232-234; Futrell 2004 *Natural Resources and Environment* 19; and Marong 2003 *Georgetown International Environmental Law Review* 28.

<sup>284</sup> The “aim” of sustainable development is seen from the report of the World Commission on the Environment and Development *Our Common Future* 65. See Feris 2010 *PELJ* 78-86; Voigt *Sustainable Development as a Principle of International Law* 14-16; Field 2006 *SALJ* 413-414; Futrell 2004 *Natural Resources and Environment* 19; and Marong 2003 *Georgetown International Environmental Law Review* 28

<sup>285</sup> For a discussion of how sustainable development took shape see Cordonier Segger and Khalfan *Sustainable Development Law* 15-95; Cordiener Segger “Sustainable Development in International Law” 87-116; Sands and Peel *Principles of International Environmental Law* 206-217; Tladi *Sustainable Development* 1-250; Voigt *Sustainable Development as a Principle of International Law* 11-34; and Kidd 2008 *SAJELP* 85-102. Also see Shrijver “Development – The Neglected Dimension in the Post-Rio International Law of Sustainable Development” 223-243. See Feris 2010 *PELJ* 86-89 and Tladi *Sustainable Development* 80.

<sup>286</sup> See Feris 2010 *PELJ* 86-89 and Tladi *Sustainable Development* 80.

<sup>287</sup> See the dissenting separate opinion of Weeramantry in *Advisory Opinion on the Legality of Nuclear Weapons* 1996 *ILM* 809. Also see paras 80 and 82 of the *Case concerning Pulp Mills on the River Uruguay Argentina v Uruguay* 2007 *ILM* 1025 and *Pulp Mills on the River Uruguay (Argentina v Uruguay)* ICJ Reports 2010 paras 55, 75, 76, 152, and 177 as well as the separate opinion of Weeramantry in the *Case concerning the Construction of the Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* ICJ Reports 1997 paras 140-141. See in general Bodansky *The Art and Craft of International Environmental Law* 33-34; Beyerlin and Marauhn *International Environmental Law* 77; and Birnie *et al International Law and the Environment* 115-123.

<sup>288</sup> See Feris 2010 *PELJ* 86-87; Tladi *Sustainable Development* 80 and Bodansky *The Art and Craft of International Environmental Law* 30-33 and Verschuuren *The Ideal of Sustainable Development* 20-22.

achieved, among other things, by good governance embedded in law and policy. The relationship among the three “pillars” is illustrated by Figure 4:

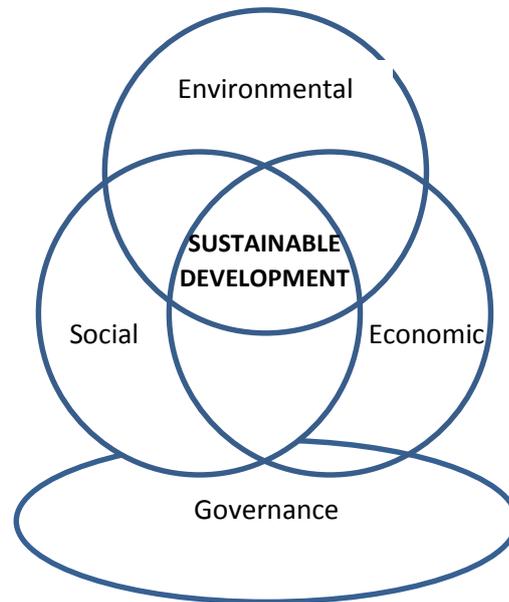


Figure 4: A graphic illustration of sustainable development<sup>289</sup>

Although not making direct reference to the traditional view of sustainable development above, the environmental initiative does link combatting poverty and socio-economic development to a healthy environment.<sup>290</sup> In this regard, NEPAD states that:<sup>291</sup>

measures taken to achieve a healthy environmental base can contribute greatly to employment, social and economic empowerment, and reduction of poverty.

One observes a mutual symbiotic relationship between a healthy environment and social and economic empowerment. It would seem that the NEPAD prescribes a healthy environment as a prerequisite for social and economic empowerment.<sup>292</sup> As the NEPAD provides the framework of conditions and priority areas necessary for sustainable development, an argument could be made that a definition of sustainable

<sup>289</sup> Adapted from the Department of Environmental Affairs *South African National Strategy for Sustainable Development* (Department of Environmental Affairs 2011) 11. Also see Zunckel *SADC TFCA Guidelines* 19.

<sup>290</sup> AU *NEPAD Framework Document* 34.

<sup>291</sup> AU *NEPAD Framework Document* 34.

<sup>292</sup> The NEPAD does not define a “healthy environment” and does not give content to what exactly a healthy environment would be. It should be noted here that the SERAC case, in defining a generally satisfactory environment, likens article 24 of the African Charter to a description of a healthy environment. One may thus deduce that the same interpretation can be given to both wordings. See the argument in para 4.2.3 below.

development could be reverse engineered from the framework provided. This argument should be seen in the light of the environmental initiative providing that a healthy environmental base will contribute to social and economic empowerment. In the AU context, then, sustainable development will include measures taken to achieve a healthy environment in order to promote social and economic empowerment. These measures will be made up of establishing the favourable conditions (peace and security, democracy, good governance, human rights, and sound economic management) in an attempt to reach and promote the sectoral priorities listed earlier in this paragraph.<sup>293</sup>

It can be deduced from the environmental initiative that a healthy environment,<sup>294</sup> in the context of Africa, will form the most important component of sustainable development. Moreover, a deduction is made that economic and social empowerment depends on a healthy environmental base. This argument may be controversial as it prioritises the environmental component of sustainable development over the social and economic components. It sets the environmental component as a prerequisite to social and economic empowerment. In doing so, the argument does not conform to the traditional view of sustainable development. However controversial this idea may be, using the environmental pillar as the basis of sustainable development is not foreign to international law. Winter<sup>295</sup> proposes a similar view of sustainable development when integrating environmental, social and economic development. He suggests that the environment is the foundation that supports the economic and social parts of sustainable development. Winter explains this view with the following figure:

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<sup>293</sup> See again the discussion on peace and security in para 2.3.3.1 above.

<sup>294</sup> And all the measures needed to provide a healthy environment.

<sup>295</sup> Winter "A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report" 24-27.

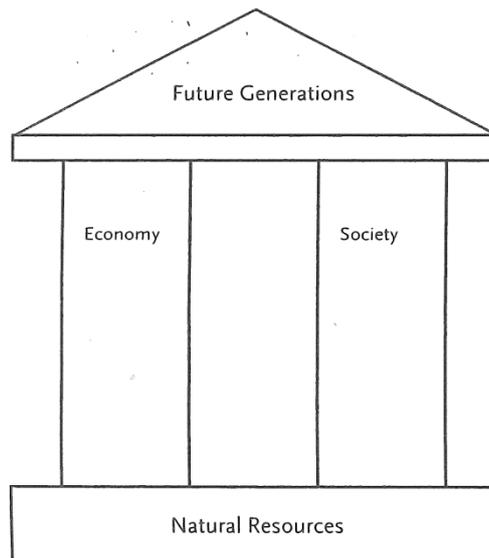


Figure 5: Sustainable development according to Winter<sup>296</sup>

From an anthropocentric perspective this view of sustainable development makes sense. It supports the notion contained in the Brundtland Report, emphasising the reliance of human kind on natural resources and inter- and intragenerational equity:<sup>297</sup>

The Earth is one but the world is not. We all depend on one biosphere for sustaining our lives. Yet each community, each country, strives for survival and prosperity with little regard for its impact on others.

A clear emphasis on the interdependent nature of the relationship between people and nature is seen. It follows logically then that the environment is seen as the basis of this relationship, as described by both NEPAD and Winter. This view is not immune to criticism, however, as it may detract from the more flexible (and perhaps better favoured) traditional view of sustainable development.<sup>298</sup> Winter argues that the social and economic parts of sustainable development are the weaker parts that need to be supported by the environment.<sup>299</sup> He favours an approach where the environment is not seen as an equal sphere / pillar, as he argues that short-term

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<sup>296</sup> Winter "A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report" 28.

<sup>297</sup> World Commission on Environment and Development *Our Common Future* 1.

<sup>298</sup> See Feris 2010 *PELJ* 85.

<sup>299</sup> Winter "A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report" 27.

social or economic goals may supersede environmental concerns.<sup>300</sup> But this approach may separate humankind from nature, a separation which would be at odds with the holistic nature of TFBC and ignores the interdependence of man and nature. Based on the foregoing, it is observed that there is a causal link between biodiversity and sustainable development. This link is easy to establish as biodiversity is one of the pillars of sustainable development. Biodiversity therefore forms an integral constituting element of sustainable development. Already, here, it should be stated that the two drivers of TFBC are closely related and that a symbiotic relationship is observable between sustainable development and biodiversity. This thesis employs the traditional view of sustainable development when considering it to be a driver of TFBC, although recognition is given to the fact that a healthy environmental component is a prerequisite for social and economic empowerment. The following section elaborates on the argument that sustainable development and biodiversity are interdependent.

#### *2.4.2 Finding symbiosis between sustainable development and biodiversity in the TFBC context*

In 2002 the World Summit on Sustainable Development (WSSD) was held in Johannesburg, South Africa.<sup>301</sup> During the WSSD, the *Johannesburg Declaration on Sustainable Development, 2002* (JDSD) was adopted. This document recognises biodiversity loss as one of the key challenges faced by society today.<sup>302</sup> Further recognising the interdependence between biodiversity and sustainable development is the *Johannesburg Plan of Implementation* of 2002 (JPOI), which was also adopted at the WSSD. The JPOI indicates that there is an important link between biodiversity and sustainable development in stating that biodiversity plays a critical role in sustainable development.<sup>303</sup> The JPOI expounds on this critical relationship and identifies various practices that will further the critical role played by biodiversity in sustainable development. In this context the JPOI reiterates the importance of the CBD and the role thereof in facilitating the sustainable use and fair and equitable

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<sup>300</sup> Winter "A Fundament and Two Pillars: The Concept of Sustainable Development 20 Years after the Brundtland Report" 27-28. Also see Feris 2010 *PELJ* 85.

<sup>301</sup> See para 1 of the JDSD.

<sup>302</sup> See para 13 of the JDSD.

<sup>303</sup> See para 44 of the JPOI.

sharing of biodiversity. As was explained above, sustainable use and equitable sharing are inherently part of TFBC in TFCAs.<sup>304</sup> Furthermore, the participation and involvement of all relevant stakeholders, including local communities, are also acknowledged and emphasised.<sup>305</sup> These are key aspects of the TFBC in TFCAs, as argued above.<sup>306</sup> Other important issues raised by the JPOI are: the transfer of technology and the principle of common but differentiated responsibility.<sup>307</sup>

Of particular relevance to TFBC is a statement in paragraph 44(k) to the effect that in order to reach the objectives of the CBD, action at all levels must be taken to:

effectively conserve and sustainably use biodiversity, promote and support initiatives for hot spot areas and other areas essential for biodiversity and promote the development of national regional ecological networks and corridors.

The establishment of regional ecological networks and corridors through TFCAs and TFBC initiatives in general may thus be seen as a direct contribution towards the objectives of the JPOI and accordingly to sustainable development. It would therefore seem that a definite link could be established between sustainable development and biodiversity. This causal link is reiterated by the CBD in articles 8 and 10, which focus on sustainable approaches towards *in-situ* conservation and sustainable use respectively.<sup>308</sup> The link between biodiversity and sustainable development is also reflected in the *African Consensus Statement to Rio+20* of 2011.<sup>309</sup>

When proposing TFBC across sovereign borders, a need for a common ideological approach is necessary to inform holistic governance. It has already been indicated that Africa is hampered by the legacy of colonialism and its exigencies, such as fragmentation and the existence of rigid approaches to state sovereignty (the latter in fear of renewed colonialism).<sup>310</sup> Although these negative effects may hamper holistic

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<sup>304</sup> See paras 2 and 2.3 above.

<sup>305</sup> See para 44(k) of the JPOI.

<sup>306</sup> See paras 2, 2.3 and 2.3.3 above.

<sup>307</sup> See para 44(m) of the JPOI.

<sup>308</sup> Article 2 of the CBD explains *in-situ* conservation as: “the conservation of ecosystems and natural habitats and the maintenance and recovery of viable populations of species in their natural surroundings and, in the case of domesticated or cultivated species, in the surroundings where they have developed their distinctive properties”.

<sup>309</sup> See among others para 28 of the Statement.

<sup>310</sup> See para 2.2 above.

approaches towards transfrontier environmental governance in general, common ground is found in the main drivers behind TFBC: sustainable development and biodiversity.

The causal link established above between biodiversity and sustainable development (specifically in a TFCA) provides the ideological basis for distilling the legal principles for a legal framework relevant to TFBC. Splicing sustainable development and biodiversity ensures that the legal basis includes all concerns (environmental, economic and social) leading to a balanced and holistic approach towards TFBC, and ensures that the scope and nature of TFBC in TFCAs are encapsulated within a legal framework. The use of two idealistic and broad concepts (biodiversity and sustainable development) as a basis for distilling the legal principles for TFBC ensures that the legal framework is also likely to be more inclusive than exclusive, providing the overtly collectivist approach necessitated by TFBC.<sup>311</sup> In simple terms, legal principles distilled from a more inclusive basis are likely to better facilitate the broad and diverse needs of TFBC. Furthermore, this more inclusive method is likely to cater for the diverse and different needs of member states in the SADC region.

## **2.5 Summary**

The overarching goal of this chapter was to establish the main drivers of TFBC. A driver in this context denotes the ideal/s and/or goal/s that form the basis of TFBC. This goal stems from the main research question of this thesis: Which legal principles should inform a legal framework that would facilitate sustainable TFBC in the context of TFCAs in the SADC?<sup>312</sup>

When considering the SADC as described in the foregoing paragraphs it becomes clear that it would be difficult to holistically govern any single issue at the SADC level and to overcome the existing external fragmentation. The insistence on protecting sovereignty, vested in the history of colonialism, is perhaps one of the biggest

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<sup>311</sup> Since TFBC incorporates a diverse range of issues that needs to be governed, being more inclusive could perhaps be beneficial to a governance framework, in that the possibility of various issues falling outside the scope of the framework becomes smaller.

<sup>312</sup> See para 1.2 above.

challenges. This does not bode well for holistic governance in the SADC. This is especially of concern in the context of the words of Bowman and Redgwell calling for collectivist approaches in resource use grounded not primarily in the notion of national territorial sovereignty.<sup>313</sup> This call to transcend political borders stresses the need for TFBC, and this need is elevated in the SADC, given the importance of preserving biodiversity, the states' rigid approaches to sovereignty, and the resultant fragmentation of law and governance in the sub-region.

TFBC in the SADC may foster the collectivist approach called for by Bowman and Redgwell, but cognizance is to be taken of the special circumstances (colonialism, sovereignty, and fragmentation) described in the foregoing paragraphs. One of these factors, perhaps the most important, is sovereignty. It is clear that sovereignty, although extremely important, remains a challenge in the TFBC context. With one of the explicit goals of TFCAs being to conserve biodiversity beyond sovereign borders, it will make sense not to follow a rigid approach to sovereignty in these areas. The concept of custodial sovereignty is therefore again put forward as an important goal to be contained and realised in a legal framework for TFBC in TFCAs. It is again acknowledged that custodial sovereignty is not accepted as a part of international law but only (in the broader context of custodianship argued by Brown-Weiss) a legal concept *de lege ferenda*.<sup>314</sup> As argued above, the concept may serve as a tool to align fragmented approaches within the SADC region towards biodiversity conservation whilst promoting the future of sovereignty, a principle currently held in high regard by SADC member states.

It was found that two main drivers that inform the ideology behind sustainable TFBC in TFCAs are sustainable development and biodiversity, and that they should therefore feature prominently in the process of distilling the legal principles for TFBC.. This chapter further defined biodiversity in the context of this study and explained the relevance and importance of biodiversity conservation in both the global and regional contexts. A discussion of the need for TFBC provided further contextual background. The chapter also looked into the scope and nature of TFBC in TFCAs. Finally, it discussed the main drivers and combined them in order to

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<sup>313</sup> Bowman and Redgwell *International Law and Biodiversity* 12.

<sup>314</sup> See para 2.2.2.1 above.

provide a unified ideological basis for distilling the legal principles for the research question. The table below presents the issues that will be relevant to a legal framework regulating TFBC in SADC.

Facilitate overtly collectivist approaches
Harmonise law and policy
Respect and acknowledge sovereignty but not the rigid application thereof
Incorporate traditional knowledge and conservation measures (as part of biodiversity conservation)
Facilitate connectivity
Facilitate and incorporate good governance (as tailored for PA governance)
Incorporate sustainable use (as part of biodiversity)
Provide measures facilitating peace and security
Provide measures facilitating regional economic integration and poverty alleviation
Facilitate and ensure public participation and beneficiation

Figure 6: Issues relevant to the legal framework of TFBC in TFCAs

While chapter 2 identified the two main drivers behind TFBC as well as the issues relevant to the legal framework for TFBC in TFCAs, the next step will be to distil the legal principles based on the two drivers. Upon the basis provided by the discussion of sustainable development and biodiversity conservation, this thesis will in chapter 3 distil the legal principles of TFBC. The legal principles will be used to make recommendations about a legal framework constituting sustainable TFBC in TFCAs.

## Chapter 3 – The principles of TFBC in TFCAs

### 3 Introduction

As was argued in chapter 1, a legal framework is crucial in facilitating sustainable biodiversity conservation initiatives such as TFBC.<sup>1</sup> This thesis distils legal principles from the drivers of TFBC as identified in chapter 2.<sup>2</sup> The principles may arguably provide the content of a legal framework which could facilitate TFBC. In distilling the legal principles this chapter will focus on two particular instruments deemed as soft law in the international legal sphere. These are the New Delhi Declaration (which is relevant to sustainable development) and the 1978 UNEP Principles (which are relevant to biodiversity). These two documents arguably provide a general normative framework in which the legal principles for TFBC could be found. Accordingly, the main research question to be answered in this chapter is: Which legal principles facilitate TFBC in the TFCA context? In answering this question this chapter will discuss and explain:

- the role of soft law and why this thesis focuses on such law;
- the nature and role of legal principles;
- the relevance of the New Delhi Declaration and the UNEP Principles; and
- the principles in the context of the two chosen instruments.

#### 3.1 *Distilling the principles*

##### 3.1.1 *The role of and reliance on soft law*

At the start of this chapter it is important to acknowledge that there is a heavy reliance in the chapter on so-called “soft law” despite its non-binding nature.<sup>3</sup> It should be clearly stated that the legal debate on the differences between hard and

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<sup>1</sup> See para 1.1.3 above.

<sup>2</sup> These are: sustainable development and biodiversity. See chapter 2 in general.

<sup>3</sup> See in general Boyle “Some Reflections on the Relationship of Treaties and Soft Law” 25-26 and Guzman and Meyer 2010 *Journal of Legal Analysis* 171-225. Also see Baxter 1980 *International and Comparative Law Quarterly* 549-566. Also see Dupuy 1990 *Michigan Journal of International Law* 420-435.

soft law does not fall within the scope of this thesis.<sup>4</sup> This section merely explains why this section primarily focuses on instruments classified as soft law for the purpose of identifying and explaining the principles of TFBC.

Soft law, according to Abbott and Snidal,<sup>5</sup> consists of measures where state obligation, precision and/or delegation are weakened by the nature and content thereof. Dugard<sup>6</sup> explains soft law as falling between law and non-law. He further states that the goal of soft law is to serve as guidelines to states in their conduct.<sup>7</sup> Maljean-Dubois<sup>8</sup> describes soft law as pre-law or law *in statu nascendi*, whereas Beyerlin and Marauhn<sup>9</sup> describe soft law as having a non-legal nature. Yet they argue that soft law still binds the addressees to act in accordance to the prescriptions of the soft instrument.<sup>10</sup> They do point out, however, that where the addressees fail to comply with the prescriptions of the soft law, no remedial legal action can be taken.<sup>11</sup> Kiss and Shelton<sup>12</sup> also reiterate that soft law has the character of being non-legally binding. They argue that the emergence or establishment of soft law often reflects the desire to bring the content of soft law into the normative process.<sup>13</sup> This view corresponds with the view of Maljean-Dubois (as stated above) that soft law can be seen as pre-law or law *in statu nascendi*. Being “soft” can in some cases also be the purpose or goal of law and in these cases soft law is not necessarily meant to be pre-law but another type of law. Abi-Saab<sup>14</sup> explains this kind of soft law as: “not the law of the upholder or law or the gendarme, but a more pliable and discrete law of the social architect.” In this case soft law is described not as a means to an end but the end itself.<sup>15</sup> From the above it is clear that diverging opinions exist on the nature and scope of soft law and that no

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<sup>4</sup> For a discussion of the difference see De Sadeleer *Environmental Principles* 312-318; D’Amato 2009 *European Journal of International Law* 897-910.

<sup>5</sup> Shelton “Law, Non-Law and the Problem of ‘Soft Law’” 10-13 and Abbott and Snidal 2000 *International Organization* 421-456.

<sup>6</sup> Dugard *International Law A South African Perspective* 32.

<sup>7</sup> Dugard *International Law A South African Perspective* 32. He further argues that international environmental law today is very dependent on soft law.

<sup>8</sup> Maljean-Dubois “The Making of International Law Challenging Environmental Protection” 47.

<sup>9</sup> Beyerlin and Marauhn *International Environmental Law* 290.

<sup>10</sup> Beyerlin and Marauhn *International Environmental Law* 290.

<sup>11</sup> Beyerlin and Marauhn *International Environmental Law* 290.

<sup>12</sup> Kiss and Shelton *A Guide to International Environmental Law* 10.

<sup>13</sup> Kiss and Shelton *A Guide to International Environmental Law* 9.

<sup>14</sup> Abi-Saab *Cours Général de Droit International Public* 213 as quoted and translated in Maljean-Dubois “The Making of International Law Challenging Environmental Protection” 48.

<sup>15</sup> Maljean-Dubois “The Making of International Law Challenging Environmental Protection” 48

universally accepted definition for soft law exists.<sup>16</sup> It is also clear that soft law may have a variety of purposes depending on the goal of the instrument within which it is embedded. Abott and Snidal<sup>17</sup> summarise the foregoing point by stating that: “soft law is sometimes designed as a way station to harder legalization, but often it is preferable on its own terms.” A final definition that encompasses all of the aspects of soft law is that of Chinkin,<sup>18</sup> who states that soft law:

range[s] from treaties, but which include only soft obligations ... to non-binding or voluntary resolutions and codes of conduct formulated and accepted by international and regional organizations ... to statements prepared by individuals in a non-governmental capacity, but which purport to lay down international principles.

From this definition it is clear that hard law can also contain soft law (or soft obligations). This is confirmed by Hunter *et al*<sup>19</sup> when they state that: “it is possible to have ‘soft’ obligations in ‘hard’ law form.” When considering all of the views above, Chinkin’s seems best suited to the divergent range of opinions and is not binary in the sense that it categorises soft law as being either legal or non-legal.

Examples of soft law instruments guiding the conduct of states, specifically in the field of environmental law, are the 1972 *Stockholm Declaration on the Human Environment* (Stockholm Declaration)<sup>20</sup> and the 1992 *Rio Declaration on Environment and Development* (Rio Declaration).<sup>21</sup> Supra-national law-making (law-making based on something like common consensus)<sup>22</sup> more often than not results in soft law, as actual common consensus is difficult to reach. Soft law is therefore plays a crucial role in consensus building and future policy formulation.<sup>23</sup> This is especially true in the SADC, where development is high on the agenda and consensus to form hard law (especially where it is environmental law that may be seen to negatively affect social and economic development) may be shunned on the grounds of the need to protect states’ right to development in their respective sovereign territories.<sup>24</sup> For this reason, soft law instruments are received better than

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<sup>16</sup> Also see Chinkin 1989 *International and Comparative Law Quarterly* 850.

<sup>17</sup> Abott and Snidal 2000 *International Organization* 423.

<sup>18</sup> Chinkin 1989 *International and Comparative Law Quarterly* 851.

<sup>19</sup> Hunter *et al* *International Environmental Law and Policy* 353.

<sup>20</sup> 1972 11 *ILM* 1416.

<sup>21</sup> Rio Declaration on Environment and Development, 1992 UNGA A/CONF.151/26.

<sup>22</sup> See in general Lubbe and Barnard 2012 *SADC Law Journal* 36-54.

<sup>23</sup> Hunter *et al* *International Environmental Law and Policy* 353.

<sup>24</sup> See para 2.2 above.

hard law instruments in the African (and specifically the SADC) context, as they are perceived to be less intrusive on the sovereignty of states.<sup>25</sup> Soft law therefore plays a crucially important role in consensus-building in the SADC context.<sup>26</sup>

Furthermore, as argued above, soft law could over time develop into hard law.<sup>27</sup> De Sadeleer<sup>28</sup> argues that principles [as a form of soft law] may act as a precursor to hard law and furthermore that they can serve as catalysts to customary international law.<sup>29</sup> Soft law may also be adopted as hard law in national legal regimes.<sup>30</sup> This is evident in the current South African legal framework, where principles like public participation and environmental impact assessments serve as examples of aspects of soft law (the New Delhi and the UNEP Principles) being translated into national law.<sup>31</sup> These characteristics make the “legislating” process of soft law easier, as consensus may be easier to obtain and therefore faster – an important factor when environmental law is the topic. This is especially noteworthy where clinging to sovereignty may be a challenge. Abbott and Snidal<sup>32</sup> discuss the benefits of what they call soft legalisation:

This [the fact that soft law is easier to create] is especially true when the actors are states that are jealous of their autonomy and when the issues at hand challenge state sovereignty. Soft legalization also provides certain benefits not available under hard legalization. It offers more effective ways to deal with uncertainty, especially when it initiates processes that allow actors to learn about the impact of agreements over time. In addition, soft law facilitates compromise, and thus mutually beneficial cooperation, between actors with different interests and values, different time horizons and discount rates, and different degrees of power.

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<sup>25</sup> See in general Abi-Saab 1962 *Howard Law Journal* 118-119; Anand 1966 *International and Comparative Law Quarterly* 55, 70; Osman 1979 *Nordic Journal of International Law* 15-24. On Africa's not partaking in the creation of international law see Maluwa 2000 *African Journal of International and Comparative Law* 201-225 and Maluwa *Netherlands International Law Review* 81-103

<sup>26</sup> This should be read in conjunction with the discussion on custodial sovereignty, as this thesis proposes the use of the latter approach to sovereignty. See para 2.2 above and para 3.3.2 below.

<sup>27</sup> Also see, for example Gold *American Journal of International Law* 443-489 and Andorno *The Invaluable Role of Soft Law in the Development of Universal Norms in Bioethics* available at <http://www.unesco.de/1507.html> [date of use 3 October 2014].

<sup>28</sup> De Sadeleer *Environmental Principles* 313.

<sup>29</sup> Also see Shelton “Law Non-Law and the Problem of ‘Soft Law’” 121-142 and Birnie *et al International Law and the Environment* 115-123.

<sup>30</sup> Dupuy uses Principle 21 of the Stockholm Declaration as an example of where soft law becomes hard law. See Dupuy 1990 *Michigan Journal of International Law* 420.

<sup>31</sup> Public participation in terms of section 23(2)(d) of the *National Environmental Management Act* 107 of 1998 (NEMA), among other things, and environmental assessments in terms of section 24 (in general) of the NEMA, among other things.

<sup>32</sup> Abbott and Snidal 2000 *International Organization* 423.

Soft law seems to cater well for many of the issues prevalent in TFBC, such as mutually beneficial cooperation; multi-stakeholder acknowledgement; and different degrees of power structures that exist.<sup>33</sup> Accordingly, it is clear that soft law plays a vital and important role in consensus-building in environmental law in general, and furthermore could add value to a debate related to the development of law in the SADC region.

### 3.1.2 *Legal principles*

For the sake of methodological clarity and because of its frequent use in this thesis, the term “legal principle” needs to be defined. The term is central to the recommendations made in this thesis and therefore a better understanding of it is required. The literature and policy documents analysed in this chapter refer to legal principles, yet these documents fail to describe what legal principles are. Two interpretations may be followed in the interpretation of what they are.

Generally speaking, the nature of the first interpretation of a principle is that a principle is broad and inclusive and the second interpretation defines the nature of a principle as being more confined and rigid, yet still not as rigid as a legal rule. In this regard, it is important to differentiate between a legal rule and a legal principle. Dworkin describes a clear distinction between principles and rules:<sup>34</sup>

The difference between legal principles and legal rules is a logical distinction. Both sets of standards point to particular decisions about legal obligation in particular circumstances, but they differ in the character of the direction they give. Rules are applicable in an all-or-nothing fashion. If the facts a rule stipulates are given, then either the rule is valid, in which case the answer it supplies must be accepted, or it is not, in which case it contributes nothing to the decision.

According to Dworkin, rules require a specific answer and are applicable to specific facts. Principles on the other hand are generic. They merely direct the decision and their existence does not necessitate the provision of a specific answer. This thesis proposes a generous and inclusive description of legal principles by including both interpretations (of legal principles, as will be discussed hereunder). This is possible

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<sup>33</sup> See the paragraphs following hereunder. See especially para 3.3.

<sup>34</sup> Dworkin *Taking Rights Seriously* 40-41.

as the two interpretations are not necessarily mutually exclusive, as will be seen from the discussion here.

The first interpretation is embodied in a description by Verschuuren and Oudenaarden. They describe legal principles as being flexible and open-ended.<sup>35</sup> These characteristics make legal principles well suited to address the wide ranging concerns of TFCAs already identified by this thesis, as this interpretation provides for principles to be inclusive rather than restrictive.<sup>36</sup> If they were restrictive this could hamper efforts towards holistic governance and potentially exclude some of the aspects relevant to TFBC. This is because of the fact that TFCAs and TFBC are extremely diverse and present a myriad of issues to be governed.<sup>37</sup> Legal principles also better support and effect the main drivers of TFBC, as they provide guidance rather than factual specific rules. As TFBC contains an array of issues, it would be almost impossible to produce a set of legal rules to manage the day-to-day activities that take place within a TFCA. The “cookbook” analogy used by Paterson in chapter 2 above is used to explain this.<sup>38</sup> Rather than having specific rules governing the recipe for transfrontier conservation, legal principles provide a broader, more flexible and more holistic approach to facilitate many of the nuances, conditions and needs in the SADC. Legal principles will therefore not prescribe a specific recipe, but rather general guidelines according to which a specific recipe for specific circumstances and needs may be developed. Principles (as soft or more rigid supra national law) for TFBC could guide the development of legal rules within specific actual situations making the rules relevant to a specific situation (a specific TFCA, for example) while still being relevant to TFBC in the SADC. Applying legal principles could ultimately ensure harmonised approaches towards TFBC in the SADC,<sup>39</sup> which is a very important quality, given the emphasis on harmonisation in the SADC.<sup>40</sup> Legal principles, as described by Verschuuren and Oudenaarden, further lend themselves to better facilitating common consensus in a transfrontier setting as they may

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<sup>35</sup> Verschuuren and Oudenaarden “The Role of Ideals in Legal Development” 231. Also see Verschuuren *The Ideal of Sustainable Development* 20-49.

<sup>36</sup> See para 2.5 above.

<sup>37</sup> See para 2.3 above.

<sup>38</sup> See para 2 above.

<sup>39</sup> See para 2.2.3.1 above.

<sup>40</sup> See para 2.2.3.1 above.

achieve political buy-in more readily than rigid rules because of their generally non-binding legal nature in the supra-national context.<sup>41</sup>

The second interpretation is one where a legal principle may be interpreted in a narrower or more rigid sense. The polluter pays principle (PPP) serves as an example. Although commonly referred to as a “legal principle”, it does not have the characteristics of being flexible and open-ended. It contains precise and rigid content as to the liability for pollution. The relation between the two different interpretations here is rather like the difference between hard and soft law described above.<sup>42</sup> Interpretation one is similar to soft law and interpretation two shows more rigid characteristics and is enforceable, like hard law.<sup>43</sup> This thesis submits that the nature and content of the specific legal principle being assessed will determine whether a narrow or open-ended approach will be followed in the interpretation thereof. In this context, legal principles are thus argued to be ideal building blocks for supra-national legal frameworks, as they may be able to offer direction for the creation of new law and serve as concrete legal “rules”, depending on their content.

As a legal framework cannot originate from a vacuum and must always be understood in a certain context,<sup>44</sup> the legal principles facilitating TFBC should be framed and understood within the drivers of TFBC in TFCAs: sustainable development and biodiversity conservation. The legal framework then operates within the confines of the drivers of TFBC and serves as a mechanism to codify and implement the drivers by means of the legal principles that will be distilled below.

In sum, principles are argued to be the ideal building elements of a legal framework for TFBC because they are able to cater for the divergent needs in TFCAs in SADC. An agreement on a set of principles would also not lead to the adoption of a

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<sup>41</sup> Kiss and Shelton *International Environmental Law* 8-9; Dupuy 1990 *Michigan Journal of International Law* 420; and Abott and Snidal 2000 *International Organization* 423. Also see in general Lubbe and Barnard 2012 *SADC Law Journal* 36-54 and para 2.2.2 above.

<sup>42</sup> See para 3.1.1 above.

<sup>43</sup> This remark is based on the examples given above and does not apply to all legal principles. Various other factors may have an effect on whether the principles are seen as hard or soft law. Sustainable development, as codified in the Constitution of the Republic of South Africa, 1996 serves as an example where sustainable development and its components form part of hard, enforceable law.

<sup>44</sup> See in general Fuller *The Morality of Law* 1-215 1-215; Zamir and Medina *Law, Economics, and Morality* 58-78; Bosselmann *The Principle of Sustainability* 46-50.

'cookbook' approach and could better guide TFCA-specific legal development in a flexible and open-ended manner. This TFCA-specific legal development would still be harmonised as the principles would provide the collective normative basis and basic shared ideology behind TFBC in the SADC. For these reasons, the identification and adoption of a set of principles are argued to be suitable in order to form the backbone of a legal framework facilitating TFBC in the SADC.

The following section explains why this study uses the New Delhi declaration and the UNEP principles to distil the legal principles for the drivers of TFBC in the SADC.

### 3.1.3 *Why New Delhi and UNEP*

The New Delhi Principles were drafted by the International Law Association (ILA) and are therefore not the result of a conference of states.<sup>45</sup> The origin of the New Delhi Principles can be traced to a committee established at the 1992 Cairo ILA conference.<sup>46</sup> This committee was established with the purpose of identifying and elucidating principles, norms and rules of international law, both existing and emerging, which could constitute a normative framework for sustainable development.<sup>47</sup> The Committee acknowledges that the drafting of the Principles was influenced by the increasing international awareness of the interrelationship between environmental conservation and development efforts through the notion of sustainable development.<sup>48</sup> In this context, the background to the drafting of the New Delhi Principles fits the arguments linking sustainable development and biodiversity conservation in this thesis and makes them an important benchmark for normative guidance related to TFBC. The importance is derived from the fact that TFBC also acknowledges the interrelationship between environmental conservation and social and economic development. It is also important to note that the provisions in the preamble to the New Delhi Principles acknowledge landmark policy

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<sup>45</sup> The ILA, which was founded in 1873 in Brussels, busies itself with the study, clarification and development of international law. See para 3 of the Constitution of the Association (as adopted at the 75<sup>th</sup> Conference, 2012).

<sup>46</sup> Para 1 Final Report: New Delhi Conference 2002.

<sup>47</sup> Resolution 12 ILA Report of the Sixty-Fifth Conference Cairo 12-13 and 422-423.

<sup>48</sup> The committee consulted various documents including the Brundtland Report, expert reports of the UN Secretariat (1995) and UNEP (1997, 2000), and the revised IUCN *Draft Covenant on Environment and Development* of 2000 and the *Earth Charter* of 2000. See para 1 Final Report: New Delhi Conference 2002.

developments and events such as Our Common Future, the Rio Declaration and the WSSD. This gives the principles credibility in the international legal sphere.

Apart from the context behind the document, the content thereof has become increasingly relevant in international judicial proceedings. This is especially true in the context of the African Court on Human and Peoples' Rights (ACHPR) and the African Commission on Human and Peoples' Rights (African Commission).<sup>49</sup> The principles embodied in the New Delhi Principles were, for example, applied in the *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* 2001 (SERAC case). It should be noted that the SERAC case did not refer to the New Delhi Declaration but applied its principles as individual principles of international law. In other words, the New Delhi Declaration was not applied, but some of the individual principles encapsulated in the Declaration were applied. The use of these principles in the SERAC case provides insight into the content of the New Delhi Declaration, which is finding increased applicability and importance in the African context.<sup>50</sup> Although the African Commission cannot make binding decisions,<sup>51</sup> the application of the principles is an important step in influencing both sub-regional and national jurisprudence. This statement is supported by the recent *Sofia Declaration*<sup>52</sup> of 2012, where it is pointed out that the New Delhi Principles are frequently used in international, regional and national judicial decisions. As a result, the Sofia Declaration reaffirms the New Delhi Declaration of 2002.<sup>53</sup> As chapter 2 above pointed out, sustainable development is one of the core goals of TFBC in TFCAs. Accordingly, this thesis draws the reasonable inference that the New Delhi Declaration could provide important guidance for distilling legal principles (or potential legal principles) related specifically

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<sup>49</sup> See in general *Social and Economic Rights Action Center and the Center for Economic and Social Rights v Nigeria* 2001; *Democratic Republic of Congo v Burundi, Rwanda and Uganda* 2003; *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 2010; *Free Legal Assistance Group v Zaire* 1995; and *Purohit and Moore v The Gambia* 2003.

<sup>50</sup> The Commission referred to sustainable use (Principle 1); CBDR (Principle 3); the precautionary principle (Principle 4); public participation (Principle 5); good governance (Principle 6); and implicitly to integration (Principle 7). See the discussion of each in paras 3.2.1 - 3.2.7 below.

<sup>51</sup> The Commission only makes recommendations and therefore the "cases" are referred to as "communications." See chapter 3 of the *African Charter on Human and Peoples' Rights*, 1981.

<sup>52</sup> Adopted by the ILA at its 75<sup>th</sup> Conference held in Sofia, Bulgaria.

<sup>53</sup> Preamble to the Sofia Declaration.

to the driver of sustainable development for a legal framework facilitating TFBC in TFCAs.

In 1973 the UN General Assembly adopted a resolution emphasising the importance of cooperation where natural resources are shared by two or more states.<sup>54</sup> The resolution stresses the importance of the Stockholm Declaration with particular reference to principles 21, 22 and 24.<sup>55</sup> The resolution further stresses the need for international standards to guide the conservation and harmonious exploitation of shared natural resources.<sup>56</sup> The General Assembly then mandated the Governing Council of UNEP to give effect to the resolution and to report back on measures adopted for the implementation thereof.<sup>57</sup> After much deliberation, the draft UNEP Principles were adopted by the UNEP Governing Council in its 5<sup>th</sup> session in 1977.<sup>58</sup> Consisting of fifteen guiding principles, the UNEP Principles provide a broad overview of important matters to be considered where two or more states may be involved in the conservation/utilisation of shared natural resources. These Principles thus provide important normative guidance and set a good foundation for guiding the process of formulating the day-to-day governance rules of TFBC in TFCAs. During the 5<sup>th</sup> session of the Governing Council two delegations advanced the opinion that a clear definition of “natural resources” was needed to further the work of the team assembled to draft the Principles.<sup>59</sup> It would seem that nothing came of this, as no definitions are contained within the document.<sup>60</sup> For the purposes of this discussion, natural resources are considered to form part of biodiversity, as was argued above.<sup>61</sup> As the UNEP Principles provide the only relevant benchmark (within the scope of this thesis) for normative development in the field of the shared governance of natural resources, they serve as firm guidelines to inform the development of a legal

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<sup>54</sup> UNGA RES/3129 (XXVIII).

<sup>55</sup> These principles addressed sovereignty (Principle 21), cooperation (Principle 22), and cooperation based on equality (Principle 24). One may even argue that Principle 24 reflects early signs of the CBDR principle.

<sup>56</sup> Para 1 UNGA RES/3129 (XXVIII).

<sup>57</sup> See para 3 of UNGA RES/3129 (XXVIII).

<sup>58</sup> UNEP General Council 73<sup>rd</sup> meeting 20 May 1977. For a discussion see the minutes of the meeting available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=65&ArticleID=1260&l=en> [date of use 26 November 2013].

<sup>59</sup> See para 408 of the minutes available at <http://www.unep.org/Documents.multilingual/Default.asp?DocumentID=65&ArticleID=1260&l=en> [date of use 26 November 2013].

<sup>60</sup> There is one exception. “Significantly affect” as used in principles 4 and 6 is defined in the text.

<sup>61</sup> See para 2.1.1 above.

framework, together with the New Delhi Principles. As the UNEP Principles date back to 1978 and were formulated primarily to accommodate inter-state shared resource governance, the Principles may be out-dated and not perfectly suited to TFBC. For this reason, when analysing the UNEP Principles, the relevant New Delhi Principles will be read together with the UNEP Principles in order to provide a more contemporary reflection on the interpretation of the UNEP Principles. This is important as such a method may provide a more contemporary interpretation of the UNEP Principles for TFBC.

### **3.2 Sustainable development: the New Delhi Declaration<sup>62</sup>**

The New Delhi Declaration provides the platform for the distillation of the principles of sustainable development. The principles to be discussed are sustainable use, equity and poverty alleviation, common but differentiated responsibility (CBDR), the precautionary principle, public participation, good governance, and integration.

#### *3.2.1 Principle 1: Sustainable use*

As argued above, sustainable use is one of the more important links in the symbiotic relationship between biodiversity and sustainable development.<sup>63</sup> Sustainable use incorporates the principle of sovereignty and natural resource use, as it places a duty on a state to use its resources in a sustainable fashion.<sup>64</sup> In short, the principle implies that states may exploit their natural resources in accordance with their own environmental and developmental policies.<sup>65</sup> This sovereign right is coupled with the responsibility not to cause harm to the environment beyond their sovereign jurisdiction.<sup>66</sup> As regards sovereign exploitation, the New Delhi Declaration states that natural resources must be used in a rational, sustainable and safe manner.<sup>67</sup> This explanation corresponds with the definition given to sustainable use in the CBD,

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<sup>62</sup> On the New Delhi Declaration see in general Rayfuse “The Challenge of Sustainable High Seas Fisheries” 468; Sands and Peel *Principles of International Environmental Law* 206-228 and Cordiener Segger “Sustainable Development in International Law” 167-175.

<sup>63</sup> See para 2.4.2 above.

<sup>64</sup> Principle 1 of the New Delhi Declaration.

<sup>65</sup> Principle 1 of the New Delhi Declaration.

<sup>66</sup> Principle 1 of the New Delhi Declaration. See also para 2.2.2 above.

<sup>67</sup> Principle 1.2 of the New Delhi Declaration.

namely:

the use of components of biological diversity in a way and at a rate that does not lead to long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations.

By explaining sustainable use with reference to the principles of inter- and intragenerational equity, the CBD clearly establishes causality between biodiversity and sustainable development. Principle 1 reiterates the importance of intergenerational equity in stating that future generations' needs are to be taken into account when determining the rate at which biodiversity is exploited. As was argued in chapter 2, biodiversity is not confined to sovereign borders and furthermore forms the basis of livelihoods for people in the SADC (and other regions in Africa).<sup>68</sup> Taking into account the fact that biodiversity traverses borders and the need for intergenerational equity, sustainable use takes on a new dimension, which is that states need to act as custodians and not as owners of biodiversity.<sup>69</sup> This potentially restricts their permanent sovereignty in exploiting their natural resources.<sup>70</sup>

In the SERAC case the African Commission implicitly recognised that the principle of sustainable use forms part of article 24<sup>71</sup> of the *African Charter on Human and Peoples' Rights*, 1981 (African Charter). The Commission stated that article 24 (the Charter's environmental right) creates clear obligations for African governments and that article 24:<sup>72</sup>

requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an *ecologically sustainable development and use of natural resources*.<sup>73</sup>

In *Democratic Republic of Congo v Burundi, Rwanda and Uganda*, 2003 (Congo case) the Commission implicitly referred to the principle of sustainable use. The Commission criticised the plunder of vast natural resources resulting in human rights violations during the widespread violence inflicted by the armed forces of Burundi,

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<sup>68</sup> See para 2.1 above.

<sup>69</sup> See para 2.2.2 above.

<sup>70</sup> See para 2.2.2 above.

<sup>71</sup> The right to a general satisfactory environment.

<sup>72</sup> Para 52 of the SERAC case.

<sup>73</sup> Own emphasis.

Rwanda and Uganda on Congolese territory.<sup>74</sup> This reliance on the sustainable use principle in African quasi-judicial proceedings strengthens the argument for the applicability and relevance thereof.<sup>75</sup>

The New Delhi Declaration states that future generations' needs are to be taken into account when determining what a sustainable rate of use would encompass.<sup>76</sup> The Declaration further indicates that the protection, preservation and enhancement of the natural environment with specific reference to biodiversity and the climate system are the common concern of humankind.<sup>77</sup> Interestingly, the notion that sustainable use is a common concern may place an even greater responsibility on states to develop sustainably, and gives effect to the concept of custodial sovereignty rather than permanent sovereignty.<sup>78</sup> A possible restriction is thus made on the sovereign claims of states as stated above. Accordingly, as it is seen as a common concern, the sustainable use of biodiversity requires states to develop sustainably and furthermore to use the common resource – biodiversity – in a sustainable manner.

In broad terms, the principle of sustainable use caters for both human and environmental concerns and reiterates the interdependence of the human species and the environment. The principle also recognises that particular regard needs to be paid to the rights of indigenous people as part of sustainable use.<sup>79</sup> This is an important recognition, as indigenous people form an integral part of most TFCAs and as a consequence their livelihoods normally depend directly on the occurrence of biodiversity in and around TFCAs.<sup>80</sup> The inclusion of the rights of indigenous people

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<sup>74</sup> See paras 88-95 of the Congo case.

<sup>75</sup> The term "quasi-judicial" is used to refer to the fact that the Commission cannot make any binding decisions, whereas this thesis will describe a judicial body as one that can make binding decisions.

<sup>76</sup> Principle 1.2 of the New Delhi Declaration.

<sup>77</sup> Principle 1.3 of the New Delhi Declaration.

<sup>78</sup> See para 2.2.2 above 2. Also see van der Linde *et al Beyond Boundaries: Transboundary Natural Resource Management in Sub-Saharan Africa* 111.

<sup>79</sup> Principle 1.2 of the New Delhi Declaration.

<sup>80</sup> See para 2 above. Indigenous peoples may also have cultural rights coupled with natural resources and possess important indigenous knowledge that may contribute to the successful and sustainable use of natural resources. Empowering indigenous people and including them in the decision-making process may lead to a strengthened governance effort. This is in line with Principles 2 and 5 of the SADC *RISDP*. See SADC *RISDP* 84. See in general Munthali 2007 *Natural Resources Forum* 51-60.

in a legal framework may also provide some legal recourse where they are not consulted in the management of TFCAs and more importantly do not benefit from the establishment of TFCAs. Much has been written about indigenous people's not being consulted and not benefitting, and this specific issue is seen as a challenge for TFCAs.<sup>81</sup>

The principle of sustainable use would seem to lie at the heart of TFBC as it encapsulates the essence of sustainable development and biodiversity conservation. Adding to the importance of the notion of sustainable use is the fact that it is considered to be a particular expression or manifestation of sustainable development.<sup>82</sup> In fact, Beyerlin and Marauhn argue that sustainable use may even have become a self-contained international norm when linked with a defined object of use.<sup>83</sup> The importance of sustainable use is also reflected in the fact that some authors believe that it has become customary international law.<sup>84</sup> Although it cannot be argued that the principle of sustainable use is indeed already customary international law, Cordiener Segger suggests that the increased use thereof in international treaties points to the growing importance thereof and the possible eventual elevation of the principle to customary status.<sup>85</sup> Sustainable use, as a principle giving effect to sustainable development, should therefore be an important inclusion in the legal framework facilitating TFBC in TFCAs.

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<sup>81</sup> Lausche *Guidelines for Protected Areas Legislation* 271; Duffy 2006 *Political Geography* 89-109; Whande and Suich "Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area" in Suich and Child (eds) *Evolution & Innovation in Wildlife Conservation* 372-388 and Katerere, Hill and Moyo *A critique of Transboundary Natural Resource Management in Southern Africa* 20-21. Also see Hanks 2003 *Journal of Sustainable Forestry* 138 and in general Paterson and Glazewski "Protected Areas and Community Based Conservation" 321-362.

<sup>82</sup> Beyerlin and Marauhn *International Environmental Law* 82. Also see Cordiener Segger "Sustainable Development in International Law" 167-168.

<sup>83</sup> Beyerlin and Marauhn *International Environmental Law* 82.

<sup>84</sup> Cordiener Segger "Sustainable Development in International Law" 167-168. Also see also Beyerlin and Marauhn *International Environmental Law* 82. The authors argue this point on the basis of the various references to sustainable use in international treaties. This argument is made where the principle is placed within a specific context such as biodiversity or maritime resources, for example.

<sup>85</sup> Cordiener Segger "Sustainable Development in International Law" 167-168. This point is reiterated by Beyerlin and Marauhn. See Beyerlin and Marauhn *International Environmental Law* 82.

### 3.2.2 Principle 2: Equity and poverty alleviation

The second principle deals primarily with equity, and more specifically, with the dual dimensions of inter- and intragenerational equity. Both equity between the parts of the current generation and equity with regard to future generations need to be taken into account. Equity is central to sustainable development as it gives effect to the central idea that the resources of the earth belong to all generations.<sup>86</sup> This principle directly correlates with and is interrelated with the principle of sustainable use as it speaks to the equal distribution of resources. This emphasises the belief that biodiversity is a common concern of mankind. With this interpretation the view of the common concern of mankind is stretched beyond the temporal limits of the present to include future generations. It implies that the current generation may develop and use resources only bearing in mind the long-term effects of its actions.<sup>87</sup> The Declaration further emphasises the importance of cooperation in the eradication of poverty.<sup>88</sup> The Declaration states that although the primary responsibility lies within a state to take measures to eradicate poverty - in other words this is a sovereign responsibility – there is a further responsibility on states to assist one another in the achievement thereof.<sup>89</sup> This inclusion may further strengthen the argument against absolute sovereignty and motivate a move towards custodial sovereignty. The inclusion is bolstered by article 15(7) of the CBD, that reiterates that benefits derived from the use of biodiversity are to be shared between the relevant parties.<sup>90</sup>

In general, the principle is seen as a guiding concept in international law, and its concrete application or substance is difficult to ascertain.<sup>91</sup> Notwithstanding this general view, the principle of equity has received the attention of the International

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<sup>86</sup> “All generations” refers to both present and future generations. See Hepburn and Khalfan *The Principle of Equity and the Eradication of Poverty* 4.

<sup>87</sup> Principle 2.2 of the New Delhi Declaration.

<sup>88</sup> Principle 2.3 of the New Delhi Declaration.

<sup>89</sup> Principle 2.4 of the New Delhi Declaration.

<sup>90</sup> Article 15(7) states: “Each Contracting Party shall take legislative, administrative or policy measures, as appropriate, and in accordance with Articles 16 and 19 and, where necessary, through the financial mechanism established by Articles 20 and 21 with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilization of genetic resources with the Contracting Party providing such resources. Such sharing shall be upon mutually agreed terms”.

<sup>91</sup> See Hepburn and Khalfan *The Principle of Equity and the Eradication of Poverty* 5.

Court of Justice (ICJ) in various decisions and opinions. In the *Case Concerning Maritime Delimitation in the Area between Greenland and Jan Mayen*<sup>92</sup> (Denmark v Norway) Judge Weeramantry explored the application of intergenerational equity in a separate opinion. Judge Weeramantry explained that global traditions of equity, not yet applied in the context of the law of the sea, include:<sup>93</sup>

...concepts of a higher trust of earth resources, an equitable use thereof which extends inter-temporally, the “*sui-generis*” status accorded to such planetary resources as land, lakes and rivers, the concept of wise stewardship thereof, and their conservation for the benefit of future generations.

Although the above passage concerns the possible application of these equitable concepts to maritime law, an important recognition is given to equity as a well-entrenched concept in international law. In a dissenting judgment in the *Case Concerning Nuclear Tests*<sup>94</sup> (New Zealand and Australia v France) Judge Weeramantry again considered intergenerational equity and described the right of future generations to have “woven themselves into international law through major treaties, through juristic opinion and through general principles of law recognised by civilised nations.”<sup>95</sup> Judge Weeramantry clearly considers intergenerational equity as being part of international law, although the majority opinion did not address the legal status of the principle. Thus, uncertainty as to its exact legal status remains. Notwithstanding, it may be safe to say that the principle of equity is clearly a guiding principle in international law.<sup>96</sup>

Intragenerational equity and poverty eradication seem to have a lesser legal status than intergenerational equity. In ICJ jurisprudence poverty has been described as a “virtually extraneous” factor that could not be considered in determining a boundary line between Libya and Tunisia.<sup>97</sup> In the *Maritime Delimitation and Territorial*

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<sup>92</sup> [1993] ICJ 38.

<sup>93</sup> Denmark v Norway, separate opinion of Judge Weeramantry at para 235.

<sup>94</sup> [1974] ICJ 457.

<sup>95</sup> Dissenting judgment of Judge Weeramantry at para 341.

<sup>96</sup> See for example the case of the *World Trade Organisation Tribunal: European Communities- Conditions for the Granting of Tariff Preferences to Developing Countries* 2003-WT/DS246/R and *European Communities- Export Subsidies on Sugar - Complaint by Brazil* 2004-WT/DS266/R as well as the ICJs’ *Advisory Opinion on the Legality of Nuclear Weapons* 1996 ILM 29.

<sup>97</sup> *Case Concerning the Continental Shelf* [1982] ICJ 18.

*Questions Between Qatar and Bahrain*<sup>98</sup> (Qatar v Bahrain) Judges Bedjaoui, Ranjeva and Koroma all agreed in their combined dissenting opinion that poverty “is of no legal relevance whatsoever, as the entire body of international jurisprudence has consistently demonstrated”.<sup>99</sup> This remark was made in the context of a border dispute and it does not render the principle of poverty eradication null and void in international jurisprudence. In fact, poverty alleviation is very high on the African developmental agenda.<sup>100</sup> The three judges did, however, recognise that poverty may be relevant to seeking a more equitable solution to international disputes.<sup>101</sup> Thus, although the legal status of the principle of equity and poverty alleviation seems to be uncertain, it would seem that it has a guiding influence in international jurisprudence.

This influence shows through its recognition and application by the African Commission in *Purohit and Moore v. The Gambia, 2003* (Purohit case). In the Purohit case the African Commission implicitly recognised the principle in applying it to article 16 of the African Charter, stating that everyone should have the right to equal access to health facilities, goods and services without discrimination.<sup>102</sup> It should be noted here that the SERAC case clearly established a link between articles 16 and 24 of the African Charter.<sup>103</sup> This link must therefore by way of inference extend the principle of equity to article 24 of the African Charter as well. In other words, everyone should have equal access to a generally satisfactory environment. Such an interpretation holds transfrontier importance, as it again emphasises the need for harmonisation (of all means necessary) in order to ensure a generally satisfactory environment across borders in the context of sustainable development. The foregoing argument is also in line with the fact that biodiversity (and therefore the environment) is not confined by political boundaries and is seen as one integrated whole.<sup>104</sup> The African Commission emphasises an important point in the Purohit case by acknowledging that the realisation of article 16 is hampered by

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<sup>98</sup> [2001] ICJ 40.

<sup>99</sup> Qatar v Bahrain, dissenting judgment of Judges Bedjaoui, Ranjeva and Koroma at para 214.

<sup>100</sup> See the decision of the 23<sup>rd</sup> Ordinary session of the AU Assembly on the post-2015 Development Agenda. AU/Dec.517-545(XXIII).

<sup>101</sup> Qatar v Bahrain, dissenting judgment of Judges Bedjaoui, Ranjeva and Koroma at para 212.

<sup>102</sup> Para 80 of the Purohit case.

<sup>103</sup> Para 51 of the SERAC case.

<sup>104</sup> See para 2.1 and 2.2 above.

poverty and a lack of resources.<sup>105</sup> The Commission therefore obliges states to take concrete steps within their available resources to realise article 16 in an equitable fashion.<sup>106</sup> It would seem that the African Commission here recognises poverty not only at the individual level but also at state level by stating:<sup>107</sup>

African Countries are generally faced with the problem of poverty which renders them [the African countries] incapable to provide the necessary amenities, infrastructure and resources...

This statement has important implications for TFBC when considering the common but differentiated responsibility principle, as it may in theory require more developed states to share their resources, expertise and infrastructure in a particular TFCA with a lesser developed state. The principle of common but differentiated responsibility will be discussed in more detail below.<sup>108</sup> The African Commission provides important insight into applying principle 2 by providing the contextual reality faced by African countries. The reality is that an important nexus exists between equity and poverty alleviation and that the two are interdependent in the African context.<sup>109</sup>

By embracing the goals of sustainable development and biodiversity conservation, TFBC also requires a temporal dimension to be effective. This temporal dimension could be provided by the principle of equity and poverty eradication. Using resources in a manner that will provide equity for future generations may not benefit future generations only but may also benefit present generations as it could contribute to ensuring the continued provision of ecosystem services.<sup>110</sup> TFCAs provide an important “haven” for ecosystem services, and effective TFBC could secure ecosystem services that may be beneficial not only to the human population

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<sup>105</sup> Para 84 of the Purohit case. Article 16 is the right to health in terms of the African Charter.

<sup>106</sup> Para 84 of the Purohit case.

<sup>107</sup> Para 84 of the Purohit case.

<sup>108</sup> See para 3.2.3 below.

<sup>109</sup> This nexus is, of course, generic in nature and applies to other jurisdiction outside Africa as well.

<sup>110</sup> The ecosystem services approach is defined as an approach that “provides a framework by which ecosystem services are integrated into public and private decision-making. Its implementation typically incorporates a variety of methods, including ecosystem service dependency and impact assessment valuation, scenarios and policies and other interventions targeted at sustaining ecosystem services. These methods are often applied at a watershed or landscape level and frequently involve projecting a decade or more into the future. The Ecosystem Services Approach builds on the Ecosystem Approach developed under the Convention on Biological Diversity, but further emphasizes ecosystem services as the link between ecosystems and development.” Ranganathan *et al Ecosystem Services A guide for Decision Makers 2*. Also see Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF’s Portfolio 8*.

inside the TFCAs, but also to those outside TFCAs.<sup>111</sup>

A further aspect of this principle that is of importance to TFCAs is the fact that states are obliged to assist one another in the eradication of poverty.<sup>112</sup> This assistance fits perfectly into the TFCA context and may encourage and strengthen cooperation and peaceful relations among states. Considering Principle 2 of the New Delhi Declaration and the remarks made by the African Commission in the Purohit case on the nexus between equity and poverty alleviation, it is argued that Principle 2 is critically important in supporting sustainable development. TFCAs aim to strike a balance between the conservation and use of biodiversity by introducing the concept of sustainable use as discussed above.<sup>113</sup> Sustainable use, in turn, allows local communities to benefit from TFCAs, and this will allow for the potential situation where poverty alleviation and equity may be achieved. As was argued in the beginning of this section, Principles 1 and 2 of New Delhi are interrelated and offer important substantive guidance in efforts to achieve sustainable development. Both Principles will form an important part of a legal framework facilitating sustainable TFBC in TFCAs.

### 3.2.3 Principle 3: Common but differentiated responsibility (CBDR)

As a principle, CBDR has its roots in the disparities between developed and developing countries,<sup>114</sup> and is encapsulated in Principle 7 of the Rio Declaration, among other instruments:

States shall cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem. In view of the different contributions to global environmental degradation, States have common but differentiated responsibilities. The developed countries acknowledge the responsibility that they bear in the international pursuit of sustainable development

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<sup>111</sup> Ecosystem services include the provision of fresh water, food and storm protection, amongst other services. See in general Ranganathan *et al Ecosystem Services A guide for Decision Makers 2*. Also see Ervin *et al Protected Areas for the 21st Century: Lessons from UNDP/GEF's Portfolio 8*.

<sup>112</sup> Principle 2.3 of the New Delhi Declaration.

<sup>113</sup> See para 3.2.1 above.

<sup>114</sup> See Cordinier Segger "Sustainable Development in International Law" 168-169 and Beyerlin and Marauhn *International Environmental Law* 61-62. Also see in general Goepel 2010 *Sustainability* 1694-1718.

in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.

At the heart of CBDR is entrenched the principle of cooperation towards the achievement of sustainable development.<sup>115</sup> This duty of cooperation goes beyond traditional inter-state cooperation and extends to include international organisations,<sup>116</sup> corporations, non-governmental organisations (NGOs) and civil society.<sup>117</sup> Including all of these stakeholders in the duty of cooperation is on a par with the cooperation requirements of TFCAs (albeit unintentionally).<sup>118</sup>

Of greater importance for TFCAs is the differentiation built into the principle of CBDR. Differentiation is of critical importance in the SADC as there are major disparities between member states.<sup>119</sup> The existence of different economic, legal and social conditions between member states necessitates the recognition of these disparities when the states work together.<sup>120</sup> Again, one needs to recognise that the principle of CBDR originated from the consideration of the vast difference in development between the developed and developing countries (also called the North-South debate).<sup>121</sup> In this context the principle might not apply to the SADC at face value.<sup>122</sup> It is argued, however, that CBDR can be applied within the SADC context, as the disparities between the SADC member states mimic those of the originating paradigm. This is especially true of South Africa and its neighbours.<sup>123</sup> South Africa in this context will have a special responsibility to contribute to capacity building, to provide financial assistance, and to provide access to environmentally sound technology, especially in a TFCA.<sup>124</sup> The principle will apply throughout the rest of the SADC, with the higher responsibility falling on the more developed country. The core value of CBDR thus lies in the consideration that it may facilitate

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<sup>115</sup> Principle 3.1 of the New Delhi Declaration.

<sup>116</sup> As will later be seen, in chapter 5, the KAZA TFCA is an example of an international organisation with legal personality.

<sup>117</sup> Principle 3.1 of the New Delhi Declaration.

<sup>118</sup> See in general para 2.3 above.

<sup>119</sup> Macroeconomic indicators show that South Africa has a 65% share of the combined Gross Domestic Product for the SADC. The closest contenders are Angola and Tanzania with 6.1% each, See SADC *RISDP* 10.

<sup>120</sup> Principle 3.2 of the New Delhi Declaration.

<sup>121</sup> Principle 3.3 of the New Delhi Declaration.

<sup>122</sup> The reason is that all countries in the SADC are seen to be developing countries.

<sup>123</sup> See SADC *RISDP* 9-20.

<sup>124</sup> Principle 3.4 of the New Delhi Declaration.

an equitable spread of contributions and responsibilities within a TFCA where one state may be better developed (whether it be legally, economically or socially) than other states.<sup>125</sup> This approach may also uplift and build the capacity of the less developed state. In so doing, it is argued that CBDR promotes equality by means of differential treatment to achieve equality among unequals.<sup>126</sup> This view of CBDR should also be linked to the benefit sharing provisions contained in principle 2 as discussed above. Should a more developed state share its benefits with a lesser developed state in the SADC context (based on the CBDR principle) it may further the ideal of equity in the SADC, for example. Furthermore, applying the CBDR principle to equity and poverty alleviation, it could require stronger states to assist less developed states to achieve equity and poverty alleviation within their sovereign territory. This can be done with technical and financial assistance, for example.

Although the CBDR principle is legislated in some international instruments,<sup>127</sup> various authors argue that it is a principle providing guidance for rule makers and those who interpret the law.<sup>128</sup> They further argue that CBDR possesses the normative quality to become a principle of customary international law although it cannot yet be regarded as such.<sup>129</sup> This viewpoint is reiterated by the ILA in the *Sophia Declaration* of 2012.<sup>130</sup> It is important here to refer back to the discussion on legal principles above.<sup>131</sup> The importance is derived from the fact that the CBDR principle may become hard law in future. The CBDR principle could be seen as pre-

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<sup>125</sup> The Stockholm Declaration also made mention of cooperation based on an “equal footing”. This may be an early indication of the CBDR principle in international law. See Principle 24 of the Stockholm Declaration.

<sup>126</sup> Schachter *Sharing the World's Resources* 7 and Goepel 2010 *Sustainability* 1699.

<sup>127</sup> See in general Honkonen *The CBDR Principle* 35-110; Beyerlin and Maruhn *International Environmental Law* 66-68; Cordonier Segger “Sustainable Development in International Law” 168-169; Goepel 2010 *Sustainability* 1699; and Hepburn and Ahmad *The Principle of Common but Differentiated Responsibilities* 5-9.

<sup>128</sup> See Honkonen *The CBDR Principle* 301-325; Cordonier Segger “Sustainable Development in International Law” 168-169; Goepel 2010 *Sustainability* 1699 and Beyerlin and Maruhn *International Environmental Law* 70.

<sup>129</sup> Honkonen *The CBDR Principle* 293-306; Cordonier Segger “Sustainable Development in International Law” 168-169; Goepel 2010 *Sustainability* 1699 and Beyerlin and Maruhn *International Environmental Law* 70. It seems that the content of the principle is subject to divergent opinions and that no clarity exists regards the content and scope of the principle. Hepburn and Ahmad *The Principle of Common but Differentiated Responsibilities* 12-14.

<sup>130</sup> Para 5 of the Sofia Declaration. Para 5 reads: “The principle of common but differentiated responsibilities has a recognised status in treaty law, case law and State practice”.

<sup>131</sup> See paras 3.1.1 and 3.1.2 above.

law or law *in statu nascendi*.<sup>132</sup> CBDR may, in the SADC context, play a vital role in regulating cooperation between member states and may also play an important role in promoting equity between member states.<sup>133</sup>

However, an important caveat regarding the application of the CBDR principle in the SADC must be pointed out here. Differentiated responsibilities may promote equality and cooperation in theory, but they may also produce a scenario where the state with less capability sits back and makes no contribution to TFBC. In such a case, the state providing support and bearing the bigger burden may withdraw from a project within a TFCA or even from the TFCA as a whole, and leave the TFBC effort as a sovereign affair. This may be a pessimistic view, but realistically it needs to be considered in the SADC context, where many disparities exist between member states and states are very aware of their permanent sovereignty.<sup>134</sup>

#### 3.2.4 Principle 4: Precautionary principle

The precautionary principle may be viewed as one of the most prominent concepts in international environmental law.<sup>135</sup> The precautionary principle is encapsulated in Principle 15 of the Rio Declaration and reads:

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 full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.

The precautionary principle as described by the Rio Declaration makes implicit reference to the CBDR principle by including: “[the precautionary approach] ... shall be widely applied by States according to their capabilities.”<sup>136</sup> This is clear evidence of the North-South debate’s having had an influence on the Rio negotiations, as is

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<sup>132</sup> See Maljean-Dubois “The Making of International Law Challenging Environmental Protection” 47. Also see para 3.1.1 above.

<sup>133</sup> Also see in general Hepburn and Ahmad *The Principle of Common but Differentiated Responsibilities* 12-13; Honkonen *The CBDR Principle* 301-325; Goepel 2010 *Sustainability* 1699; and Beyerlin and Maruhn *International Environmental Law* 66-70.

<sup>134</sup> See para 2.2.2 above.

<sup>135</sup> De Sadeleer *Environmental Principles* 39-102; Bodansky *The Art and Craft of International Environmental Law* 194-199; and Beyerlin and Maruhn *International Environmental Law* 47.

<sup>136</sup> Principle 15 of the Rio Declaration. Also see Trouwborst 2009 *Erasmus Law Review* 105-127.

also reflected by its explicit inclusion in principle 7 of the Rio Declaration.<sup>137</sup> The CBDR was again included in Rio+20's *The Future We Want Declaration*, emphasising the importance thereof.<sup>138</sup>

In terms of the New Delhi Declaration, the precautionary approach is a proactive principle guiding activities or proposed activities in such a manner that they may avoid significant harm to human health or natural resources and ecosystems.<sup>139</sup> As defined in the Declaration, the principle contains many issues and considerations that are applicable to TFCAs. Firstly, the principle incorporates accountability.<sup>140</sup> This is important in a transfrontier setting where damage is caused by one state to another or to non-state parties. Such accountability (or the possibility of being held accountable) should urge states to act cautiously and diligently in all matters related to TFCAs. This aspect also requires a mechanism for dispute settlement where accountability could be required. In the absence of a mechanism for transfrontier dispute settlement, stakeholders will not be able to find redress for damages caused, and states may thus escape accountability for the damage caused by them.<sup>141</sup>

The principle also calls for planning based on clear criteria and well defined goals.<sup>142</sup> This inclusion is of specific importance with respect to TFCAs as these areas will be subject to joint management not only by states but also by other stakeholders. Planning thus becomes a critical element of TFBC in giving effect to the precautionary principle, and ultimately to sustainable development. Moreover, planning contains a temporal element and creates the potential for a more sustainable outcome than *ad hoc* solutions and policy. This argument is based on the general fact that the purpose of planning is to take into account all relevant factors and to think into the future as regards the impact of a specific project.<sup>143</sup> In

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<sup>137</sup> See Principle 7 of the Rio Declaration. Also see Honkonen *The CBDR Principle 4* and Beyerlin and Maruhn *International Environmental Law* 48.

<sup>138</sup> See articles 15 and 191 of *Rio+20 The Future we Want*, 2012 UNGA A/66/L.56. Article 191 deals specifically with climate change.

<sup>139</sup> Principle 4.1 of the New Delhi Declaration.

<sup>140</sup> Principle 4.2(a) of the New Delhi Declaration.

<sup>141</sup> There is of course the option of approaching domestic courts, but this option may be less than useful as a mechanism for resolving transfrontier disputes arising from TFCAs.

<sup>142</sup> Principle 4.2(b) of the New Delhi Declaration.

<sup>143</sup> For a similar view and also other definitions see Mintzberg 1981 *Strategic Management Journal* 319-324.

this context planning is argued to be proactive rather than reactive. As was shown earlier, planning is an essential element in the successful management of PAs (as expressed through Management Plans), and a lack of planning is one of the reasons for biodiversity loss globally.<sup>144</sup> The principle also includes EIAs,<sup>145</sup> which are important in the TFCA context, as TFCAs incorporate more than one type of land-use and developments and projects may be undertaken in these areas.<sup>146</sup> Therefore the inclusion of EIAs is important so that all relevant interests may be considered and weighed.<sup>147</sup> EIAs are further important as they serve as one of the tools in achieving sustainable development.<sup>148</sup>

The principle furthermore requires that all decision-making processes must incorporate the precautionary approach. These processes must take into account up-to-date scientific research and they must be transparent.<sup>149</sup> Making reference in decisions to scientific research ensures that the best possible standards may be incorporated into decision making and planning, as opposed to politically motivated goals. In the context of TFCAs this is important since biodiversity conservation is a complex subject and requires many factors to be taken into account.<sup>150</sup> Transparency is also important to TFCAs, as there are many stakeholders that must be considered in all decision-making processes.<sup>151</sup> In this context the principle requires that the review of decisions should be possible, and that appropriate institutions should be available to facilitate this.<sup>152</sup> In a TFCA context, this would

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<sup>144</sup> See para 2.1.2 above.

<sup>145</sup> Principle 4.2(c) of the New Delhi Declaration.

<sup>146</sup> See the definitions in para 2.3.2 above.

<sup>147</sup> EIA is used here as a tool to effect the principle of sustainable use, in that it may determine that a certain activity cannot proceed because of the envisaged immediate or long-term effects on biodiversity. See Principle 4.2(c)-(d).

<sup>148</sup> Wilkins 2003 *Environmental Impact Assessment Review* 401-414 and George 1999 *Environmental Impact Assessment Review* 175-200.

<sup>149</sup> Principle 4.4 of the New Delhi Declaration.

<sup>150</sup> Biodiversity governance in this context refers to the governance of species (including people) ecosystems (again, people are part thereof) and genetic diversity.

<sup>151</sup> See Lausche *Guidelines for Protected Areas Legislation* 271; Duffy 2006 *Political Geography* 89-109; Whande and Suich "Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area" 20-21. Also see Hanks 2003 *Journal of Sustainable Forestry* 138; and in general Paterson and Glazewski "Protected Areas and Community Based Conservation" 321-362.

<sup>152</sup> Principle 4.4 of the New Delhi Declaration.

necessitate the establishment of an organ / body able to review such decisions.<sup>153</sup>

The precautionary principle enjoys wide recognition throughout domestic as well as international law,<sup>154</sup> although it has not (yet) achieved the status of customary international law.<sup>155</sup> At the AU level the African Commission used the principle in the SERAC case. The African Commission found that the African Charter required independent scientific monitoring of threatened environments prior to any major development.<sup>156</sup> The Commission also stated that scientific information relating to potential impacts must be disseminated to all interested and affected parties and that they were to be provided with ample time to be heard and to participate in development decisions.<sup>157</sup> In making this demand the Commission underlined the importance of precaution and transparency under the African Charter. To this end, Principle 4 contributes directly to the driver of sustainable development.

### 3.2.5 Principle 5: Public participation and access to information and justice<sup>158</sup>

TFCAs are intended to give effect to sustainable development in facilitating the integration of social, environmental and economic concerns across borders through biodiversity conservation.<sup>159</sup> Many stakeholders are involved in such a process and especially local communities are increasingly involved in all aspects of TFCAs.<sup>160</sup> For these reasons, public participation, access to information and justice are integral to the success and viability of TFBC.

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<sup>153</sup> Such a body could be established by the MoU of the TFCA, such as the Project Steering Committee of the MDTP.

<sup>154</sup> De Sadeleer *Environmental Principles* 39-102; Bodansky *The Art and Craft of International Environmental Law* 194-199; and Beyerlin and Marauhn *International Environmental Law* 47-52.

<sup>155</sup> De Sadeleer *Environmental Principles* 39-102; Bodansky *The Art and Craft of International Environmental Law* 194-199; and Beyerlin and Marauhn *International Environmental Law* 56.

<sup>156</sup> Para 53 of the SERAC case.

<sup>157</sup> Para 53 of the SERAC case.

<sup>158</sup> See in general Cordiener Segger "Sustainable Development in International Law" 172-173.

<sup>159</sup> See chapter 2 above.

<sup>160</sup> See Lausche *Guidelines for Protected Areas Legislation* 271; Duffy 2006 *Political Geography* 89-109; Whande and Suich "Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area" 20-21. Also see Hanks 2003 *Journal of Sustainable Forestry* 138; and in general Paterson and Glazewski "Protected Areas and Community Based Conservation" 321-362.

Public participation is also seen as an essential element of sustainable development and good governance.<sup>161</sup> The Sofia Declaration states: “[T]he principles of public participation and access to information and justice are foundational to sustainable development.”<sup>162</sup> The New Delhi Principles state that public participation requires responsive; transparent; and accountable stakeholders.<sup>163</sup> For TFBC in the TFCA setting, the cornerstone of public participation would be to create an enabling environment for the engagement of any interested or affected parties in all matters related to the management of the TFCA with due regard to privacy and business confidentiality.<sup>164</sup> One observes a complementary relationship between the precautionary principle as discussed in the SERAC case above and public participation as contained in principle 5 of the New Delhi Declaration. This is expressly noted in the separate opinion of Judge Trinidad in the *Case Concerning Pulp Mills on the River Uruguay* (Pulp Mills case):<sup>165</sup> “the obligation to notify and share information with the affected populations is one which ensues from the precautionary principle.” Ensuring effective engagement or participation by all relevant stakeholders should in theory ensure the balancing and consideration of all relevant social, environmental and economic concerns with a view to promoting sustainable development.

Effective empowerment on the other hand requires that certain administrative procedures and procedural rights are respected and upheld. The foregoing rights and procedures should be facilitated, enforced and mediated with the help of an effective judiciary.<sup>166</sup> In the SADC transfrontier setting this is particularly complex, as the functioning of the only judicial mechanism for supra national dispute settlement, the SADC Tribunal, has been suspended.<sup>167</sup> With TFBC requiring joint holistic management, falling back on national judiciaries as mechanisms for dispute settlement would be counterproductive. Notably, falling back on national jurisdictions

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<sup>161</sup> Principle 5.1 of the New Delhi Declaration.

<sup>162</sup> Para 7 of the Sofia Declaration.

<sup>163</sup> Principle 5.1 of the New Delhi Declaration.

<sup>164</sup> Adapted from Principle 5.2 of the New Delhi Declaration.

<sup>165</sup> *Pulp Mills on the River Uruguay* (Argentina v Uruguay) ICJ Reports 2010 paras 203-219.

<sup>166</sup> Principle 5.3 of the New Delhi Declaration. Also see Cordiener Segger “Sustainable Development in International Law” 172.

<sup>167</sup> See [www.sadc.int](http://www.sadc.int) [date of use 14 November 2013].

would “re-erect the fences” brought down by TFCAs and might undermine the overtly collectivist approaches argued earlier.<sup>168</sup> This challenge should thus be overcome with the establishment of a supra-national judicial body that can act as a transfrontier dispute settlement forum and as an enforcer of supra-national (regional SADC) law.

Although Principle 5 could possibly not be seen as customary international law, the principle offers guidance as to the important procedural aspects that may enable sustainable development in the TFBC context.<sup>169</sup> The procedural aspects contained in Principle 5 lie at the heart of the practical implementation of TFBC at grass-roots level and Principle 5 contains very important matters to be considered in a legal framework for TFBC in SADC: i.e., public participation, access to information and access to justice. Public participation is a very important issue in Africa and a crucial element within TFCAs, as communities form an integral part of TFBC. For this reason, public participation is further unpacked in the African context by looking at an interpretation thereof by the African Commission.

In *Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya*, 2010 (Endorois case) the African Commission considered the principle of public participation.<sup>170</sup> The Commission not only acknowledged the requirement of participation, but also reiterated that participation should be *effective*.<sup>171</sup> The Commission explained that mere notice of an impending project as a *fait accompli* would not be regarded as effective participation as the affected community would not have had the opportunity to influence the outcome.<sup>172</sup> The Commission further noted that an equal bargaining

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<sup>168</sup> See in general para 2 above.

<sup>169</sup> The importance of this principle is found in the existence of the *Aarhus Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters*, 1999 38 *ILM* 517. Unfortunately, this Convention does not find application in the SADC as none of the SADC member states have signed or ratified it.

<sup>170</sup> Para 1 of the Endorois case provides a brief summary of the factual dispute: “[the Endorois community allege] violations resulting from the displacement of the Endorois community, an indigenous community, from their ancestral lands, the failure to adequately compensate them for the loss of their property, the disruption of the community's pastoral enterprise and violations of the right to practise their religion and culture, as well as the overall process of development of the Endorois people.”

<sup>171</sup> Para 281 of the Endorois case.

<sup>172</sup> Para 281 of the Endorois case.

position is a requirement for effective participation.<sup>173</sup> The Commission stated that literacy and an understanding of the project at hand were seen as key-ingredients in providing an equal bargaining position as the basis for public participation. It provided further important guidance to be considered in applying the principle of public participation, explaining that:<sup>174</sup>

[t]his duty requires the State to both accept and disseminate information, and entails constant communication between the parties. These consultations must be in good faith, through culturally appropriate procedures and with the objective of reaching an agreement.

From this communication by the Commission it seems clear that public participation is held in high regard by the African Commission and it should in theory therefore be held in high regard in the African context and in the TFBC context in general.

### 3.2.6 *Principle 6: Good governance*

Good governance is a principle initially developed by the World Bank<sup>175</sup> and subsequently adopted in the JPOI.<sup>176</sup> Good governance is often described as a normative principle of administrative law.<sup>177</sup> The United Nations High Commissioner for Human Rights (OHCHR) describes the five key attributes of good governance as being transparency, responsibility, accountability, participation and responsiveness.

Furthermore, the United Nations Millennium Declaration notes that:<sup>178</sup>

[s]uccess in meeting these objectives [in this context development and poverty eradication] depends, inter alia, on good governance within each country. It also depends upon good governance at the international level and on transparency in the financial, monetary and trading systems. [The General Assembly is] committed to an open, equitable, rule based, predictable and non-discriminatory multilateral trading and financial system.

It would seem that good governance gives further effect to and complements public participation as described above.<sup>179</sup> In this sense the principle of good governance

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<sup>173</sup> Para 282 of the Endorois case.

<sup>174</sup> Para 289 of the Endorois case.

<sup>175</sup> World Bank *Sub-Saharan Africa: From Crisis to Sustainable Growth 1989*. Also see Cordiener Segger "Sustainable Development in International Law" 173-174.

<sup>176</sup> See para 4 of the JPOI.

<sup>177</sup> Chowdhury and Skarstedt *The Principle of Good Governance* 4.

<sup>178</sup> *United Nations Millennium Declaration*, 2000 UNGA A/RES/ 55/9.

seeks to ensure procedural fairness by attempting to adopt democratic and transparent decision-making procedures and financial accountability; to take effective measures to combat official or other corruption; to respect the principle of due process in their procedures; and to observe the rule of law and human rights.<sup>180</sup>

In the TFCA context it would be critical for decision making to be effective and transparent because of the engagement of multiple stakeholders.<sup>181</sup> Moreover, as these areas straddle borders, the incorporation of good governance into TFBC could benefit good neighbourliness, inter-state cooperation and state responsibility (in theory), as the existence of well-run transfrontier institutions could kindle respect across national borders. Good governance cannot be described as a principle of customary international law despite its being well legislated in various legal regimes.<sup>182</sup> Notwithstanding, good governance gives important guidance in procedural matters in order to ensure that decisions taken could eventually give effect to sustainable development.<sup>183</sup> Moreover, a framework for TFBC could arguably not be viable if the procedural aspects thereof did not comply with the principles of or give effect to sustainable development. Therefore, good governance as a guiding principle may be viewed as an important element giving effect to sustainable development and accordingly to TFBC. The following elements are generally considered to be inherent in good governance:<sup>184</sup> democratic institutions that are responsive to the needs of the people; adherence to the rule of law; participation, transparency and accountability; appropriate devolution of authority; anti-corruption and effective compliance measures; and appropriate conflict and dispute resolution as well as access to the latter. The foregoing should be read with the principles of good governance as specifically tailored for PAs by the IUCN-World Commission on Protected Areas. The principles are: legitimacy and voice, subsidiarity, fairness, do no harm, direction, performance, accountability,

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<sup>179</sup> See para 3.1.5 above.

<sup>180</sup> Principle 6.1 of the New Delhi Declaration.

<sup>181</sup> See in general Kotzé and De la Harpe 2008 *PELJ* 202-252.

<sup>182</sup> See in general Chowdhury and Skarstedt *The Principle of Good Governance* 1-22.

<sup>183</sup> Cordiener Segger "Sustainable Development in International Law" 173-174.

<sup>184</sup> IUCN *Position Paper: Governance for Sustainable Development* 5. Also see Cordiener Segger "Sustainable Development in International Law" 173-174.

transparency and human rights protection.<sup>185</sup>

In the SERAC case the African Commission highlighted certain elements of good governance as stipulated above, although the Commission did not explicitly use the term “good governance”. The Commission placed emphasis on participation, accountability and transparency and reiterated that African governments have a duty to protect their citizens by effectively implementing participation, accountability and transparency.<sup>186</sup> The importance of participation as described in the Endorois case also introduces an important dimension to good governance, when the inference is drawn that governance in general should be conducted from the basis of an equal bargaining position with respect to the state and its citizens.<sup>187</sup> The Endorois case and its requirements for equal bargaining may reflect some of the elements required for procedural natural law as described by Fuller.<sup>188</sup> The requirements to create “comprehensible law” and to publish the law to all parties affected gain considerable traction when considering the Endorois communication.<sup>189</sup> Accordingly, good governance in TFCAs, especially considering the existing disparities between member states, should take into account governance based on the elements discussed above relating to good governance in order to reflect procedural fairness, transparency, representivity, accountability and inclusive governance. A failure to do so will result in a situation where projects and developments are deemed to be *fait accompli*, as described in the Endorois case.<sup>190</sup>

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<sup>185</sup> Dudley *Guidelines for Applying Protected Area Management Categories* 28. Also see para 2.3.1.4 above.

<sup>186</sup> Paras 53, 54, 57 and 58 of the SERAC case.

<sup>187</sup> Para 282 of the Endorois case.

<sup>188</sup> See in general Fuller *The Morality of Law* 46-90. Also see Murphy 2005 *Law and Philosophy* 239-262.

<sup>189</sup> Fuller argues that law can be procedurally fair only if the law is indeed comprehensible. Fuller explains further that law needs to be made public in order for it to be accepted as fair or morally acceptable. In lay terms this entails that members of the public need to be made aware of the law applicable to them. These aspects are two of eight negative criteria developed by Fuller that, according to him, are the requirements for valid law. See Fuller *The Morality of Law* 46-90.

<sup>190</sup> Para 281 of the Endorois case.

### 3.2.7 Principle 7: Integration

The principle of integration lies at the heart of sustainable development.<sup>191</sup> In the context of the New Delhi Declaration, Principle 7 aims to integrate human rights, social concerns, economic concerns, and environmental concerns. Furthermore, the New Delhi Declaration recognises that all of the aforementioned interests and concerns are interrelated and interdependent.<sup>192</sup> Such recognition is in line with the ideology behind the drivers of TFBC (sustainable development and biodiversity) and caters for a holistic all-inclusive approach when enabling sustainable development specifically. Moreover, this recognition reiterates and justifies the inclusion of the human element in defining biodiversity, as it emphasises the fact that environmental conservation and human concerns are intertwined.<sup>193</sup>

The integration principle serves as the centrepiece of sustainable development, balancing and recognising all the relevant concerns related to sustainable development.<sup>194</sup> The integration principle serves not only to integrate social, economic and environmental concerns, but also serves to integrate the principles contained in the Declaration itself.<sup>195</sup> Thus, to properly give effect to the concept of sustainable development, all the aforementioned principles must guide a specific activity, process or decision. Accordingly, sustainable development depends on the use or promotion not only of one or two principles, but on the integration of all of the principles together.

Perhaps the most important aspect of the integration principle is that it could function as a mechanism to ensure that all three pillars of sustainable development are

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<sup>191</sup> Bugge *The Principle of Integration and its Dilemmas* paper delivered at the 7<sup>th</sup> Annual Colloquium of the IUCN Academy of Environmental Law Wuhan, China 1-5 November 2009.

<sup>192</sup> Principle 7.1 of the New Delhi Declaration. See in general Cordiener Segger "Sustainable Development in International Law" 174-176.

<sup>193</sup> See para 2.1.1 above.

<sup>194</sup> See Jodoin *The Principle of Integration and Interrelationship in Relation to Human Rights and Social, Economic and Environmental Objectives* 3.

<sup>195</sup> Principle 7.3 of the New Delhi Declaration.

balanced in decision-making.<sup>196</sup> In other words, social and economic development may not harm environmental protection, and environmental protection may not have a detrimental effect on social and economic development. At a supra-national level, the integration principle is supported by Principle 11 of the Rio Declaration. Principle 11 provides that:

States shall enact effective environmental legislation. Environmental standards, management objectives and priorities should reflect the environmental and developmental context to which they apply. Standards applied by some countries may be inappropriate and of unwarranted economic and social cost to other countries, in particular developing countries.

In acknowledging that the environmental legal framework should reflect the developmental context to which it applies, Principle 11 integrates both the social and the economic components of sustainable development into the environmental law framework. It seems that Principle 11 also implicitly incorporates the CBDR principle by stating that differential standards between countries may be appropriate. In so doing, the integration principle must be interpreted in accordance with the principle of CBDR.<sup>197</sup> An example is where state A is more developed (both socially and economically) and has a greater capacity to conserve biodiversity. State B is less developed and its developmental needs require that the environmental pillar of sustainable development may be less important than facilitating social and economic growth. In this example, state A will have a higher responsibility to conserve biodiversity than state B. In the TFBC context some conflict may arise, as holistic management of the same area is the aim. In theory the principle of CBDR should facilitate the resolution of such conflict and it could be used to equally distribute the responsibilities of each state according to their respective capabilities.

The SERAC case implicitly recognises Principle 7 when interpreting the content of article 24 of the African Charter.<sup>198</sup> The Commission states that the right to a clean

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<sup>196</sup> See in general Jodoin “The Principle of Integration and Interrelationship in International Sustainable Development Law” 83-121 and Liberatore “The integration of sustainable development objectives into EU policy-making” 107-127.

<sup>197</sup> Cordiener Segger “Sustainable Development in International Law” 175. Also see Jodoin *The Principle of Integration and Interrelationship in Relation to Human Rights and Social, Economic and Environmental Objectives* 1-26.

<sup>198</sup> Article 24 of the African Charter reads: “All peoples shall have the right to a general satisfactory environment favourable to their development”.

and safe environment is closely linked to economic and social rights.<sup>199</sup> The Commission thus confirms the need to integrate the three pillars of sustainable development and the applicability of Principle 7 to the African context, albeit implicitly.

### 3.2.8 *Synopsis*

In sum, the New Delhi Principles may be viewed as a guiding framework when attempting to achieve sustainable development in any activity, process or decision. Most of the principles contained in the New Delhi Declaration are well embedded in international law in general and international environmental law specifically, albeit mostly as soft law guidelines.<sup>200</sup> More importantly, the principles contained in the Declaration have been applied generously by the African Commission and in some instances even by the ICJ, indicating the relevance and applicability of the principles in global and African jurisprudence. It should again be stressed that African jurisprudence does not directly apply the New Delhi Declaration but applies some of the international law principles contained therein. Notwithstanding, through the application of these principles by the African Commission important guidance is given as to the standing and the legal status of the principles, as they are used to interpret factual situations where disputes arise within the African legal context. By using these principles the African Commission recognises that the principles have interpretative and substantive weight within the African legal framework. Although it would be unwarranted to argue that the principles are trite law because of their application by the African Commission, the inference is drawn that the principles contained in the Declaration are not foreign to African law and policy. In theory, then, the principles should more easily gain traction when they are included in a legal framework for enabling TFBC in TFCAs.

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<sup>199</sup> Para 51 of the SERAC case.

<sup>200</sup> See in general Cordiener Segger "Sustainable Development in International Law" 167-176.

### 3.3 *Shared natural resources: the UNEP Principles*<sup>201</sup>

The UNEP Principles address the second driver behind TFBC: biodiversity.<sup>202</sup> The principles that will be addressed in this section are cooperation, codification, sovereignty, environmental assessment, and those enabling procedural aspects related to shared governance of biodiversity.

#### 3.3.1 *Principle 1: Cooperation*

Principle 1 deals with cooperation and aims to gear cooperation between states towards the elimination and prevention of adverse effects that may be caused by the use of biodiversity (unsustainable use, for example).<sup>203</sup> Principle 1 also incorporates equity as part of cooperation by stating that cooperation should take place on an “equal footing”. Although the Principle does not explain what is meant by this reference to equity, it is possible that this may indicate the recognition of different capacity as well as different needs. Before this assumption is justified, a link between cooperation and participation will be established in order to better interpret these two aspects in the TFBC context. After having done so, an interpretation of Principle 1 in the light of the New Delhi Declaration is provided in order to elucidate what cooperation entails in the TFCA context.

Participation, as defined in the Oxford English Dictionary, is “active involvement in a matter or event, especially one in which the outcome directly affects those taking part.”<sup>204</sup> Cooperation, as defined by the Oxford English Dictionary, is the “action of

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<sup>201</sup> On the general nature of UNEP and a historical overview see Petsonk 1990 *American University International Law Review* 351-391. For a discussion of the relevance of the UNEP Principles in international environmental law see Dupuy 1990 *Michigan Journal of International Law* 424-428 and Sands and Peel *Principles of International Environmental Law* 36-37.

<sup>202</sup> See para 2.4 above.

<sup>203</sup> Principle 1 states: “It is necessary for States to co-operate in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States. Accordingly, it is necessary that consistent with the concept of equitable utilization of shared natural resources, States co-operate with a view to controlling, preventing, reducing or eliminating adverse environmental effects which may result from the utilization of such resources. Such co-operation is to take place on an equal footing and taking into account the sovereignty, rights and interests of the States concerned.”

<sup>204</sup> *Oxford English Dictionary Online* [www.oed.com](http://www.oed.com) [date of use 21 April 2014].

co-operating, i.e. of working together towards the same end, purpose, or effect; [or] joint operation.”<sup>205</sup> It would seem that the common element in the two definitions is “joint action”. Accordingly, it would be difficult to have cooperation without participation and *vice versa*. Given the synergy between cooperation and participation, it is possible to use the New Delhi Declaration in the interpretation of Principle 1 of the UNEP Principles. Important links are drawn between Principles 2, 4 and 5 of the New Delhi Declaration, as they deal with cooperative participation and may potentially influence the meaning and content of the notion of cooperation in terms of the UNEP Principles.<sup>206</sup> The first inference that may be drawn is that states have a duty to cooperate in the eradication of poverty in terms of Principle 2 of the New Delhi Declaration.<sup>207</sup> Secondly, a duty to cooperate and participate with all relevant stakeholders, as contained in Principle 4 of the New Delhi Declaration, widens the inter-state cooperation duty contained in the UNEP Principles, and is more fitting to the nature of TFBC.<sup>208</sup> This approach is more fitting as TFBC goes beyond the traditional inter-state governance model and aims to involve all stakeholders, including non-state actors.<sup>209</sup> Thirdly, Principle 5 of the New Delhi Declaration broadens the scope of inter-state cooperation by including stakeholders and by including a right to access to information as well as to justice.<sup>210</sup> The importance of including multiple stakeholders and procedural rights is reiterated by the African Commission in the Purohit, Endorois and SERAC cases.<sup>211</sup> It is acknowledged that the UNEP Principles were drafted at a time when conservation was viewed as occurring in a different paradigm where states were the predominant actors, especially where resources traversed sovereign borders. However, it is important to view the UNEP Principles now through a more contemporary lens in order to propose the best possible options for a legal framework facilitating TFBC in TFCAs.

Principle 1 of UNEP states that cooperation is to take place on an equal footing. This potentially provides an opportunity for less developed states to benefit from their

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<sup>205</sup> *Oxford English Dictionary Online* [www.oed.com](http://www.oed.com) [date of use 21 April 2014].

<sup>206</sup> See para 3.2 above.

<sup>207</sup> See para 3.2.2 above.

<sup>208</sup> See para 3.2.4 above as well as para 2 and 2.3 above.

<sup>209</sup> See para 2.3 above.

<sup>210</sup> See para 3.2.5 above.

<sup>211</sup> See in general para 3.2 above.

more developed neighbours.<sup>212</sup> The UNEP Principles does not elaborate or explain what is meant by an “equal footing”. An answer may be found in the African Commissions’ interpretation of effective participation in the Endorois case.<sup>213</sup> The Commission found that a crucial element of effective participation is an equal bargaining position.<sup>214</sup> Given the nexus between cooperation and participation established above, it is argued that “cooperation on an equal footing” could benefit from the Commissions’ explanation of participation on an equal footing in the African context. The Commission stated that literacy and understanding of the project/development at hand were crucial in providing grounds for fair bargaining.<sup>215</sup> Furthermore, the Commission in the Endorois case provided that participation requires a state to accept and disseminate information, constant two-way communication, good faith, culturally appropriate procedures, and the objective of reaching an agreement.<sup>216</sup> Given the specific interpretation and application within the African context of both participation and cooperation, it is argued that the elements of effective participation as put forward in the Endorois case should inform an interpretation of “cooperation on an equal footing” in terms of Principle 1 of the UNEP Principles in TFCAs.

Principle 1 also acknowledges cooperation in the conservation and harmonious utilisation of natural resources. However, the UNEP Principles fail to define conservation and the harmonious utilisation of natural resources. One may draw some insight from Principle 1 of the New Delhi Declaration here. Referring to sustainable use rather than harmonious utilisation, the New Delhi Declaration provides more substantive guidance as to the use of natural resources. Importantly, the New Delhi Declaration also provides room for the interpretation of sustainable use in stating that states should manage their natural resources “including natural resources within their own territory or jurisdiction, in a rational, sustainable and safe

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<sup>212</sup> See the discussion on CBDR in para 3.2.3 above.

<sup>213</sup> See para 3.2.4 above. It should be noted that the Endorois case was argued between the Endorois community and the Kenyan Government and not between states. Notwithstanding, and given the fact that it was argued above that cooperation needs to be extended beyond the state sphere, the elements of cooperation should apply regardless of the identities of the parties involved.

<sup>214</sup> See para 3.2.4 above.

<sup>215</sup> Para 289 of the Endorois case.

<sup>216</sup> Para 289 of the Endorois case.

way so as to contribute to the development of their peoples.”<sup>217</sup>

The recognition of “the development of their peoples” will probably be attractive to SADC states, as development is high on the agenda in the SADC region.<sup>218</sup> The New Delhi description provides a more subjective view of what sustainable use may be in allowing states to recognise their own people’s needs. When reading the phrase “harmonious utilisation” as contained in the UNEP Principles, it would seem that a harmonised utilisation and conservation approach is expected from states. Objectively seen, this may be unfair as member states do not have the same capacity, resources and developmental status. Here cooperation based on an equal footing, taking into account existing disparities between SADC member states may potentially provide a solution. In a TFCA setting, cooperation on an equal footing may be facilitated by using CBDR as an interpretive tool in order to achieve “differential equality”.<sup>219</sup>

### 3.3.2 *Principle 2: Codification of principles*

Principle 2 declares that states need to conclude bi- or multilateral agreements in order to effectively ensure cooperation.<sup>220</sup> The Principle further requires the inclusion of the UNEP Principles in such agreements in order to make them legally binding. The contents of the agreements, as proposed by Principle 2, are significant as they will form the guiding basis for the conduct of states in relation to shared environmental resources. In essence, they will be the legal framework or at least form a part thereof. Moreover, by including legal principles regulating their conduct,

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<sup>217</sup> Principle 1.2 of the New Delhi Declaration.

<sup>218</sup> See the discussion on sovereignty and colonialism in paras 2.2.1 and 2.2.2 above. On development in general, see the SADC *RISDP* and specifically at 65-66.

<sup>219</sup> It is argued here that, because of the many discrepancies that exist between SADC member states, differential treatment in terms of rights and responsibilities will be the only means to achieve equality. Hence the term “differential equality” is used.

<sup>220</sup> Principle 2 reads: “in order to ensure effective international co-operation in the field of the environment concerning the conservation and harmonious utilization of natural resources shared by two or more States, States sharing such natural resources should endeavour to conclude bilateral or multilateral agreements between or among themselves in order to secure specific regulation of their conduct. In this respect, applying as necessary the present principles in a legally binding manner, or should endeavour to enter into other arrangements, as appropriate, for this purpose. In entering into such agreements on arrangements, States should consider the establishment of institutional structures, such as joint international commissions, for consultations on environmental problems relating to the protection and use of shared natural resources.”

the harmonisation of decision-making processes (and thus of management efforts) should be fostered. Implementing Principle 2 in the TFBC setting could potentially bring legal certainty (or some degree thereof) to an otherwise disjointed environmental law framework.<sup>221</sup> More importantly, the codification of legal principles in a supra-national framework could provide legal recourse for interested and affected parties to enforce their rights flowing from the framework.<sup>222</sup>

Principle 2 is crucially important to the success of TFBC as it emphasises the importance of bi- or multilateral agreements in a transfrontier context. It is submitted that the development of legal principles would mean nothing should they not be “codified” in order to become legally binding in the form of a SADC Protocol. Even if the principles are codified in policy or guidelines to guide and influence the harmonisation of decisions, processes, and the development of national law – such codification would be a positive step for TFBC. In the AU in general and the SADC specifically, however, collective consensus can be problematic. Getting the required consensus in order to draft and adopt a supra-national legal instrument requires the content of such a proposed instrument to be carefully considered. Although it may not be considered a general fact, history has shown that African countries shy away from rule-based treaty / protocol approaches and prefer more general and vague instruments.<sup>223</sup> Post-Colonial Africa’s hesitant, and sometimes absent, participation in the international law arena also contributes to this lack of supra-national consensus.<sup>224</sup> The revised *African Convention on the Conservation of Nature and Natural Resources*, 2003<sup>225</sup> (Revised African Convention) as well as the *Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa*, 1991 (Bamako

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<sup>221</sup> See the comments on the SADC legal framework in paras 1 above and 4.2 below.

<sup>222</sup> These procedural rights will be discussed below.

<sup>223</sup> See the discussion on rules and principles in para 3.1.2 above. The Revised Convention is still not in force and Africa relies on an environmental framework convention concluded in 1968 without a COP. See the discussions in para 4 below. Also see Abi-Saab 1962 *Howard Law Journal* 118-119; Anand 1966 *International and Comparative Law Quarterly* 55, 70; Osman 1979 *Nordic Journal of International Law* 15-24. Also see Maluwa 2000 *African Journal of International and Comparative Law* 201-225 and Maluwa 2002 *Netherlands International Law Review* 81-103.

<sup>224</sup> See in general Abi-Saab 1962 *Howard Law Journal* 118-119; Anand 1966 *International and Comparative Law Quarterly* 55, 70; Osman 1979 *Nordic Journal of International Law* 15-24. Also see Maluwa 2000 *African Journal of International and Comparative Law* 201-225 and Maluwa 2002 *Netherlands International Law Review* 81-103.

<sup>225</sup> See para 4 below.

Convention) serve as examples where African legal instruments containing precise and binding provisions have struggled to gain traction because states are not willing to forfeit some of their sovereign rights to further a bigger cause.<sup>226</sup> The same observation may be ascribed to various other international legal instruments, notably in the climate change context.<sup>227</sup>

Principle 2 is unique, because it obliges states to conclude binding agreements in order to promote the conservation and utilisation of natural resources. Today, a mutation of such an inclusion could be the obligation on states in TFCAs to adopt joint management plans (JMPs) or integrated development plans (IDPs). JMPs and IDPs, as will be seen in chapter 5 below, do not contain all of the overarching legal principles described in both the New Delhi Declaration and the UNEP Principles. The JMPs and IDPs do, however, contain the finer detail and elements of the legal principles that enable the application of the legal principles contained in the New Delhi Declaration and the UNEP Principles. Bearing the foregoing in mind, it is important to have a sub-regional legal framework that facilitates the principles giving effect to TFBC. In theory this legal framework should in turn align the respective JMPs, IDPs, and other governance documents for each of the TFCAs in SADC. This alignment and harmonisation is theoretically possible as the legal principles distilled in this thesis should all aim to realise biodiversity conservation and sustainable development. Providing the principles at supra-national level could facilitate the development of JMPs and IDPs for TFCAs based on the guidance provided by the principles. In so doing the principles should facilitate the JMPs and IDPs to incorporate the aims of both biodiversity conservation and sustainable development. Harmonisation should thus be achieved while JMPs and IDPs should refine the legal principles taking into account the actual needs of the particular TFCA. It is important

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<sup>226</sup> For many years some African countries gained financial benefit from the storage of waste, mostly European. The notorious KOKO incident in Nigeria in 1987 led to the adoption of the Bamako Convention. The contentiousness of the issue can be explained by the fact that it took almost eight years for the necessary ten ratifications needed for the treaty to enter into force to be accumulated. This is because, among other reasons, the Bamako Convention contains substantive provisions banning the trade in hazardous waste. At the time of writing, the Bamako Convention has still been ratified by fewer than 50% of the African states. See Van der Linde *CILSA* 99. See in general Birnie *et al International Law and the Environment* 24 and Verschuuren and Oudenaarden "The Role of Ideals in Legal Development" 240.

<sup>227</sup> In general see Hunter *et al International Environmental Law and Policy* 630-725 see specifically 662-704.

to leave room to manoeuvre in the development of IDPs and JMPs, as each TFCA may have different needs: no single recipe should be proposed as the solution to all the problems arising from TFBC. A legal framework providing guiding principles for TFBC will do just that: leave room for interpretation and the development of a management framework while still setting guidelines (the principles) for a harmonised approach.<sup>228</sup> The importance of the legal framework is indicated by the fact that the MoUs and establishing treaties of TFCAs require JMPs and IDPs to be drawn up in accordance with regional and sub-regional law.<sup>229</sup>

### 3.3.3 *Principle 3: Sovereignty*

Principle 3 enshrines state sovereignty by providing that states have the sovereign right to exploit their resources in accordance with their own requirements.<sup>230</sup> This sovereign right is coupled with the duty to minimise the adverse effects their actions may have on a neighbouring jurisdiction.<sup>231</sup> In other words, a limitation is placed on the way in which a state may use its sovereign territory.

As argued above, the importance of sovereignty in the SADC is not to be underestimated.<sup>232</sup> The recognition of and respect for sovereignty, as it is held in such high regard in the SADC, should in theory have a twofold effect. Firstly it should create independent political recognition and respect leading potentially to non-biased cooperation, as a state's sovereign interest and rights are recognised.

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<sup>228</sup> See para 3.1.2 above on legal principles.

<sup>229</sup> See article 5(3) of the Treaty on the Establishment of the Great Limpopo Transfrontier Park, 2002, and article 6(3) of the Treaty on the Establishment of the Ai-Ais/Richtersveld Transfrontier Park, for example.

<sup>230</sup> Principle 3 reads as follows: "1. 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 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. 2. The principles set forth in paragraph 1, as well as the other principles entitled in this document, apply to shared natural resources. 3. Accordingly, it is necessary for each state to avoid to the maximum extent possible and to reduce to the minimum extent possible the adverse environmental effects beyond its jurisdiction of the utilization of a shared natural resource so as to protect the environment, in particular when such utilization might (a) cause damage to the environment which could have repercussions on the utilization of the resource by another sharing State; (b) threaten the conservation of a shared renewable resource; (c) endanger the health of the population of another State. Without prejudice to the generality of the above principle, it should be interpreted taking into account, where appropriate, the practical capabilities of States sharing the natural resource."

<sup>231</sup> Principle 3(3).

<sup>232</sup> See para 2.2.2 above.

The recognition of a state's sovereign interest and rights may counter feelings of renewed colonialism when entering into supra-national arrangements that require cooperation.<sup>233</sup> The second effect contrasts with the first. As pointed out in chapter 2, absolute sovereignty could hinder TFBC as it might lead to fragmentation and would not promote a holistic approach to biodiversity conservation.<sup>234</sup> In this context it was argued that the concept of custodial sovereignty may be more fitting in the TFBC context.<sup>235</sup>

In this context Principle 3 contains a provision that states that “the practical capabilities of States sharing the natural resource” should be taken into account in the general application of Principle 3. The implication of this inclusion becomes clear when Principle 3 is read with Principle 15. Principle 15 states that:

The present principles should be interpreted and applied in such a way as to enhance and not to affect adversely development and the interests of all countries, and in particular of the developing countries.

In this context it is clear that the UNEP Principles recognise developmental disparities between states. Reading Principles 3 and 15 together, it becomes clear that the interpretation of the responsibilities of states will differ in relation to their capabilities. When reading the Principles together a shade of the CBDR principle is observed, as Principles 3 and 15 would place a “lighter” responsibility on states with less capability and a “heavier” responsibility on states with more capability.<sup>236</sup> This promotes the concept of custodial sovereignty, as the common responsibilities should, in theory, promote common approaches.<sup>237</sup> Again, CBDR in the SADC should be approached with the important caveat issued above: stronger states may pull out of TFBC commitments when they feel they are not receiving enough benefits for the amount of effort and resources that they are investing.<sup>238</sup>

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<sup>233</sup> See in general para 2.2 above. On colonialism see specifically para 2.2.1 above.

<sup>234</sup> See para 2.2.2 above.

<sup>235</sup> See para 2.2.2.1 above.

<sup>236</sup> See para 3.2.3 above.

<sup>237</sup> See para 2.2.2.1 above.

<sup>238</sup> See para 3.2.3 above.

### 3.3.4 Principles 4 and 8: Environmental assessments

Principle 4 requires states to undertake environmental assessments before any activity that may significantly affect a shared resource is undertaken.<sup>239</sup> The UNEP Principles define “significantly affect” as any appreciable effects excluding *de minimis* effects. Environmental assessments (interpreted to mean EIAs in general) and Principles 4 and 5 of the New Delhi Declaration should be read together to provide a TFBC perspective, keeping focus on the drivers thereof: sustainable development and biodiversity. When considering Principle 4 of the UNEP Principles it is important to note that provision is made for environmental assessments only where the shared resource may be affected. No mention is made of the situation where the activity may potentially impact on local people directly or indirectly. The context and time of the drafting of the UNEP Principles perhaps explains this exclusion, as conservation efforts did not always then include the interests and participation of multiple stakeholders.<sup>240</sup> However, when reading Principle 4 of the New Delhi Declaration it is clear that the approach towards assessment needs to be broader when considering a legal framework for TFBC and that the interests of local communities should be considered in assessments. Principle 4 of the New Delhi Declaration clearly indicates that a precautionary approach is to be taken with respect to human health and natural resources and explicitly endorses impact assessments as a central tenet of the Principle.<sup>241</sup> The importance of impact assessments and the requirement that they be performed in such a way as to include the impact on people were confirmed in the SERAC case when the African Commission interpreted Articles 16 and 24 of the African Charter. The Commission found that:

Government compliance with the spirit of Articles 16 and 24 of the African Charter must also include ordering or at least permitting independent scientific monitoring of threatened environments, requiring and publicising environmental and social impact studies prior to any major industrial development, undertaking appropriate monitoring and providing information to those communities exposed to hazardous materials and activities and providing meaningful opportunities for individuals to be heard and to participate in the development decisions affecting their communities.

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<sup>239</sup> Principle 4 reads “States should make environmental assessment before engaging in any activity with respect to a shared natural resource which may create a risk of significantly affecting the environment of another State or States sharing that resource.”

<sup>240</sup> See para 2.3 above.

<sup>241</sup> See Principle 4.2(c) of the New Delhi Declaration.

Principle 8 of the New Delhi Principles broadly places a duty on states to engage in joint studies and assessments where environmental challenges arise in the shared resource.<sup>242</sup>

### 3.3.5 Principles 5 to 14: Procedural aspects

Principles 5 to 14 relate to important procedural aspects such as information exchange,<sup>243</sup> joint assessments,<sup>244</sup> emergency situations,<sup>245</sup> dispute settlement,<sup>246</sup> liability for damage and access to justice.<sup>247</sup> Principles 5, 6 and 7 coincide, at a very basic level, with Principle 5 of the New Delhi Declaration.<sup>248</sup> Principles 5, 6 and 7 provide for information exchange, but this duty to exchange information does not extend to parties beyond the state sphere. In other words, only states are covered and consulted and not all interested and affected parties. Principle 5 of the New Delhi Declaration may provide important guidance in interpreting the UNEP Principles in the TFBC context by including all interested and affected parties rather

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<sup>242</sup> Principle 8 reads: "When it would be useful to clarify environmental problems relating to a shared natural resource States should engage in joint scientific studies and assessments, with a view to facilitating the finding of appropriate and satisfactory solutions to such problems on the basis of agreed data".

<sup>243</sup> Principles 5, 6 and 7 read: "Principle 5: States sharing a natural resource should, to the extent practicable, exchange information and engage in consultations on a regular basis on its environmental aspects Principle 6 (1) It is necessary for every State sharing a natural resource with one or more other States:-(a) to notify in advance the other State or States of the pertinent details of plans to initiate, or make change in, the conservation or utilization of the resource which can reasonably be expected to affect significantly the environment in the territory of the other State or States; and (b) upon request of the other State or States, to enter into consultations concerning the above mentioned plans; and (c) to provide, upon request to that effect or the other States, specific additional pertinent information concerning sub plans. and (d) if there has been no advance notification as envisaged in sub-paragraph (a) above to enter into consultations about such plans upon request of the other State or States. (2) In cases where the transmission of certain information is prevented by national legislation or international conventions, the State or States withholding such information shall nevertheless, on the basis, in particular, of the principle of good faith and in the spirit of good neighbourliness cooperate with the other interested State or States with the aim of finding a satisfactory solution. Principle 7 Exchange of information, notification, consultations and other forms of co-operation regarding shared natural resources are carried out on the basis of the principle of good faith and in the spirit of good neighbourliness and in such a way as to avoid any unreasonable delays either in the forms of cooperation or in carrying out development or conservation projects."

<sup>244</sup> Providing that states may, where appropriate, jointly assess environmental problems related to their shared natural resources. Principle 8.

<sup>245</sup> States must inform each other of incidents that may cause transfrontier harm and also cooperate and assist each other in the management of such events. Principle 9(1)-(3).

<sup>246</sup> Principle 11.

<sup>247</sup> Principles 12 to 14.

<sup>248</sup> See para 3.2.5 above.

than focusing on states only.<sup>249</sup> Including all interested and affected parties in the exchange of information is in line with the nature of TFCAs and furthermore reflects the African position on access to information and public participation suggested in the Endorois case, where the African Commission reflected on what effective participation entails.<sup>250</sup>

Because a supra-national judicial body does not currently exist in SADC governance structures, dispute settlement warrants discussion. This is an important inclusion and is also not directly addressed in the New Delhi Declaration. Principle 5 of the New Delhi Declaration mentions access to justice in the same context as Principle 14 of the UNEP Principles.<sup>251</sup> Access to justice in this context places a duty on states to allow affected parties access (citizens outside the sovereign jurisdiction of the state) to the same administrative and judicial procedures that a citizen of the state would have had in the state that caused the harm.<sup>252</sup> Accordingly, a state should provide non-citizens or non-residents the same judicial and administrative relief as is available to its own citizens or residents. In the TFCA context this is important, as this recognises the rights of foreign individuals and applies these rights beyond borders.<sup>253</sup> Although this relief may in principle be implementable in practice, certain pragmatic challenges may hinder a general application thereof. Notably, different languages being spoken across borders may hamper the successful enforcement of rights beyond borders as called for by Principle 14 of the UNEP Principles.<sup>254</sup> Moreover, individuals may not have the knowledge or monetary

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<sup>249</sup> See para 3.2.5 above.

<sup>250</sup> See para 3.1.5 above.

<sup>251</sup> Principle 14 reads: "States should endeavour, in accordance with their legal systems and, where appropriate, on a basis agreed by them, to provide persons in other States who have been or may be adversely affected by environmental damage resulting from the utilization of shared natural resources with equivalent access to and treatment in the same administrative and judicial proceedings, and make available to them the same remedies as are available to persons within their own jurisdictions who have been or may be similarly affected."

<sup>252</sup> Principle 14.

<sup>253</sup> Principle 14 is applicable where persons were / will be "adversely affected" by environmental damage resulting from the utilisation of natural resources by the states involved. The question may be posed: what exactly is meant by "adversely affected", as this will determine *locus standi* in terms of Principle 14. As individuals in the SADC rely heavily on biodiversity (natural resources) to sustain their livelihoods it may be argued that any deterioration in their living standards should suffice to satisfy the requirement in Principle 14.

<sup>254</sup> In South Africa the dominant language would be English, and in Mozambique the dominant language would be Portuguese, for example. Thus, to try to accommodate either person in the other jurisdiction may be difficult.

resources to litigate in a foreign jurisdiction. For these reasons, the model of relief, as formulated in Principle 14, may be insufficient in a TFCA setting. At the time of writing, an example of principle 14's being applied in practice could not be found, perhaps further indicating that it may be difficult to implement in practice. A tribunal at SADC level dealing specifically with matters related to TFBC may be better suited to deal with disputes arising from TFBC than national courts, because national courts are already overburdened with matters falling within their exclusive jurisdiction, and these courts may also lack the specific knowledge related to supra-national (regional SADC) law.<sup>255</sup> Although a regional tribunal may be suited to the TFBC environment as argued above, these tribunals and courts are known to be less successful on the African continent.<sup>256</sup> A supra-national mechanism for dispute resolution is better suited in resolving issues of a supra-national nature and should therefore be established with the necessary consensus from states.

Principle 11 provides that where negotiations to resolve a dispute between states have failed, the dispute must be submitted to an appropriate dispute settlement procedure / institution.<sup>257</sup> More importantly Principle 11 provides that this procedure should preferably be mutually agreed upon in advance and that it must be binding. Accordingly, such an arrangement must be codified in a bi- or multilateral agreement, as suggested in Principle 2, in order to make the procedure legally binding between the parties (a treaty, for example). Furthermore, a procedure that would be binding may ensure compliance with and enforcement of all legal principles as per the bi- or multilateral agreement. This would in turn result in legal certainty and harmonised governance efforts. It is submitted that such a binding mechanism for dispute settlement is an essential element of a supra-national legal framework facilitating TFBC. Such a mechanism may also cater for individuals where they wish to settle disputes arising in TFCAs without having to resort to foreign judicial procedures as described in Principle 14. Access to justice (whether it be at national

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<sup>255</sup> See for example Visser SA *Bids to Enhance Efficiency of Courts* [www.bdlive.co.za/national/law/2013/04/29/sa-bids-to-enhance-efficiency-of-courts](http://www.bdlive.co.za/national/law/2013/04/29/sa-bids-to-enhance-efficiency-of-courts) [date of use 22 April 2014]. See also Sidimba *Court lack Skills – Mogoeng* [www.iol.co.za/news/south-africa/court-lack-skills-mogoeng-1.1637001#.U1ZzDJ0aLIU](http://www.iol.co.za/news/south-africa/court-lack-skills-mogoeng-1.1637001#.U1ZzDJ0aLIU) [date of use 22 April 2014].

<sup>256</sup> See Collier and Gunning 1999 *Journal of Economic Perspectives* 3-22.

<sup>257</sup> Principle 11(2). Appropriate settlement procedure is not defined in the Principles. It is submitted, however, that it must be understood in accordance within the normal Alternative Dispute Resolution regime to include arbitration and mediation.

or supra-national level) is extremely important in the African context as it is a procedural right through which other fundamental rights could be protected. Notwithstanding its importance, access to justice remains a controversial issue in Africa. In the case of *Atabong Denis Atemnkeng vs The African Union*, 2011 (Atabong case) the African Court on Human and Peoples' Rights (African Court), through the dissenting opinion of Akuffo, Ngoepe, and Thompson JJ, described access to justice as a "peremptory norm – *jus cogens*."<sup>258</sup> This statement by the learned judges is bold as, although the existence of *jus cogens* may generally be accepted, the rules / rights for it to be included as *jus cogens* remains uncertain and a topic of dispute.<sup>259</sup> Although the judges did not provide authority for their statement, it is worth looking at the *Barcelona Traction, Light and Power Company Ltd*<sup>260</sup> (Belgium v Spain) decided in the ICJ. In the Barcelona case the ICJ gave some direction as to which obligations are accepted as *jus cogens*. These include: protection from slavery and racial discrimination, and the basic rights of the human person.<sup>261</sup> Considering the Atabong case, the minority opinion recognised access to justice as a human right in the African context.<sup>262</sup> When combining this recognition with the direction given in the Barcelona case (the fact that the honouring of basic human rights is an example of *jus cogens*), the remark in the minority opinion that access to justice can be seen as a peremptory norm – *jus cogens* - could theoretically be justified. However, given the fact that *jus cogens* is defined as a norm accepted by the international community from which no derogation is permitted,<sup>263</sup> the remark in the minority opinion is brought into doubt. This doubt is created by the fact that it is difficult to establish whether the international community – as a whole – recognises access to justice as a norm from which no derogation is allowed. Furthermore, the author could not find any authority explicitly recognising access to justice as a peremptory norm. One could, however, argue that procedural rights are recognised as part of customary international law, specifically in the field of international environmental law. This argument is based on the ICJs' judgment in the Pulp Mills case, where the ICJ argued that a duty to carry out an EIA in the case

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<sup>258</sup> Atabong case dissention opinion at page 4 (the dissention opinion is not numbered in paragraphs).

<sup>259</sup> In general see Ferreira and Snyman-Ferreira 2014 *PELJ* 1474-1475.

<sup>260</sup> [1970] ICJ 3.

<sup>261</sup> [1970] ICJ 3 para 32.

<sup>262</sup> Atabong case at pages 3 and 4.

<sup>263</sup> Hunter *et al International Environmental Law and Policy* 317.

of transboundary harm is a principle of customary international law.<sup>264</sup> Although access to justice is not mentioned by the ICJ, it seems that a trend for respecting environmental procedural rights, as part of customary international law, is emerging.

Although the minority opinion does not form a binding precedent in the African context, it does provide important recognition as to the importance and status of access to justice as a procedural right and may advance its recognition as customary international law.

This chapter has elaborated on the role of the African Commission, especially with reference to the application and interpretation of the principles of sustainable development. Consequently, it may be easy to mistake the African Commission as a body where TFBC disputes may be resolved. The following important aspects limiting the effectiveness of the commission should be highlighted:

- It is a quasi-judicial body (its decisions are not binding);
- Its jurisdiction is limited to disputes arising from the African Charter; and
- It may be approached only where all local remedies have been exhausted.

Notwithstanding, the recognition and interpretation of sustainable development (through the principles discussed above) remains crucially important to the recognition of the importance of sustainable development in the AU.<sup>265</sup>

Another judicial mechanism referred to in this chapter was the African Court. The African Court is a fully fledged judicial body, but using it as a mechanism to resolve disputes in a TFCA context poses challenges similar to those applying to the African Commission. The main challenge is that the jurisdiction of the court is restricted to the African Charter and any other human rights instruments. One does not necessarily find significant reference to the term “human rights” in the TFBC context since human rights are not the explicit focus of the regional instruments related to

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<sup>264</sup> Pulp Mills on the River Uruguay (Argentina v Uruguay) ICJ Reports 2010 paras 203-219.

<sup>265</sup> See specifically para 3.1 above.

TFBC. The focus is usually on biodiversity.<sup>266</sup> When considering the content and principles discussed above and comparing them to the identification of human rights in the African charter, however, a clear connection is evident between the principles relevant to TFBC (especially those effecting sustainable development) and particular human rights. A list of human rights relevant to TFBC as portrayed in the African Charter would include the right to equality before the law (a component of access to justice),<sup>267</sup> the right to dignity,<sup>268</sup> procedural rights where the subject is the accused in a court case (again components of access to justice),<sup>269</sup> a right to information (a component of access to justice),<sup>270</sup> a right to health and healthcare,<sup>271</sup> a right to economic, social and cultural development,<sup>272</sup> a right to international peace and security,<sup>273</sup> a right to a generally satisfactory environment,<sup>274</sup> and a right to education

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<sup>266</sup> Some of the latest published research addressing human rights in the TFCA context includes: Du Plessis and Du Plessis "Southern African Perspectives on the Relationship between Transfrontier Conservation Areas and the Protection of Rights" 252-290 and Bocchino "Rural People in Southern African Transfrontier Conservation Areas: A Question of Governance" 291-319.

<sup>267</sup> Article 3(1) and (2) of the Charter provides: "1. Every individual shall be equal before the law 2. Every individual shall be entitled to equal protection of the law".

<sup>268</sup> Article 5 of the Charter provides: "Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man, particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment shall be prohibited".

<sup>269</sup> Article 7(1) and (2) provides: "1. Every individual shall have the right to have his cause heard. This comprises: a. The right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force; b. The right to be presumed innocent until proved guilty by a competent court or tribunal; c. The right to defence, including the right to be defended by counsel of his choice; d. The right to be tried within a reasonable time by an impartial court or tribunal. 2. No one may be condemned for an act or omission which did not constitute a legally punishable offence at the time it was committed. No penalty may be inflicted for an offence for which no provision was made at the time it was committed. Punishment is personal and can be imposed only on the offender".

<sup>270</sup> Article 9(1) and (2) provides: "1. Every individual shall have the right to receive information. 2. Every individual shall have the right to express and disseminate his opinions within the law."

<sup>271</sup> Article 16(1) and (2) provides: "1. Every individual shall have the right to enjoy the best attainable state of physical and mental health. 2. State Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick."

<sup>272</sup> Article 22(1) provides "1. All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind."

<sup>273</sup> Article 23(1) provides: "1. All peoples shall have the right to national and international peace and security. The principles of solidarity and friendly relations implicitly affirmed by the Charter of the United Nations and reaffirmed by that of the Organisation of African Unity shall govern relations between States." Article 23(1) should be read with article 24(2).

<sup>274</sup> Article 24 provides: "All peoples shall have the right to a general satisfactory environment favourable to their development."

- with regard to the rights in terms of the Charter.<sup>275</sup>

When considering the above, it may be argued that the African Court could potentially be approached to resolve disputes providing that the disputes fall within the ambit of human rights in the African Charter. This would include the human rights listed above and any other human rights agreement documented between the parties.<sup>276</sup> As with the African Commission, however, the exhaustion of local remedies is required before access to the court is allowed.<sup>277</sup> Furthermore, in a TFBC-dispute where human rights are not involved, both of these African mechanisms will not have jurisdiction and cannot be approached. In such cases, a specialised sub-regional mechanism with jurisdiction over all matters of supra-national concern is necessary. A mechanism such as the SADC Tribunal would, in this instance, be suitable, as the Tribunal would have jurisdiction over all disputes between member states and disputes between member states and legal or natural persons.<sup>278</sup>

As for procedural matters related to participation, one point of critique is raised in that very little recognition is given to local community participation (and benefit sharing) in the management of shared natural resources. When considering the title of the document<sup>279</sup> as well as the period during which it was drafted (1973-1977), one may forgive such an exclusion as it was not common during this time to include local communities in conservation practice.<sup>280</sup> When considering the Principles in the context of TFCAs, however, the role of local communities in biodiversity conservation will need to be included, as it forms an integral part of the new

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<sup>275</sup> Article 25 reads: “State Parties to the present Charter shall have the duty to promote and ensure through teaching, education and publication, the respect of the rights and freedoms contained in the present Charter and to see to it that these freedoms and rights as well as corresponding obligations and duties are understood.” The last mentioned right meaning that the people of nation states has the right to be educated and informed (by the nation states) regarding their rights in terms of the Charter.

<sup>276</sup> Article 3(1) of the *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 1998.

<sup>277</sup> Rule 40(5) of the *Rules of African Court on Human and Peoples' Rights* (2010 revision).

<sup>278</sup> Article 15(1) of the *SADC Tribunal Rules of Procedure* as updated on 22 February 2013.

<sup>279</sup> The title places emphasis on resources shared by states.

<sup>280</sup> See the discussion on the evolution of PAs in para 2.3 above.

conservation paradigm and TFCAs in general.<sup>281</sup>

### 3.3.6 *Synopsis*

Considering the UNEP Principles in sum, they emphasise and recognise the importance of cooperation in the field of natural resource management. The principles also recognise the fact that the natural environment knows no political boundaries and that it is indeed a common concern that ought to be jointly managed. Furthermore, by including provisions that implicitly give effect to the CBD principle, important recognition is given to existing disparities within the international community and in the SADC when applied to the TFBC context. Procedural rights also enjoy important recognition and are argued to be of substantial importance to TFBC, as they provide recognition of stakeholders and possible legal avenues to enforce rights.<sup>282</sup>

Considered with the New Delhi Principles, the content of the UNEP Principles provides the drivers of TFBC - sustainable development and biodiversity - with substantive and procedural content in the form of guiding principles. It is these principles that are proposed as the central elements of any legal framework facilitating TFBC in TFCAs in the SADC. The foregoing point is supported by a summary and exposition of the legal principles proposed to form the said framework.

### **3.4 *A summary of the principles underlying sustainable development and biodiversity conservation***

As argued in chapter 2, the concept of biodiversity conservation has undergone major changes in recent years.<sup>283</sup> The emphasis in conservation has shifted from fortress conservation to more holistically connected approaches that recognise the value of nature for man.<sup>284</sup> Currently, the concept of TFCAs may be argued to be the evolutionary peak of PAs, because TFCAs innovatively seek to incorporate

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<sup>281</sup> See paras 2 and 2.3 above.

<sup>282</sup> Stakeholder participation and the enforcement of rights are revisited in para 5 below.

<sup>283</sup> See para 2.3 above.

<sup>284</sup> See para 2.3 above.

social, economic and environmental concerns (otherwise understood as the full spectrum of sustainable development), as opposed to only environmental issues. At the same time, TFCAs aim to connect fragmented ecosystems by transcending political / geographical borders,<sup>285</sup> and they strive to inculcate mutual respect, solidarity, good neighbourliness, peace and security between SADC member states.<sup>286</sup> To this end, TFCAs may be seen as one of the most likely and viable mechanisms through which to ensure biodiversity conservation and therefore promote the livelihoods of SADC citizens as a whole, as opposed to an otherwise sovereign and selfish state-centred and fragmented approach. TFCAs may thus be the starting point to effect larger efforts of TFBC, and the success of TFCAs is therefore of primary concern in the region.

One of the primary assumptions of this thesis is that sustainable TFBC depends on the existence of a supra-national legal framework containing legal principles that must facilitate sustainable TFBC.<sup>287</sup> As the principles were discussed above, it became clear that an overarching principle can have constitutive elements forming the content of the principle. Good governance, for example, requires the following: democratic institutions that are responsive to the needs of the people; adherence to the rule of law; participation, transparency and accountability; appropriate devolution of authority; anti-corruption and effective compliance measures; and conflict and dispute resolution.<sup>288</sup> Another example is the principle of public participation, which needs to be understood and interpreted in the context of the Endorois case. The characteristics of participation will accordingly lead to “effective participation”, with the requirements of participation being that the subject at issue is not a *fait accompli*;<sup>289</sup> the creation of an equal bargaining position for all participants; the participants are literate and understand the nature of the project; acting in good faith; the timely dissemination and receipt of information (people should have a chance to

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<sup>285</sup> See para 2.3 above. Some exceptions do exist where these areas still consist only of traditional PAs. Even in these cases, the management of these areas reflects modern PA practices. The Kgalagadi Transfrontier Park (between South Africa and Botswana) is one example where the land use is exclusively confined to traditional PAs. South African National Parks [www.sanparks.org/parks/kgalagadi/](http://www.sanparks.org/parks/kgalagadi/) [date of use 23 January 2014].

<sup>286</sup> See para 2.3.3 above.

<sup>287</sup> See para 1.3.1 above.

<sup>288</sup> See para 3.2.6 above. It further requires legitimacy and voice, subsidiarity, fairness, do no harm, direction, performance, and the protection of human rights.

<sup>289</sup> In other words, participation must not be an accomplished fact and that participation must be able to affect the decision.

influence decisions); and communication should take place in a culturally appropriate fashion.<sup>290</sup>

As the principles discussed above have various constitutive aspects, the summary here will indicate only the overarching principle itself and not repeat the discussion on the content thereof. It is also noted that there is a symbiotic relationship between the two drivers of TFBC, and consequently there will be an overlap in the relevance of the legal principles to TFBC.<sup>291</sup> In other words, there is no single legal principle that supports only one driver, whether it is biodiversity or sustainable development. All of the legal principles chosen and discussed support TFBC as a whole, and therefore support both drivers.

Accordingly, it is proposed that the following principles serve as the backbone for a legal framework facilitating TFBC in the SADC:

- Sustainable use;
- Equity and poverty alleviation;
- CBDR;
- The precautionary approach;
- Good governance (including public participation, adherence to the rule of law, information exchange, and access to justice);
- Integration;
- Cooperation;
- Sovereignty (as argued in the light of custodial sovereignty); and
- Environmental assessments.

It should be noted that although national legislation and policy may dictate a particular country's approach towards these principles, the approaches are effectively confined to geographical borders and cannot find application extra-territorially.<sup>292</sup> Moreover, the establishing agreements of TFCAs indicate that the

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<sup>290</sup> See para 3.2.5 above.

<sup>291</sup> See para 2.4.2 above.

<sup>292</sup> This is the general rule, but in certain cases in private international law and in some cases of criminal and property law national law can be applied beyond the sovereign territory of the state in question. See Dugard *International Law A South African Perspective* 146-157. Also see Bennet and Strug *Introduction to International Law* 47-56.

areas need to be developed and managed in accordance with TFCA-specific governance instruments (JMPs, for example) which need to be developed in accordance with regional and international law; and they do not, for the most part,<sup>293</sup> acknowledge national legal regimes.<sup>294</sup> TFBC principles at SADC level could therefore play an important role in providing guidance that reaches across national legal regimes.

The following chapter analyses the SADC regional framework to determine to what extent provision in supra-national instruments is made for the distilled principles of TFBC, and whether or not TFBC is indeed possible in the context of the current regional regulatory framework.<sup>295</sup>

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<sup>293</sup> Notably, however, all of the establishing agreements recognise the principle of sovereignty and also in some cases recognise or propose the application of domestic law relevant to conservation. See, for example, article 7 of the Bilateral Agreement Establishing the Kgalagadi Transfrontier Park, on “respect for domestic law”. Also see para 5 below.

<sup>294</sup> See article 5(3) of the Treaty on the Establishment of the Great Limpopo Transfrontier Park, 2002, and article 6(3) of the Treaty on the Establishment of the Ai-Ais/Richtersveld Transfrontier Park, for example.

<sup>295</sup> This chapter will specifically focus on the SADC framework. For a discussion of the AU and international framework relevant to TFCAs, see Lubbe 2007 *YbIEL* 126-152.

## **Chapter 4 – An analysis of the regional legal framework**

### **4 The current legal framework regulating TFBC in SADC**

This chapter identifies and critically discusses the current legal framework that regulates TFBC in the SADC context. The aim of this chapter is to use the TFBC principles distilled in the previous chapter and to analyse the AU and SADC legal framework against the TFBC principles. This analysis is done to establish to what extent the legal framework facilitates the TFBC principles and as a consequence – TFBC in TFCAs. In so doing, this chapter aims to prove the hypothesis that inadequate provision is made in the SADC and AU legal framework to facilitate sustainable TFBC.<sup>1</sup>

In order to systematically analyse the legal framework, this chapter will first investigate the AU legal and policy framework and thereafter the SADC legal and policy framework.

#### **4.1 The AU legal and policy framework**

##### *4.1.1 African Charter*

The *African Charter on Human and Peoples' Rights*, 1986 (African Charter) has been ratified by 53 African states. Although the African Charter does not explicitly recognise biodiversity conservation or sustainable development, it does provide various rights that may give effect to or support both drivers.<sup>2</sup> Using the drivers and the distilled principles as background, the value of the African Charter in relation to TFBC is analysed.

The analysis will begin with article 24, i.e., a right to a generally satisfactory environment. Article 24 states that “[a]ll peoples shall have the right to a general[ly]

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<sup>1</sup> See para 1.3 above.

<sup>2</sup> Although the Charter may not explicitly recognise the drivers, the African Commission includes sustainable development to form part of article 24 by means of its interpretation in the SERAC case, for example. See the quote from the SERAC case in the main text above.

satisfactory environment favourable to their development.” This provision is regarded as a pioneering norm in international environmental law.<sup>3</sup> The significance of this provision lies therein that this was the first international recognition of a right to the environment.<sup>4</sup> Following the inclusion of article 24, several countries in Africa included such a right or constitutional principle into their national policy regimes.<sup>5</sup> As far as could be established, 35 countries in Africa have already included an environmental right/principle in their constitutions.<sup>6</sup> This right is applicable in the SADC context, as SADC member states are members of the AU and should therefore give effect to article 24 in the sub-region.

Although the right is not explained or defined in the Charter, the African Commission has provided sound guidance in this regard.<sup>7</sup> To repeat the discussion in chapter 3, the Commission stated in the SERAC case that article 24 creates clear obligations for African governments and that article 24:<sup>8</sup>

requires the State to take reasonable and other measures to prevent pollution and ecological degradation, to promote conservation, and to secure an ecologically sustainable development and use of natural resources.

From the Commissions’ interpretation it is clear that sustainable development and environmental conservation is supported and included in article 24. As a result, sustainable development is made part of article 24 through the interpretation of the Commission in the SERAC case. It could therefore be argued that, by recognising sustainable development, the African Charter implicitly recognises the principles giving effect to sustainable development (the New Delhi Principles) as discussed in chapter 3 above. In the TFBC context then, the New Delhi Principles could potentially be embodied in article 24 of the African Charter. This would mean that sustainable use, equity and poverty alleviation, common but differentiated

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<sup>3</sup> Van der Linde 2002 *CILSA* 99.

<sup>4</sup> For an in-depth discussion on the interpretation of article 24, see the SERAC case at paras 52 and 53 and Van der Linde and Louw 2003 *African Human Rights Law Journal* 167-187.

<sup>5</sup> The distinction between right and principle is made because of enforceability issues in some countries. In some countries where such an inclusion would be referred to as an environmental principle, it cannot be enforced via legal action. See Boyd *The Environmental Rights Revolution* 149-164 and Bruch and Coker *Innovation* 2.

<sup>6</sup> Bruch and Coker 1999 *Innovation* 2. This means that 66 per cent of African countries have recognised a right to the environment in their highest form of law. Also see Ebeku 2003 *African Human Rights Law Journal* 149-166 and Boyd *The Environmental Rights Revolution* 149-164.

<sup>7</sup> See, in general, chapter 3 above.

<sup>8</sup> Para 52 of SERAC case.

responsibilities, the precautionary principle, public participation, access to justice and participation, good governance and integration should all be considered when article 24 is applied to interested and affected parties.<sup>9</sup> Although such an interpretation has never been given to article 24, it may be appropriate to do so in the TFBC and broader sustainable development context. This is because such an interpretation will recognise the diverse range of challenges faced by TFBC and also further provide normative content to sustainable development in the AU context.<sup>10</sup> Should an authoritative legal mechanism such as the African Charter be deemed to embody guiding principles on sustainable development, it is bound to inform and guide sub-regional law and policy. As the African Charter currently stands, article 24 creates no legal certainty as to what exactly a right to a generally satisfactory environment entails, and this detracts from a potentially crucial human right embodied in the African Charter.<sup>11</sup> Notwithstanding, article 24 provides a good normative basis from which new law and policy may evolve through informed interpretation akin to that of the SERAC case.

In addition to this, the following human rights are relevant in the TFBC context, specifically in the light of the procedural aspects contained in principles 5-14 of the UNEP Principles.<sup>12</sup> Article 3 contains the right to equality before the law and equal protection under the law. This right is applicable to individuals. In the TFBC context this will require member states to provide individuals with a platform to effectively participate, as prescribed by the Endorois case.<sup>13</sup> Furthermore, the right to equality places a duty on states to consider and protect all interested and affected parties' rights equally under the law. Article 5 contains the right to dignity and in the TFBC context individuals may protect their cultural traditions (in the use and conservation of biodiversity) by using this right, as these practices inherently form part of their *dignitas*. Article 9(1) provides an important procedural right forming part of the concept of effective participation: the right to access to information. In so doing, this

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<sup>9</sup> Interested and affected parties here may include the African Commission, the African Court, member states, local communities and any other party affected by article 24.

<sup>10</sup> This statement is made notwithstanding the fact that the African Commission referred to many of these principles through its communications, as discussed in chapter 3 above.

<sup>11</sup> The interpretations given to article 24 in the communications of the African Commission do give some content to the right, but it should be remembered that these communications are not binding and therefore do not create duties on states to implement article 24 as interpreted.

<sup>12</sup> See para 3.3.5 above.

<sup>13</sup> See para 3.2.5 above.

right provides the possibility for informed participation. Article 16 contains a right to health and healthcare. This right was considered to be linked to article 24 in the SERAC case and is therefore relevant in the environmental context.<sup>14</sup> Where local communities reside in or adjacent to TFCAs, states will have to provide healthcare and moreover must ensure that the environment is not damaging to their health. Article 22(1) provides the right to economic, social and cultural development. This right is coupled with the freedom to enjoy the common heritage of mankind which, incidentally, includes biodiversity. This freedom is unfortunately not explained or defined in the Charter. In the context of the CBD, however, the common heritage should be interpreted as including, among others, the biodiversity of the African continent. It could therefore be argued that this enjoyment should occur with the New Delhi Declaration in mind and that the enjoyment must be in line with the principle of sustainable use.<sup>15</sup> Finally, article 25 provides that states have a duty to educate people with regard to the rights in terms of the Charter. This duty is important in the TFBC context as it will create awareness for interested and affected parties in and around the TFCAs, and furthermore ensure that states can be held accountable when informed interested and effected parties enforce their rights.<sup>16</sup>

#### *4.1.2 African Convention and its revision*

The 1968 African Convention states in its preamble that natural resources must be utilised to satisfy the needs of man according to the carrying capacity of nature. In doing so the Convention juxtaposes man and nature by acknowledging the dependency of man on nature and further recognising that this dependency is limited to the ability of nature in satisfying these needs while still keeping its own ecological processes intact. The African Convention requires states to adopt principles to conserve water, soil, fauna and flora in accordance with scientific principles and in the best interest of the people.<sup>17</sup> Hence the Convention places a duty on contracting parties to develop and adopt policy and legislation to promote and facilitate the principles needed to conserve and manage soil, water, fauna and flora resources.

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<sup>14</sup> See para 3.3.4 above.

<sup>15</sup> See para 3.2.1 above.

<sup>16</sup> This will be possible by approaching either the African Court or the African Commission. It should be remembered that the African Commission cannot make binding and enforceable rulings. See para 3.1.3 above.

<sup>17</sup> Article II of the African Convention.

The preambular provision as well as the other foregoing articles potentially provide some normative guidance for both biodiversity conservation and sustainable development, albeit very vaguely.

The Convention places a greater responsibility on a state where a specific endangered species is regarded as endemic to that state.<sup>18</sup> Therefore, given the discussion above on biodiversity hotspots,<sup>19</sup> SADC Member states may, in theory, have stricter responsibilities under the Convention due to the high levels of biodiversity endemism found in their territories. Furthermore, a duty is placed on contracting parties to protect existing conservation areas and to establish new ones, taking into account land-use management programmes.<sup>20</sup> Importantly, provision is made for cooperation between contracting parties.<sup>21</sup> There is a duty on contracting parties to cooperate in matters concerning the implementation of the Convention and furthermore where national action is likely to affect a neighbouring state.<sup>22</sup> No provision is made for harmonised environmental governance approaches at either regional or sub-regional level. Given the date of the Convention (1968) and considering that Africa was still in the beginning of the post-colonial era, one could understand the lack of provisions for more harmonised governance efforts that may potentially have impacted on the newly found sovereignty of African states.<sup>23</sup>

However, as a whole, the Convention could serve as a guiding instrument as to what measures should be taken by African states to conserve biodiversity, and to this end may serve as a guiding instrument for policy alignment and harmonisation. Unfortunately, the Convention is out-dated and cannot be used to serve as a benchmark for harmonisation, as it was established without a Conference of Parties (COP) or any other enforcement or review mechanism. In effect this means that the Convention has been unaltered since 1968. It goes without saying that environmental challenges are in flux and environmental law needs to constantly evolve in order to keep pace with these and respond to changes to remain effective. The African Convention as it currently stands brings very little to the table

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<sup>18</sup> Article II of the African Convention.

<sup>19</sup> See paras 1 and 2.1.3 above.

<sup>20</sup> Article X of the African Convention.

<sup>21</sup> Article XVI of the African Convention.

<sup>22</sup> Article XVI of the African Convention.

<sup>23</sup> See paras 2.2.1 and 2.2.2 above.

for TFBC. This is unfortunate as this Convention is the framework convention for environmental governance.<sup>24</sup>

Recognising the flaws in the African Convention, a more comprehensive and revised version of the African Convention has been tabled to address some of the shortcomings of the original. The revised Convention is not yet in force.<sup>25</sup> For the purpose of completeness and as the revised Convention may come into force in future, a brief discussion of the revised Convention follows. The revised Convention is more in pace with contemporary environmental law and challenges than the 1968 Convention. It recognises, for example, issues such as sustainable development and the importance of endemic biodiversity and uses these contemporary developments in its provisions. In so doing it could serve as guideline for AU Member states in the adoption of legislation and policy giving effect to contemporary environmental law and challenges.<sup>26</sup>

Of particular importance for transfrontier conservation are the extensive provisions relating to cooperation, generally.<sup>27</sup> Emphasis is placed on cooperation relating to the harmonisation of law and policy in particular, among other things, where natural resources or ecosystems traverse national borders.<sup>28</sup> It is further provided that parties shall cooperate in the management, development and conservation of these transfrontier areas.<sup>29</sup> Hence, a duty is placed on parties to cooperate specifically in transfrontier areas. Although TFCAs are not mentioned by name, transfrontier areas

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<sup>24</sup> For a discussion on the ineffectiveness of the Convention see Van der Linde 2002 *African Human Rights Law Journal* 33-59.

<sup>25</sup> Recognising that the African Convention is out of date with modern developments in environmental law, a revision was required. Agencies involved in this revision were, *inter alia*, the United Nations Environmental Programme (UNEP), the International Union for Conservation of Nature and Natural Resources (IUCN) and the OAU. A draft revised African Convention of Nature and Natural Resources was presented at the Fifth Inter-Agency Meeting in 2002. On July 11th, another version of the revision was laid to table in Maputo, Mozambique, and subsequently adopted. The revised Convention requires fifteen states to ratify it before entry into force. To date, thirty-four states have signed but only four have ratified it. Thus the revised Convention still requires the ratification of eleven states before it will enter into force. For more information and to obtain the revised Convention see the AU website on the Internet. See [www.africa-union.int](http://www.africa-union.int) (date of use 6 June 2014). For critique on the current African Convention also see Van der Linde 2002 *African Human Rights Law Journal* 33-59.

<sup>26</sup> See articles XIV and XII(1) as well as Annex 2, where conservation areas are defined.

<sup>27</sup> Article XXII of the revised Convention.

<sup>28</sup> Article XXII of the revised Convention.

<sup>29</sup> Own emphasis.

can be argued to include TFCAs. This is based on the description in article XXII(2)(c):

[W]henver a natural resource or an ecosystem is transboundary, the Parties concerned shall undertake to cooperate in the conservation, development and management of such resource or ecosystem and if the need arises, set up interstate commissions for their conservation and sustainable use;

From the above it is possible to conclude that TFCAs may potentially be recognised under article XXII(2)(c), as TFCAs need to be jointly managed. However, the importance of the provision does not lie in the fact that it may potentially recognise TFCAs. The importance lies in the recognition that biodiversity traverses borders and that joint conservation and sustainable use are important elements of cooperation. This provision may be seen as a paradigm shift from conservation efforts based solely on sovereign laws and policies, and reflects a more contemporary approach to sovereign control over biodiversity.<sup>30</sup> Such an approach is indeed in line with the ideology of TFBC and furthermore of the custodianship of biodiversity rather than of sovereign ownership.<sup>31</sup>

The revised Convention further places a duty on member states to implement and apply the precautionary principle within their respective states.<sup>32</sup> In so doing, the revised African Convention could directly give effect to the precautionary principle when it comes into force. As for the current African Convention not having mechanisms for enforcement and review, the revised Convention may improve this situation by including both a COP and Secretariat as mechanisms for enforcement and implementation.<sup>33</sup> Provision is also made for dispute settlement, and disputes that cannot be settled by direct agreement between the parties or the good offices of a third party will be referred to the Court of Justice of the AU.<sup>34</sup> The foregoing

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<sup>30</sup> See, in general, paras 2.2 and 2.1.3 above.

<sup>31</sup> See paras 2.2 and 2.3 above.

<sup>32</sup> Article IV of the revised African Convention.

<sup>33</sup> This could be one reason why the revised Convention is not in force yet. See the discussion in para 3.3.2 above on the Bamako Convention.

<sup>34</sup> Article XXX of the revised Convention. This provision will be effective only once the Court of Justice has been merged with the African Court on Human and Peoples' Rights, as the Protocol establishing the latter supersedes the *Protocol of the Court of Justice of the African Union, 2003*. The merged court will be known as the African Court of Justice and Human Rights. The *Protocol of the African Court of Justice and Human Rights, 2008* has to date obtained only 5 deposits of the required instruments of ratification. It remains to be seen whether and when such a court will be established, considering the general lack of interest in mechanism bringing accountability to

provides for a component of the principle of good governance – access to justice. It needs to be stated however that access to justice is limited to state parties and does not provide relief for individuals. This could be a shortcoming in the TFBC context as local communities are in need of a forum to resolve cross-border disputes as argued above.<sup>35</sup> This point of critique is qualified by the fact that instruments regulating relationships between states, do not necessarily provide relief for individuals. These instruments normally provide relief for states as states are (mostly) the subjects of these instruments. Notwithstanding, the revised African Convention does afford procedural rights to individuals falling within the scope of good governance. These include dissemination of environmental information, access to information, public participation, and access to justice.<sup>36</sup> The foregoing rights are formulated so as to place a duty on member states to ensure the legislative and regulatory environment within which these rights can find application. In this context, one could expect the revised African Convention to provide a platform for individuals where the foregoing rights are not provided or adhered to by member states.

Unfortunately the revised Convention is not yet in force, and for all practical purposes remains null and void in terms of legal force. Such delays have long been a challenge for substantive law-making at AU level in post-colonial Africa.<sup>37</sup> This is alarming as the revised Convention has been tabled for more than 10 years and even if it should come into force it is likely to be out of date with current challenges and developments.<sup>38</sup> Supporting this statement is the fact that the revised Convention does not mention the global environmental challenge of climate change. Should the revised Convention enter into force, its text could need revision to be relevant to current environmental challenges. Notwithstanding, it provides insight as

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African states. See in general Sarkin 2012 *Interdisciplinary Journal of Human Rights* 83-102 and Sarkin 2008 *Inter-American & European Human Rights Journal* 199-242.

<sup>35</sup> See para 3.3.5 above.

<sup>36</sup> Article XVI(1)(a)-(d) of the revised African Convention.

<sup>37</sup> Maluwa *International Law in Post-Colonial Africa* 1-352; Maluwa 2000 *African Journal of International and Comparative Law* 201-225; and Maluwa *Netherlands International Law Review* 81-103. For a list of the ratifications of the Convention see [http://au.int/en/sites/default/files/Revised%20-%20Nature%20and%20Natural%20Resources\\_1.pdf](http://au.int/en/sites/default/files/Revised%20-%20Nature%20and%20Natural%20Resources_1.pdf) [date of use 29 September 2014].

<sup>38</sup> Since being tabled, the Convention has not been updated with changes in environmental challenges. Should the Convention eventually enter into force, it may need extensive revision in order to be relevant to current environmental challenges.

to the intent of the African legislature and the importance of TFBC on the legal agenda at AU level.

#### 4.1.3 *Treaty of the African Economic Community*

The Treaty Establishing the African Economic Community<sup>39</sup> (AEC Treaty) contains various environmental provisions which are relevant to TFBC. Harmonisation and the integration of policy are addressed in article 54. It provides that states must harmonise and integrate their policies and programmes with regard to energy and natural resources.<sup>40</sup> Article 56 establishes a duty for cooperation between member states in relation to natural resources and energy. This duty to cooperate entails, amongst other, exchange of information and transfer of technology and knowledge.<sup>41</sup> Article 58 deals with the environment. In terms of this provision, states must promote a healthy environment. No reference is made to what “a healthy environment” means or what type of measures should be taken to “promote” it.<sup>42</sup> One would therefore have to fall back on the interpretation given to a “general[ly] satisfactory environment” as contained in article 24 of the African Charter when interpreting article 58.<sup>43</sup> It may be argued that article 58 has no direct relevance to TFBC and TFCAs considering the vague formulation of the content thereof. However, in the interpretation of article 58, the New Delhi Principles on sustainable development (as discussed in chapter 3 above) may be used to provide substantive meaning to the concept of a healthy environment. This would be similar to the use of the principles in the interpretation of article 24 of the African Charter as argued above.<sup>44</sup> Such an argument would make sense, considering that the SERAC case used the term “the right to a healthy environment” as if it were synonymous with the

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<sup>39</sup> Signed in Abuja, Nigeria June 1991 at the 27th ordinary session of the Assembly. The Treaty entered into force on 12 May 1994. At present, a total of 52 countries have signed the treaty and 48 countries have signed and ratified it.

<sup>40</sup> Article 55 deals with energy and sets out the different fields of cooperation. The issues covered are mineral and water resources, nuclear energy, and renewable and new energy. Article 55(2) deals with the proper or sustainable use of energy resources. Energy does not fall within the scope of this study and will thus not be investigated further.

<sup>41</sup> Article 56(a) and 56(e) of the AEC Treaty.

<sup>42</sup> See Van der Linde and Louw 2003 *African Human Rights Law Journal* 167-187.

<sup>43</sup> Although article 24 itself does not provide a clear interpretation, the SERAC communication does give some clarity on the interpretation. See para 3.3.4 above. Also see Van der Linde and Louw 2003 *African Human Rights Law Journal* 167-187 and Ebeku 2003 *African Human Rights Law Journal* 149-166.

<sup>44</sup> See para 3.3.4 above.

right to a generally satisfactory environment – in essence bringing articles 24 and 58 in relation to each other.<sup>45</sup> Article 58 therefore supports article 24 and the interpretation thereof in the SERAC case, and in so doing implicitly brings sustainable development into play. By linking article 24 of the Charter with article 58 of the Treaty of the AEC, the principles of sustainable development are brought into an interpretation of article 58 as well. By means of such interpretation, article 58 is given more substantive content and can contribute towards TFBC, albeit only implicitly.

Apart from article 58, article 79 could be seen as a provision giving effect to the CBDR principle. All member states to the AEC Treaty have a common responsibility towards the application of the provisions of the AEC Treaty. Article 79, however, contains special provisions for least developed, landlocked, semi-landlocked, and island states. These special provisions arise from the consideration that economic and social challenges could exist in these states as a result of them being landlocked. As a result member states that are in a better position (socially and economically), are required to assist the states that are experiencing the aforementioned challenges in the application of the AEC Treaty.<sup>46</sup>

The AEC Treaty does not contribute further to TFBC in TFCAs. It does, however, again emphasise the importance of the environment in Africa and places environmental considerations on the AU legal and policy agenda.

#### *4.1.4 Cultural Charter*

As local communities form an inherent part of TFBC in TFCAs,<sup>47</sup> their culture should be catered for in a legal framework governing TFBC in TFCAs.<sup>48</sup> The *Cultural Charter for Africa, 1976* (Cultural Charter) provides legal guidance related to cultural issues in Africa and is therefore relevant to this thesis. Although the Cultural Charter does not take the form of a treaty, it does bind member states to certain duties

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<sup>45</sup> Para 52 of the SERAC case.

<sup>46</sup> Article 79(1) of the AEC Treaty. Special treatment and assistance for states experiencing challenges include: temporary exemption from the full application of the AEC Treaty, and assistance from the fund in terms of the AEC Treaty. See article 79(2)(a)-(b) of the AEC Treaty.

<sup>47</sup> See para 2 above.

<sup>48</sup> On culture as a part of TFBC in TFCAs see paras 2; 3.2.1; and 3.2.5 above.

contained in the Cultural Charter. The aims of the Cultural Charter are, broadly summarised, to improve, educate, use, and acknowledge the richness found in Africa.<sup>49</sup> The Cultural Charter also strongly emphasises the principle of sovereignty through recognising the importance of national identity.<sup>50</sup> The Cultural Charter recognises and emphasises the importance of cultural diversity within national identities and one may argue that this recognition holds an important lesson for TFBC. It is argued that, if (hypothetically speaking) a TFCA is seen as a holistic identity (akin to a national identity), recognising the cultural diversity within that TFCA may enrich and strengthen social cohesion. As good governance depends on participation and input from local people,<sup>51</sup> a strengthened social component should in theory be beneficial to governance in TFCAs. The recognition of cultural diversity is therefore an important aspect to be recognised in a legal framework governing TFBC in TFCAs.

The Cultural Charter further provides means and methods for states to develop national cultural policies and emphasises the importance of training and education.<sup>52</sup> The Cultural Charter connects training and education to both cultural development and economic and social development,<sup>53</sup> and provides for inter-African cultural cooperation by emphasising its importance and urging states to exchange information, documentation and cultural material.<sup>54</sup> This could be especially beneficial to tourism activities in TFCAs, where tourists may be exposed to all of the indigenous cultures. This in turn should lead to local economic benefits and economic integration – also a goal of TFCAs. The Cultural Charter therefore implicitly enables access to and the improvement of cultural heritage, tourism and local economic integration, and possibly even poverty alleviation.<sup>55</sup>

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<sup>49</sup> See article 1 of the Charter.

<sup>50</sup> Articles 3, 4, and 5.

<sup>51</sup> See paras 3.1.1 and 3.1.5 above.

<sup>52</sup> Part III and IV of the Charter.

<sup>53</sup> Article 12 of the Charter.

<sup>54</sup> Article 31 of the Charter.

<sup>55</sup> See chapters 2 and 3 in general.

In sum, the Cultural Charter provides guidance in recognising, developing and protecting cultural rights in Africa and may be seen as a good legal guide for the development of principles informing a legal framework governing TFBC in TFCAs.<sup>56</sup>

#### 4.1.5 *The Lusaka Agreement*

The *Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora*, 1996 (Lusaka agreement) emphasises the importance of biodiversity conservation and sustainable development. It is important to TFBC in TFCAs as the Agreement focuses on the illegal trade in biodiversity across borders. The Lusaka agreement is not strictly considered to be AU law, as it is not a document applicable to all African states.<sup>57</sup> It was developed by eastern and southern African countries and therefore applies to certain SADC member states who are party thereto.<sup>58</sup> The main aim of the Lusaka agreement is to eliminate the illegal trade in wild fauna and flora and in so doing to conserve biodiversity, thus leading to sustainable development.<sup>59</sup> The Lusaka Agreement does provide for dissemination of information in several of its provisions (an element of the principle of good governance).<sup>60</sup> These provisions are, however, applicable between the state parties and the task force (discussed below).

Apart from the provisions on information exchange, the Agreement largely deals with institutional arrangements in order to establish a “Task Force” for the elimination of illegal trade, and unfortunately does not provide guiding measures for TFCA practitioners as to how to combat illegal trade within TFCAs. Reliance will have to

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<sup>56</sup> It should be noted that the *Charter for African Cultural Renaissance*, 2006 has been tabled to replace the Cultural Charter. The 2006 Charter needs 36 ratifications to enter into force and to date only 7 ratifications have been recorded. Given the rate at which African countries ratify AU instruments, it may take a long time for the new Charter to enter into force. For this reason the new Charter will not be analysed in this thesis. For a list of ratifications see [http://au.int/en/sites/default/files/Cultural%20Renaissance%20Charter\\_2.pdf](http://au.int/en/sites/default/files/Cultural%20Renaissance%20Charter_2.pdf) [date of use 29 October 2014].

<sup>57</sup> It is however discussed under regional law as it covers more than one REC in terms of its application and cannot be classified as SADC-specific law.

<sup>58</sup> The Republics of Congo (Brazzaville), Kenya, Liberia, Tanzania, Uganda, Zambia and the Kingdom of Lesotho are currently parties to the Agreement. South Africa, Ethiopia and the Kingdom of Swaziland are currently signatories.

<sup>59</sup> Article 2 of the Agreement.

<sup>60</sup> Articles 4(3), 9(c), and 9(d) of the Agreement.

be placed on the task force set up under the Lusaka agreement.<sup>61</sup> It should be noted here that it is theoretically possible for the Task Force to operate in TFCAs, as its mandate is to fight and stop the illegal trade in biodiversity across borders.<sup>62</sup>

The Task Force operates from Nairobi and facilitates activities between the National Bureaus established under the agreement. The existing National Bureaus are from Lusaka, Congo, Kenya, Tanzania, Uganda, Zambia, Liberia and Lesotho. As can be seen from the foregoing, not all SADC member states have designated National Bureaus. This is unfortunate and may render the Task Forces' activities in SADC ineffective in areas where no National Bureaus exist. Notwithstanding, where National Bureaus have been designated the Lusaka agreement operates well, and the Task Force seem to be very active in the field.<sup>63</sup> The agreement and the existence of the Task Force may provide the ideal platform to address current issues of wildlife crime such as rhino poaching and the illegal ivory trade, as was illustrated in the recent 'Operation Cobra II' in January 2014.<sup>64</sup> The illegal trade of biodiversity is a major concern in SADC, especially in the light of the GLTP, where the current controversy around rhino and elephant poaching is playing out. Successes like Operation Cobra II, if extended to areas like the GLTP, could significantly benefit TFBC.<sup>65</sup>

#### 4.1.6 NEPAD

This thesis has already dealt with NEPAD,<sup>66</sup> but it is worth reiterating that NEPAD is the single most important policy document geared towards one of the main goals of TFBC, i.e., sustainable development. In chapter 2 it was proposed that sustainable

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<sup>61</sup> Article 5 of the Agreement.

<sup>62</sup> Article 1 of the Agreement.

<sup>63</sup> See some of the press releases found at [http://lusakaagreement.org/?page\\_id=259](http://lusakaagreement.org/?page_id=259) [date of use 7 May 2014].

<sup>64</sup> This operation was a joint operation between African, Asian and North American law enforcement officers and provided great results. Over 36 rhino horns, three tons of elephant ivory, over ten-thousand turtles and many other protected species were recovered. See <http://lusakaagreement.org/wp-content/uploads/2013/09/Operation-Cobra-II--Press-Release-Final.pdf> [date of use 7 May 2014].

<sup>65</sup> The issue of poaching in the GLTP is specifically addressed in para 5.2 below.

<sup>66</sup> See para 2.3.1 above.

development and biodiversity are causally linked and interconnected.<sup>67</sup> As was argued above, NEPAD recognises this link through the environment initiative.<sup>68</sup>

The premise of the environment initiative is that a healthy and productive environment is a prerequisite for reaching the main goal of NEPAD, namely sustainable development.<sup>69</sup> Accordingly, the environment is described as the basis from which the main goal of NEPAD is to be reached.<sup>70</sup> This strengthens the arguments made above that the New Delhi Principles should be included in the interpretation of both article 24 of the African Charter and article 58 of the AEC Treaty.<sup>71</sup>

Given that this thesis employs the traditional view of sustainable development, which is based on the concept of three pillars or spheres, it is important to indicate how law or a legal framework fits into this picture. This traditional view is refined when the concept of governance is added as serving as an integrating factor among the pillars.<sup>72</sup> It is here that law and policy play important roles, as they facilitate governance and thus facilitate the integration of the pillars and ultimately could lead to sustainable development.<sup>73</sup> A visual explanation is given by adapting figure 4 above as follows:<sup>74</sup>

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<sup>67</sup> See para 2.4 above.

<sup>68</sup> See para 2.3.1 above.

<sup>69</sup> AU NEPAD Framework Document 34.

<sup>70</sup> AU NEPAD Framework Document 34.

<sup>71</sup> See paras 4.2.1 and 4.2.3 above.

<sup>72</sup> Department Environmental Affairs *South African National Strategy for Sustainable Development and Action Plan 2011-2014* 11.

<sup>73</sup> The definition of governance is subject to varied approaches and views. This thesis does not venture into a discussion of governance and the definitional debate that surrounds it. For a discussion of various definitions see Paterson "Protected Areas Governance in a Southern African Transfrontier Context" 168-169.

<sup>74</sup> See para 2.4.1 above. The adaptation involves the incorporation of law and policy into governance. Also see para 1.1.3 above on the relation between law and governance.

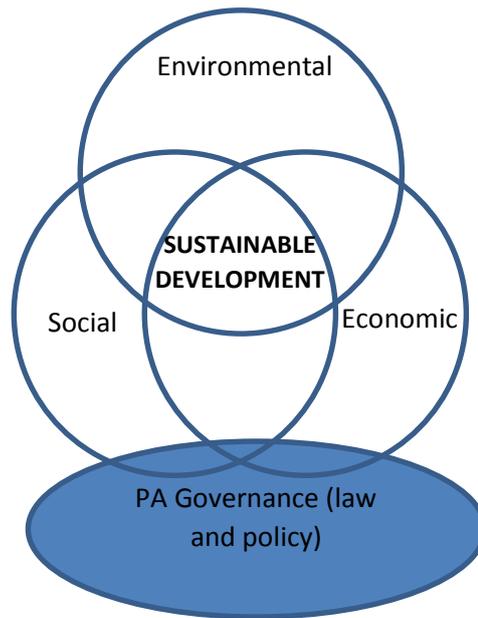


Figure 6: Sustainable development for TFBC<sup>75</sup>

It should be noted that NEPAD’s description reflects a mutual, symbiotic relationship between a healthy environment and social and economic empowerment, as it suggests that a healthy environment is a prerequisite for social and economic empowerment.<sup>76</sup> As NEPAD provides the framework of conditions and priority areas necessary for sustainable development, it provides a potentially solid policy foundation for guiding extraneous factors that may influence sustainable development for TFBC in TFCAs. The main factors and conditions set out in NEPAD remain largely extraneous to private TFCA practitioners (i.e. non-state TFCA practitioners) and they place a duty on states to sustain and create these conditions.<sup>77</sup> These conditions and sectoral priority areas as discussed in chapter 2 are:<sup>78</sup>

- Conducive conditions: peace; security; democracy; good governance; human rights; and sound economic management.

<sup>75</sup> Figure adapted from Department of Environmental Affairs *National Strategy for Sustainable Development and Action Plan 2011-2014* 11.

<sup>76</sup> See the argument made in para 2.3.1 above.

<sup>77</sup> AU NEPAD Framework Document 16-36.

<sup>78</sup> See para 2.4.1 above and AU NEPAD Framework Document 16-36.

- Sectoral priority areas: bridging the infrastructure gap; human resources development initiative, including reversing the brain drain; agriculture; culture; science and technology platforms; and the environmental initiative.

The foregoing conditions and priority areas relate closely to the New Delhi Principles and add value to a legal framework governing TFBC in TFCAs by complementing and reinforcing the New Delhi Principles. Good governance reflects Principles 5 and 6 of the New Delhi Declaration. Furthermore, peace, security, and sound economic management reflect the goals of TFCAs as identified above.<sup>79</sup> All in all, NEPAD reflects and supports sustainable development – a core element of TFBC in TFCAs. NEPAD creates an important policy framework for African states, setting out how sustainable development is to be achieved, and it therefore directly contributes (albeit unintentionally, as TFBC is never mentioned explicitly) to TFBC in TFCAs. One may criticise NEPAD, however, for not providing a definition of sustainable development. This paucity creates uncertainty, it may perhaps leave too much room for interpretation, and does not provide clear guidance on this important concept.<sup>80</sup>

#### *4.1.7 A synopsis of the TFBC principles the AU framework*

Before doing a principle-by-principle analysis, general observations regarding sustainable development and biodiversity are made. The AU legal and policy framework as a whole provides important guidance for and recognition of the concept of sustainable development. The fact that sustainable development is not mentioned explicitly by hard law instruments such as the African Charter, the African Convention and the Treaty of the AEC is a weakness of the AU legal framework for TFBC and environmental governance on the continent in general. One is left to infer the recognition of sustainable development from these documents by relying on the interpretation of the African Commission, specifically in the SERAC case.<sup>81</sup>

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<sup>79</sup> See para 2.3.3 above.

<sup>80</sup> This statement is made in the recognition that even if a definition had been given by the NEPAD, the definition of sustainable development as it currently stands (see para 2.4.1 above) is in itself malleable and vague, and clear guidelines are required to enable and support the definition.

<sup>81</sup> See paras 2.4.1 and 3.2.1 above.

This is hardly the ideal situation for such an important concept, as one would expect pertinent mention thereof as well as provisions supporting and enabling it. Despite the foregoing criticism, some principles giving effect to sustainable development are prevalent in AU law.<sup>82</sup> These are scattered among different conventions and charters, however, and are not explicitly linked to sustainable development (save for those contained in the NEPAD).<sup>83</sup> Without a structured and informed approach as to what the content of sustainable development is, it will be difficult to find aspects in the legal framework (hard law instruments) supporting sustainable development. This shows the importance of using the New Delhi Declaration as a tool to distil the legal principles that support and enable sustainable development. Through using the New Delhi Declaration as the tool for distillation, relevant policy statements have been found that may support sustainable development and therefore TFBC.

Sustainable development is covered explicitly and generously in the NEPAD. Although the NEPAD is only a policy, it provides solid guidance as to how sustainable development can be achieved by providing the conditions considered to be conducive to it as well as by identifying sectoral priority areas that need to be addressed in order to achieve sustainability. The NEPAD is not beyond criticism, however, as pointed out above, and the lack of a definition remains a stumbling block in the way of certainty.<sup>84</sup>

On the other hand, biodiversity enjoys no direct mention in the AU legal framework apart from the African Convention and the Lusaka Agreement.<sup>85</sup> As a whole, the AU legal framework does not provide for the holistic approach towards biodiversity necessary to TFBC in TFCAs and the concept of biodiversity conservation as defined in this thesis.<sup>86</sup> Furthermore, no mention is made of transfrontier conservation except in the Revised African Convention, which is not yet in force, and where the reference is indirect.<sup>87</sup> The legal framework therefore does not reflect the reality and needs of TFBC. This is worrying, as law and policy play central roles in facilitating TFBC, and even more alarming as the African continent currently plays

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<sup>82</sup> See para 4.1 above in general.

<sup>83</sup> See the analysis of the documents in paras 4.1.1 – 4.1.6.

<sup>84</sup> See para 4.1.6 above.

<sup>85</sup> See para 4.1.2 and 4.1.5 above.

<sup>86</sup> See para 2 above in general.

<sup>87</sup> See para 4.1.2 above.

host to almost a quarter of the Worlds' transfrontier TFCAs.<sup>88</sup> Africa is out of step with current environmental challenges and has no substantive and enforceable provisions in its legal framework to address these important challenges.

The foregoing remarks are general as to the provision for sustainable development and biodiversity conservation in the AU framework. This thesis now provides a synopsis of the extent to which the AU framework provides for the distilled principles i.e. sustainable use, equity and poverty alleviation, CBD, the precautionary principle, good governance,<sup>89</sup> cooperation, sovereignty, environmental assessments, and integration.<sup>90</sup>

#### 4.1.7.1 Sustainable use

The principle of sustainable use is never mentioned explicitly in the AU framework. This thesis has argued that the enjoyment of the common heritage as referred to in article 22(1) of the African Charter could be coupled with the principle of sustainable use. Even if this argument is accepted, the recognition of sustainable use remains implicit and does not have the strong legal recognition (in the current AU framework) needed to guide governance and new legal development. The main conservation instrument at AU level, the African Convention, disappoints further by not including any provisions for sustainable use. Only an implied reference to sustainable use is found in the preamble to the African Convention. This implied reference provides that natural resources must be utilised to satisfy the needs of people according to the carrying capacity of nature.

The revised African Convention does provide for sustainable use as one of its main objectives.<sup>91</sup> Moreover, the revised African Convention provides specifically for sustainable use in transfrontier areas.<sup>92</sup> These provisions are positive for TFCAs

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<sup>88</sup> The latest figures were published in 2007. According to these figures Africa plays host to 931 617.95 sq km<sup>2</sup> of the total global coverage, which is 4 626 601.85 sq km<sup>2</sup>. See [www.tbpa.net](http://www.tbpa.net) [date of use 11 June 2014].

<sup>89</sup> Including the principles of public participation, information exchange, and access to justice.

<sup>90</sup> See para 3.4 above.

<sup>91</sup> Article II(2) of the revised African Convention.

<sup>92</sup> Article XXII(2)(c) of the revised African Convention. Also see para 4.1.2 above for the relation between transfrontier areas and TFCAs.

and should bolster the principle of sustainable use and its application in the AU legal framework once the revised African Convention enters into force.

The AEC Treaty, in article 58, places an obligation on states to promote a healthy environment. As stated above, no definition is given as to what a healthy environment is or how a healthy environment should be promoted.<sup>93</sup> It was argued earlier that a link could be established between article 58 and article 24 of the African Charter through the interpretation of a right to a healthy environment by the SERAC case.<sup>94</sup> In so doing, article 58 could implicitly include sustainable development and therefore implicitly include sustainable use. A healthy environment should thus be subject to sustainable use in order to fulfil, amongst other things, the temporal aspect of generational equity in sustainable development. Unfortunately, without explicitly recognising sustainable use, the AEC Treaty fails to provide concrete guidance as to the possible application of this important principle.

The Lusaka Agreement does not specifically provide for sustainable use. It does, however, refer to sustainable use when defining conservation in article 1 thereof. Conservation is defined as: “the management of the human use of organisms or ecosystems to ensure such use is sustainable.” Considering the foregoing definition, the Lusaka Agreement contributes to sustainable use by the “management of human use” through combating illegal trade in wild *fauna* and *flora*. Hence, through the implementation of the Lusaka Agreement the principle of sustainable use may be argued to find direct application in the SADC context.<sup>95</sup>

As stated above, the NEPAD is the main document at AU level that aims to promote sustainable development. With sustainable use being an important component of sustainable development, the NEPAD disappoints in not making any provision for sustainable use.<sup>96</sup> Again, as was done with the African Convention and the AEC Treaty, one is left to infer the principle of sustainable use in the NEPAD framework. This implied inclusion is based on the inference that sustainable use forms part of

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<sup>93</sup> See para 4.1.3 above.

<sup>94</sup> See para 4.1.3 above.

<sup>95</sup> This is also true for parts of eastern Africa as the Lusaka Agreement only binds certain countries. See para 4.1.5 above for the detailed explanation.

<sup>96</sup> See para 4.1.6 above.

sustainable development, the latter being explicitly recognised by the NEPAD. At face value this implication may seem weak, but when reading the provisions related to agriculture it seems that sustainable use (or at least some form of the principle) could be recognised. The foregoing statement is based on one of the objectives related to agriculture, which reads: “to promote measures against natural resource degradation and encourage production methods that are environmentally sustainable.”<sup>97</sup> This objective alone may not justify the implicit inclusion of sustainable use in the NEPAD. However, when considering the NEPAD in the light of the statements made in the *AU Agenda 2063 The Africa we Want*, 2014 (draft document), the principle of sustainable use gains traction through the commitments stipulated in the document. One of the most relevant commitments resorts under the heading “Environmentally sustainable and climate resilient economies and communities”. The following excerpt highlights the emphasis on and acknowledgement of the principle of sustainable use:<sup>98</sup>

Africa by 2063 would have been transformed such that natural resources would be sustainably managed and African societies would consume and produce goods and services in a sustainable manner. National income accounts would be reformed to fully reflect changes in renewable and non-renewable natural resources wealth.

By 2063, Africa’s biodiversity, including its forests, rivers and lakes, genetic resources, land, as well as degraded fish stocks and coastal and marine ecosystems would be fully conserved and used sustainably. Forest and vegetation cover would be restored to 1963 levels.

Although a commitment to restore forest and vegetation cover to 1963 levels could be seen as idealistic and not necessarily achievable, it is clear that sustainable use is recognised as an important principle in achieving environmental sustainability. Agenda 2063 may accordingly have a positive influence on states in encouraging the use of the principle of sustainable use in their national laws and policies. Agenda 2063 may further encourage the AU to incorporate the principle in new legal and policy developments.

In sum, then, the foregoing discussion has pointed out that no explicit recognition is given to the principle of sustainable use in the AU legal framework (apart from the revised African Convention, which is not in force). The application of the principle is

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<sup>97</sup> Para 154 *AU NEPAD Framework Document* 41.

<sup>98</sup> *AU Agenda 2063 The Future we Want* 14.

therefore left to theoretical arguments resulting in the implicit recognition of the principle. As a result, no legal certainty or clear guidance is given by the AU legal framework as to the application of the principle of sustainable use.

#### 4.1.7.2 Equity and poverty alleviation

Equity or poverty alleviation is a very important principle giving effect to sustainable development, as was demonstrated in chapter 3 above.<sup>99</sup> The principle is further of crucial importance to TFBC, as many rural local communities live in or adjacent to TFCAs in the SADC.<sup>100</sup> As explained above, the principle of equity and poverty alleviation deals primarily with equity (the inter- and intragenerational context) and cooperation between states in the eradication of poverty.<sup>101</sup>

The African Charter makes no mention of equity in the inter- and intragenerational context. The African Charter does, however, deal with the broader concept of equality related to human rights, as equality is one of the important foundational principles of the Charter.<sup>102</sup> Article 3 contains the right to equality before the law and equal protection under the law, for example.<sup>103</sup> The Charter further provides for equal access to public services, equity in the workplace, and equal enjoyment of the common heritage of mankind.<sup>104</sup> The African Charter lacks specific provisions directly addressing cooperation with respect to the eradication of poverty. The Charter does, however, afford African people the right to economic and social development.<sup>105</sup> This right to economic and social development may bolster the fight against poverty eradication. This will depend, however, on individuals or organisations using the right in a court of law with the aim of eradicating poverty through the application thereof.

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<sup>99</sup> See para 3.2.2 above.

<sup>100</sup> See chapter 2 above in general.

<sup>101</sup> See para 3.2.2 above.

<sup>102</sup> Preamble to the African Charter.

<sup>103</sup> See para 4.1.1 above.

<sup>104</sup> Articles 13, 15 and 22 of the African Charter. Many other rights relevant to equality are to be found in the Charter but are not discussed within the scope of this thesis.

<sup>105</sup> Article 22(1) of the African Charter.

The African Convention does not explicitly provide for equity or poverty alleviation. As argued above, the principle of equity and poverty alleviation correlates with the principle of sustainable use.<sup>106</sup> It was further argued that the principle of sustainable use could be derived from the preamble of the African Convention.<sup>107</sup> Accordingly, the principle of equity and poverty alleviation should also be included implicitly in the preamble of the African Convention. It should be stressed here, however, that the fact that the inclusion of this important principle can only be implied leaves too much room for interpretation and creates legal uncertainty as to the possible application of the principle.

The revised African Convention provides that developmental and environmental needs must be ensured by states in a sustainable, fair and equitable manner.<sup>108</sup> This provision does, however, not reflect equity in the inter- and intragenerational sense as described elsewhere in this thesis.<sup>109</sup> The equitable use of water resources, equitable access to genetic resources, equitable benefit sharing, and equal judicial remedies (in the case of transfrontier harm) also fall within the broader scope of equality, and enjoy attention in the revised African Convention.<sup>110</sup> In terms of poverty alleviation, the revised African Convention makes general reference to the social and economic needs of people, but never explicitly addresses the challenge of poverty alleviation.<sup>111</sup> However, considering the argument that the principles of sustainable use and equity and poverty alleviation are connected, the principle of equity and poverty alleviation may by implication find application in the revised African Convention. This is due to the fact that sustainable use is one of the main objectives of the revised African Convention.<sup>112</sup> Again, implied inclusion is not the ideal situation to provide legal certainty, and leaves the principle of equity and poverty alleviation (as used in this thesis) absent from the revised African Convention.

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<sup>106</sup> See para 3.2.2 above.

<sup>107</sup> See para 4.1.7.1 above.

<sup>108</sup> Article III(3) of the revised African Convention.

<sup>109</sup> See para 3.2.2 above.

<sup>110</sup> Articles VII(3), IX(2)(j), IX(2)(k), and XIV(2) of the revised African Convention.

<sup>111</sup> See, for example, article VIII(1)(a) of the revised African Convention.

<sup>112</sup> Article II(2) of the revised African Convention.

The AEC Treaty does not directly deal with equity as understood in this thesis. The AEC Treaty does provide for the equality of member states as one of the principles of the Treaty.<sup>113</sup> The foregoing provision does not relate, however, to equity and poverty alleviation. Poverty alleviation is specifically included in article 72(2)(a) of the AEC Treaty. Article 72(2)(a) provides that states undertake to:

[h]armonize gradually their labour and social security legislation with a view to eliminating poverty and promoting balanced socio-economic development within the Community.

In reading the foregoing article it is clear that states are urged to cooperate (by harmonising their legislation) in order to eliminate poverty. In so doing, article 72 directly contributes to the principle of equity and poverty alleviation. The NEPAD aims to promote the achievement of sustainable development in Africa, and therefore it could be argued that the principle of equity and poverty alleviation could be tacitly embedded within NEPAD, as equity and poverty alleviation form an integral part of sustainable development.<sup>114</sup> Although the NEPAD framework document contains references to the concept of equality and equity, no provision/s in the document fits the bill of equity as described in this thesis.<sup>115</sup> The expected outcomes of the NEPAD, through the aim of achieving sustainable development, are to reduce poverty and inequality, among other things.<sup>116</sup> Accordingly, at a very basic level, the ideology of the NEPAD seen through the outcomes of the NEPAD correlate with the principle of equity and poverty alleviation. Keeping the foregoing in mind, the NEPAD could be criticised for not including specific goals and/or provisions related to inter- and intragenerational equity. Contrary to equity, there are many provisions in the NEPAD related to poverty alleviation. These provisions range from an overview of the historical impoverishment of the African continent to the role of globalisation on poverty in Africa.<sup>117</sup> Of importance to TFBC is the recognition of the environment initiative as a prerequisite to the NEPAD.<sup>118</sup> This recognition is important as a connection is made between the sustainable use and conservation of biodiversity and poverty alleviation.<sup>119</sup> Moreover, in the Plan of Action, the NEPAD

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<sup>113</sup> Article 3(a) of the AEC Treaty.

<sup>114</sup> See para 3.2 above.

<sup>115</sup> See para 3.2.2 above.

<sup>116</sup> Para 69 AU *NEPAD Framework Document* 14.

<sup>117</sup> Paras 18-41 AU *NEPAD Framework Document* 4-8.

<sup>118</sup> For a discussion on the environment initiative, see para 2.4.1 above.

<sup>119</sup> Paras 135-136 AU *NEPAD Framework Document* 34.

indicates that one of its long-term objectives is to alleviate poverty. It also underlines the importance of bridging the infrastructure gap in an attempt to eradicate poverty.<sup>120</sup> In sum, the NEPAD provides strategic direction that may contribute to – and support - the principle of equity and poverty alleviation. It should again be stressed that the NEPAD Framework Document is not a legally binding document and that it is a programme run under the auspices of the AU.

In sum, then, the foregoing discussion has pointed out that the principle of equity or poverty alleviation enjoys almost no recognition in the AU legal framework. Although equality is mentioned and used in various legal (and non-legal) instruments, the content thereof does not equate to equity as described in this thesis. Again, one is left to implicitly derive the principle from the legal framework. As for poverty alleviation, the NEPAD provides important strategic direction as to how poverty may be reduced, but poverty enjoys no direct attention in the legal framework related to TFBC.<sup>121</sup> As a result no legally enforceable rights and/or obligations exist in the AU that can help pave the road towards poverty alleviation.

#### 4.1.7.3 CBDR

Apart from the implied application of the principle of CBDR as a principle giving effect to sustainable development,<sup>122</sup> the AU legal framework does not directly provide for the principle of CBDR. One provision, in the African Convention, could however be construed to indirectly accommodate the CBDR principle. This is the case where member states with endemic species (considered to be endangered) are given a higher responsibility to conserve and protect the species in question.<sup>123</sup> Article II of the African Convention places a higher duty on member states with endemic species regarded as endangered. Accordingly, although all member states have a duty to protect and conserve species, some states may have a higher responsibility (or differentiated responsibility) to protect and conserve species. Another provision that tacitly recognises the CBDR principle is article 79 of the AEC

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<sup>120</sup> Para 98 AU *NEPAD Framework Document* 22.

<sup>121</sup> This thesis has not investigated legal instruments falling outside the scope of biodiversity conservation and sustainable development.

<sup>122</sup> See para 4.1.2 above.

<sup>123</sup> Article II of the African Convention. Also see para 4.1.3 above.

Treaty as discussed above.<sup>124</sup> Article 79 provides for different responsibilities, in terms of their duties towards the AEC Treaty, in accordance with their social and economic challenges.<sup>125</sup>

In sum, no explicit provisions exist in the AU framework accommodating the CBDR principle. Notwithstanding, the tacit recognition of the principle in article 79 of the AEC Treaty, offers a good example of how the principle could be applied in the African context.

#### 4.1.7.4 The precautionary principle

The precautionary principle could be argued to find tacit application in the AU legal framework considering the discussion of article 24 of the African Charter above.<sup>126</sup> The principle is directly recognised in the revised African Convention, although the application of the principle depends on the entry into force of the revised African Convention.<sup>127</sup> The foregoing are the only provisions related to the precautionary principle in the AU framework analysed by this thesis.<sup>128</sup>

#### 4.1.7.5 Good governance<sup>129</sup>

In general, the principle of good governance (or rather the separate elements thereof) enjoys generous recognition throughout the AU legal framework. As described above, article 3 of the African Charter places a duty on states to afford all interested and affected parties equal protection under the law.<sup>130</sup> The foregoing speaks to access to justice and affords parties the right to participate in legal

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<sup>124</sup> It may be argued that the content of the provision points to direct recognition of the CBDR principle. But as the CBDR principle is not mentioned explicitly, this thesis argues that the recognition is only tacit.

<sup>125</sup> See para 4.1.3 above.

<sup>126</sup> See para 4.1.1 above.

<sup>127</sup> See article IV of the revised African Convention and the discussion in para 4.1.2 above.

<sup>128</sup> Other AU law and policy also include the precautionary principle but is not discussed within the scope of this thesis. See, for example, article 3(f) of the Bamako Convention. For a brief discussion on the Bamako Convention see para 3.2.2 above.

<sup>129</sup> Including the principles of public participation, information exchange, and access to justice as elements thereof.

<sup>130</sup> See para 4.1.1 above.

procedures and adjudication for their protection under the law.<sup>131</sup> Furthermore, article 9(1) of the African Charter affords every individual the right of access to information that is related to access to justice.<sup>132</sup> The foregoing not only forms a part of good governance but is also seen as an integral part of effective participation.<sup>133</sup> As discussed above, access to justice was recognised by the African Court as a human right and a peremptory norm – *jus cogens*, albeit in a dissenting opinion.<sup>134</sup> It has been pointed out above, however, that access to justice, under the auspices of being a procedural right, could at most be recognised as a principle of customary international law.<sup>135</sup> Notwithstanding, access to justice forms an important component of good governance and the African Charter provides important procedural rights to individuals through which they may protect and enforce their human rights. The question remains, however, whether or not states will give effect to the rights as provided for in the African Charter.<sup>136</sup>

The principle of good governance is absent from the African Convention but is found in the revised African Convention. Article XVI, as discussed above, places a duty on states to disseminate information, to allow access to information, to facilitate public participation, and to allow access to justice.<sup>137</sup> The revised African Convention explicitly provides for procedural rights in article XVI thereof. These include the dissemination of environmental information, access to environmental information, public participation, and access to justice. The revised African Convention further affords parties that are victims of transboundary harm protection similar to the protection in Principle 14 of the UNEP Principles.<sup>138</sup> As discussed above, the Lusaka Agreement provides for the dissemination of information in several of its articles and could thereby also contribute to good governance in TFBC.<sup>139</sup>

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<sup>131</sup> See the discussion on the Atabong case in para 3.3.5 above.

<sup>132</sup> See para 3.3.5 above.

<sup>133</sup> For a discussion on the elements of good governance see para 3.2.6 above. For the link between effective participation and access to information see the discussion on effective participation as interpreted by the Endorois case in para 3.2.5 above.

<sup>134</sup> See the discussion on the Atabong case in para 3.3.5 above.

<sup>135</sup> See para 3.3.5 above.

<sup>136</sup> This was the source of conflict in the Atabong case. See the minority opinion of the Atabong case at pages 1-4.

<sup>137</sup> See the discussion and critique in para 4.1.2 above.

<sup>138</sup> See the discussion on Principle 14 in para 3.3.5 above.

<sup>139</sup> Articles 4(3), 9(c), and 9(d) of the Agreement. See the discussion in para 4.1.5 above.

The AEC Treaty provides for inter-state participation between member states by exchanging experiences and information on literacy, vocational training, and employment.<sup>140</sup> Although this provision on exchanging experiences and information focuses on inter-state relations (as opposed to state and individuals), it could be relevant in the TFBC context. Where TFCAs are in the process of drafting management plans or IDPs, the exchange of information and experiences in the fields mentioned above could simplify the process by encouraging harmonisation and mutual understanding between the different states. This provision could therefore contribute to good governance in the TFBC context.

It was argued above that the Cultural Charter could tacitly give effect to the recognition and participation of local communities in TFCAs.<sup>141</sup> Further contributing to good governance is the provision for exchange of information, documentation and cultural material.<sup>142</sup> This provision for information exchange, documentation and cultural materials may positively reinforce the provision of the AEC Treaty discussed in the previous paragraph, and also contribute to the drafting of harmonised management plans and/or IDPs.

The NEPAD specifically caters for good governance in the context of sustainable development by listing good governance as one of the conditions conducive to sustainable development.<sup>143</sup> The effect of this provision is that access to information and public participation enjoy general recognition through the NEPAD Framework document. Unfortunately, however, good governance – as a principle – is not defined or given substantive meaning in the NEPAD. This lack of substantive meaning and definition weakens the inclusion of good governance as a principle of NEPAD as it fails to give the principle clear and guiding content within the African context. This leaves those who govern without a clear guideline to direct their actions and decisions towards the goals of good governance and sustainable development.

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<sup>140</sup> Article 72 of the AEC Treaty.

<sup>141</sup> See para 4.1.4 above.

<sup>142</sup> Article 31 of the Cultural Charter. Also see para 4.1.4 above.

<sup>143</sup> AU *NEPAD Framework Document* 16-36. Also see para 4.1.6 above.

In sum, most aspects of the principle of good governance are included throughout the AU legal framework discussed in this thesis. The principles of public participation and access to information are the most prominent. As these two principles are important in the TFBC environment where local communities are involved, the inclusion thereof provides good legal support for TFBC. Public participation and access to information further form part of access to justice in the widest sense. The dissenting opinion of the African Court in the Atabong case recognising access to justice as a peremptory norm is also an interesting (although controversial) development in African jurisprudence.<sup>144</sup> When the revised African Convention comes into force, procedural rights will arguable be well-established in the African context.

#### 4.1.7.6 Cooperation

Cooperation, as defined above, refers to joint action between parties.<sup>145</sup> This joint action takes many faces when considering the UNEP and New Delhi Principles discussed above.<sup>146</sup> Cooperation is required in terms of Principle 2 of the New Delhi Declaration where states aim to eradicate poverty; cooperation and participation are required with all relevant stakeholders when considering the precautionary principle under Principle 4 of the New Delhi Declaration; and cooperation is seen through Principle 5 of the New Delhi Declaration where it requires public participation and access to justice.<sup>147</sup> Moreover, the CBDR principle at its core implies and requires cooperation between states.<sup>148</sup> The foregoing examples of where and how cooperation could manifest through the Principles 4 and 5 of the New Delhi Declaration show that cooperation is not confined to cooperation between states. Cooperation also takes the form of cooperation between the state and the individual, especially in the TFBC context, where NGOs, local communities and other

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<sup>144</sup> This is stated with due recognition of the fact that the dissenting opinion of the African Court is not binding, nor does it create a peremptory norm – *jus cogens*. The author agrees with the dissention opinion, however, based on the fact that access to justice is a human right and human rights, according to the Barcelona case, are examples of peremptory norms. See the discussion in para 3.3.5 above.

<sup>145</sup> See para 3.3.1 above.

<sup>146</sup> See para 3.3.1 above.

<sup>147</sup> See para 3.3.1 above.

<sup>148</sup> See para 3.3.2 above.

stakeholders are involved.<sup>149</sup> Considering the foregoing, cooperation can be seen as a cross-cutting requirement for TFBC. It is crucially relevant where more than one party is involved in the governance process.

Since cooperation is important in the TFBC context and in the regional legal context, the African Charter disappoints by making only a single explicit reference to cooperation. This reference is found in article 21(3) promoting “international economic cooperation based on mutual respect, equitable exchange and the principles of international law.” The African Charter does not elaborate on what international economic cooperation entails, but logic dictates that it refers to economic relations between African and foreign countries.<sup>150</sup>

It was argued that cooperation is also connected to equity and poverty alleviation, CBDR, the precautionary principle, and aspects of good governance. Accordingly, all of the provisions that tacitly or expressly give effect to the latter principles will imply cooperation. To avoid repetition, the cases where cooperation could be implied on the basis of the connection between the principles and cooperation will not be discussed here. This analysis will continue with a focus on where explicit recognition is given to cooperation.

Explicit recognition is given to cooperation in the African Convention.<sup>151</sup> In this regard the African Convention places a duty on states to cooperate in giving effect to the provisions of the Convention.<sup>152</sup> This broad mandate of cooperation is, in essence, a complete mandate for cooperation in terms of the African Convention. Operating without a Secretariat or COP, however, renders the duty of cooperation void, as this duty cannot be enforced. The African Convention further obliges states to cooperate with the (then) OAU by providing it with information relevant to their efforts in implementing the African Convention.<sup>153</sup> Again, this provision remains

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<sup>149</sup> See para 2 in general and 2.3.3 specifically.

<sup>150</sup> A second provision is found in Article 45(1)(c). This duty of cooperation is relevant to the African Commission only, however. In terms of article 45(1)(c) the African Commission is obliged to cooperate with other African and international institutions concerned with the promotion of human rights.

<sup>151</sup> Article XVI of the African Convention.

<sup>152</sup> Article XVI(a) of the African Convention.

<sup>153</sup> Article XVI(2)(a)(c) of the African Convention.

toothless without a Secretariat or COP to enforce it. The revised African Convention provides for cooperation where water resources traverse national boundaries. The foregoing cooperation includes consultation between states as well as establishing inter-state commissions for the joint management and conservation of the shared resource.<sup>154</sup> The revised African Convention also obliges states to cooperate, through the establishment of multilateral agreements, in combating illegal trade in wild *fauna* and *flora*.<sup>155</sup> Of particular importance to TFBC, as discussed above, is the provisions for cooperation where biodiversity traverses borders.<sup>156</sup> A duty is placed on states to cooperate in the management, development, and conservation of transfrontier areas.<sup>157</sup> The foregoing provision for cooperation could benefit the legal framework for TFBC if and when the revised Convention enters into force.

The AEC Treaty, in chapter four thereof, deals generally with cooperation in the fields of food and agriculture.<sup>158</sup> This general duty for cooperation relates specifically to food security and the enhancement of agriculture. Although the aforementioned duty is not directly relevant to TFBC, member states are further required (in effecting the general duty) to cooperate in plant and animal protection. The duty to cooperate in plant and animal protection could be used to bolster biodiversity conservation in the TFBC context. The AEC Treaty specifically places a duty on member states to cooperate in the areas of natural resources and energy.<sup>159</sup> As stated above, this duty to cooperate entails, amongst other things, the exchange of information and the transfer of technology and knowledge.<sup>160</sup>

The Cultural Charter emphasises inter-African cultural cooperation by means of the exchange of information, documentation and cultural material.<sup>161</sup> As seen from the previous paragraph, the exchange of information forms an important component of cooperation – at least in the context of the AEC Treaty and Cultural Charter. In the TFBC context the exchange of information as well as effective participation may also

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<sup>154</sup> Article VII(3) of the revised African Convention.

<sup>155</sup> Article XI(2) of the revised African Convention.

<sup>156</sup> See para 4.1.2 above.

<sup>157</sup> See para 4.1.2 above and article XXII(2)(c) of the revised African Convention.

<sup>158</sup> Articles 46 and 47 of the AEC Treaty.

<sup>159</sup> See para 4.1.3 above and article 56 of the AEC Treaty.

<sup>160</sup> Article 56(a) and 56(e) of the AEC Treaty. See para 4.1.3 above.

<sup>161</sup> Article 31 of the Cultural Charter. Also see para 4.1.4 above.

form integral components of cooperation, as many stakeholders could be involved when decisions are taken and when projects/developments are proposed.<sup>162</sup>

The Lusaka Agreement, which is geared towards the elimination of illegal trade in wild *fauna* and *flora*, recognises the need for cooperation among states in achieving the aim of the Agreement.<sup>163</sup> In terms of the Lusaka Agreement states are called to cooperate with each other and the Task Force.<sup>164</sup> The Task Force is further required to facilitate cooperation between the National Bureaus.<sup>165</sup> Apart from the foregoing, no further provision describe or further give effect to the principle of cooperation.

In general, the NEPAD Framework document recognises cooperation in many forms and cooperation related to various aspects. This thesis is, however, is limited to cooperation within the context of TFBC. In relation to sustainable development, regional cooperation is specifically mentioned as an objective for bridging the infrastructure gap.<sup>166</sup> Regional cooperation for shared water resources and cooperation in planning related to water are also set as objectives in the document.<sup>167</sup> Tourism also enjoys attention and cooperative partnerships between member states are encouraged with the purpose of capturing the benefits of shared knowledge related to the tourism industry.<sup>168</sup> These agreements are supposed to serve a further purpose in providing a knowledge base from which other countries could build their own tourist-related industries.<sup>169</sup>

In essence, in any action/process where more than one party is involved, cooperation stands central to the achievement of the aims of the action/process. As TFBC involves many stakeholders, cooperation becomes a complex - but crucial - requirement to ultimately achieve sustainable TFBC. Cooperation is complex not only because of the multitude of possible stakeholders involved, but also because of the hierarchical dimension that could be involved in the cooperation. Cooperation

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<sup>162</sup> See, in general, para 2 above.

<sup>163</sup> Preamble to the Lusaka Agreement.

<sup>164</sup> Article 4 of the Lusaka Agreement.

<sup>165</sup> Article 5(9)(a) of the Lusaka Agreement. Also see para 4.1.5 above.

<sup>166</sup> Para 102 AU *NEPAD Framework Document* 22.

<sup>167</sup> Para 113 AU *NEPAD Framework Document* 28.

<sup>168</sup> Para 161 AU *NEPAD Framework Document* 45.

<sup>169</sup> Para 161 AU *NEPAD Framework Document* 45.

may be required between a state and individuals/groups, for example. Because cooperation can be complex in the TFBC setting, the principle of cooperation should be well entrenched in supra-national law to foster transboundary governance of biodiversity. Although many provisions are found facilitating cooperation or aspects of cooperation, no clear duty to cooperate in the field of TFBC exists in the AU legal framework. The duty to cooperate is provided for in a piecemeal fashion among the relevant legal instruments. Yet it would be wrong to fault the legal framework as a whole for the piecemeal nature in which cooperation is included. Each legal document can introduce cooperation only within the aim and purport of that specific document and its regulatory focus. The blame should rather be carried by the fact that Africa is challenged with a lack of an enforceable environmental framework convention. The current African Convention is outdated and cannot facilitate the cooperation needed in terms of a modern notion like TFBC. A framework convention should facilitate connected cooperation. This connected cooperation implies transfrontier cooperation as well as cooperation between all relevant stakeholders.

#### 4.1.7.7 Sovereignty, environmental assessments, and integration

As sovereignty is a principle held in special high regard in Africa, it may come as a surprise that most of the documents in the AU legal framework do not explicitly recognise it.<sup>170</sup> Yet sovereignty is recognised as a general principle of international law<sup>171</sup> and therefore, by implication, applies to the legal framework and should not need explicit inclusion. The revised African Convention refers to sovereignty in its preamble but not in the main text. The AEC Treaty refers only to “principles of international law governing relations between states” in its preamble and does not explicitly mention sovereignty, although it may be implied. The only document explicitly recognising sovereignty is the Cultural Charter, through the recognition of the importance of a national identity.<sup>172</sup> Limitations to sovereignty are found in the legal framework, however, and, to a certain degree these limitations give effect to the theoretical concept of custodial sovereignty. The concept of sustainable use, as discussed above, serves as an example, as it requires states to use their sovereign

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<sup>170</sup> See para 2.2.2 above for a discussion on sovereignty.

<sup>171</sup> See the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States* UNGA RES/2625 (XXV).

<sup>172</sup> See para 4.1.4 above and articles 3, 4 and 5 of the Cultural Charter.

resources in a sustainable manner.<sup>173</sup> Furthermore, where cooperation is required in terms of shared resources, this cooperation also limits the sovereign right of states to exploit their resources.

Environmental assessments, in the transboundary context, are not explicitly covered in the AU legal framework. It could be argued that the principle of sustainable use requires environmental assessments implicitly as sustainable use, at its core, requires the assessment of current and future use. Unfortunately, sustainable use is not currently a generally recognised principle in the AU legal framework.<sup>174</sup> The revised African Convention does provide for impact assessments to ensure that conservation and management plans are taken into account for national or local development plans.<sup>175</sup> A further duty is placed on states to use impact assessments to ensure that the spheres of sustainable development are considered when development plans are drafted.<sup>176</sup> Again, these provisions are not legally enforceable as the revised Convention is yet to enter into force.<sup>177</sup>

The principle of integration is not found explicitly in the AU legal framework.<sup>178</sup> The integration principle aims to integrate human rights, social concerns, economic concerns, and environmental concerns – it consequently captures the balancing act of sustainable development.<sup>179</sup> It was argued above that the SERAC case implicitly recognised the integration principle when the African Commission interpreted article 24 of the African Charter.<sup>180</sup> The Commission stated that the right to a clean and safe environment is closely linked to economic and social rights.<sup>181</sup> As was argued above, TFBC revolves around two main (and interrelated) drivers: biodiversity conservation and sustainable development.<sup>182</sup> As biodiversity conservation could form part of the environmental sphere of sustainable development, the integration principle becomes crucially important in a legal framework facilitating TFBC. Without

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<sup>173</sup> See para 4.1.7.1 above.

<sup>174</sup> See para 4.1.7.1 above.

<sup>175</sup> Article XIV of the revised African Convention.

<sup>176</sup> Article XIV of the revised African Convention.

<sup>177</sup> See para 4.1.2 above.

<sup>178</sup> See para 3.2.7 above.

<sup>179</sup> See para 3.2.7 above.

<sup>180</sup> Article 24 of the African Charter reads: “All peoples shall have the right to a general satisfactory environment favourable to their development”.

<sup>181</sup> Para 51 of the SERAC case.

<sup>182</sup> See para 2.4 above.

the integration and balancing of the three different spheres, effect cannot be given to sustainable TFBC. It is thus crucial that the principle of integration is to be recognised in a legal framework effecting TFBC.

#### 4.1.7.8 The extent of facilitation

The foregoing paragraphs explained whether or not the distilled principles are facilitated in the AU framework. To a large extent the principles are not directly incorporated within the legal framework. This could be consequential to the fact that the framework does not yet recognise the concept of TFBC. As indicated above, most of the principles could be tacitly included in the legal framework when using assumptions, inferences, and non-binding jurisprudence through the African Commission. The fact that the recognition is tacit creates challenges for legal certainty and accordingly for governance processes that in essence require legal guidance in the TFBC context. Some positive aspects regarding procedural rights are also observed. The revised African Convention provides generously for procedural rights and should greatly improve the position of individuals when it enters into force. The African Charter also recognises the importance of procedural rights and affords individuals certain procedural rights as basic human rights. The foregoing was further recognised by the minority opinion in the Atabong case before the African Court.

Although some positive aspects are drawn from the AU framework, the extent to which the principles of TFBC are facilitated falls short when considering the necessity of legal certainty for transfrontier governance. Consequently, the African legal framework (especially the hard law documents) urgently needs updating to cater for contemporary environmental challenges and for modern environmental initiatives with a view to fostering sustainable development (TFBC being an example).

## **4.2 The SADC legal and policy framework**

The instruments analysed in this section include the SADC Treaty,<sup>183</sup> the SADC Protocol on Forestry,<sup>184</sup> the SADC Protocol on Wildlife and Law Enforcement,<sup>185</sup> the SADC Protocol on Fisheries,<sup>186</sup> the SADC Protocol on Shared Watercourses,<sup>187</sup> the SADC Protocol on Tourism,<sup>188</sup> the SADC RISDP, the SADC Biodiversity Strategy, and the SADC Regional Biodiversity Action Plan (RBAP). These documents have been chosen as they are most relevant to the topic of TFBC in TFCAs. After the documents are analysed, a summary will be provided indicating the extent to which the distilled TFBC principles are facilitated in the SADC framework.

### *4.2.1 SADC Treaty*

The SADC Treaty establishes SADC as the REC of the Southern African region. The Treaty affirms the principles of sovereignty; solidarity, peace and security; human rights, democracy, and the rule of law; equity, balance and mutual benefit; and peaceful settlement of disputes.<sup>189</sup> These principles, as described in the SADC Treaty, are meant to regulate the relationship between SADC states, and are to be implemented by SADC members in their national legal regimes in order to harmonise the political and socio-economic policies of SADC members.<sup>190</sup>

The objectives of SADC coincide with some of the principles distilled for TFBC TFCAs and they fit within the contextual and conceptual background of TFCAs as discussed above.<sup>191</sup> These include economic growth, the alleviation of poverty, regional integration, peace and security, the interdependence of member states, the sustainable use of biodiversity and the protection thereof, and the strengthening and consolidation of social and cultural links among the people of the region.<sup>192</sup> The

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<sup>183</sup> Adopted in Windhoek, Namibia in August 1992.

<sup>184</sup> Adopted in Luanda, Angola, October 2002.

<sup>185</sup> Adopted in Maputo, Mozambique 18th of August, 1999.

<sup>186</sup> Adopted in Blantyre, Malawi, 14th of August, 2001.

<sup>187</sup> Adopted in Windhoek, Namibia 7th of August, 2000.

<sup>188</sup> Adopted in Kinshasa, Congo 1998 and amended in 2009.

<sup>189</sup> Article 4 of the Treaty.

<sup>190</sup> See the objectives in general as encapsulated in article 5 of the Treaty.

<sup>191</sup> See paras 2.3 and 3 above.

<sup>192</sup> Article 5(1) of the Treaty.

SADC Treaty also places a duty on member states to cooperate in social, economic and environmental matters, among others.<sup>193</sup> This duty to cooperate confirms the cooperation principle contained in the UNEP Principles.<sup>194</sup> The Treaty does not provide the detail of the cooperation required, but requires this information to be determined in Protocols relating to each area of cooperation.<sup>195</sup> Insofar as such provisions exist, they will be discussed in the relevant Protocols below. The following sections analyse the SADC Protocols and policy in order to conclude to what extent the distilled principles for TFBC in TFCAs are facilitated in this framework.

#### 4.2.2 *Wildlife Protocol*

The Wildlife Protocol may be considered the single most important Protocol in the SADC legal framework as it is the only instrument directly addressing TFCAs.<sup>196</sup> For this reason, one would expect it to contain numerous provisions related to the primary objectives of TFCAs, namely sustainable development and biodiversity conservation. Unfortunately, however, the Protocol uses the terms “conservation” and “sustainable use” of “wildlife” throughout. In the definitional section of the Protocol, “wildlife” is defined as “animal and plant species occurring within natural ecosystems and habitats”.<sup>197</sup> This poses a difficulty as the scope of TFCAs is much broader than sustainable use of wildlife, as is evident in the TFBC principles supporting the drivers of biodiversity conservation and sustainable development. Moreover, the terms used cover only a small part of the contextual background of TFCAs sketched in chapter 2 above.<sup>198</sup> In defence of the Protocol, the preamble states that the conservation and sustainable use of wildlife contributes to both biodiversity conservation and sustainable development. The preamble is the only place in the Protocol where sustainable development and biodiversity conservation are mentioned. The Protocol exacerbates this limited focus by excluding forestry

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<sup>193</sup> The Treaty also emphasises cooperation in the areas of politics, science and technology, and infrastructure as well as food security land and agriculture. See article 21 of the Treaty.

<sup>194</sup> See para 3.3.1 above.

<sup>195</sup> Article 22 of the Treaty.

<sup>196</sup> See Lubbe “A Legal Appraisal of the SADC Normative Framework Related to Biodiversity Conservation in Transfrontier Conservation Areas” 223.

<sup>197</sup> Article 1 of the Protocol.

<sup>198</sup> See paras 2.2 and 2.3 above.

and fisheries from its scope.<sup>199</sup> This failure to recognise the importance of biodiversity more generally and thus the need for connectivity further undermines the vision of the holistic nature of biodiversity<sup>200</sup> and a connected approach towards the governance of TFBC in TFCAs.<sup>201</sup>

In contrast to the severe limitations of the scope of the Protocol, article 4 emphasises the need for “common approaches” and affirms the need for the harmonisation of law, the exchange of information, capacity building, and community involvement in wildlife resource governance to facilitate such common approaches. Article 4 therefore includes some of the distilled principles for TFBC by going beyond the frequently used terms (conservation and the sustainable use of wildlife) and recognises the exchange of information<sup>202</sup> and public participation specifically.<sup>203</sup> The Protocol further elaborates on the harmonisation of law by specifically stating that states should adopt national laws where the following issues are standardised:<sup>204</sup>

- Protection measures for wildlife and their habitat;
- The taking of wildlife;
- Trade in wildlife and wildlife products;
- Penalties for illegal taking and trade;
- The powers of enforcement officers;
- Extradition procedures;
- Community-based wildlife resource management; and
- Economic and social incentives for conservation and sustainable use.

All of the above are important aspects around which harmonisation must occur and should harmonisation be achieved, it could contribute to aligning national efforts to realise TFBC in SADC. However, without a mechanism for measuring, implementing

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<sup>199</sup> Article 2 of the Protocol.

<sup>200</sup> See para 2.1 above.

<sup>201</sup> See paras 2.1, 2.2, 2.2.3, and 2.3.1.4 above.

<sup>202</sup> As contained in Principles 4 and 5 of the New Delhi Declaration and Principles 1, 4, and 8, as well as the procedural aspect contained in the UNEP Principles. See paras 3.2 and 3.3 above.

<sup>203</sup> Public participation is recognised by Principles 5 and 6 of New Delhi and Principles 5 to 14 of the UNEP Principles. See paras 3.2.5, 3.2.6, and 3.3.5 above.

<sup>204</sup> Article 6, which deals with the standardisation of protection, capturing wildlife, trade in wildlife, crime and economic incentives for conservation, among other topics.

and monitoring harmonisation in SADC, this remains an ideal yet to be reached.<sup>205</sup> The challenge is exacerbated by the fact that the legal instruments fail to explain what is meant by harmonisation and how it should be achieved, as explained above.<sup>206</sup>

The Protocol further includes provisions on wildlife management,<sup>207</sup> cooperation in wildlife law enforcement<sup>208</sup> and capacity building.<sup>209</sup> These provisions are formulated in a way that places a duty on states to establish provisions enabling all of the objectives in the Protocol. It is therefore important, in order for the Protocol to effectively contribute towards TFBC, that the conduct of member states as regards their duties in terms of the Protocol are monitored and enforced. In order to accomplish this, the Wildlife Sector Technical Coordinating Unit (WSTCU) was created.<sup>210</sup> It would seem that the WSTCU is currently not in operation, since no record of any activities/decisions could be found. If so, this is unfortunate, as it is the primary instrument to oversee the joint governance of wildlife resources in SADC.

Nonetheless, an important aspect of the Protocol is that it recognises the need for transfrontier conservation and encourages the establishment of TFCAs. By including and recognising certain principles of TFBC, the Protocol contributes towards a legal framework for TFBC, albeit only in part. The Protocol fails to provide a holistic normative framework for decision makers, containing the full spectrum of principles required to govern TFBC in TFCAs. By focusing on the “sustainable use and conservation of wildlife,” the wording and approach in the Protocol coincide with classical approaches to PA governance. This is problematic since TFCAs fall in the scope of “modern to emerging” models.<sup>211</sup> It further seems as if the synergy between the integration of environmental, social and economic considerations is not

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<sup>205</sup> It should be noted that, in general, a certain amount of harmonisation has been reached in environmental legislation in SADC. See Jones *KAZA Law and Policy Review* 1-81 and para 5.1.4 below.

<sup>206</sup> See para 2.2.3.1.

<sup>207</sup> Article 7, which includes measures relating to protection, restrictions on trade, community involvement, cooperative management, economic incentives and education among others.

<sup>208</sup> Article 9, which generally deals with the enforcement of conservation legislation, illegal taking, trade, and the smuggling of wildlife.

<sup>209</sup> Article 10(1), which places a duty on states to cooperate in capacity building and to incorporate traditional knowledge into capacity building.

<sup>210</sup> Article 5. It would seem that the WSTCU currently operates out of Malawi, although no record of or information about its activities could be found.

<sup>211</sup> See para 2.3 above.

encapsulated in the Protocol. Considering that the Wildlife Protocol is the primary protocol regulating TFCAs in SADC, the foregoing shortcomings are of considerable concern to the legal framework proposing to regulate TFBC.<sup>212</sup>

The Protocol's weak emphasis on TFCAs as well as the fact that the WSTCU seems to be non-operational, might be the reason why similar policies and guidelines (like the 2008 Policy of the Zambezi River Authority developed in terms of the Watercourses Protocol discussed below)<sup>213</sup> have not yet been developed. The SADC authorities have recognised these shortcomings in the Wildlife Protocol and there is currently an extensive revision process underway.<sup>214</sup> Unfortunately the process is not yet in the public domain and no draft Protocol could be analysed for the purposes of this thesis.

#### 4.2.3 Forestry Protocol

Forests and forestry are important for the SADC region in environmental, social and economic terms. In general, forestry contributes to economic development, and forest products provide energy to rural society while capturing carbon dioxide as well.<sup>215</sup> Forestry therefore contributes to sustainable development and biodiversity conservation and in so doing, also potentially to TFBC in TFCAs.

One of the key objectives of the *SADC Protocol on Forestry, 2002* (Forestry Protocol) is to ensure effective forestry protection to safeguard the interests of present and future generations.<sup>216</sup> This temporal aspect indicates and gives effect to one of the primary goals of sustainable development: inter- and intragenerational equity. Article 12 provides that states shall adopt national policies and mechanisms to enable local communities to benefit from the use of forest resources and to ensure their participation in forest management. This incorporates the principle of public participation as distilled from the New Delhi Declaration.<sup>217</sup> Article 12 also places a

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<sup>212</sup> See para 2.3 above.

<sup>213</sup> See para 4.3.4 below.

<sup>214</sup> Information obtained from Department of Foreign Affairs, South Africa. Information on file with author.

<sup>215</sup> See Kasparek *Sustainable Forest Management and Conservation Project Evaluation* 1-198.

<sup>216</sup> Article 3(1)(c).

<sup>217</sup> See Principle 5 of the New Delhi Declaration at para 3.2.5 above.

duty on states to develop regional guidelines, and to share information and expertise related to community-based forest management, thereby including the elements of economic integration and poverty alleviation, the beneficial use of ecosystem services and the joint management of ecosystems as a part of securing ecological integrity. Article 12 therefore further emphasises public participation and includes access to information and benefit sharing. The foregoing provisions arguably contribute to the principles of sustainable use, equity and poverty alleviation, and public participation.

In 2011 SADC adopted a *Regional Support Programme on REDD+* as well as a *SADC Common Position on REDD+ and Climate Change*.<sup>218</sup> Although the SADC REDD+ initiatives are not directly related to TFBC in TFCAs, they directly address sustainable development and biodiversity conservation in the SADC region as a whole. This brings transfrontier benefits and cooperation to the foreground and is thus beneficial and relevant to TFBC in TFCAs. A laudable forestry project is the SADC-GIZ project entitled “Transboundary use and protection of natural resources in the SADC region”.<sup>219</sup> This project, started in 1996, contributes directly to TFCAs in supporting local communities living in buffer zones around TFCAs to practise sustainable management and the conservation of forest resources. The project further focuses on increasing the incomes of local people living in the buffer zone.<sup>220</sup> The project is designed to run in three phases, the third and final of which is from 2012 to 2015. Whereas the previous two phases (1996-2008 and 2009-2012) focused on forest management on the periphery of TFCAs, the current project seeks to address sustainable use and conservation within TFCAs.<sup>221</sup>

Article 14 declares that state parties shall enter into agreements to promote the integrated and cooperative management of transboundary forests and PAs. This is potentially an important provision, as it is the first indication in the Forestry Protocol that directly relate to TFCAs or transfrontier biodiversity conservation. Unfortunately,

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<sup>218</sup> See [www.sadc.int/REDD](http://www.sadc.int/REDD) [date of use 11 June 2014]. REDD + is a program run by UNEP to reduce deforestation and forest degradation, and includes the role of conservation, the sustainable management of forests and the enhancement of forest carbon stocks.

<sup>219</sup> See <http://www.giz.de/en/worldwide/15903.html> [date of use 11 June 2014].

<sup>220</sup> This is specifically in the GLTP.

<sup>221</sup> For information on the project see <http://www.giz.de/en/downloads/giz2013-en-sadc-natural-resources.pdf> [date of use 11 June 2014].

the Forestry Protocol does not provide any further clarification or explanation as to what is meant by integrated and cooperative management or what is expected to be contained in these agreements.<sup>222</sup> Article 14 could therefore potentially contribute to foster connectivity, but its lack of clarity and detail will remain a challenge in contributing towards a legal framework for TFBC in TFCAs.<sup>223</sup> The SADC-GIZ project may be an example of article 14 being implemented in practice although it cannot be directly linked to article 14 as it is not an agreement between state parties but rather a project run through an external (German) funder (GIZ) and SADCs' Food Agricultural and Natural Resources (FANR) directorate for the benefit of neighbouring states. Notwithstanding, it is an example of transfrontier cooperation and beneficiation containing aspirations similar to those of TFBC in TFCAs.

Article 15, in general, provides for the protection of forests. It places a duty on states to implement national and regional measures to ensure that both human and natural threats will be addressed. Of specific importance to TFCAs is the regulation of the illegal or accidental introduction of alien species.<sup>224</sup> Article 15 may therefore directly contribute to TFBC as the regulation and eradication of alien species are an important part of biodiversity conservation.<sup>225</sup> Alien species have been known to devastate biodiversity and are seen as one of the main drivers of biodiversity loss in SADC.<sup>226</sup>

Article 16 provides for the protection of traditional knowledge and aims to secure equitable benefit sharing where such knowledge is used. No further measures or specifics are dealt with in article 16, which is unfortunate because, as was illustrated above, traditional knowledge and conservation measures are intertwined with efforts aimed at biodiversity conservation in SADC.<sup>227</sup> In theory, however, article 16 provides for public participation as well as equity and poverty alleviation, considering

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<sup>222</sup> It would have been useful to have a set of standardised principles for these agreements so that they may be harmonised throughout SADC, for example.

<sup>223</sup> On connectivity see para 2.3.1.4 above.

<sup>224</sup> Article 15(2)(e). Alien species may include plant pests and all other species classified as invasive alien species in the region.

<sup>225</sup> See SADC *RBAP* 10.

<sup>226</sup> See SADC *RBAP* 10.

<sup>227</sup> See para 2.3 in general above.

that local communities are to be engaged and their knowledge used in order to secure equity and benefit sharing.<sup>228</sup>

Article 17 deals with the use of forest genetic resources and places a duty on state parties to ensure access and benefit sharing derived from their use. Article 18(1)(g) stresses that the well-being of surrounding communities should be addressed by forest-based industries.<sup>229</sup> This emphasises the principle of equity and poverty alleviation.

Importantly, capacity building and public awareness are addressed in article 19. State parties are required to educate, train and build capacity in order to support the achievement of all the goals contained in the Forestry Protocol. Particular emphasis is placed on the development and capacity building of rural and local communities, which is a contribution to the principle of equity and poverty alleviation.<sup>230</sup> Further, the Protocol addresses information exchange and sharing,<sup>231</sup> and inter-state cooperation.<sup>232</sup> Information exchange and sharing is limited in the Protocol to exchange and sharing between states and no provision is made for individuals to gain access to information. This is a potential drawback in the TFBC context as local communities and other stakeholders may have vested interests in transfrontier projects these project may potentially affect their rights. The same argument is true where cooperation is concerned as the Protocol specifically caters for inter-state cooperation and does not extend this to cooperation with other potential stakeholders. Although these foregoing provisions are valuable for relations between states, the multi-faceted governance environment of TFBC in TFCAs requires a more inclusive approach. Inclusive in this sense would mean that states and other all other stakeholders' rights should be recognised and facilitated in a legal framework for TFBC in TFCAs.

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<sup>228</sup> See principles 2, 5 and 6 of the New Delhi Declaration as discussed in paras 3.2.2, 3.2.5 and 3.2.6 above. Also see the procedural aspects contained in principles 5-14 of the UNEP Principles.

<sup>229</sup> The SADC-GIZ project may be seen as a good example of article 18(1)(g) in practice, although the project is not a direct result of article 17.

<sup>230</sup> See principle 2 of the New Delhi Declaration in para 3.2.2 above.

<sup>231</sup> Article 21.

<sup>232</sup> Article 22.

Although the Forestry Protocol provides various principles necessary for TFBC in TFCAs, it fails to provide specific guidance for regional harmonisation or a body to oversee the harmonisation of forestry management. This is problematic because harmonisation plays an important role in reaching the goal of the holistic management of shared resources in SADC, as was illustrated above. Furthermore, the Protocol fails to establish a mechanism to oversee and implement guiding standards for transboundary forest management. However, the REDD+ programme and the SADC-GIZ project are positive developments in the forestry sector, and on balance the provisions of the Protocol make important contributions to the objectives of sustainable development and TFBC (albeit only in part and not holistically) in TFCAs.

#### 4.2.4 *Shared Watercourses Protocol*

Arguably, water is the most precious foundation of biodiversity in SADC and the sustainable management and conservation of water is of critical importance.<sup>233</sup> The main objective of the *Revised Protocol on Shared Watercourses*, 2000 (Watercourses Protocol) is to “foster closer cooperation for the judicious, sustainable and coordinated management, protection and utilisation of shared watercourses”.<sup>234</sup> The central tenet of the Watercourses Protocol is to enable harmonised approaches towards water management in the SADC region. This call resonates with the goal of harmonised and holistic efforts of biodiversity conservation in TFCAs, and it supports the provisions of the Forestry Protocol in this respect, although it is specifically aimed at shared watercourses.

Article 2 of the Watercourses Protocol provides the objectives of the Protocol. These include the promotion of the exchange of information, the sustainable use of water resources, the harmonisation of legislation and policy, and the promotion of research and technology development.<sup>235</sup> These provisions support the principles of

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<sup>233</sup> Malzbender and Earle *Water Resources of the SADC* 1-23.

<sup>234</sup> Article 2 of the Protocol.

<sup>235</sup> See article 2(a)-(d).

sustainable use, and public participation.<sup>236</sup> An interesting inclusion in article 3(7) (which refers to the equitable utilisation of shared watercourses) implies the application of CBDR.<sup>237</sup> This may be derived from the provision that in sharing watercourses the planning and utilisation should take into account natural factors,<sup>238</sup> the social and economic needs of states,<sup>239</sup> and the reciprocal effects of shared use amongst the states concerned.<sup>240</sup> This implicit reference to CBDR clearly acknowledges the many differences between SADC member states and the Protocol aims to manage and utilise water resources accordingly. This implicit reference to CBDR could be valuable for a legal framework regulating TFBC in TFCAs as it could contribute to equity by taking into account the capacity and needs of the member states involved.

Contrary to the Forestry Protocol, the Watercourses Protocol provides for the establishment of mechanisms to facilitate shared governance. These mechanisms are termed Shared Watercourse Institutions (SWIs).<sup>241</sup> SWIs aim to provide a collaborative environment through which shared waters are managed and through which the provisions of the Watercourses Protocol are implemented.<sup>242</sup> They are also tasked with harmonising national legal regimes related to water, conducting research, exchanging information, as well as stimulating public awareness and participation.<sup>243</sup> Furthermore, SWIs are tasked with managing and monitoring the shared utilisation of watercourses<sup>244</sup> and environmental protection.<sup>245</sup> Notably, SADC's *Guidelines for Strengthening River Basin Organisations: Environmental Management*, 2010 (SADC River Basin Guidelines) complements the Protocol in this respect. The River Basin Guidelines applies an innovative approach to guide and harmonise shared watercourse governance by providing guiding principles to

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<sup>236</sup> Sustainable use is referred to in principle 1 of the New Delhi Declaration (para 3.2.1 above), and public participation in principles 5 and 6 of the New Delhi Declaration (paras 3.2.5 and 3.2.6 above) as well as principles 5 to 14 of the UNEP Principles (para 3.3.5 above).

<sup>237</sup> See para 3.2.3 above.

<sup>238</sup> Article 7(a). These include geographical, hydrographical, hydrological and climatic factors.

<sup>239</sup> Article 7(b).

<sup>240</sup> Article 7(c).

<sup>241</sup> Article 5(1)(b). These are still referred to as River Basin Management Institutions (RBMs) or River Basin Organisations (RBOs) in some literature and specifically on the SADC website. See <http://www.sadc.int/themes/natural-resources/water/> [date of use 14 May 2014].

<sup>242</sup> Article 3(1).

<sup>243</sup> Articles 5(1)(b)(i)-(v).

<sup>244</sup> Article 5(1)(c).

<sup>245</sup> Article 5(1)(d).

facilitate environmental governance in the SWIs.<sup>246</sup> These are sustainability, precaution, integration and participation. They partially reflect the principles of TFBC.<sup>247</sup> The innovation in the Guidelines lies not in the guiding principles, which have long been established, but in incorporating the principles as part of the governance framework at the sub-regional level. This provides more support for the argument that the principles underlying sustainable development and biodiversity conservation should form part of a governance framework providing guidance for TFBC in TFCAs.

In addition, the Guidelines propose the establishment of a single coherent environmental management policy for each SWI.<sup>248</sup> An example of such a policy is the 2008 *Policy of the Zambezi River Authority*,<sup>249</sup> which is managed by Zambia and Zimbabwe. This detailed policy specifically deals with joint governance issues and addresses the inherently important aspects relevant for decision makers to enable them to provide a sound framework for joint governance. The principles in the Guidelines provide decision makers with a clearer normative framework to facilitate their decision making and they should, at least in theory, contribute to harmonising procedural aspects of governance between all SADC SWIs. Clearly, the Protocol on Shared Watercourses, together with the SADC Guidelines, provides a benchmark for similar frameworks that seek to govern shared natural resources. Currently 12 SADC mainland states share 15 river basins. These river basins are managed by 12 RBOs operating through the Protocol and the SADC Guidelines, indicating the success of the Protocol and the SADC Guidelines.<sup>250</sup>

Although the Watercourses Protocol does not directly mention biodiversity or TFCAs, it does provide direct reference to aspects supporting a framework for biodiversity conservation in TFCAs. Water is furthermore an important environmental medium supporting biodiversity and therefore any provisions related to water will be important

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<sup>246</sup> SADC *River Basin Guidelines* 2. For a discussion of guiding principles in the SADC context, see Lubbe and Barnard 2012 *SADC Law Journal* 36.

<sup>247</sup> Public participation occurs in principles 5 and 6 of the New Delhi Declaration (paras 3.2.5 and 3.2.6 above) as well as principles 5 to 14 of the UNEP Principles (para 3.3.5 above). Precaution occurs in principle 4 of the New Delhi Declaration (para 3.2.4 above) and integration in terms of principle 7 of the New Delhi Declaration (para 3.2.7 above).

<sup>248</sup> SADC *Guidelines for Strengthening River Basin Organisations: Environmental Management* 3.

<sup>249</sup> Copy on file with author and available on request.

<sup>250</sup> See <http://www.sadc.int/themes/natural-resources/water/> [date of use 14 May 2014].

to TFBC – especially where shared watercourses are the subject of the provisions. The first example is that article 3(4) the Protocol places a duty on state parties to balance and integrate the three pillars of sustainable development.<sup>251</sup> Cooperation,<sup>252</sup> the exchange of information,<sup>253</sup> and the avoidance of harm are also encapsulated in the Protocol.<sup>254</sup> Cooperation and the exchange of information speak to New Delhi and UNEP directly,<sup>255</sup> but the no-harm provision speaks to an element of good governance as formulated by the IUCN-World Commission on PAs.<sup>256</sup> Apart from being an element of the IUCN good governance definition for PAs, it must be remembered that no-harm is also a principle of customary international law as pointed out above.<sup>257</sup> Provision for the joint protection of shared watercourse ecosystems,<sup>258</sup> a duty to jointly prevent and reduce pollution and to harmonise law and policy in this regard,<sup>259</sup> the prevention of the introduction of alien and invasive species,<sup>260</sup> and the protection of the aquatic environment all support biodiversity conservation and sustainable development.<sup>261</sup> Considering the significance of water to biodiversity and the scarcity thereof in SADC, joint management and conservation of the shared watercourses may arguably lie at the very centre of biodiversity conservation, and the model provided by the Watercourses Protocol is therefore of the utmost importance.<sup>262</sup>

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<sup>251</sup> See the discussion on sustainable development in para 2.4.1 above.

<sup>252</sup> Article 2(4) of the Protocol.

<sup>253</sup> Article 2(5) of the Protocol.

<sup>254</sup> Articles 2, 2(e), and 3(10) of the Protocol.

<sup>255</sup> The exchange of information in terms of public participation occurs in principles 5 and 6 of the New Delhi Declaration (paras 3.2.5 and 3.2.6 above) as well as principles 5 to 14 of the UNEP Principles (para 3.3.5 above). Cooperation occurs in principle 1 of the UNEP Principles (para 3.3.1 above).

<sup>256</sup> Article 10(a)-(c). See para 2.3.1.4 above for the elements of good governance as described by the IUCN-World Commission on PAs.

<sup>257</sup> See para 2.2.2.1 above.

<sup>258</sup> Article 4(2)(a).

<sup>259</sup> Article 4(b)(2)(i) and 4(2)(b)(ii).

<sup>260</sup> Article 4(2)(c).

<sup>261</sup> Article 4(2)(d).

<sup>262</sup> For further reading also see Dombrowsky and Grey “The Status of River Management in Africa” 85-86 and Thomashausen 2002 *CILSA* 26-37.

#### 4.2.5 Fisheries Protocol

Aquatic ecosystems (both salt- and freshwater) form an integral part of biodiversity,<sup>263</sup> and the *SADC Protocol on Fisheries*, 2001 aims to promote the responsible and sustainable use of aquatic ecosystems.<sup>264</sup> In so doing, the aim of the Protocol supports the principle of sustainable use as distilled above.<sup>265</sup> Although this thesis focuses on terrestrial TFCAs, the fact that the Fisheries Protocol applies to both the salt- and freshwater environments adds important value to a legal framework facilitating TFBC in TFCAs.

The main objectives of the Protocol are to promote and enhance food security and animal health, to safeguard the livelihood of fishing communities, to generate economic opportunities for individuals in the region, to ensure intergenerational equity, and poverty alleviation.<sup>266</sup> The objectives largely correlate with the goals and definition of sustainable development as described above.<sup>267</sup> As a result, the objectives support principles 1 and 2 of the New Delhi Declaration, i.e., sustainable use, and equity and poverty alleviation.<sup>268</sup>

Article 4(1) places a duty on states to cooperate where members share resources. This duty generally reflects principle 1 of the UNEP Principles.<sup>269</sup> Public participation (supporting principle 2 of the New Delhi Declaration) is also covered by the Protocol, which states that: “State Parties shall endeavour to ensure participation of all stakeholders in the promotion of the objective of this Protocol.”<sup>270</sup> Sustainable use is directly incorporated in article 4(3).<sup>271</sup> Article 4(3) requires parties with the: “capacity in matters of fisheries ... to transfer skills and technology to other State Parties to

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<sup>263</sup> Also see Dombrowsky and Grey “The Status of River Management in Africa” 85-86 and Thomashausen 2002 *CILSA* 26-37.

<sup>264</sup> Article 3.

<sup>265</sup> See para 3.2.1 and 3.4 above.

<sup>266</sup> Article 3(a)-(e).

<sup>267</sup> See para 2.4.1 above.

<sup>268</sup> See paras 3.2.1 and 3.2.2 above.

<sup>269</sup> See para 3.3.1 above.

<sup>270</sup> Article 4(2). See para 3.2.5 above.

<sup>271</sup> Article 4(3) provides that: “State Parties shall take appropriate measures to regulate the use of living aquatic resources and protect the resources against over-exploitation, whilst creating an enabling environment and building capacity for the sustainable utilisation of the resources.”

enhance effective regional co-operation.” From the foregoing article 4(3) can be seen to implicitly recognise the CBDR principle as described above.<sup>272</sup>

In order to foster cooperation in the management of shared fish resources, a duty is placed on member states to harmonise fisheries legislation.<sup>273</sup> Furthermore, and in line with the CBDR principle, the Protocol urges member states with capacity related to fisheries to endeavour to transfer these skills and technologies to other member states with a view to enhancing regional cooperation.<sup>274</sup> Furthermore, the Protocol provides that all inequalities between member states should be addressed when implementing the Protocol.<sup>275</sup> This provision implicitly recognises the CBDR principle.

The Protocol makes no explicit reference to TFCAs, but the inclusion of measures for the management of shared resources, the harmonisation of legislation, artisanal, subsistence fisheries and small-scale commercial fisheries, human resources development, trade and investment, science and technology, and information exchange may contribute to the drivers of TFBC as discussed above.<sup>276</sup> With the exception of the management of shared resources and artisanal, subsistence and small-scale fisheries, these provisions also resemble those of other protocols discussed earlier. The relevance of the foregoing provisions is evident in what are called Transfrontier Conservation Marine Areas (TFCMAs). Although this thesis focuses on terrestrial TFCAs only, a brief discussion of TFCMAs is provided as an illustration of shared resources governance that is in essence similar to terrestrial TFBC, at least as far as the governance, policy and legal issues are concerned.

TFCMAs enjoy less attention in literature, as they are not as prevalent and well established in SADC.<sup>277</sup> This should not be allowed to detract from their importance,

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<sup>272</sup> Article 4(4). See para 3.2.3 above.

<sup>273</sup> The harmonisation of legislation is provided for in article 8 of the Protocol on Fisheries. Article 17 provides for cooperation in the field of science and technology, and the exchange of information between member states is covered by article 18.

<sup>274</sup> Article 4(4).

<sup>275</sup> Article 4(5).

<sup>276</sup> Articles 7,8,12,15,16,17, and 18. See paras 2 and 3.2 above.

<sup>277</sup> See for example SADC *SADC Conservation Areas* available at <http://www.sadc.int/themes/natural-resources/transfrontier-conservation-areas/> [date of use 14 November 2014].

though since two-thirds of the earth's surface is covered by water. The first TFCMA in Africa was the Lubombo MTBPA, which was established in 2007 between Mozambique, South Africa, and Swaziland.<sup>278</sup> At grassroots level various projects exist to promote the sustainable use of the marine environment.<sup>279</sup> These projects are not run at SADC institutional level, but they consist of various countries (some of them SADC members and some not) cooperating to ensure the sustainable use of marine resources.<sup>280</sup>

Article 7 deals with the management and sustainable use of shared resources and focuses on disputes resulting from the management of shared water resources.<sup>281</sup> It refers disputes to the Integrated Committee of Ministers.<sup>282</sup> Complementing the latter are provisions regarding the exchange of information related to the state of shared resources, plans for new or expanded exploitation, and research activities and results.<sup>283</sup> Article 7 points to the importance of a mechanism to resolve disputes when managing shared resources. This recognises the need for dispute and conflict resolution as a part of the principle of good governance discussed under principle 6 of the New Delhi Declaration.<sup>284</sup> It is also in line with principle 11 of the UNEP

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<sup>278</sup> See [www.tbpa.net](http://www.tbpa.net) [date of use 14 June 2014].

<sup>279</sup> The following projects currently exist, with the exception of the Agulhas and Somali Current Large Marine Ecosystems project, which ended in 2013. The SmartFish programme <http://www.smartfish-coi.org/#!publications/cwro> [date of use 14 June 2014] involves some SADC member states (Seychelles, Mauritius, Madagascar and Tanzania) and operates in the Eastern, Southern Africa and Indian Ocean (ESA-IO) region. The South West Indian Ocean Fisheries project <http://www.swiofp.net> [date of use 14 June 2014] is a multinational research project focusing on the sustainable use of marine resources within an ecological context. Several SADC member states (Mozambique, South Africa, Seychelles, Mauritius and Tanzania) are involved in the project. The Indian Ocean Tuna Commission (IOTC) <http://www.iotc.org/about-iotc> [date of use 14 June 2014] is an intergovernmental organization responsible for the management of tuna and tuna-like species in the Indian Ocean. It also deals with compliance issues by contracting parties under the agreement. The Agulhas and Somali Current Large Marine Ecosystems Project <http://www.asclme.org/en/documents.html> [date of use 14 June 2014] had several objectives including developing a strategic action programme to deal with transboundary threats and strengthening scientific and management expertise, with a view to introducing an ecosystem approach to managing the living marine resources in the western Indian Ocean region. The author wishes to acknowledge Kevan Zunckel and James Mougall for their help in obtaining the above information.

<sup>280</sup> See the examples in note 944 above.

<sup>281</sup> Article 7(8) specifically mentions sustainable use.

<sup>282</sup> Article 7(1). The Integrated Committee of Ministers is the SADC organ that is responsible for policy direction, planning and implementation.

<sup>283</sup> Article 7(3).

<sup>284</sup> See para 3.2.6 above.

Principles calling for measures for dispute settlement where the governance of shared resources is concerned.<sup>285</sup>

Provision is made for the establishment of joint instruments for the coordination, cooperation and management of shared natural resources. To this end, the Protocol mentions specialist scientific/technical advisory groups and joint ministerial commissions.<sup>286</sup> As far as could be established, the only example of such an institution is the Benguela Current Commission<sup>287</sup> (BCC), which was established in 2007.<sup>288</sup> The BCC aims to promote integrated management, sustainable development and, importantly, an ecosystem approach to governing the shared resource (this area or shared resource is called the Benguela Current Large Marine Ecosystem (BCLME)).<sup>289</sup> The importance of the ecosystem approach under this Protocol is that it acknowledges a more holistic approach than, for example, the Wildlife Protocol discussed above.<sup>290</sup> The BCC also serves as a vehicle to implement the provisions of the Fisheries Protocol within the BCLME. The BCC created the *Benguela Current Convention, 2013* (Benguela Current Convention)<sup>291</sup> which was signed on the 18<sup>th</sup> of March 2013. This Convention confirms the ecosystem approach and it takes a holistic view of environmental governance generally by acknowledging the following principles: cooperation, collaboration and sovereign equality; sustainable use and management; the precautionary principle; the prevention, avoidance and mitigation of pollution; the polluter pays principle; and the protection of biodiversity in the marine ecosystem.<sup>292</sup> Moreover, and complementing the holistic approach, the Convention aims to promote long-term conservation, protection, rehabilitation, enhancement and the sustainable use of the

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<sup>285</sup> See para 3.3.5 above.

<sup>286</sup> Article 7(4).

<sup>287</sup> Established between South Africa, Angola and Namibia.

<sup>288</sup> See [www.benguelacc.org](http://www.benguelacc.org) [date of use 14 June 2014].

<sup>289</sup> See [www.benguelacc.org](http://www.benguelacc.org) [date of use 14 June 2014].

<sup>290</sup> See para 4.2.2 above. On the ecosystem approach in general, see Marauhn and Böhringer “An Ecosystem Approach to the Transboundary Protection of Biodiversity” 90-104.

<sup>291</sup> See [www.benguelacc.org](http://www.benguelacc.org) [date of use 14 June 2014]. The Convention is clearly a direct result of the BCC that was established in terms of the Protocol. Although the BCC aims to govern shared resources in terms of the Protocol, the Convention disappoints in not mentioning or directly implementing the Protocol in its text.

<sup>292</sup> Article 4(1) of the Benguela Current Convention.

BCLME to provide economic, environmental and social benefits.<sup>293</sup> In other words, the Convention promotes sustainable development.<sup>294</sup>

Artisanal, subsistence and small-scale commercial fisheries are provided for in article 12(1)(a) and (b) of the Fisheries Protocol, which places a duty on states to create legal and enforcement measures that must ensure a rational and equitable division between the social and economic objectives of the Protocol. Furthermore, special provision is made for economically disadvantaged fishers so that their needs may be taken into account in developing these measures.<sup>295</sup> State parties are also encouraged to harmonise their national legislation on traditional resource management systems by taking into account traditional knowledge and practices.<sup>296</sup> The Protocol further provides for the protection of the aquatic environment, the development of human resources in fisheries, trade and investment, cooperation in science and technology, and information exchange.<sup>297</sup> In sum, the Protocol generally provides for some of the principles of TFBC, even though it is not in the context of TFCAs. Notwithstanding, where shared resources within the scope of the Protocol are found in a TFCA, the Protocol could contribute to the shared management of the shared resources.

#### 4.2.6 *Protocol on Tourism*

The *SADC Protocol on Tourism*, 1998 (Tourism Protocol)<sup>298</sup> is important to biodiversity because tourism in SADC (as a consequence of the region's rich biodiversity) plays a vital role in the GDP of member states.<sup>299</sup> This is confirmed by the objectives of the Protocol as a clear link between tourism and sustainable development is brought to light.<sup>300</sup> An interesting inclusion as an objective is the aim

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<sup>293</sup> Article 2 of the Benguela Current Convention.

<sup>294</sup> See the discussion of sustainable development in para 2.4.1 above.

<sup>295</sup> Article 12(1)(b) read with article 12(2).

<sup>296</sup> Article 12(7).

<sup>297</sup> Articles 14, 15, 16, 17, and 18.

<sup>298</sup> As amended in 2009.

<sup>299</sup> See para 2.1.2 above. SADC *RBS* 42 and SADC Food, Agriculture and Natural Resources Directorate Report 20

<sup>300</sup> See article 2 in general. Article 2(1) specifically states that one of the objectives is: "To use tourism as a vehicle to achieve sustainable social and economic development through the full realisation of its potential for the region". Section 2(3) states that another objective is: "To optimise resource usage and increase competitive advantage in the Region vis-a-vis other

to facilitate intra-regional travel through the removal of travel and visa restrictions.<sup>301</sup> Although this objective is in line with the borderless ideal of TFCAs, in practice it is very difficult to execute and apply. This is mainly due to the need for border restrictions to ensure the maintenance of peace and security, as well as capacity concerns in SADC, as was argued in chapter 2 above.<sup>302</sup> Nevertheless, this objective remains highly relevant to the goals of TFCAs.

Article 3 of the Protocol describes the guiding principles of the Protocol, which provide support for the principles of TFBC. These include private sector involvement (supporting public participation), cooperation, sustainable tourism (environmentally and socially), the preservation of natural, cultural and historical resources, and respecting and promoting human rights.<sup>303</sup> These guiding principles support both the drivers of sustainable development and biodiversity conservation in general. The Protocol further places a duty on states to pursue sustainable policies on the utilisation and management of natural and cultural resources in order to give effect to environmentally sustainable tourism.<sup>304</sup> Although it does not explicitly refer to TFCAs, the principles of the Protocol could in theory benefit and support TFBC in TFCAs where tourism is involved.

#### 4.2.7 SADC RISDP

The RISDP is a strategic plan stating the SADC agenda and targets to be reached in order to ultimately reach SADC's regional integration and development goals.<sup>305</sup> Established in 2005, the RISDP operates in segments of 5 years until 2020. The RISDP is a document covering all aspects of SADC including its history, its vision and mission, the socio-economic situation in SADC at large, a review of policy and

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destinations through collective efforts and co-operation in an environmentally sustainable manner”.

<sup>301</sup> Article 2(10) describes another objective as: “To facilitate intra-regional travel for the development of tourism through the easing or removal of travel and visa restrictions and harmonisation of immigration procedures.”

<sup>302</sup> There is the exception of the Kgalagadi TFCA. This aspect is discussed at length in para 2.3.3.1 above.

<sup>303</sup> See article 3 in general.

<sup>304</sup> Article 11 of the Protocol.

<sup>305</sup> SADC *RISDP* 7.

strategies, and priority intervention areas.<sup>306</sup> The present discussion focuses only on the section labelled “environment and sustainable development” and areas where TFCAs and biodiversity are specifically mentioned.

The RISDP immediately recognises integrated tourism development in TFCAs as a challenge and links this to the borderless approach required by the Tourism Protocol discussed above.<sup>307</sup> Unfortunately, the RISDP does not provide any other guidance on TFCAs.<sup>308</sup> It only links these areas to tourism and seems to ignore the multi-faceted and complex role they may play in SADC.

The RISDP discusses the environment from a sector-based approach and from the start does not address the environment as a single integrated unit. This is not surprising as the protocols already discussed regulate natural resources by such a silo-based approach.<sup>309</sup> It is indicated that the transboundary conservation of natural resources is a current policy and strategic challenge.<sup>310</sup> The extent of the challenge is not discussed or elaborated upon. It is not within the scope of this thesis to establish why the RISDP fails to elaborate on why transboundary conservation is a strategic challenge. It may, however, be posited that transboundary conservation is still seen as a potential intrusion upon sovereign territory and on other sovereign concerns. Accordingly, it might be difficult to find consensus upon which policy could be built or developed.<sup>311</sup> This emphasises the need for a legal framework to guide TFBC in SADC, as proposed in this thesis.

The RISDP explains the importance of biodiversity in SADC by stating that the region is plagued by:<sup>312</sup>

land degradation, deforestation, loss of biodiversity, pollution, and inadequate access to clean water and sanitation services and poor urban conditions. These factors are linked to the high and rising levels of poverty in the Region, whereby the poor are both victims and agents of environmental degradation.

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<sup>306</sup> See the SADC *RISDP* 1-94.

<sup>307</sup> SADC *RISDP* 30. See in general Bocchino “Rural People in Southern African Transfrontier Conservation Areas: A Question of Governance” 291-319.

<sup>308</sup> SADC *RISDP* 68.

<sup>309</sup> SADC *RISDP* 33-38.

<sup>310</sup> SADC *RISDP* 53.

<sup>311</sup> See para 2.2.2 above.

<sup>312</sup> SADC *RISDP* 62.

The fact that environmental degradation is linked to poverty underlines the importance of sustainable development and the link between sustainable development and biodiversity conservation.<sup>313</sup> The RISDP clearly states that sustainable use and sustainable development are goals strived for in SADC.<sup>314</sup> In order to make it possible to reach these goals, the RISDP identifies focus areas, the most important of which for the purpose of the present study is:<sup>315</sup>

Creating the requisite harmonised policy environment, as well as legal and regulatory frameworks to promote regional cooperation on all issues relating to environment and natural resources management including transboundary ecosystems.

Since the RISDP was published in 2005, no significant progress has been made in the harmonisation of legal and policy frameworks, as can be seen from the analysis of the protocols above. SADC is also still awaiting a Protocol on Biodiversity, as called for in the SADC Biodiversity Strategy discussed below.<sup>316</sup> Biodiversity, as an area of regulatory focus, seems to have lacked the necessary legal attention and furthermore face specific challenges such as lack of expertise as far as its drafting is concerned.<sup>317</sup> The failure is emphasised by the fact that the RISDP set a specific target date for the creation of a legal instrument for regional cooperation in environment and natural resources (a Protocol on Biodiversity). The target was 2005/6, yet such an instrument has still not been created.<sup>318</sup>

A desk assessment of the first 5 years of the RISDP was performed by the SADC Secretariat, based on 3 indicators: coherence of interventions,<sup>319</sup> effectiveness,<sup>320</sup>

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<sup>313</sup> See para 2.4.2 above.

<sup>314</sup> SADC *RISDP* 62.

<sup>315</sup> SADC *RISDP* 62. The other aims upon which the assessment focused are as follows: "Promote environmental mainstreaming in order to ensure the responsiveness of all SADC policies, strategies and programmes for sustainable development; regular assessment, monitoring and reporting on environmental conditions and trends in the SADC region; capacity building, information sharing and awareness creation on problems and perspectives in environmental management; ensuring a coordinated regional position in the negotiations and implementation of MEAs; and other agreements".

<sup>316</sup> See para 4.2.8 below.

<sup>317</sup> A lack of expertise at SADC level seems to be one of the challenges. See SADC *A Desk Assessment of the RISDP* 89. As far as the author could establish the Protocol is in the process of being drafted.

<sup>318</sup> SADC *RISDP* 62. A total of 9 targets were set. See SADC *RISDP* 62-63.

<sup>319</sup> Determining that the programmes and projects implemented are those that have been agreed upon and are in line with the key priority areas.

<sup>320</sup> Investigating the extent to which the planned outputs have been achieved.

and efficiency.<sup>321</sup> Overall, the assessment found that more effort is needed in all of the key areas identified to fully achieve the goals identified in the RISDP.<sup>322</sup> One finding of particular importance relates to the area under which “environment and sustainable development” falls. The targets for this area, according to the assessment, received the following results: 16% were fully achieved; 56% partially achieved; and 28% were not achieved.<sup>323</sup> As this area is inherently amenable to TFBC, the results of the desk assessment are disappointing. Since TFCAs form such an integral part of the region and specifically the goals of SADC, the RISDP further disappoints in not giving any guidance for TFBC in TFCAs. The lack of guidance may be a result of the legal framework (the relevant Protocols specifically) not providing specific guidance for TFBC in TFCAs.

#### *4.2.8 SADC Biodiversity Strategy*

The SADC RBS is the main policy document in SADC specifically aimed at biodiversity conservation. Broadly, and in line with the purpose of TFCAs, the Strategy supports a holistic approach towards biodiversity conservation, recognises the value of biodiversity resources in the socio-economic development efforts of the region, confirms that biodiversity resources transcend national boundaries thereby necessitating supra-national conservation measures, and acknowledges that biodiversity is a basic resource for sustainable development in the region.<sup>324</sup> This appraisal of biodiversity conservation by the RBS in SADC is interpreted against the backdrop of regional challenges/constraints to biodiversity conservation also pointed out by the RISDP. These include increased pressure from agriculture and natural resource exploitation to sustain livelihoods, inadequate biodiversity inventory and monitoring, inadequate incentives for biodiversity conservation and sustainable use, low levels of awareness and knowledge about the value of biodiversity, and institutional and legal frameworks that are too weak to carry out biodiversity initiatives.<sup>325</sup>

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<sup>321</sup> SADC *A Desk Assessment of the RISDP Plan 2005-2010* 27.

<sup>322</sup> SADC *A Desk Assessment of the RISDP Plan 2005-2010* 93-94.

<sup>323</sup> SADC *A Desk Assessment of the RISDP Plan 2005-2010* 83.

<sup>324</sup> SADC *RBS I-VII*

<sup>325</sup> SADC *RBS* 5.

The RBS specifically criticises national legal frameworks<sup>326</sup> and the SADC legal framework for being weak with respect to biodiversity protection.<sup>327</sup> Importantly, the RBS indicates that national legal frameworks do not clearly articulate national and collective positions related to the transfrontier governance of natural resources. This critique may be harsh, as national legal frameworks tend to focus on governance within their own jurisdictions, as they cannot and do not apply extra-territorially.<sup>328</sup> According to the RBS, the shortcomings in national legal frameworks have major implications for animal health and disease control. The most relevant implication to TFBC is the fact that no harmonised approach in combating ill animal health and disease control exists.<sup>329</sup>

The RBS paints a rather negative picture of biodiversity conservation in SADC, and based on the appraisal of the challenges facing biodiversity in this region, the RBS proposes that three strategic areas are in need of attention to address these challenges.<sup>330</sup> Firstly, it prioritises raising the value of biodiversity by enhancing the region's economic and business base through the commercialisation of biodiversity.<sup>331</sup> In theory this should contribute to economic integration and poverty alleviation and in so doing, contribute towards sustainable development. The RBS also proposes to facilitate the establishment of a "green" market to guard against the unsustainable harvesting of resources, thus potentially supporting the principle of sustainable use as described in the New Delhi Declaration.<sup>332</sup> Secondly, resource inventory and monitoring is stated as a strategic goal. The RBS emphasises the importance of access and benefit sharing principles within such an inventory and

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<sup>326</sup> SADC RBS 13. The critique includes that the national frameworks have not been effectively enforced, especially those relating to invasive alien species. They tend to focus on conservation and not the need of local communities to benefit from resources. Lastly, they do not provide guidelines on access and benefit sharing by outside parties.

<sup>327</sup> SADC RBS 60.

<sup>328</sup> As stated in para 3.4 above, this is the general rule. In certain instances where private international law, criminal law, and property law are concerned, the relevant national laws can be applied beyond the sovereign territory of the state in question. See Dugard *International Law A South African Perspective* 146-157. Also see Bennet and Strug *Introduction to International Law* 47-56.

<sup>329</sup> SADC RBS 13 and 50. In this context some progress has been made by SADC in the form of the Phakalane Declaration of 2012. See further Animal and Human Health for the Environment and Development <http://www.wcs-ahead.org/> [date of use 11 October 2014].

<sup>330</sup> SADC RBS 19.

<sup>331</sup> SADC RBS 19.

<sup>332</sup> See para 3.2.1 above. It is proposed that this should be achieved by means of a certification system. SADC RBS 19.

monitoring system.<sup>333</sup> In order to achieve this, the RBS proposes the establishment of *sui generis* legislation as well as a regional biodiversity protocol to protect traditional knowledge and genetic diversity.<sup>334</sup> Thirdly, biodiversity awareness, information and capacity building programmes, and research and development initiatives are prioritised.<sup>335</sup> In sum then, the three strategic areas are raising the value of biodiversity through commercialisation (with an emphasis on sustainable use), access to biodiversity and benefit sharing, and capacity building (through the elements named above). Although all three strategic areas provide some evidence of an improvement in strategic thinking in relation to biodiversity conservation, the RBS fails to develop clear guidelines as to how these objectives should be achieved. Nonetheless, all three areas support the principles of sustainable use, good governance,<sup>336</sup> and poverty alleviation.

Because of the weak legal framework related to biodiversity conservation at the SADC level, the RBS relies for its implementation on National Biodiversity Strategy and Action Plans (NBSAPs).<sup>337</sup> This may potentially be counterproductive as NBSAPs are based on the very same national legislation that the RBS criticises. Furthermore, some countries' NBSAPs have been known to be out-dated.<sup>338</sup> Proof is found in the CBD, where 170 parties have developed their NBSAPs in terms of the Convention, but only a mere 35 have revised their NBSAPs.<sup>339</sup> The failure to revise the NBSAPs may indicate a lack of political will towards NBSAPs, and may provide a reason for not using NBSAPs as vehicles to implement the SADC RBS. More significant is perhaps the fact that 141 parties have not submitted a NBSAP.<sup>340</sup> This is problematic as it means that 141 parties have not yet incorporated the *Strategic Plan for Biodiversity (2011-2020)* into their NBSAPs.<sup>341</sup>

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<sup>333</sup> SADC RBS 20.

<sup>334</sup> SADC RBS 20.

<sup>335</sup> SADC RBS 20.

<sup>336</sup> Public participation, for example.

<sup>337</sup> SADC RBS 26.

<sup>338</sup> CBD GBO 3 20.

<sup>339</sup> CBD GBO 3 20.

<sup>340</sup> Secretariat of the CBD NBSAPs available at [www.cbd.int/nbsap](http://www.cbd.int/nbsap) [date of use 16 December 2014].

<sup>341</sup> See decision X/2 of the CBD COP 2010.

Although the RBS does not specifically address biodiversity conservation within TFCAs, it identifies several focal points to facilitate sustainable use of biodiversity.<sup>342</sup> In identifying TFCAs as a focal point in facilitating the synergy between the components of sustainable development, the RBS recognises one of the drivers behind TFBC in TFCAs - sustainable development. Notwithstanding the fact that the RBS does not offer any concrete provisions to achieve the three strategic objectives, it does identify important weaknesses in both the SADC and national regimes constraining biodiversity conservation. As the only document in the SADC framework that provides a holistic view of biodiversity conservation, the RBS offers a guide for decision makers as to the issues that need to be included in management plans and policies for TFBC in TFCAs. Unfortunately, although the RBS provides some conceptual guidance, none thereof has been concretised in law or policy relating to TFBC generally and TFCAs specifically. It is fair to argue though, that it is not the purpose of a RBS document to provide a rigid framework within which governance may take place. In giving guidance and strategic purpose, the RBS does provide some strategic direction and should bolster further political activity and aid consensus with respect to the future development and revision of normative arrangements that seek to govern TFBC in TFCAs.

#### *4.2.9 SADC Regional Biodiversity Action Plan*

The RBS is complemented by the new *SADC Regional Biodiversity Action Plan*, 2013 (RBAP). The RBAP aims to operationalise the RBS and NEPAD, among other policies. It thus serves as the mechanism to implement some of the strategic goals discussed above.<sup>343</sup> The RBAP focuses, as one of its goals, on improving three key areas: sustainable use, conservation, and equitable access and benefit sharing. In doing so the RBAP directly supports sustainable use and equity and indirectly support poverty alleviation by including/focusing on benefit sharing. In reaching this multi-faceted goal, the RBAP identifies the improvement of the governance framework of TFCAs as a key strategic area.<sup>344</sup> To achieve this, the RBAP emphasises the harmonisation of legal frameworks as a key action and thus speaks

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<sup>342</sup> SADC *RBS* 24-25. Although the emphasis specifically falls on plant and animal health in the examples listed in the Strategy, the designation of TFCAs as a focal point is important.

<sup>343</sup> See para 4.2.8 above.

<sup>344</sup> SADC *RBAP* 16.

to both the RISDP and the Regional Biodiversity Strategy.<sup>345</sup> The RBAP further refers to where TFCAs may be used and improved but, does not provide any concrete measures to implement TFCAs as described in the Wildlife Protocol or RBS.

The RBAP identifies biodiversity governance as the first strategic area.<sup>346</sup> It identifies five areas to focus on in order to improve biodiversity governance, namely:

- Effective biodiversity management policies and legislation;
- Fostering equity and benefit sharing from biodiversity;
- Synergies and the effective implementation of Multilateral Environmental Agreements (MEAs) and regional environmental protocols;
- Functional institutional frameworks for biodiversity management; and
- Improvements in the governance frameworks of TFCAs.

From the foregoing it seems clear that law and policy may play an important role in improving biodiversity governance in SADC. This statement is based on the fact that three out of the five areas refer directly (or implicitly) to law and policy.<sup>347</sup> Although the RBAP identifies these as different focus areas, all of them still aim to achieve the same goal: improving biodiversity governance. All of the identified areas above should also contribute to TFBC in TFCAs, as biodiversity conservation is one of the main aims of TFBC. These areas also resonate with and support the principles distilled for TFBC in TFCAs in chapter 3.<sup>348</sup> It is thus argued that the principles distilled in chapter 3 should support the RBAP in enabling biodiversity governance. It is interesting to note that the concept of sustainable development is never mentioned in the whole of the RBAP. This is a curious omission, since this thesis has thus far indicated a close relationship between biodiversity and sustainable development and one would expect that SD is mentioned in this, seemingly comprehensive, instrument that specifically focuses on biodiversity.<sup>349</sup>

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<sup>345</sup> SADC *RBAP* 32.

<sup>346</sup> SADC *RBAP* 16.

<sup>347</sup> See the argument made on law and policy being a key component of governance in para 4.1.6 above.

<sup>348</sup> See in general paras 3.2 and 3.3 above.

<sup>349</sup> See para 2.4.2 above.

The RBAP provides an implementation plan and elaborates on its goal of improving the governance frameworks of TFCAs. The implementation plan indicates that the following key actions and targets are to be undertaken and met within a specific time frame:

<b>Key actions</b>	<b>Target</b>
Harmonise national policy and legislation	Policy frameworks in at least 6 TFCAs to be harmonised (Years 1-15)
Develop regional guidelines on the establishment and management of TFCAs	Years 1-5 (to be published 2015)
Establish and implement effective TFCA structures	Multi-stakeholder fora established in all TFCAs (Years 1-10)
Improve TFCA learning and networking	Establish a regional functional TFCA learning network (Years 1-5)

Figure 7: Summary of Actions and Targets relevant to TFCAs in terms of RBAP<sup>350</sup>

It is clear that harmonisation of all biodiversity-related aspects is a key priority in SADC in terms of the RBAP. It is also clear, given the time frame, that this may be the most difficult target to reach. This could potentially be a consequence of the fact that no biodiversity protocol is yet in force to guide member states to harmonise their legislation in this respect. It may also be a consequence of states clinging on to sovereignty, as argued above.<sup>351</sup> In addition, the term “harmonisation” is used without describing the required degree of harmonisation that should be achieved. In other words, should the legislation and policy be exactly the same, largely similar, contain the same goals/ideals, or contain the same principles? This lack of clarity creates uncertainty, further adding to the complexity of the notion of harmonisation. Although this thesis has proposed a brief theoretical explanation of harmonisation in the SADC context, the legal framework is still silent on this topic.<sup>352</sup> Because the

<sup>350</sup> Adapted from SADC *RBAP* 32-33.

<sup>351</sup> See para 2.2.2 above.

<sup>352</sup> See para 2.2.3.1 above.

RBAP is brand new, it is difficult to ascertain to what extent the five areas set out above will be addressed. One of them, however, the development of regional guidelines for the establishment and management of TFCAs, is already being drafted and is close to completion.<sup>353</sup> This swift action bodes well for the future intentions of SADC in implementing the RBAP.

In sum, the RBAP, although not providing guidance for TFCAs, seem to move a step closer to implementing the Regional Biodiversity Strategy. In so doing, it emphasises the role and importance of biodiversity in achieving the goals of the RISDP and the SADC region.<sup>354</sup>

#### *4.2.10 A synopsis of the TFBC principles in the SADC framework*

In general the SADC Protocols disappoint in not explicitly providing for TFBC in TFCAs. The Protocols, in general, fail to provide a complete legal framework containing all of the principles distilled in chapter 3. Moving on to policy, strong guiding documents exist relating to biodiversity governance. The SADC Biodiversity Strategy and the new RBAP provide some important focus areas that need to be improved in order to strengthen biodiversity governance. In terms of the RBAP, the SADC has shown that it is serious about implementing the action plan, as it is already in the process of finalising regional guidelines for the establishment and management of TFCAs as proposed in the RBAP.<sup>355</sup> It remains to be seen how the rest of the RBAP as discussed above will be implemented. To highlight the foregoing and to substantiate the statements, a principle-by-principle analysis is conducted below (similar to that of the AU framework above) to establish to what extent the principles of TFBC are facilitated in the SADC framework.<sup>356</sup>

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<sup>353</sup> The author is part of the team drafting the guidelines, which should be published by the SADC FANR directorate in the coming months.

<sup>354</sup> The RBAP identifies five other strategic areas focusing on and specialising in biodiversity-based community livelihoods; economic development and biodiversity; biodiversity management systems; biodiversity and climate change; and biodiversity and energy. As these focal areas are highly specialised they will not be considered for the purposes of this thesis. See SADC *RBAP* 17-21.

<sup>355</sup> See Zunckel *SADC TFCA Guidelines* 30-34. This document is a final draft and not yet in the public domain. It was used with the permission of the editor as the author of the thesis contributed to the Guidelines.

<sup>356</sup> See para 4.1.7 above.

#### 4.2.10.1 Sustainable use

Sustainable use is included as one of the main objectives of the SADC by the SADC Treaty.<sup>357</sup> However, the SADC Treaty does not elaborate or provide any further information on what sustainable use is or how it should be achieved. The Wildlife Protocol emphasises the sustainable use of wildlife by explicitly incorporating it several times in the text of the Protocol.<sup>358</sup> Although explicit mention is made of sustainable use, the emphasis falls on wildlife, which is only a component of biodiversity.<sup>359</sup> This recognition of sustainable use does not accord with a holistic approach to biodiversity conservation and emphasises the need for a biodiversity protocol as called for in the RBS.<sup>360</sup> Moreover, as the Wildlife Protocol is the only SADC instrument explicitly recognising TFCAs, it could be expected of the Protocol to cover the needs and challenges posed by TFCAs in a more holistic fashion. But providing for the needs and challenges of TFCAs does not take place in a holistic fashion in the Wildlife Protocol and sustainable use is covered only insofar as it is relevant to the sustainable use of wildlife.<sup>361</sup>

The Forestry Protocol recognises sustainable use in its preamble and further in article 1. Article 1 specifically recognises the concept of sustainable use in relation to traditional forest-related knowledge. Article 1 therefore recognises the important role potentially to be played by traditional knowledge in sustainable use and furthermore implicitly recognises public (local community) participation in TFBC.

Turning to the Shared Watercourses Protocol, it is strange to observe that the principle of sustainable use is not explicitly recognised, as water is a scarce resource in the SADC region; one would expect this principle to apply very explicitly in the water context.<sup>362</sup> The SADC River Basin Guidelines set out guiding principles for shared watercourse governance.<sup>363</sup> One of the guiding principles is sustainable development and, according to the New Delhi Declaration and the arguments raised

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<sup>357</sup> See article 5(1)(g) of the SADC Treaty.

<sup>358</sup> See para 4.2.2 above.

<sup>359</sup> See para 4.2.2 above.

<sup>360</sup> See para 4.2.8 above.

<sup>361</sup> See para 4.2.7 above.

<sup>362</sup> See para 4.2.4 above.

<sup>363</sup> See para 4.2.4 above.

in chapter 2, sustainable use forms an integral part of sustainable development. It could thus be argued that the Guidelines implicitly include the principle of sustainable use in their guidelines for shared watercourse governance. The Shared Watercourses Protocol further places a duty on state parties to balance the three pillars of sustainable development.<sup>364</sup> This explicit reference to sustainable development further indicates the relevance of the principle of sustainable use to shared watercourse governance, although the relevance is deduced from the New Delhi Declaration.

The Fisheries Protocol specifically states that the sustainable use of aquatic ecosystems is one of its main aims.<sup>365</sup> Sustainable use is thus provided for where fresh- and saltwater environments occur.<sup>366</sup> Where the aforementioned environments occur within TFCAs, sustainable use will form a component of the governance framework. Further provision for sustainable use is made in article 4(3) of the Fisheries Protocol, placing a duty on states to build capacity and create enabling environments so that resources can be sustainably utilised. Article 7(8) of the Fisheries Protocol supports the principle of sustainable use by placing a duty on states to prevent and eliminate overfishing. As mentioned above, the Fisheries Protocol calls for the establishment of joint management mechanisms to give effect to the aims of the Protocol.<sup>367</sup> The BCC is an example of such a mechanism and one of the principles upon which it grounds its governance framework is sustainable use. This recognition of sustainable use in the BCC is an important development, as it sets an example of the importance of sustainable use in a sub-regional governance framework.

The Protocol on Tourism aims to optimise resource usage in an environmentally sustainable manner.<sup>368</sup> Supporting the foregoing aim is the duty placed by the Protocol on states to pursue sustainable policies on the utilisation and management of natural and cultural resources in order to enable and promote environmentally

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<sup>364</sup> Article 3(4) of the Shared Watercourses Protocol.

<sup>365</sup> Article 3 of the Fisheries Protocol.

<sup>366</sup> See para 4.2.5 above.

<sup>367</sup> See para 4.2.5 above.

<sup>368</sup> Article 2(3) of the Tourism Protocol.

sustainable tourism.<sup>369</sup> A clear duty of sustainable use is thus supported by the Protocol on Tourism.

Moving to policy, the RISDP reaffirms the fact that sustainable use is one of the main goals in the SADC.<sup>370</sup> However, the RISDP does not elaborate or provide further details as to how the objective of sustainable use is to be achieved. The SADC RBS broadly and generically recognises the needs of TFBC. In general the RBS notes that sustainable use requires considerable attention in the SADC region.<sup>371</sup> The RBS aims to establish a green market for biodiversity trade to regulate and guard against the unsustainable harvesting of biodiversity,<sup>372</sup> and it identifies TFCAs as one of the focal points in the SADC to facilitate sustainable use.<sup>373</sup> However, it does not elaborate or provide guidance as to how sustainable use is to be achieved in TFCAs. It emphasises the need for sustainable use in SADC throughout its text and emphasises the need for a stand-alone protocol on biodiversity to support the SADC's commitment to sustainable use,<sup>374</sup> and it aims to operationalise the RBS while focusing on improving sustainable use.<sup>375</sup> Sustainable use furthermore forms an integral component of the vision of the RBAP:<sup>376</sup>

[t]he people of the SADC region enjoying a healthy environment and enhanced quality of life derived from effective conservation and sustainable use of biodiversity in line with international and regional commitments, while respecting national spiritual and cultural values

The RBAP identifies four actions that are geared towards the achievement of the vision (and therefore sustainable use), namely:<sup>377</sup>

- Meeting the urgent livelihoods and economic development needs from biodiversity;
- Improving biodiversity management systems;
- Strengthening biodiversity governance; and
- Strengthening the financial base for the desired biodiversity future.

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<sup>369</sup> Article 11 of the Protocol.

<sup>370</sup> SADC *RISDP* 62.

<sup>371</sup> See the SADC *RBS* 1-78.

<sup>372</sup> SADC *RBS* 19.

<sup>373</sup> SADC *RBS* 24-25.

<sup>374</sup> SADC *RBS* 60.

<sup>375</sup> SADC *RBAP* 15 and para 4.2.9 above. The promotion of sustainable use is stated as one of the key objectives of the RBAP.

<sup>376</sup> SADC *RBAP* 13.

<sup>377</sup> SADC *RBAP* 14.

All of the aforementioned actions should in theory contribute to the principle of sustainable use and should therefore be aims to be encapsulated in a legal framework regulating TFBC. The RBAP also prescribes the ecosystem approach as one of its guiding principles in achieving sustainable use. This thesis has, at various instances above, indicated that a fragmented - rather than integrated - approach is followed towards biodiversity conservation.<sup>378</sup> The ecosystem approach, as described in the RBAP, aims to manage land, water and living resources (all of which are elements of biodiversity) in an integrated manner.<sup>379</sup>

In sum, the principle of sustainable use is well covered in both the protocol and the policy framework. The SADC protocols fails, however, to provide substantive guidance as to what sustainable use is and, moreover, where sustainable use is mentioned, it is sector-specific, meaning that it applies only to the resource falling within the jurisdiction of the protocol.<sup>380</sup> As the protocols analysed all have a specific scope and mandate, it is not realistic to expect them to extend the scope of sustainable use beyond their mandates. The RBAP does, however, prescribe an integrated management approach requiring inter-sectoral cooperation. Although the RBAP is only a policy document, it is hoped that a possible new biodiversity protocol as called for in the RBS will in future prescribe and foster an integrated approach as is implied with the RBAP.

#### 4.2.10.2 Equity and poverty alleviation

Equity and poverty alleviation speak to one of the important components of TFBC, i.e., local communities and their welfare. The SADC Treaty provides the achievement of equity, balance and mutual benefit as among its principles.<sup>381</sup> The foregoing supports the principle of equity and poverty alleviation. The SADC Treaty further explicitly states that poverty alleviation is one of the main goals of the SADC

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<sup>378</sup> This is true of both the AU and SADC levels. See para 4.1 above.

<sup>379</sup> SADC *RBAP* 29.

<sup>380</sup> For example, the sustainable use only of forestry, and of nothing else, is covered in the Forestry Protocol. The sustainable use of wildlife within a forestry area is thus subject to the Wildlife Protocol. A collectivist approach is not easy to take in the current legal framework

<sup>381</sup> Article 4 of the SADC Treaty. Also see para 4.2.1 above.

and requires all activities and programmes to address poverty alleviation.<sup>382</sup> Clear support is thus given to a generic interpretation of the principle of equity and poverty alleviation through the principles and objectives of the SADC Treaty. This general support may be used to formulate more specific law or policy relevant to TFBC.

The role of local communities and traditional knowledge in effective wildlife governance is acknowledged by the Wildlife Protocol.<sup>383</sup> As local communities may form an integral part of TFCAs and furthermore play an integral part in TFBC, this recognition is important.<sup>384</sup> The recognition of local knowledge and the incorporation of the techniques used in terms of the local knowledge should in theory be beneficial to local communities. This statement is based on the assumption that they should have the intellectual ownership of the relevant knowledge and skills. The Wildlife Protocol is silent on this matter, however. Poverty alleviation could benefit where financial benefits or employment opportunities are provided for those who have ownership of traditional knowledge. One area where the Protocol provides a partial solution to the foregoing problem is the recognition of Community-Based Natural Resource Management (CBNRM) as a potential technique in which traditional knowledge and skills can be used.<sup>385</sup> Where CBNRM is used the community could derive social and financial benefits, and such an approach may contribute towards poverty alleviation. This would depend, however, on the nature of the CBNRM initiative. The recognition of CBNRM involves the partial recognition of a policy consideration formulated in the preamble of the Wildlife Protocol:

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<sup>382</sup> Article 5(1)(a) of the SADC Treaty. Also see article 5(1)(j) specifically. In achieving the objectives set out in the SADC Treaty, article 5(2)(a)-(j) further states that state parties shall “[i]n order to achieve the objectives set out in paragraph 1 of this article, SADC shall: a) harmonise political and socio-economic policies and plans of member states; b) 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; c) create appropriate institutions and mechanisms for the mobilisation of requisite resources for the implementation of programmes and operations of SADC and its institutions; d) 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; e) promote the development of human resources; f) promote the development, transfer and mastery of technology; g) improve economic management and performance through regional co-operation; h) promote the coordination and harmonisation of the international relations of member states; i) secure international understanding, co-operation and support, and mobilise the inflow of public and private resources into the region; j) develop such other activities as member states may decide in furtherance of the objectives of this Treaty.”

<sup>383</sup> Article 10(3) of the Wildlife Protocol.

<sup>384</sup> On the role and involvement of local communities in TFCAs, see para 2 above.

<sup>385</sup> Article 10(2) of the Wildlife Protocol. On CBNRM see Dressler *et al* 2010 *Environmental Conservation* 5-15.

[b]elieving that the regional management of wildlife and wildlife products will promote awareness of the socio-economic value of wildlife and enable equitable distribution of the benefits derived from the sustainable use of wildlife.

Although this belief as formulated in the preamble provides the impression that the equitable distribution of benefits and the socio-economic value of wildlife are to be core concerns of the Protocol, it fails to sufficiently provide for financial benefits and the distribution of benefits (especially where traditional knowledge is concerned). In essence, the Wildlife Protocol fails to facilitate the policy consideration by failing to provide the required operationalising provisions therefor.

The Forestry Protocol provides for generational equity (both inter and intra) as one of its main objectives.<sup>386</sup> In doing so, the Protocol directly addresses equity as encapsulated in the New Delhi Principles.<sup>387</sup> It places a duty on states to enable local communities to benefit from the use of forest resources and furthermore to participate in forest management.<sup>388</sup> Through beneficiation and participation, the principle of equity and poverty alleviation finds tacit implication.<sup>389</sup> The Forestry Protocol further recognises the role of traditional knowledge in forest management and states that equitable benefit sharing should be applied where such knowledge is used in forest management.<sup>390</sup> In this regard, poverty alleviation may also be addressed to a certain extent through the benefits derived from local knowledge. The Protocol further places a duty on forest-based industries to contribute to the well-being of surrounding communities.<sup>391</sup> From the foregoing it is clear that the Forestry Protocol fosters equitable benefit sharing. Benefit sharing, as encapsulated in the Protocol, could indirectly address the principle of equity and poverty alleviation and therefore TFBC, where forest governance forms part of TFCAs.

The Watercourses Protocol refers to the equitable utilisation of shared watercourses.<sup>392</sup> In requiring equitable utilisation the Protocol also specifically places a duty on states to protect watercourses for present and future

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<sup>386</sup> Article 3(1)(c) of the Forestry Protocol.

<sup>387</sup> Principle 2 of the New Delhi Principles. See para 3.2.2 above.

<sup>388</sup> Article 12 of the Forestry Protocol.

<sup>389</sup> See para 4.2.3 above.

<sup>390</sup> Article 16(2)(a) of the Forestry Protocol.

<sup>391</sup> Article 18(1)(g) of the Forestry Protocol.

<sup>392</sup> Article 3(7)(a) of the Watercourses Protocol.

generations.<sup>393</sup> Moreover, the Protocol recognises poverty alleviation as part of its main objective.<sup>394</sup> Although the Protocol does so, no further substantive arrangements is found in the Protocol that directly addresses this issue.

The Fisheries Protocol directly addresses equity and poverty alleviation by providing for the enhancement of food security, safeguarding the livelihoods of fishing communities, creating economic opportunities for individuals in the region, ensuring intergenerational equity, and poverty alleviation.<sup>395</sup> Although the Protocol mentions poverty alleviation as a stand-alone objective, all of the other stated objectives will contribute towards poverty alleviation. This is based on the possibility that all of the objectives, should they be achieved, could create wealth and ensure the sustainability of the livelihoods of local communities. The objectives of the Fisheries Protocol provide traction for the principle of equity and poverty alleviation in SADC environmental law and therefore TFBC. The Protocol further provides for equity and poverty alleviation where local fishermen are seen as economically disadvantaged.<sup>396</sup> This is done by means of the development of small-scale commercial fisheries.<sup>397</sup> All in all, the Fisheries Protocol is a good example of how the principle of equity and poverty alleviation could be incorporated in the SADC legal framework. Although not much detail is provided as to what and how equity and poverty alleviation are to be achieved, sufficient guidance is given to integrate equity and poverty alleviation in issue-specific decision-making frameworks such as TFBC.

The Tourism Protocol contains no specific provisions related to equity and poverty alleviation. In the light of TFBC in TFCAs, this could be argued to be a flaw, since

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<sup>393</sup> Article 3(7)(a) of the Watercourses Protocol.

<sup>394</sup> Article 2 of the Watercourses Protocol determines that the overall objective of the Protocol is to: "foster closer cooperation for judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourses and advance the SADC agenda of regional integration and poverty alleviation."

<sup>395</sup> Article 3(a)-(e) of the Fisheries Protocol.

<sup>396</sup> Article 12(1)(b) and 12(2) of the Fisheries Protocol.

<sup>397</sup> Article 12(2) of the Fisheries Protocol.

TFCA play host to tourism activities where local communities may be involved and derive benefits.<sup>398</sup> These benefits may contribute to poverty alleviation.

In terms of policy, the SADC RISDP affords significant attention to poverty alleviation and states that it is a top priority to be addressed. The RISDP further recognises the link between poverty alleviation and socio-economic development:<sup>399</sup>

[t]he RISDP accords top priority to poverty eradication with the aim to promote sustainable and equitable economic growth and socio-economic development that will ensure poverty alleviation with the ultimate objective of its eradication.

To alleviate poverty the RISDP proposes several strategies including creating opportunities for the poor to create their own wealth.<sup>400</sup> To create such opportunities the RISDP suggests that the capital assets of the poor should be built up, natural assets should be redistributed, infrastructure must be constructed and maintained, the promotion of knowledge and health must be achieved, the environment must be protected, and economic inequalities reduced.<sup>401</sup> The RISDP also recognises that environmental degradation is linked to poverty.<sup>402</sup> Addressing poverty could thus lead to a better state of the environment in general.<sup>403</sup> The RISDP, in general, recognises poverty alleviation and provides important guidance in terms of which strategies could contribute to poverty alleviation. These strategies are important considerations when the principle of equity and poverty alleviation is to be interpreted within a legal framework facilitating TFBC.

As part of the vision of the RBS, equitable access to and sharing the benefits of biodiversity are emphasised.<sup>404</sup> As argued earlier in this section, access and benefit sharing could contribute to the principle of equity and poverty alleviation.<sup>405</sup> The RBS further emphasises the important link between local communities and

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<sup>398</sup> See SADC *Transfrontier Conservation Areas in the Southern African Development Community* available at [www.giz.de/de/downloads/giz2015-en-sadc-tfca-factsheet.pdf](http://www.giz.de/de/downloads/giz2015-en-sadc-tfca-factsheet.pdf) [date of use 22 December 2014].

<sup>399</sup> Para 6 of the Executive Summary of the SADC *RISDP*.

<sup>400</sup> SADC *RISDP* 56.

<sup>401</sup> SADC *RISDP* 56.

<sup>402</sup> SADC *RISDP* 62.

<sup>403</sup> See para 4.2.7 above.

<sup>404</sup> SADC *RBS* 1.

<sup>405</sup> Also see para 4.2.8 above.

biodiversity conservation.<sup>406</sup> The RBS uses the research of Visser *et al* to state that local communities are the direct resource dwellers and users and they are therefore vital in influencing conservation outcomes.<sup>407</sup> Here again, it is important to note the link between poverty and biodiversity-loss. As the link between biodiversity and local communities is strong, the application of the principle of equity and poverty alleviation may help facilitate sustainable use rather than heavy dependence on biodiversity. This environment may be created by economic incentives, opportunities and further creating awareness of the economic value that biodiversity may hold. If their awareness of the economic value of biodiversity is raised, local communities may become aware that the sustainable use thereof is important to their own survival and further to their economic wellbeing. A potential pitfall in raising awareness of the economic value of biodiversity is that local communities may see it as a commodity to provide only for their economic well-being. One of the methods to counteract this potential difficulty is to educate local communities about the importance of biodiversity for livelihoods and the services it could provide.<sup>408</sup>

The RBAP aims to improve equitable access and benefit sharing as one of its key purposes. As indicated in the paragraphs above, access to biodiversity forms an integral part of biodiversity conservation. Furthermore, it was indicated that benefit sharing may help alleviate poverty. Accordingly, the RBAP tacitly supports the principle of equity and poverty alleviation. It explicitly recognises equity and benefit sharing as a focus area that may improve biodiversity governance. Equity and benefit sharing are therefore important aspects of poverty alleviation and by implication then – of TFBC.

In sum, equity and poverty alleviation are broadly catered for in the legal and policy framework. Poverty alleviation enjoys specific recognition in the protocols, although no concrete measures are provided to address this particular challenge. Equity also finds recognition specifically in terms of equitable access and the use of

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<sup>406</sup> SADC RBS 10.

<sup>407</sup> SADC RBS 10.

<sup>408</sup> This includes food, water, shelter, the maintenance of soil fertility and the absorption of pollutants among other things. SADC RBS vii.

biodiversity.<sup>409</sup> A point of critique must be raised, however, in terms of the lack of provisions in the Wildlife Protocol for local community beneficiation. Apart from benefits that may be derived from CBNRM initiatives, the Wildlife Protocol is silent on the important link between local communities and biodiversity conservation, as emphasised in the RBS.<sup>410</sup> As the Wildlife Protocol is seen as the primary legal instrument regulating TFCAs, the omission of this important aspect that could potentially address equity and poverty alleviation may be detrimental to TFBC. Viewed holistically, however, the legal and policy framework recognises the importance of equity and poverty alleviation in the SADC region, albeit not specifically focused on TFBC efforts.

#### 4.2.10.3 CBDR

The CBDR principle, as encapsulated in the New Delhi Principles, is nowhere explicitly mentioned in the SADC legal and policy framework that is investigated in this thesis. One can, however, deduce the implied and indirect application of the CBDR principle from several provisions in the framework, and these will be highlighted briefly.

In the SADC Treaty, solidarity is mentioned as one of the principles of the SADC. Hestermeyer<sup>411</sup> argues that the core of the concept of solidarity is the “idea of the interdependence of members of a self-identified and legitimate group who expect and are willing to help each other in need to some extent.” He goes further and states that the concept of solidarity is applied where common or community interests are at stake.<sup>412</sup> Importantly, then Hestermeyer argues that the concept of solidarity is extremely relevant to international environmental law:<sup>413</sup>

[i]n no area of law are the common interests of mankind clearer, the threats to the very existence of humanity more obvious, than in international environmental law.

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<sup>409</sup> Equitable access and benefit sharing are addressed in the Protocols on Forestry, Fisheries, and Watercourses.

<sup>410</sup> SADC RBS 10.

<sup>411</sup> Hestermeyer *Reality or Aspiration? Solidarity in International and World Trade Law* 7.

<sup>412</sup> Hestermeyer *Reality or Aspiration? Solidarity in International and World Trade Law* 8.

<sup>413</sup> Hestermeyer *Reality or Aspiration? Solidarity in International and World Trade Law* 9.

Hestermeyer then indicates that the concept of solidarity is embedded in the CBDR principle:<sup>414</sup>

Solidarity with developing countries clearly shows in the doctrine of common but differentiated responsibilities, which implements both relevant facets of solidarity: achieving common objectives through differentiated obligations and actions in favour of particular states

In agreement with Hestermeyer, it is argued that the CBDR principle may find tacit application in the SADC through the principle of solidarity as recognised in the SADC Treaty.

The Wildlife Protocol, in article 4, calls for common approaches where the exchange of information and national and regional capacity building forms part of such common approaches. Article 4 includes aspects of solidarity observed from the notion of common goals and cooperation in capacity building. Accordingly, the principle of CBDR may find indirect application. It is not clear, however, from the Protocol at which level (inter-state or at national level) the capacity building should take place, and furthermore who the beneficiaries of the capacity building should be.

The Forestry Protocol also aims to build regional capacity through cooperation.<sup>415</sup> This regional cooperation further aims to facilitate meeting the objectives of the Protocol. States are required to obtain the assistance and cooperation of other states and organisations in achieving its objectives.<sup>416</sup> Assistance and cooperation in the achievement of a common goal (i.e., achieving the objectives of the Forestry Protocol) could implicitly and indirectly include the CBDR principle in the Forestry Protocol. Apart from this potential tacit recognition, no explicit reference is made to the CBDR principle in the Protocol.

The Watercourses Protocol could also be argued to implicitly host the CBDR principle. This argument is based on the inclusion of the concept of equitable use and the components described to facilitate equitable use.<sup>417</sup> The components

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<sup>414</sup> Hestermeyer *Reality or Aspiration? Solidarity in International and World Trade Law* 11.

<sup>415</sup> Article 3(2)(d) of the Forestry Protocol.

<sup>416</sup> Article 22(1) of the Forestry protocol. This obligation even stretches to member states (of the SADC) who are not party to the Forestry Protocol. See article 22(2) of the Forestry Protocol.

<sup>417</sup> Article 3(7) of the Watercourses Protocol.

determining equitable use are natural factors, the social and economic needs of states, and the reciprocal effects of shared use amongst the states concerned.<sup>418</sup> From the foregoing components it is clear that equitable use will be determined according to different circumstances and needs. The common responsibility will thus be equitable use and this (equitable use) will be determined by differentiated responsibilities (by taking the different circumstances and needs into account). Accordingly, it is argued that the CBDR principle finds tacit application through article 3(7) of the Watercourses Protocol.

The Fisheries Protocol does not provide any explicit reference to the CBDR principle. However, as one of its principles the Protocol places an obligation on parties with capacity in fisheries to transfer their skills and technologies to other states in order to enhance regional cooperation.<sup>419</sup> Should this transfer of skills and technology happen, states with stronger capacity in the fisheries sector will potentially help weaker states achieve the common responsibilities as prescribed in the Fisheries Protocol.<sup>420</sup> The Protocol further aims to address all inequalities in its implementation.<sup>421</sup> This foregoing aim is specifically focused on gender equality and is generally focused on inequalities. The formulation of the aim is vague and the Protocol does not further provide any clarification as to how inequalities and gender equality are to be addressed. Although inequality in general could be argued to refer to a component of the CBDR principle, the vagueness of the Protocol does not justify

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<sup>418</sup> Article 7(a)-(c) of the Watercourses Protocol. Also see para 4.2.4 above.

<sup>419</sup> Article 4(4) of the Fisheries Protocol.

<sup>420</sup> These may be the national responsibilities in terms of article 5 of the Fisheries Protocol, for example. Article 5(1)-(5) sets out the national responsibilities as: "1. State Parties shall take measures, at national and international levels, suitable for the harmonisation of laws, policies, plans and programmes on fisheries aimed at promoting the objective of this Protocol. 2. State Parties shall adopt measures to ensure that their nationals and juridical persons act in a responsible manner in the use of living aquatic resources in areas within and beyond the limits of national jurisdiction. 3. A State Party shall authorise the use of vessels flying its flag, for fishing in waters, to which this Protocol applies, only where it is able to effectively exercise its responsibilities under this Protocol in respect of such vessels. 4. A State Party, whose vessels or nationals fish in waters to which this Protocol applies, shall take such appropriate steps as to ensure that they comply with measures adopted under this Protocol and that they do not engage in any activity that undermines the effectiveness of such measures. 5. State Parties, taking into account the best scientific evidence available shall, through proper conservation and management measures ensure that aquatic living resources in the areas under their national jurisdiction are not endangered by over exploitation."

<sup>421</sup> Article 4(5) of the Fisheries Protocol.

an argument in favour of the implicit recognition of the CBDR principle based on the reference to inequality in the Protocol.<sup>422</sup>

The RISDP refers to the concept of solidarity in discussing the historical background and development of the SADC.<sup>423</sup> The RISDP further explicitly states that, in achieving its mission, it will be guided by the principles of the SADC Treaty.<sup>424</sup> As one of the SADC principles is solidarity, one could argue that the CBDR principle should find tacit application throughout the RISDP. This would imply that the provisions in the RISDP should be interpreted while keeping the CBDR principle in mind. The SADC RBS and RBAP do not contain any provisions directly relevant to the CBDR Principle.

In sum, no explicit reference was found to the CBDR principle in the SADC legal and policy framework. As indicated in the foregoing paragraphs, however, the CBDR principle may find tacit application through many provisions encapsulated in the framework. Importantly, through the link established between the concept of solidarity (recognised as one of the guiding SADC principles) and the CBDR principle, the CBDR principle should in theory be applied throughout the whole SADC legal and policy framework as a guiding principle when provisions are interpreted/applied.

#### 4.2.10.4 The precautionary principle

Both the SADC Treaty and the Wildlife Protocol make no reference to the precautionary principle. The Forestry Protocol does, however, explicitly cater for the precautionary principle as a guiding principle:<sup>425</sup>

[s]tate Parties shall not use lack of scientific certainty as a reason for postponing measures to prevent or minimise potentially serious or irreversible harm to forests.

The foregoing provision encapsulating the precautionary principle is further supported by the obligation put on states to promote sustainable forest management

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<sup>422</sup> See the discussion of the CBDR principle in para 3.2.3 above.

<sup>423</sup> SADC *RISDP* 1.

<sup>424</sup> See article 4 of the SADC Treaty. Also see para 4.2.1 above.

<sup>425</sup> Article 4(7) of the Forestry Protocol.

based on the best available scientific information.<sup>426</sup> As the precautionary principle is seen as a guiding principle in the Protocol, it should in theory find application to all of the provisions contained therein.

The Watercourses Protocol also does not explicitly provide for the principle of precaution, yet its application may be implied where the Protocol addresses the prevention and mitigation of harm.<sup>427</sup> Although the prevention and mitigation of harm cannot directly be linked to the principle of precaution, a certain amount of causality does exist between them. The causality is found in the fact that both principles aim to prevent future harm or damage to the environment.<sup>428</sup> The exception to this causality will be where damage has already been caused and the situation requires mitigation to be applied.

The Fisheries Protocol does not directly address the precautionary principle. An indirect application of the principle can, however, be deduced from article 17(2) of the Protocol, which determines that: “[s]tate Parties shall work towards the generation and application of best scientific advice as a basis for decisions on the sustainable use of the living aquatic resources...” When interpreting article 17(2) it could be argued that decisions must be taken mindful of the best scientific advice/evidence and that decisions cannot be taken where there is a lack of scientific advice/evidence. Such an approach could lead to an implicit recognition of the precautionary principle in all decisions related to the sustainable use of aquatic resources. As discussed above, the BCC was established as an instrument for joint coordination, cooperation and management in terms of the Fisheries Protocol.<sup>429</sup> The BCC adopted the Benguela Convention in terms of which the BLCME is jointly

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<sup>426</sup> Article 11(1)(a) of the Forestry Protocol.

<sup>427</sup> Article 4(a)-(b) of the Watercourses Protocol.

<sup>428</sup> This is seen through the license conditions required by article 4(b) of the Watercourses Protocol. Where the granting of such a license is at stake, it may be argued that the precautionary approach will be a consideration that could influence the granting of the license. Article 4(b) determines: “State Parties shall require any person intending to use the waters of a shared watercourse within their respective territories for purposes other than domestic or environmental use or who intends to discharge any type of waste into such waters, to first obtain a permit, license or other similar authorisation from the relevant authority within the State concerned. The permit or other similar authorisation shall be granted only after such State has determined that the intended use or discharge will not cause significant harm on the regime of the watercourse.”

<sup>429</sup> See para 4.2.5 above.

governed.<sup>430</sup> The Benguela Convention acknowledges the precautionary principle as one of its guiding principles.<sup>431</sup> The fact that the Benguela Convention specifically includes the precautionary principle recognises the potential importance of the precautionary principle in shared resources governance.

At policy level the RISDP, RBS, and the RBAP fail to explicitly include the precautionary principle as part of their provisions. This could be due to the silence on the precautionary principle in the protocols discussed above. With the exception of the Forestry Protocol, no clear and explicit mandate to include the precautionary principle could be identified from the protocols investigated. In sum, then, the recognition of the precautionary principle remains largely in the hands of arguments in favour of its implicit inclusion. This is unfortunate as the precautionary principle is important to sustainable development and the situation in the SADC legal framework creates legal uncertainty as to the status of the principle in the SADC.

#### 4.2.10.5 Good governance

Most of the components of good governance are catered for in the SADC legal and policy framework.<sup>432</sup> The core elements of good governance as set out above are public participation, information exchange, access to justice, and the rule of law.<sup>433</sup> In addition, and in line with the requirements formulated for good governance in the PA sphere, legitimacy and voice, subsidiarity, fairness, do no harm, direction, performance, and human rights protection are also required.<sup>434</sup>

The SADC Treaty caters for respect for the rule of law, human rights protection, and access to justice.<sup>435</sup> The foregoing aspects are recognised as principles in terms of which states must act. No specific guidance or substance is given, however, to the principles in the rest of the SADC Treaty. The Wildlife Protocol allows for information

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<sup>430</sup> See para 4.2.5 above.

<sup>431</sup> Article 4(1)(c) of the Benguela Convention. Also see para 4.2.5 above.

<sup>432</sup> For an overview and description of good governance see para 3.2.6 above. Also see para 3.4 above.

<sup>433</sup> See paras 3.2.6 and 3.4 above.

<sup>434</sup> *Dudley Guidelines for Applying Protected Area Management Categories* 28.

<sup>435</sup> Article 4 of the SADC Treaty. See para 4.2.1 above. Access to justice is catered for by the inclusion/recognition of the principle of the peaceful settlement of disputes.

exchange concerning wildlife management, utilisation, and the enforcement of laws.<sup>436</sup> Although this is an aspect of good governance, the application thereof extends only to information sharing between states and it does not extend to the potential relationship between states and individuals or communities. This is a potential concern, as the Protocol recognises CBNRM as one of its main objectives and furthermore proposes to incorporate traditional knowledge into conservation practices.<sup>437</sup> Accordingly local communities could be engaged within the scope of the Protocol and therefore good governance becomes an important issue that should be facilitated in the Protocol.<sup>438</sup>

The Forestry Protocol specifically caters for public participation where local communities are involved.<sup>439</sup> Along with the duty to ensure public participation, the Protocol also incorporates information exchange (between states) related to community based forest management.<sup>440</sup> Although the Protocol is primarily an instrument regulating the relationship between states, information exchange is an important aspect that could affect local communities. Accordingly, the duty to exchange information should be extended to apply to all interested and affected parties in order to ensure that good governance is facilitated by the Protocol.

The Watercourses Protocol provides for information exchange in shared watercourses governance as one of its objectives.<sup>441</sup> The foregoing provision is not extended beyond the inter-state realm, however. Apart from this provision, the Protocol does not contain any other explicit provisions facilitating good governance. The SADC River Basin Guidelines do, however, provide that participation is regarded as a guiding principle where environmental management in shared watercourses is concerned.<sup>442</sup> The River Basin Guidelines describe participation for local communities as an “opportunity to take part in decision-making that affect their well-being and livelihoods.”<sup>443</sup> From the Guidelines it is clear that participation is a

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<sup>436</sup> Article 4(d) of the Wildlife Protocol.

<sup>437</sup> Articles 4(g), 7(4), and 10(2) of the Wildlife Protocol.

<sup>438</sup> See the discussion in paras 4.2.10.1 and 4.2.10.2 above.

<sup>439</sup> Article 12(a) of the Forestry Protocol.

<sup>440</sup> Article 12(b) of the Forestry Protocol. Also see article 21 of the Forestry Protocol.

<sup>441</sup> Articles 2(e), 3(6), 4(1)(a) of the Watercourse Protocol.

<sup>442</sup> SADC *River Basin Guidelines 2*. The aspect of participation is further elaborated in the SADC *River Basin Guidelines*).

<sup>443</sup> SADC *River Basin Guidelines 2*.

core element that is to be taken into account where shared watercourses are governed. Apart from information exchange and participation, however, the Protocol and Guidelines fall short in providing for all of the elements constituting good governance.

The Fisheries Protocol provides for inter-state information exchange in relation to the management of shared resources.<sup>444</sup> Article 7(7) obliges states to ensure that all stakeholders participate in decision-making processes where the governance of shared watercourses is concerned. With the foregoing in mind, expanding information exchange to non-state parties should create a better platform for good governance, as non-state actors are involved in the governance process. This is done by article 18, which is dedicated to information exchange. The Protocol provides that states shall ensure effective communication strategies with stakeholders in order to promote participative management of aquatic resources.<sup>445</sup> The foregoing provision should allow all interested and affected parties to communicate with the relevant states and it should also foster cooperative management as opposed to state-centred management. As such, participation and the exchange of information are facilitated. It may even be argued that, by allowing potential participative management, the element of subsidiarity is catered for. The inclusion of the foregoing elements of good governance is to be welcomed in the SADC legal framework. The extension of the mandate to exchange information and participation beyond the inter-state realm should be regarded as a step in the right direction. The step is in line with modern to emerging governance models relevant to PAs and natural resource management in general.<sup>446</sup>

The Protocol on Tourism provides two important elements of good governance: private sector involvement, and respecting and promoting human rights.<sup>447</sup> Private sector involvement also falls within the ambit of public participation and stakeholder engagement. In fact, the Protocol recognises stakeholder engagement as one of its guiding principles. Apart from the foregoing recognition, the Protocol does not contain any other provisions related to good governance.

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<sup>444</sup> Article 7(3) of the Fisheries Protocol.

<sup>445</sup> Article 18(2) of the Fisheries Protocol.

<sup>446</sup> See para 2.3 above.

<sup>447</sup> Article 3 of the Protocol on Tourism. Also see para 3.2.6 above.

The RISDP recognises that good governance is integral in achieving the SADC Mission Statement.<sup>448</sup> The RISDP goes further and states that:<sup>449</sup>

[g]ood political and economic governance, entrenched in a culture of democracy, transparency and respect for the rule of law, represent the bedrock upon which this RISDP is premised.

The RISDP gives effect to the quotation above as good governance is presented as a prerequisite to address all of the challenges identified throughout the RISDP.<sup>450</sup> However, the RISDP does not define or give substantive content to the term good governance, which is disappointing, as a definition – in the SADC context – could have been useful for decision-makers for guiding their decisions to effect good governance. It should be highlighted, however, that the RISDP links public participation, transparency, and respect for the rule of law to good governance.<sup>451</sup>

The RBS never explicitly refers to the principle of good governance and uses the word governance only in reference to the NEPAD only as a prerequisite to achieving sustainable development.<sup>452</sup> It indicates that community participation requires legislative attention in order to help facilitate the sustainable management of biodiversity.<sup>453</sup> This element of good governance (public participation) is therefore important in the SADC legal context. It has already been argued above that there is an important link between local communities and biodiversity conservation and that local communities should be involved in (good) governance.<sup>454</sup> In general, the RBS indicates that biodiversity governance is in urgent need of attention in the SADC region.<sup>455</sup>

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<sup>448</sup> SADC *RISDP* 4. Article 5 of the SADC Treaty encapsulates the Mission Statement of SADC as the promotion of “sustainable and equitable economic growth and socio-economic development through efficient productive systems, deeper co-operation and integration, good governance, and durable peace and security, so that the region emerges as a competitive and effective player in international relations and the world economy.”

<sup>449</sup> SADC *RISDP* 6.

<sup>450</sup> See the executive summary of the SADC *RISDP* as well as the SADC *RISDP* 1-94.

<sup>451</sup> Executive summary of the SADC *RISDP*.

<sup>452</sup> SADC *RBS* 29.

<sup>453</sup> SADC *RBS* 9-10.

<sup>454</sup> See paras 4.2.10.1 and 4.2.10.2 above.

<sup>455</sup> SADC *RBS* 6-18.

The RBAP also refers to the SADC Mission Statement and makes a commitment to good governance in terms of the SADC Treaty. The enjoyment of a healthy environment, according to the RBAP, involves factors including accountability and transparency. The RBAP also mentions good governance as a factor, which is another reason why the lack of a definition is problematic in the SADC context. As defined in this thesis, accountability and transparency will form part of good governance. In terms of the RBAP, however, accountability and transparency seem to stand apart from good governance. The fact that they are factors to be considered on their own is not the challenge. The challenge lies in the fact that the RBAP, or any other African legal or policy document that was discussed in the context of TFBC, fails to define good governance. As good governance seems to be such an important part of the policy discussed thus far, clarity as regards the content of good governance should be important.

In sum, most elements of good governance are contained in the legal and policy framework. The Protocols on Forestry and Fisheries are to be mentioned specifically as they are the only Protocols to extend participation beyond the inter-state realm. This extension is important as it creates the potential for meaningful public participation and beneficiation – an aspect lacking in natural resource governance in general.<sup>456</sup> One important element of good governance that is lacking throughout all of the protocols is accountability. This omission could be a manifestation of a compromise around sovereignty in the creation of supra-national law, although this thought would be only speculation.<sup>457</sup> What is important, however, is that accountability is seen as an important element in biodiversity governance (and good governance) in terms of the RBAP. Accordingly, accountability needs to be addressed in the SADC protocols in order to ensure this element of good governance has formal legal standing. As a whole, the elements of good governance enjoy fragmented recognition. To fully facilitate good governance the SADC legal framework will have to define good governance and thereafter incorporate the elements of the definition into enforceable law. To incorporate good

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<sup>456</sup> See para 2 above.

<sup>457</sup> See in general the discussion on colonialism and sovereignty in paras 2.2.1 and 2.2.2 above.

governance in TFBC, this thesis argues that the elements as set out above should form the basis of good governance.<sup>458</sup>

#### 4.2.10.6 Cooperation

As described above, cooperation can be seen as a cross-cutting requirement for TFBC.<sup>459</sup> The SADC Treaty recognises that cooperation is indispensable to the realisation of the ideals of the SADC.<sup>460</sup> Article 21 of the SADC Treaty deals specifically with cooperation and the areas where cooperation are required. Of specific relevance to TFBC are the designated areas of food security, land and agriculture; and natural resources and environment.<sup>461</sup> Article 22 further determines that, for each area of cooperation, member states may conclude protocols regulating the said cooperation. Article 22 can be argued to be the mandate in terms of which sector-specific protocols (like the ones discussed in this thesis) regulate cooperation in their specific sectors.

Cooperation plays an important role in the Wildlife Protocol and forms an integral part of the guiding principles thereof.<sup>462</sup> The Protocol specifically calls for cooperation with the aim of developing common approaches to conservation and the sustainable use of wildlife<sup>463</sup> and further for cooperation where shared wildlife resources and transfrontier activities are at stake.<sup>464</sup> In order to facilitate the cooperation aimed for, the Protocol places a duty on states to enter into agreements to promote the cooperative management of shared wildlife resources across international borders.<sup>465</sup> A further duty is placed on states to cooperate in capacity building to facilitate effective wildlife management.<sup>466</sup> A clear emphasis is thus placed on cooperation in achieving the goal of the Wildlife Protocol – the development of common approaches to the conservation and sustainable use of wildlife. This emphasis on cooperation can be seen as an essential element in any

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<sup>458</sup> See para 3.2.6 above.

<sup>459</sup> See para 4.1.7.6 above.

<sup>460</sup> Preamble of the SADC Treaty.

<sup>461</sup> Article 21(a) and 21(e) of the SADC Treaty.

<sup>462</sup> Article 3 of the Wildlife Protocol.

<sup>463</sup> Article 3(2)(b) of the Wildlife Protocol.

<sup>464</sup> Article 3(3)(c) of the Wildlife Protocol.

<sup>465</sup> Article 7(5)(a) of the Wildlife Protocol.

<sup>466</sup> Article 10(1) of the Wildlife Protocol.

attempt at governance where multiple stakeholders are involved. As the use of indigenous knowledge and the facilitation of CBNRM are recognised as possible measures to be used in attempting to achieve the aims of the Protocol, cooperation is theoretically extended to local communities as well.<sup>467</sup>

In the Forestry Protocol, cooperation among member states is said to be central to the achievement of the objectives of the Protocol.<sup>468</sup> The Protocol provides that cooperation should always be in good faith.<sup>469</sup> In dealing with transboundary forests, article 14 places a duty on states to: “establish programmes and enter into agreements to promote the co-operative and integrated management of transboundary forests and protected areas.” This duty to establish agreements in terms of which cooperative management could be facilitated is similar to the provision of the Wildlife Protocol discussed earlier.<sup>470</sup> An example of article 14 in practice is the SADC-GIZ project discussed earlier.<sup>471</sup> Article 22(1) places a general duty of cooperation among the member states in order to achieve the objectives of the Protocol. This duty is also extended to apply to member states that are not party to the Protocol, should this be appropriate or necessary under the circumstances.<sup>472</sup> Accordingly, cooperation can be seen as an important principle in the Forestry Protocol.

The principle of cooperation is central to the Watercourses Protocol. This is evidenced by the fact that the overall objective of the protocol is to: “foster closer cooperation for judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourses”<sup>473</sup> This overall goal is further embedded in the general principles of the Protocol, as states are required to undertake and establish close cooperation where projects are likely to have any effect on shared watercourses.<sup>474</sup> Moreover, states are required to cooperate in the protection and

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<sup>467</sup> Articles 7(4) and 7(8) of the Wildlife Protocol.

<sup>468</sup> Article 3(2) of the Forestry Protocol.

<sup>469</sup> Article 4(1) of the Forestry Protocol.

<sup>470</sup> See article 7(5)(a) of the Wildlife Protocol.

<sup>471</sup> See para 4.2.3 above.

<sup>472</sup> Article 22(2) of the Forestry Protocol.

<sup>473</sup> Article 2 of the Watercourses Protocol.

<sup>474</sup> Article 3(5) of the Watercourses Protocol.

development of shared watercourses within the ambit of the Protocol.<sup>475</sup> A discussion of the Watercourses Protocol would not be complete without reference to the SWIs/RBOs. These mechanisms of joint management are good examples of cooperation in practice.<sup>476</sup> When looking at the SADC River Basin Guidelines, one of the principles links to cooperation and potentially takes inter-state cooperation to another level. As discussed above, participation as one of the guiding principles of the Guidelines allows local communities to cooperate and be engaged in governance.<sup>477</sup> When using participation as a platform for cooperation, cooperation is extended beyond the inter-state model and includes all interested and affected parties. As already stated, TFBC presents a complex governance paradigm and it is important that cooperation be extended to include all parties directly/indirectly affected.

The Fisheries Protocol provides perhaps the most illustrative example of cooperation and the relationship of cooperation with shared resources. The Protocol provides that the:<sup>478</sup>

responsibility for the implementation of this Protocol is primarily national, but in the case of shared resources, State Parties shall co-operate with one another to ensure that the objective of this Protocol is achieved.

It is accordingly clear that cooperation between states is a requirement when shared resources are concerned. In the light of the remarks on participation made in terms of the River Basin Guidelines in the foregoing paragraph, cooperation may need to transcend the inter-state paradigm to be truly effective and inclusive. The provisions in article 18(2) of the Protocol allowing for effective communication and participative management may bridge this inter-state paradigm.<sup>479</sup> Article 18(2) may indirectly allow all interested and affected parties to engage in the cooperative management of shared resources. Where local communities depend on artisanal or small-scale fishing, the Protocol provides that states should allow participatory approaches for the benefit of these communities.<sup>480</sup> Through these participatory approaches

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<sup>475</sup> Article 3(7)(a) of the Watercourses Protocol. Also see article 4(2)(d) of the Watercourses Protocol for cooperation on the protection of shared watercourses.

<sup>476</sup> See para 4.2.4 above.

<sup>477</sup> See paras 4.2.4 and 4.2.10.5 above.

<sup>478</sup> Article 4(1) of the Fisheries Protocol.

<sup>479</sup> See the analysis of the Fisheries Protocol in para 4.2.10.5 above.

<sup>480</sup> Article 12(6) of the Fisheries Protocol. Also see article 12 of the Fisheries Protocol in general.

cooperation between states, the relevant state departments and local communities should be facilitated. Article 18(2) therefore extends cooperation beyond the inter-state paradigm. The importance of cooperation in the light of shared resources management is further illustrated by the fact that it is encapsulated as one of the guiding principles in the Benguela Current Convention.<sup>481</sup>

The Protocol on Tourism encapsulates cooperation as one of its guiding principles.<sup>482</sup> The cooperation, as formulated in the Protocol, is wide and extends to the private sector, the public sector, local communities, and local authorities.<sup>483</sup> Apart from the wide mandate of cooperation, the Protocol places a duty on states to cooperate in the following fields: the facilitation of travel across borders; tourism training and education; the marketing and promotion of tourism; research and tourism statistics; service standards; and the pursuit of environmentally sustainable tourism.<sup>484</sup>

Moving to policy, the RISDP identifies that cooperation in the field of “environment and natural resources” is required and sets the target that a legal instrument for regional cooperation in environment and natural resources must be finalised by 2006.<sup>485</sup> To date, however, this legal instrument has not been forthcoming. Cooperation has been seen to be covered sector by sector in the protocols discussed above, but the promise of holistic cooperation as identified by the RISDP is nevertheless welcomed. Cooperation cutting across the different sectors may lead to better and more holistic governance of the environment as a whole. Cross-cutting cooperation is also in line with the integration principle, and integration is crucially important to sustainable development.<sup>486</sup> It is therefore worrying that the legal instrument (that could potentially facilitate cross-cutting cooperation) is now nine years overdue.

The RBS, in its foreword, recognises the transboundary nature of biodiversity and confirms that transboundary cooperation is essential in the protection and

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<sup>481</sup> Article 2 of the Benguela Current Convention. Also see para 4.2.5 above.

<sup>482</sup> Article 3(1)-(3) of the Protocol on Tourism.

<sup>483</sup> Article 3(1)-(4) of the Protocol on Tourism.

<sup>484</sup> Articles 6-11 of the Protocol on Tourism.

<sup>485</sup> SADC *RISDP* 62.

<sup>486</sup> See paras 2.4 and 3.2.7 above.

conservation thereof: "...the successful conservation and sustainable use of the region's biological resources depends on trans-boundary cooperation."<sup>487</sup> Although the importance of transboundary cooperation is recognised continually throughout the RBS, it fails to provide a framework in terms of which transboundary cooperation can take place. This could be the result of the RBS recognising that there is no "clear underlying policy framework on biodiversity issues" in the SADC.<sup>488</sup> The foregoing recognition underpins the urgency for the development of a legal framework for TFBC in the SADC.

The RBAP recognises that the SADC region requires stakeholder engagement at various levels.<sup>489</sup> Accordingly, the RBAP states that effective institutional frameworks for biodiversity management should have open stakeholder consultation mechanisms that can facilitate agreements for cooperation between the stakeholders.<sup>490</sup> Other than the mechanisms that may facilitate cooperation, the RBAP does not provide any further substantial provisions related to cooperation.

In sum, cooperation stands central to the SADC Mission Statement.<sup>491</sup> Cooperation between member states is therefore crucially important in the achievement of the SADC objectives. Cooperation is emphasised in all of the SADC protocols discussed in this thesis. It is important to reiterate, however, that although cooperation is covered sector by sector, holistic cross-cutting cooperation is prescribed by the RISDP.<sup>492</sup> Cross-cutting cooperation is essential in integrating the different aspects of TFBC. Should cooperation be bounded to specific areas, it will be difficult to follow a holistic and integrated approach to the facilitation of TFBC. As a consequence, integration could possibly not be achieved as required by sustainable development, and therefore TFBC could potentially fail. Finally, extending cooperation beyond the inter-state paradigm is important for TFBC. This extension of cooperation is not facilitated by the SADC Treaty or the Watercourses

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<sup>487</sup> SADC *RBS* iii.

<sup>488</sup> SADC *RBS* 26.

<sup>489</sup> SADC *RBAP* 24.

<sup>490</sup> SADC *RBAP* 25. The mechanisms envisaged by the RBAP include: a biodiversity stakeholder forum, inter-directorate committee meetings, SADC environment technical committee meetings, and SADC national committee meetings. See SADC *RBAP* 26.

<sup>491</sup> Article 5 of the SADC Treaty.

<sup>492</sup> See the analysis of the *RISDP* earlier in this paragraph.

Protocol. In the TFBC context, cooperation with local communities is important and cooperation should be sufficiently flexible to allow the participation of all interested and affected parties.

#### 4.2.10.7 Sovereignty, environmental assessments, and integration

As argued above, sovereignty is recognised as a general principle of international law<sup>493</sup> and therefore applies to the legal framework. Sovereignty should therefore not need explicit inclusion.<sup>494</sup> Contrary to most of the AU framework, the SADC Treaty, however, confirms the principle of sovereignty as one of its guiding principles.<sup>495</sup> The Wildlife Protocol also refers to sovereignty, albeit in its preamble and not in the main text. The right to the sovereign exploitation of resources is also encapsulated as a guiding principle in the Forestry Protocol.<sup>496</sup> Similarly, the Watercourses Protocol allows for use according to sovereign rights as a general principle.<sup>497</sup> The Fisheries Protocol does not refer to sovereignty in its text. Although it clearly states that the responsibility for the implementation of the Protocol is primarily national, it emphasises that where shared resources are concerned, cooperation among state parties is essential.<sup>498</sup> In essence, shared resources may require the traditional sense of sovereignty to be diluted as states could be required to cooperate beyond their sovereign territory in these cases. The provision requiring cooperation where resources are shared could theoretically be argued to limit the traditional concept of sovereign ownership.<sup>499</sup>

At policy level, the RISDP refers to sovereignty as encapsulated in the SADC Treaty and provides that it will be used as a guiding principle in pursuit of the aims of the RISDP.<sup>500</sup> It refers to TFBC as a process that intrudes on sovereignty and states that equal national capacity is critical to the success of TFBC efforts.<sup>501</sup> Although

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<sup>493</sup> See the *Declaration on Principles of International Law Concerning Friendly Relations and Cooperation between States* UNGA RES/2625 (XXV).

<sup>494</sup> See para 4.1.7.7 above.

<sup>495</sup> Article 4 of the SADC Treaty.

<sup>496</sup> Article 4(2) of the Forestry Protocol.

<sup>497</sup> Article 3(2) of the Watercourses Protocol.

<sup>498</sup> Article 4(1) of the Watercourses Protocol.

<sup>499</sup> See para 2.2.2 above.

<sup>500</sup> SADC *RISDP* 4.

<sup>501</sup> SADC *RBS* 64.

this reference to sovereignty is not positive, it could be argued that by mentioning equal national capacity it suggests that the CBDR principle may have a role to play in the possible facilitation of such equal national capacity. Should this be achieved, TFBC processes may seem less intrusive on national sovereignty. Equal national capacity should also create a more accepting environment for concepts such as custodial sovereignty to be applied to biodiversity. Finally, the principle of sustainable use, along with the argument that biodiversity is a common concern of mankind,<sup>502</sup> should in theory inherently curtail the sovereign exploitation of biodiversity. This curtailment would be to the extent that the exploitation or proposed exploitation is deemed not to be sustainable.<sup>503</sup>

Environmental assessments are not explicitly covered in the legal framework, although it may be argued that sustainable use would imply that environmental assessments would have to be carried out.<sup>504</sup> It may further be argued that the implementation of the precautionary principle would also facilitate environmental assessments.<sup>505</sup> Accordingly, environmental assessments may implicitly be required in the SADC legal framework. Where biodiversity is concerned in the TFBC context, joint environmental assessment should be conducted by the states and stakeholders involved. As described above, joint assessments may pose challenges when not addressed in a holistic fashion.<sup>506</sup> A holistic approach could imply that a single supra-national body will direct the assessments and further decide on their outcomes.

At policy level, the RISDP acknowledges the role and importance of environmental assessments for sustainable development.<sup>507</sup> The RBS further stresses the need for environmental assessments in the SADC region and emphasises the need for regional capacity to conduct environmental assessments.<sup>508</sup> The RBAP also

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<sup>502</sup> See para 2.1 above.

<sup>503</sup> See para 3.2.1 above.

<sup>504</sup> See the discussion on sustainable use in para 4.2.10.1 above.

<sup>505</sup> See the discussion on the precautionary principle in para 4.2.10.4 above.

<sup>506</sup> See the discussion on the MDTP in para 1.1.1 above.

<sup>507</sup> SADC *RISDP* 106.

<sup>508</sup> SADC *RBS* 8, 20, and 22.

confirms the importance of environmental assessments in relation to biodiversity conservation in the SADC region.<sup>509</sup>

The SADC legal framework regularly refers to the concept of regional integration.<sup>510</sup> The integration principle, however, as used in this thesis, aims to integrate all of the principles distilled for TFBC.<sup>511</sup> Accordingly, integration as used in this thesis takes on a very specific form, focusing mainly on the integration and interrelationship of all of the principles that are argued to constitute TFBC. From the SADC legal framework it is clear that no holistic approach has yet been adopted towards environmental governance. This is made clear through the remarks in the RISDP and RBS.<sup>512</sup> Moreover, although most of the TFBC principles are facilitated in the legal framework (directly or indirectly), there is no instrument containing all of the principles and integrating them. In order to allow holistic approaches to TFBC, the fragmented state of the principles in the legal framework (where present) may not suffice to support sustainable TFBC. Since the integration principle provides the balancing act for sustainable development, the principle is integral in achieving sustainable development, and therefore the principle should be instrumental to a legal framework facilitating all of the TFBC principles.

In sum, sovereignty is covered well and explicitly apart from the fact that it is not mentioned in the Fisheries Protocol. At policy level, the RBS notes that TFBC is a process that intrudes on sovereignty and emphasises that equal national capacity is of critical importance to help overcome this intrusion into sovereignty. Environmental assessments are not covered explicitly in the legal framework. They are important and the need for them in should be stressed in the policy framework for regional environmental governance. As for integration, it was argued that fragmentation hampers the adoption of integrated and holistic approaches to environmental governance. It was further argued that the legal framework, as it stands, may not be able to support sustainable TFBC as formulated in this thesis.

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<sup>509</sup> SADC *RBAP* 21, 37, and 43.

<sup>510</sup> Regional integration is, for example, proposed as a mechanism through which some of the main objectives of the SADC can be achieved. See article 5(1)(a) of the SADC Treaty.

<sup>511</sup> See para 3.2.7 above.

<sup>512</sup> See paras 3.2.7, 3.2.8, and 3.2.10.5 above.

#### 4.2.10.8 The extent of facilitation

The preceding paragraphs have analysed the extent to which the principles distilled for TFBC are encapsulated in SADC law and policy. In general, the SADC framework provides for most of the principles whether directly or indirectly. Sustainable use is covered throughout the SADC legal framework and is well embedded in the framework analysed. The fact that the SADC is yet to adopt the biodiversity protocol, which will attempt to integrate sustainable use across the sectoral approach currently in place, however, does hamper holistic attempts to facilitate the sustainable use of biodiversity.<sup>513</sup> In sum, sustainable use is catered for extensively yet the provisions are scattered through different protocols, creating a fragmented approach to a single concept - biodiversity. Equity and poverty alleviation is mentioned as one of the main guiding principles in the SADC Treaty.<sup>514</sup> The Wildlife Protocol and Watercourses Protocols fail to effectively provide for the engagement of local communities in order to alleviate poverty.<sup>515</sup> In contrast the Forestry and Fisheries Protocols provide for local communities to benefit from the local biodiversity and in so doing create juridical opportunities to alleviate poverty.<sup>516</sup>

The CBDR principle is facilitated only tacitly and never mentioned explicitly. Should the argument of Hestermeyer be accepted, however, (that solidarity and CBDR are related), CBDR should be implicitly applied throughout the whole SADC framework, since solidarity is a guiding principle of the SADC in terms of the SADC Treaty.<sup>517</sup> The precautionary principle is explicitly mentioned only in the Forestry Protocol.<sup>518</sup> The rest of the framework makes either no mention of the principle or the application thereof is to be deduced from other provisions.<sup>519</sup> The Benguela Convention, which was adopted by the BCC in terms of the Fisheries Protocol, does however explicitly

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<sup>513</sup> See paras 4.2.10.1 and 4.2.10.6 above.

<sup>514</sup> Article 4 of the SADC Treaty.

<sup>515</sup> See para 4.2.10.2 above. The Wildlife Protocol does mention CBNRM but does not provide details as to how communities could/should derive benefits from this. The Watercourses Protocol fails to provide any provisions for poverty alleviation (despite the fact that poverty alleviation is a goal in the Protocol).

<sup>516</sup> See para 4.2.10.2 above.

<sup>517</sup> See para 4.2.10.3 above.

<sup>518</sup> See para 4.2.10.4 above.

<sup>519</sup> See para 4.2.10.4 above.

provide for the precautionary principle as one of its guiding principles.<sup>520</sup> This is despite the fact that the Fisheries Protocol does not include the precautionary principle.

The elements of good governance are generally covered in most of the framework, although the phrase “good governance” is referred to only in the policy documents. One issue that stands out is the fact that, where participation is concerned, participation is normally not extended beyond the inter-state paradigm. In line with modern and emerging governance models, the Forestry and Fisheries Protocols extend participation to include all relevant stakeholders – specifically local communities. One matter that the SADC legal framework fails to address in its entirety is accountability. Although certain procedures for dispute resolution exist, most of these depended on the existence of the SADC Tribunal, which is not in operation at the moment. Reference to accountability, an important element of good governance, is therefore absent, and without the element of accountability it cannot be said that good governance – as a complete package – is catered for in SADC; especially considering that accountability is one of the primary aims of good governance.

Cooperation is an element inherent in TFBC. This is in part illustrated by the Fisheries Protocol, which provides that cooperation is required where shared resources are to be jointly governed.<sup>521</sup> Cooperation is provided throughout the whole framework, although it is confined to the scope and application of the specific protocol in question. It is here that the RBS provides valuable input in recognising cooperation as a cross-cutting issue. Moreover, the RBS recognises that successful environmental governance (in this case TFBC) depends on cooperation beyond mere sector-based (or protocol-based) cooperation. This cross-cutting cooperation is supposed to be facilitated by a holistic environmental protocol that was due in 2006.<sup>522</sup> This protocol has not yet come about.

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<sup>520</sup> See para 4.2.10.4 above.

<sup>521</sup> See para 4.2.10.6 above.

<sup>522</sup> SADC *RISDP* 62.

Sovereignty is facilitated in the legal framework and it was argued above that sovereignty may be “softened” by the principle of sustainable use.<sup>523</sup> Sovereignty is seen as one of the most important principles in the SADC and as it is intruded on by TFBC, as it were, it should be dealt with carefully in a legal framework.<sup>524</sup> Furthermore, although environmental assessments are not explicitly covered, they are recognised as being important by the policy framework, and should thus enjoy attention in a legal framework for TFBC. As for integration, although the principle may not be as tangible as sustainable use or precaution, the integration principle is crucially important in achieving sustainable TFBC. As the current SADC legal framework stands, the integration principle is undermined by the taking of fragmented approaches towards the various instances of environmental governance and the lack of an encompassing environmental protocol. The inclusion thereof in a legal framework for TFBC should therefore be non-negotiable in order to help facilitate sustainable development in TFBC initiatives.

### **4.3 Summary**

At SADC level, no framework law for environmental governance exists, and environmental regulation is left to a silo-based approach where biodiversity is segregated into some of its various components (wildlife, forestry, fisheries, and water), leading to fragmented regulation. This fragmented approach towards environmental regulation is directly opposed to the objective of harmonisation in SADC.<sup>525</sup> As TFBC proposes to holistically govern biodiversity in TFCAs, a fragmented legal framework cannot support this holistic goal. Although existing policy instruments address biodiversity conservation, these documents specifically address a need for the adoption of a Protocol regulating biodiversity conservation.<sup>526</sup> The RBS is specifically critical of the SADC legal framework in relation to biodiversity conservation.<sup>527</sup>

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<sup>523</sup> See para 4.2.10.7 above.

<sup>524</sup> See the comments on equal national capacity in para 4.2.10.7 above.

<sup>525</sup> On harmonisation see para 2.2.3 above and on the harmonisation mandate in SADC see article 5(2)(b) of the SADC Treaty.

<sup>526</sup> See the discussion on the *RISDP* (para 4.2.7 above) and the *RBS* (para 4.2.8 above).

<sup>527</sup> See para 4.2.8 above.

Furthermore, concerns remain with respect to the existence and implementation of concrete measures to harmonise law and policy, measures for conflict and dispute resolution, and measures related to procedural fairness. As the regional harmonisation of law and policy is one of SADC's main goals, all of the Protocols disappoint in not providing any concrete guidance as to how harmonisation must be achieved. Moreover, the Protocols generally contain only vague provisions in this respect,<sup>528</sup> which does not advance the process of harmonisation, as the Protocols do not provide a clear benchmark/norm to comply with. This unfortunately could lead to harmonisation's being viewed as mere political rhetoric and not as a substantive and enforceable objective and may also leave biodiversity governance situated in TFCAs in the hands of divergent legal and political systems that contain potentially contradictory measures. Furthermore, the lack of measures for conflict and dispute resolution in this respect is also worrying. As was indicated above, conflict could arise in TFCAs and in the governance context where various stakeholders are involved, and conflict resolution is therefore crucially important.<sup>529</sup> This is especially important in the light of the recent suspension of the SADC Tribunal.<sup>530</sup> Without the SADC Tribunal, the SADC legal and policy framework are without an interpreting and conflict resolution organ. This contributes to legal uncertainty, especially in the light of the fragmented governance framework.

Procedural fairness should be related to conflict and dispute resolution, as this is a principle contained in the UNEP Principles. No provision for dispute resolution is made for the case where individuals are harmed by neighbouring states (transfrontier harm). This omission is significant in TFCAs as local communities may directly be affected by states in and around these areas.

The problem of fragmentation should again be emphasised, as holistic management is central to the concept of TFBC in TFCAs. It would seem that the framework is plagued by the parochial fragmented approach to environmental governance also found in other national, regional and international normative arrangements.<sup>531</sup> For

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<sup>528</sup> In some instances this is understandable, as the Protocols need to gain consensus/buy-in in order to come into force.

<sup>529</sup> See para 2.3.1.2 above.

<sup>530</sup> See [www.sadc.int/about-sadc/sadc-institutions/tribun/](http://www.sadc.int/about-sadc/sadc-institutions/tribun/) [date of use 11 June 2014].

<sup>531</sup> See generally Kotzé 2006 *PELJ* 1-44.

example, the Protocols do not recognise the interconnectedness of nature and the interconnectedness between nature and man, and therefore seem to be stuck in the same ideological paradigm as classical model of PA governance.<sup>532</sup> This leaves decision makers in TFCAs in a position where they have to consult a variety of Protocols to guide their decisions. The concerns surrounding fragmentation are compounded by fact that none of the Protocols directly addresses biodiversity conservation in any real holistic way. This fact is acknowledged by the Biodiversity Strategy. It remains unclear why a Biodiversity Protocol has not yet been developed. One might imagine that the importance of a holistic approach to environmental governance has perhaps not yet been fully grasped at the SADC level. For these reasons the conservation approaches and Protocols remain fragmented, and the situation will require drastic legal and policy reform in order to more effectively ensure the development of holistic biodiversity conservation in a transboundary setting. Without an integrated and holistic regional framework, decision makers are left to apply their national legislation and NBSAPs to govern TFCAs,<sup>533</sup> but reverting to undiluted national legal and policy regimes would be counterproductive and would re-erect the few fences that have already been dropped.

Apart from the challenges, there are also numerous positive attributes of the SADC framework with respect to biodiversity conservation. First, the Watercourses Protocol is a good example of an instrument that seeks to facilitate transboundary resource governance. In principle, water and biodiversity are both shared resources and are important for one another. One may assume that in the water-scarce regions of SADC, the importance of water features high on the political and policy-making agenda. This led to the development of some effective guidelines and policies adopted by the SWIs, which in turn could present a model for a more integrated transboundary approach to biodiversity conservation as well. Secondly, the BCC established under the Fisheries Protocol that promotes an ecosystem approach to governing the shared resource (BCLME) is a good example of cooperative governance in transfrontier context. Moreover, resulting from the BCC was the

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<sup>532</sup> See para 2.1.1 above and CBD *GBO* 3 94; WWF *LPR 2014* 1-10; UNEP *AEO 2* 226-295 as well as UNEP *AEO 3* 10-11 and SADC RBS 1-122.

<sup>533</sup> It is acknowledged that national law and policy as well as the NBSAPs will always play a role. It is argued, however, that with a supranational legal framework guiding TFBC in TFCAs holistically, national law and policy as well as NBSAPs may over time be harmonised by this framework.

Benguela Current Convention that concretised the ecosystem approach as part of sustainable resource management. This Convention can be considered an innovative approach to connectivity, integration and the transboundary governance of biodiversity resources.

While these examples are important indicators that the SADC framework does have the potential for sustainable TFBC in SADC, clearly much remains to be done in terms of expanding, refining, and ultimately implementing regional arrangements that seek to better respond to the many challenges facing TFBC in SADC.

## Chapter 5 – The principles in practice

### 5 TFBC in practice: The KAZA and GLTP

The aim of this chapter is to use the principles identified and explored in chapter 3 to determine how they are currently incorporated (if at all) in the governance frameworks of two chosen TFCAs.<sup>1</sup> Similar to the approach used in chapter 4, the relevant governance documents pertaining to these TFCAs will be discussed and thereafter a summary will be provided on the extent to which the principles are facilitated in the frameworks. The finding of each analysis will be localised in nature (TFCA-specific) and not generically applicable like the analysis in chapter 4 above. It should be made clear that no empirical research was done for purposes of this chapter and that the research and findings are based on a desktop study of the documents relevant to the establishment and governance of the TFCAs.

The two TFCAs were specifically selected as they generally represent the broad array of challenges that fall within the nature and scope of TFBC as identified in this thesis.<sup>2</sup> The first TFCA chosen is the KAZA, which is the largest TFCA in SADC and potentially the largest in the world.<sup>3</sup> The KAZA incorporates five different member states and accordingly brings unique political, legal and policy challenges to holistic governance, as many jurisdictions need to be considered when attempting to govern a single TFCA. Second, the GLTP is chosen as it is perhaps the TFCA hampered with the most conflict regarding conservation, local communities, and conflict in the relationship between the communities and conservation.<sup>4</sup> The most prominent source of conflict in this area in recent years has been rhino poaching.<sup>5</sup> These

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<sup>1</sup> For the principles see para 3.4 above.

<sup>2</sup> See specifically paras 2.2 and 2.3 above.

<sup>3</sup> See [www.kavangozambezi.org/about-us](http://www.kavangozambezi.org/about-us) [date of use 20 August 2014].

<sup>4</sup> Webster and Suich “Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area” 379. Also see Muboko *Conflict and Sustainable Development: The Case of the Great Limpopo Transfrontier Park; Southern Africa* 179-240. Also see [www.peaceparks.co.za/programme.php?pid=25&mid=1009](http://www.peaceparks.co.za/programme.php?pid=25&mid=1009) [date of use 21 July 2014].

<sup>5</sup> See [www.peaceparks.co.za/programme.php?pid=24&mid=1021](http://www.peaceparks.co.za/programme.php?pid=24&mid=1021) [date of use 25 August 2014]. Also see Molewa “Renewed Hope in Poaching War” *Sunday Independent*.

conflicts hinder the main drivers behind TFBC: sustainable development and biodiversity conservation.<sup>6</sup>

## 5.1 KAZA TFCA

### 5.1.1 Background

The KAZA TFCA was formally established by *The Memorandum of Understanding Concerning the Establishment of the Kavango-Zambezi Transfrontier Conservation Area* (KAZA MoU) between Angola, Botswana, Namibia, Zambia and Zimbabwe in December 2006.<sup>7</sup> It is the world's largest TFCA, spanning approximately 520 000 km<sup>2</sup> (this is similar to the size of France) and it includes 36 national parks, game reserves, community conservancies and game management areas.<sup>8</sup> The mission of the KAZA TFCA as set out in the *Kavango-Zambezi Strategic Action Plan 2011-2016* (KAZA SAP) is to:<sup>9</sup>

...sustainably manage the Kavango Zambezi ecosystem, its heritage and cultural resources based on best conservation and tourism models for the socio-economic wellbeing of the communities and other stakeholders in and around the eco-region through [h]armonisation of policies, strategies and practices.

From the mission it is clear that sustainable development and biodiversity conservation are central concerns in the TFCA that should be achieved through harmonisation of policies, strategies and practices. In essence, the mission captures TFBC as portrayed in this thesis and one would accordingly expect the legal principles facilitating TFBC to be found in the governance framework of the KAZA TFCA. To establish whether this is in fact the case, a critical textual analysis of the KAZA MoU, the *Treaty on the Establishment of the Kavango-Zambezi Transfrontier Conservation Area* (KAZA Treaty), 2011, the KAZA SAP, and the draft *KAZA Stakeholder Engagement Strategy*, 2007 (KAZA SES) is undertaken below.

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<sup>6</sup> For a discussion on the drivers see para 2.4 above.

<sup>7</sup> KAZA SAP 1.

<sup>8</sup> See [www.peaceparks.co.za/tfca.php?pid=19&mid=1008](http://www.peaceparks.co.za/tfca.php?pid=19&mid=1008) [date of use 21 July 2014].

<sup>9</sup> KAZA SAP 2.

### 5.1.2 KAZA MoU

The preamble of the KAZA MoU recognises the principles of sustainable use, cooperation, economic development and sovereignty. The principle of sovereignty is linked with the responsibility to sustainably use natural resources. In so doing, it tacitly gives effect to custodial sovereignty as described above.<sup>10</sup> The MoU does not define natural resources and it does not recognise that natural resources traverse sovereign borders by defining them as such. Sustainable use is defined in the MoU as: “use in a way and rate that does not lead to the long-term decline of renewable natural resources.”<sup>11</sup> As natural resources are not defined or interpreted to have a transfrontier dimension, the definition of sustainable use can be applied only in a sovereign setting. This leaves the holistic goal of biodiversity conservation (and connectivity therewith) unsupported in the MoU as no guidance is provided for transfrontier sustainable use.<sup>12</sup> Moreover, the failure to define natural resources as a transfrontier asset (or as a common concern) does not leave room for the explicit application of the concept of custodial sovereignty. Accordingly, states cannot expect other states to act as custodians over their natural resources – ‘their’ being interpreted here as a common property or a common concern.<sup>13</sup> Although not explicitly, this lack of custodianship may be countered by the provision in article 4(1), which states that:

Each Member State shall ensure the protection and management of those parts of the Kavango Zambezi ecosystem falling directly under its jurisdiction or control and the development of tourism so that activities in one country will not cause any adverse effects in areas beyond the limits of national jurisdiction.

This content of article 4(1) reflects article 3 of the CBD as well as principle 21 of the Stockholm Declaration and provides a definite limitation in the way a state may use its natural resources.<sup>14</sup> Some authors argue that principle 21 may be a norm of

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<sup>10</sup> See para 2.2.2.1 above.

<sup>11</sup> Article 1 of the KAZA MoU.

<sup>12</sup> MoUs, as discussed in this chapter, are viewed only as statements of intent by the states involved that do not create contractual or legal obligations. They are therefore seen as policy at most.

<sup>13</sup> See para 2.2.1 above.

<sup>14</sup> See the discussion on sovereignty in para 2.2.2 above.

customary international law.<sup>15</sup> Should this narrative be accepted, article 4(1) may potentially be construed to carry duties of custodianship as contained in the concept of custodial sovereignty. This could potentially have accountability implications for states in how they use their natural resources – using it in a way not causing harm.<sup>16</sup> Should this argument be accepted, article 4(1) may implicitly give effect to accountability as is required under the principle of good governance.<sup>17</sup>

Article 4(2)(a) requires states to cooperate with all interested and affected parties.<sup>18</sup> This inclusion reflects an element of the principle of good governance namely participation.<sup>19</sup> It also broadly reflects the principle of cooperation and requires states to cooperate to develop common approaches to natural resources management and tourism development.<sup>20</sup> The MoU further acknowledges that the rights of stakeholders (in both national and international law) are to be respected by the states party to the MoU.<sup>21</sup> However, the MoU does not name or refer to specific rights that should be respected. Notwithstanding, the MoU gives stakeholders a basis for potential litigation where a right (under national or international law) has been infringed by the TFCA. This is obviously subject to the admissibility criteria as prescribed by the rules and procedure of the relevant court that is approached.<sup>22</sup>

Article 5 sets out the objectives of the TFCA, and these broadly reflect the principles of cooperation, public participation, harmonisation, equity and poverty alleviation.<sup>23</sup>

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<sup>15</sup> See Birnie *et al International Law and the Environment* 89; Wolfrum 1990 *German Yearbook of International Law* 308-309; Dupuy “Overview of the Existing Customary Legal Regime Regarding International Pollution” 61, for example.

<sup>16</sup> It is stressed that this obligation to not cause harm is a negative duty and there is no positive obligations coupled to the no harm principle.

<sup>17</sup> See para 3.2.6 above.

<sup>18</sup> This includes governmental authorities, communities, NGOs, and the private sector.

<sup>19</sup> See para 3.2.6 above.

<sup>20</sup> Article 4(2)(b) of the KAZA MoU.

<sup>21</sup> Article 4(3) of the KAZA MoU.

<sup>22</sup> This may differ from court to court. Where supranational courts are approached it should usually be indicated that all local remedies have been exhausted. See for example the discussion on the African Commission (although not strictly a court) in para 3.3.5 above. Article 4(4) also acknowledges that states may enter into agreements with stakeholders regarding the protection and regulation of these rights.

<sup>23</sup> Cooperation specifically in ecosystems and cultural resource management is recognised in article 5(1)(a); public participation in the management of biological and cultural resources is recognised in article 5(1)(b); the harmonisation of natural resources management and approaches to tourism in article 5(1)(c); and equity and poverty alleviation in the form of social and ecological development in article 5(1)(e). To see the link between equity and poverty alleviation, and social and ecological development, see para 3.3.2 above.

The rest of the MoU is devoted to the creation of the institutional framework of the TFCA and includes national Coordinating Agencies, the Ministerial Committee, the Technical Committee, the TFCA working groups and the Secretariat.<sup>24</sup> In the light of the principles discussed thus far, the most important institutional mechanism is the Technical Committee (TC), as it is responsible for the implementation of most of these principles. The TC is tasked with the harmonisation of the management of the TFCA, ensuring stakeholder engagement, and monitoring the activities of stakeholders, for example.<sup>25</sup> The rest of the institutional mechanisms are tasked, in general, with the management of the MoU and the preparation of the KAZA Treaty (at the time of the MoU the Treaty was yet to be created).

Finally, the MoU provides for the settlement of disputes relating to the interpretation or implementation of the MoU. It provides that such disputes should be resolved through amicable negotiations between the state parties to the MoU.<sup>26</sup> If these negotiations fail, parties are allowed to submit the dispute for arbitration with SADC.<sup>27</sup> The MoU provides only for dispute settlement between state parties and not for other interested and affected parties. From the foregoing discussion it is clear that the MoU requires the involvement of all interested and affected parties in the TFCA. The failure to provide these interested and affected parties with recourse to dispute settlement may potentially be argued as a flaw in the MoU, since access to justice is an important element of the principle of good governance.<sup>28</sup>

In general the MoU provides for some of the important principles of TFBC. One should keep in mind that the MoU can at best be seen as a statement of intent by the state parties. It is seen as *travaux préparatoires* to the KAZA Treaty, and may be used to contextualise the interpretation of the Treaty. The KAZA Treaty that will now be analysed should provide a clearer view of the real intentions and commitments of the states party to the KAZA TFCA.

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<sup>24</sup> Articles 6-11 of the KAZA MoU.

<sup>25</sup> For a complete list see article 9(4) of the KAZA MoU.

<sup>26</sup> Article 13(1) of the KAZA MoU.

<sup>27</sup> Article 13(2) of the KAZA MoU. It is unsure to which body in SADC disputes should be referred to as the MoU only refers to SADC and not a specific body.

<sup>28</sup> See para 3.2.6 above.

### 5.1.3 KAZA Treaty

The preambular provisions of the KAZA Treaty reflect the provisions of the MoU and emphasises sovereignty, sustainable use, and the importance of the participation of all interested and affected parties. Article 1 of the Treaty contains the definitions and defines “natural resources” where the MoU failed to do so. Natural resources are described by the Treaty as:

Materials occurring naturally within environments which are of value to mankind, and often characterised by amounts of biodiversity existent in various ecosystems.

This definition is very wide and, importantly, refers to biodiversity as part of natural resources. This is important because it incorporates biodiversity in the definition of natural resources for the purposes of the interpretation of the Treaty. When looking at the definition of natural resources as described by the KAZA Treaty, a link is found between natural resources and biodiversity.<sup>29</sup> As biodiversity conservation is one of the central drivers in TFCAs, the inclusion of the term is welcomed in the Treaty, but it is not such that it is recognised as an independent concept. This is strange, as biodiversity conservation is one of the primary goals behind TFCAs.<sup>30</sup> Furthermore, biodiversity is an internationally recognised concept (see for example the CBD) and biodiversity is the primary aspect addressed by various policy instruments in SADC.

From the definition of natural resources it is argued that the definition allows for natural resources to be understood as natural resources not bound by sovereign territory. This conclusion is based on the description that natural resources are materials occurring naturally within environments which are of value to mankind. It has been argued that the natural environment is not bound by political borders and therefore the first part of the definition (materials occurring naturally within environments) extends it to apply beyond political borders.<sup>31</sup> Moreover, when reference is made to the fact that these “materials” are of value to humankind, one is reminded of the notions of trusteeship and common interest raised by the Brundtland

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<sup>29</sup> The Treaty describes natural resources as “Materials occurring naturally within environments...” and “often characterised by amounts of biodiversity. Article 1 of the Treaty.

<sup>30</sup> See para 1.1.1 above

<sup>31</sup> Bowman and Redgwell *International Law and Biodiversity* 12.

Report and Brown-Weiss.<sup>32</sup> The idea of nature as a common interest and the argument that states are trustees of nature reiterates the fact that sovereign “ownership” is not without its limitations.<sup>33</sup> Nature as a common interest therefore provides room for the concept of custodial sovereignty to find indirect application in the Treaty.<sup>34</sup>

Of further importance is the definition of “sustainable use” in article 1. The Treaty defines sustainable use as:<sup>35</sup>

the integrated management of resources to assure efficient use of and equitable access to Natural and Cultural Heritage Resources for the benefit of current and future generations while protecting and maintaining Natural and Cultural Heritage Resources.

The definition of sustainable use in the Treaty is more elaborate than the one provided by the MoU and refers to efficient use and equitable access of natural resources for the benefit of current and future generations.<sup>36</sup> The definition also adds cultural heritage resources to the scope of natural resources, thereby significantly expanding the concept of natural resources to include cultural heritage. The principles of equity and sustainable use are therefore provided for in the definition. “Equitable access”, as used in the definition of sustainable use, is not defined in the Treaty, however. This is unfortunate as a definition of equitable access could potentially provide guidance for access to biodiversity where local communities are involved in the TFCA. Equitable access is also not defined in the MoU, which leaves a gap regarding this important element of equity. Principles 2 and 5 of the New Delhi Declaration may provide some support if applied in this context as they provide guidance in the principles of equity and public participation.<sup>37</sup>

Article 3 contains one of the most important and interesting provisions of the Treaty. Article 3 deals with the legal status of the TFCA and determines that the KAZA TFCA shall be an international organisation with legal personality and the ability to enter into contracts, acquire or dispose of property, and sue or be sued. This provision is

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<sup>32</sup> See para 2.3.3 above.

<sup>33</sup> See para 2.2.2 above.

<sup>34</sup> See para 2.2.2 above.

<sup>35</sup> Article 1.

<sup>36</sup> See the definition of the MoU in para 5.1.2 above.

<sup>37</sup> See paras 3.2.2 and 3.2.5 above

interesting because it creates accountability for the KAZA TFCA (and by implication the five member states).<sup>38</sup> Accountability is normally something that is shied away from, as can be seen through the suspension of the SADC Tribunal, for example.<sup>39</sup> The importance of article 3 is positive, however, as it creates a platform for local communities and all other interested and affected parties to litigate against the KAZA TFCA where their rights (in terms of the Treaty or their national jurisdictions) have been transgressed by the governance officials of the KAZA TFCA. Accordingly, the Treaty and the principles of TFBC (particularly principle 6 of the New Delhi Declaration) can be enforced by all interested and affected parties.

Article 3 creates clarity regarding the legal personality of the KAZA TFCA as an international organisation. The fact that international organisations can have legal personality is not new in international law as the ICJ in its *Advisory Opinion on the Reparation for Injuries Suffered in the Service of the United Nations*, 1949 (Reparation Case) clearly stated that legal personality can vest in an international organisation; in this case, the United Nations.<sup>40</sup> The possible implications of legal personality (apart from the obvious stated in article 3) remain to be seen. It does, however, provide the ideal platform for the application of good governance as it creates a body that can be held accountable. Accountability potentially brings the following consequences to the KAZA TFCA: institutions need to be democratic and responsive to the needs of people; the rule of law needs to be adhered to; participation, transparency, and accountability should be facilitated; the devolution of authority should be appropriate; measures for compliance and anti-corruption should be in place; and provision for conflict and dispute resolution should be provided for.<sup>41</sup>

Article 5 of the KAZA Treaty contains the general principles to be upheld in the execution of the objectives of the Treaty. These roughly coincide with the principles and contextual goals of TFBC and include: the recognition of sovereignty; solidarity, peace and security; dispute resolution; the sustainable use and rehabilitation of species/habitat; the precautionary approach informed by traditional knowledge; the

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<sup>38</sup> It is ironic that the member state responsible for the suspension of the Tribunal, Zimbabwe, is party to this Treaty.

<sup>39</sup> See para 3.2.5 above.

<sup>40</sup> [1949] ICJ 174. See particularly 178-180.

<sup>41</sup> See para 3.2.6 above.

creation of forums for effective participation; codification; and benefit sharing, equality, good governance and cooperation.

Certain principles in article 5 need further discussion as they provide unique content for TFCAs seen against the principles of TFBC as distilled in chapter 3. Sustainable use and the rehabilitation of species and/or habitat is the first principle requiring attention.<sup>42</sup> The principle of sustainable use is coupled with a duty to rehabilitate species or habitat where human activity is negatively affecting it. This duty to rehabilitate can be seen as a constructive and potentially far-reaching contribution towards TFBC and is unique in the context of the normal interpretation of sustainable use.<sup>43</sup> The second unique characteristic is the inclusion of traditional knowledge in the precautionary approach. A normal reading of the precautionary approach will take into account the extent of scientific certainty (based on scientific knowledge and research) when decisions are made that might affect the environment. In terms of the approach in the Treaty, however, “interdisciplinary research and traditional knowledge” are to be taken into account.<sup>44</sup> Accordingly, science is to be complemented with traditional knowledge, thus broadening the scope of the precautionary approach. Including traditional knowledge in the precautionary approach could also ensure that local communities must be consulted when decisions are taken. The third and final unique element is the reference to effective participation. Participation has been argued throughout this thesis to be an integral part of TFBC governance.<sup>45</sup> In the KAZA Treaty, however, the term “effective” participation is used. By requiring participation to be effective, the Treaty provides room for interpretation as to what “effective participation” constitutes. In this case, the Endorois case provides crucial guidance, as discussed earlier.<sup>46</sup> Effective participation as described in the Endorois case entails that participation should not be dealt with as a *fait accompli*; an equal bargaining position should be created;

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<sup>42</sup> Article 5(1)(e) reads: “prevent excessive utilization of Natural Resources and ensure that the use of Natural Resources is commensurate with the productive capacity of species and habitats. Where appropriate the Partner States shall take measures to rehabilitate populations of species in decline or degraded habitats and prevent the indiscriminate destruction of habitats through pollution or other human activities”.

<sup>43</sup> See para 3.2.1 above and sustainable use as interpreted in the KAZA MoU and Treaty, for example.

<sup>44</sup> Article 5(1)(f).

<sup>45</sup> See paras 2 and 3 in general.

<sup>46</sup> See para 3.2.5 above.

literacy and understanding of the project is paramount; good faith is equally important; information should be accepted and disseminated (people should have a chance to influence decision/s); and communication should be culturally appropriate.<sup>47</sup> This, arguably, unique African interpretation of what effective participation entails should be applied when interpreting effective participation in the KAZA Treaty, and provides useful guidance for participation in general in TFBC.

Article 6 deals with the objectives of the KAZA and reiterates that the management and maintenance of the “shared natural and cultural heritage resources and biodiversity of the KAZA TFCA to support healthy and viable populations of wildlife species” is one of its primary objectives.<sup>48</sup> The management and maintenance of four separate matters are mentioned here: natural resources, cultural resources, biodiversity, and wildlife species. In keeping with the ideal that TFBC is about holistic management of shared resources, this objective is formulated in a way that may, at face value, be counterproductive to integrated governance. All four of the matters fall within the scope of components constituting biodiversity (in the most holistic sense, as argued in chapter 2) and the separation could be a consequence of the fragmented legal and policy framework.<sup>49</sup> This critical view should be viewed differently at the level of a TFCA, however. Although the four aspects are listed separately, they are contained in a single governance instrument creating an opportunity for which all four can be integrated and governed.

Article 6 further states that connectivity should be encouraged by the promotion and development of complementary PAs linked through corridors to safeguard and accommodate migratory wildlife species.<sup>50</sup> It also raises the issue of poverty alleviation by stating that programmes should be developed and implemented to improve the livelihoods of local communities.<sup>51</sup> This is complemented by the objective of facilitating an economic environment conducive to public-private-community partnerships, private investment and regional economic integration. According to research, the aforesaid partnerships and economic environment are

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<sup>47</sup> See para 3.2.5 above.

<sup>48</sup> Article 6(1)(a).

<sup>49</sup> See para 4 above.

<sup>50</sup> Article 6(1)(b).

<sup>51</sup> Article 6(1)(e).

already partially present in the KAZA.<sup>52</sup> The facilitation and promotion of the harmonisation of legislation and policy related to sustainable use are also stated to be objectives of the KAZA TFCA.<sup>53</sup> Specific mention is made of the harmonisation of legislation and policy related to transboundary animal disease prevention.<sup>54</sup> Unfortunately, the Treaty does not provide a mechanism or substantive provisions to facilitate this important objective of harmonisation.<sup>55</sup>

Article 7 designates the respective ministries responsible for the environment, natural resources, wildlife and/or tourism in the five member states as the responsible agents for the coordination and implementation of the provisions of the Treaty. Article 8 of the Treaty deals with the obligations of the partner states and as could be expected, these correlate with the objectives set out in article 6.<sup>56</sup> Article 9 describes the role of SADC in the KAZA TFCA. It states that an agreement will be concluded between SADC and KAZA which will address four key issues outlining the role of SADC: promoting KAZA as a legitimate regional development programme; ensuring that the activities of KAZA are in line with SADC Protocols and international Protocols that target poverty alleviation and community empowerment; promoting political awareness as well as facilitating technical and financial assistance to support development programmes; and promoting equality between member states. Despite several attempts, the agreement could not be located. The possible existence of the agreement, whether it is formal or informal, may however be deduced from a sentence in an undated document of the KAZA titled: *Organisational and Operational Arrangements for the Development of the Kavango-Zambezi Transfrontier Conservation Area* (Development Document).<sup>57</sup> The sentence reads: “The recognition and approval of the KAZA TFCA as a SADC project means it is a programme encapsulating the SADC vision of regional integration...”<sup>58</sup> Although an assumption, based on the sentence, could be made as regards the existence of the agreement – such an assumption may be dangerous and without enough supporting

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<sup>52</sup> This is based on extensive empirical research undertaken by Suich *et al* in the KAZA TFCA. See Suich, Busch and Barbancho 2005 *Conservation International South Africa* 47-49.

<sup>53</sup> Article 6(1)(h).

<sup>54</sup> Article 6(1)(j). See para 2.3.3.1 above regarding the adoption of the Phakalane Declaration.

<sup>55</sup> See para 2.2.3.1 above for a discussion on harmonisation.

<sup>56</sup> The obligations are largely a repetition of the objectives and will not be discussed again.

<sup>57</sup> KAZA TFCA *Development Document* 10.

<sup>58</sup> KAZA TFCA *Development Document* 10.

evidence. What can however be argued is that SADC plays an important role in the KAZA TFCA and that the role of SADC is relevant to the TFCA as depicted in the four key issues mentioned above.<sup>59</sup> The possible role to be played by SADC is important, as SADC is responsible for creating law and policy that will directly influence the management of all TFCAs in southern Africa. Accordingly, with SADC (specifically the FANR directorate) being involved at grassroots level, it will be informed as to the issues and needs to be addressed in the legal and policy framework that it will be creating and updating.

Articles 10 to 15 deal specifically with the institutional mechanisms and arrangements of the KAZA. Of particular importance to joint and holistic management are the composition and functions of the Joint Management Committee (JMC). The JMC consist of two individuals from each member state and one individual from the SADC Secretariat.<sup>60</sup> The JMC is commissioned with the important task of formulating action plans and strategy protocols for the management and development of the KAZA.<sup>61</sup> Moreover, the JMC is tasked with some crucial elements related to the principles of public participation and good governance, including ensuring stakeholder engagement and participation and the monitoring of the activities of stakeholders and institutions.<sup>62</sup> The JMC is also appointed the watchdog over the KAZA Secretariat to ensure that it delivers the expected outputs (see the discussion below).<sup>63</sup> Finally, the JMC is tasked with overseeing the activities of any *ad hoc* specialist advisory groups with terms of reference<sup>64</sup> as determined by the JMC.<sup>65</sup>

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<sup>59</sup> Although this is only an assumption as no hard evidence could be found of the agreement itself, the KAZA TFCA is also explicitly mentioned (along with the GLTP) on the SADC website as an example of a TFCA under its “TFCA Programme”. These are the only two examples given, and it may be asked why, out of a possible sixteen other examples, these were specifically chosen. Although this is still not a strong argument, this is the only material available to draw a deduction from.

<sup>60</sup> Article 13(1).

<sup>61</sup> Article 13(1)(b).

<sup>62</sup> Article 13(1)(c) and article 13(1)(d). In relation to the monitoring article 13(1)(d) specifically mentions the examples of immigration, customs, veterinary health, archaeology, culture, natural resources, tourism, and security.

<sup>63</sup> Article 13(1)(e).

<sup>64</sup> Article 13(1)(f) states that terms of reference must: advise the JMC on issues within areas of their specialization; represent the interests of the different sections of society in each partner state in the planning and development of the KAZA TFCA; collect information and prepare specialist reports to facilitate the development of the KAZA TFCA; and facilitate the exchange of information on matters of mutual interest among the partner states.

<sup>65</sup> These groups are appointed by the KAZA Secretariat in terms of article 14(4)(b).

The KAZA Secretariat is headed by an Executive Director, who is appointed by the Ministerial Committee of the KAZA TFCA.<sup>66</sup> The responsibilities of the Secretariat are, amongst others, to drive and coordinate the daily activities related to planning and development of the TFCA; to ensure that Specialist Advisory Groups are established as discussed above; to coordinate the drafting of an action plan with the full participation of the stakeholders; to ensure that relevant regional protocols and international treaties are followed; to liaise with the JMC in identifying activities that would require funding and assist in the mobilisation of resources; to foster collaboration with other organisations; and to provide management and progress reports.<sup>67</sup> It is clear that the Secretariat plays an important role in the management of the TFCA. It is furthermore clear that ultimately the Secretariat is responsible for the effective management of the TFCA, as it is accountable to the Ministerial Committee and it therefore plays a crucial role in TFBC.<sup>68</sup> The importance of the Secretariats' role is emphasised by the fact that a watchdog role is given to the JMC, as pointed out earlier.

The final institutional provisions relate to the establishment of National Committees.<sup>69</sup> These are established by member states (one by each), and the member state determines the operation and composition of its own National Committee.<sup>70</sup> National Committees are obliged to implement and coordinate national and local level programmes of the TFCA; facilitate the participation of the stakeholders in overall KAZA planning and policies; safeguard the interests and aspirations of various stakeholders; promote awareness amongst the stakeholders; ensuring the delivery of equitable benefits for local communities; and ensure that KAZA activities are aligned with local conservation and development strategies.<sup>71</sup> Although the aforementioned duties of National Committees can be aligned with the principles of public participation, good governance and equity, there are also some concerns in

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<sup>66</sup> The Ministerial Committee is established by article 11 and comprises of the ministers heading up the National Implementing Agencies, as discussed in the main text above. The previous Executive Director was Dr Victor Siamudaala, but the post was advertised in October 2013 and as far as could be established has not yet been filled. See <http://www.kavangozambezi.org/vacancy-kaza-tfca-secretariat-executive-director> [date of use 18 August 2014].

<sup>67</sup> Article 14(4)(a)-(j).

<sup>68</sup> Article 14(1).

<sup>69</sup> Article 15.

<sup>70</sup> Article 15(2).

<sup>71</sup> Article 15(3)(a)-(f).

this respect. The duty to ensure participation is a duplication of the responsibility given to the JMC.<sup>72</sup> This may either bolster public participation or it may create confusion as to who is responsible for effecting public participation. It is argued that the duty to ensure public participation should rather lie with the National Committees, because if this right were to be encroached upon, it would be easier to enforce this right to participate in the affected party/ies own national jurisdiction. Another challenge arising from the responsibilities of the National Committees is the duty to ensure that the KAZA activities are in line with local conservation and development strategies. The question here is what if the local strategies and/or law are not in line with the proposed KAZA activities. A supposed example will be where one of the KAZA activities may be to suggest the sustainable use of a certain species of *flora* and not all of the member states allow this species to be harvested/used in terms of their national law. This potential challenge again points to the important role of harmonisation in SADC. The fact that the Treaty does not address the question where proposed activities and strategies and/laws are not in line emphasises this *lacuna*. It was pointed out in chapter 2 that various discrepancies exist between SADC member states and, as a result, the strategies and laws in these member states deployed in order to address the different challenges will also vary.<sup>73</sup> The idea, then, that a single conservation and development strategy (such as the KAZA's) will be in line with the strategies and laws of five SADC member states, is far-fetched.<sup>74</sup>

In article 15 dispute settlement is addressed with regard to any disputes arising from the interpretation, application, and implementation of the Treaty. Disputes are to be settled amicably through consultation and negotiation between the partner states. Interestingly, only partner states are mentioned and not stakeholders or other interested parties affected by the interpretation, application and implementation of the Treaty.<sup>75</sup> This is a concern, as stakeholders have various rights in terms of the Treaty and they will definitely need access to dispute settlement where these rights

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<sup>72</sup> See the discussion above and article 13(3) in general.

<sup>73</sup> See para 2.3.1.2 above.

<sup>74</sup> See specifically the discussion on the legal and policy review in para 5.1.4 below.

<sup>75</sup> Article 25(1). Article 25(2)-(4) determines that if a dispute is not resolved amicably the dispute may be submitted to an *ad hoc* Tribunal consisting of three member states appointed by the Ministerial Committee. The Tribunal will determine its own rules and procedures and its decision is binding and final.

have been infringed. The Treaty therefore provides for the element of conflict and dispute resolution which is embedded in the principle of good governance, but only partly, as not all possible parties are included. Limiting dispute resolution to member states fails other interested and affected stakeholders (even though they carry rights in terms of the Treaty) and reflects the provision for dispute settlement in the MoU.<sup>76</sup>

#### 5.1.4 KAZA SAP

The KAZA SAP provides the finer detail as to the management of the TFCA and contains the action plan for the TFCA for the period 2011-2016. At first glance the SAP reiterates the goals and ideology of the TFCA as contained in the MoU and Treaty.<sup>77</sup> But then the SAP provides an interesting set of figures derived from a performance audit workshop in October 2010.<sup>78</sup> The figures show the following deficiencies: a) no legal entity had been established; b) no legal and policy database existed; c) no harmonised operational procedures had been adopted; and d) no joint conservation plan existed, among others.<sup>79</sup> It needs to be stated that the Treaty was not yet in force at the time of the audit and the SAP, and this could partly be blamed for some of the deficiencies. As the Treaty has since entered into force, the first deficiency - lack of a legal entity - has been put to bed.

This thesis has been critical of the way in which harmonisation is dealt with in the SADC legal framework<sup>80</sup> and in the Treaty, and it is no surprise that harmonisation is seen as an area of concern by the audit. The SAP acknowledges that the harmonisation of law and policy (in the form of legislative and policy reform) will have repercussions outside the scope of the TFCA,<sup>81</sup> and suggests that the alignment of operational procedures rather than legislative reform may be a better option to enable joint initiatives in the TFCA. It is deduced that some form of legislative reform may still be required to facilitate the alignment of operational procedures. It is

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<sup>76</sup> See para 5.1.2 above.

<sup>77</sup> KAZA SAP 2-3. See paras 5.1.2 and 5.1.3 above.

<sup>78</sup> KAZA SAP 4-5.

<sup>79</sup> KAZA SAP 6-7. It should be noted that these deficiencies are defined as key priority areas by the SAP. There are many more, and this thesis focuses on only those relevant to the principles of TFBC.

<sup>80</sup> See para 2.2.3.1 above.

<sup>81</sup> KAZA SAP 13.

argued that this reform should at first be geared towards the KAZA and not be applicable to conservation, PAs and other relevant legislation in general. Accordingly, the reform needed could be provided by the KAZA Treaty which was not yet in force when the SAP called for the alignment of operational procedures. The KAZA Treaty provides both the institutional mechanisms and guiding principles through which operational principles can be aligned. In agreement with SAP's suggestion of alignment it is pointed out that (in addition to the KAZA Treaty), in achieving the said alignment, a supra-national legal framework providing principles for TFBC will play a crucial role by providing guidance on the alignment of operational procedures and the harmonising of TFBC law and policy.<sup>82</sup>

The SAP makes its own suggestions to facilitate the alignment of the operational procedures. There should be a collation of law and policy related to the activities in KAZA at international, regional and local levels; and a regular update of the aforementioned database.<sup>83</sup> The SAP suggests that the database will provide information from which best practices could be derived, and from which aligned operational procedures may be formulated. Although this suggestion is to be commended and could be workable, it will be extremely difficult to incorporate all levels of law and policy in the database, as not all member states are likely to be party to certain international and regional instruments, for example. It could furthermore be very complex to gain consensus when attempting to collate the law and policy of five national jurisdictions, as politics and sovereignty will inevitably accompany the lawyers to the negotiating table.<sup>84</sup> Nonetheless, the suggestion remains a good indication of strategic will towards the facilitation of a joint operational approach.<sup>85</sup> In the light of this, the KAZA issued a tender for a consultancy to collate the law and policy relevant to KAZA in the five member states. The collation was performed in regard to national law and policy only, and no supra-

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<sup>82</sup> This legal framework should in essence align all of the operational procedures in SADC for TFBC.

<sup>83</sup> KAZA SAP 14.

<sup>84</sup> See para 2.2.2 above.

<sup>85</sup> To strengthen the possibility of finalising the aligned operational procedures, the SAP proposes to tender a consultancy to assess and review the policy and legal frameworks in the five partner countries. The aim of this review is to provide a basis upon which a harmonised procedure can be drafted for the TFCA. It is noted that the mandate for the review, as contained in the SAP, does not include a review of regional and international law and policy. KAZA SAP 15.

national law was taken into account, as required by the SAP.<sup>86</sup> Nevertheless, the review is focused on three key aspects of the legal and policy framework: a) perceived shortfalls in legislation; b) complementarity between legislation; and c) conflicting policy and legislation.<sup>87</sup> The review firstly points out that, with the exception of Angola, a large degree of complementarity exists between the countries.<sup>88</sup> It is noted in the review that Angola is in the process of legislative reform.<sup>89</sup> In 2014 a decree was passed by the Angolan government approving the statute of the Ministry of Environment.<sup>90</sup> A great deal of further legal development has taken place since the review, and the Angolan component of the review is therefore not up to date.<sup>91</sup> The review states that the beneficial relationship sought between local communities and conservation is accepted by Botswana, Namibia, Zambia and Zimbabwe.<sup>92</sup> This acceptance is in contrast to the approach of each state regarding access to resources in PAs and people living in PAs. As reviewed in 2008, Angola had no provision for access to resources or people living in parks.<sup>93</sup> Botswana currently provides access and the use of resources in general,<sup>94</sup> but does not allow people to live in parks with the exception of the central Kalahari game reserve.<sup>95</sup> Namibia does not allow general access or use for communities, although this can be established through co-management agreements and through what is

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<sup>86</sup> KAZA SAP 14. It should be noted that this was not an omission by the author of the document, but was due to the scope set out in the terms of reference in the consultancy. See Jones *KAZA Law and Policy Review* 1-81.

<sup>87</sup> Jones *KAZA Law and Policy Review* 59.

<sup>88</sup> Jones *KAZA Law and Policy Review* 59.

<sup>89</sup> The author does not describe the reform, but it appears that since 2008 a lot of environmental laws have been promulgated in Angola. The issues addressed by the new laws or “decrees,” as they are known in Angola, range from licensing fees to waste management and pollution prevention, among other matters. See for example <http://www.arc-angola.com/laws.html> [date of use 20 August 2014].

<sup>90</sup> Presidential Decree 85/14.

<sup>91</sup> It is not the purpose of this thesis to update the Angolan (or any other member state’s) part of the review, as the focus is on supra-national law. However, this thesis has looked at the extent of the legislative changes since 2008 and found it to be quite substantial. A lot of the reform is unfortunately geared towards the regulation of gas, petroleum and other mineral resources and not conservation, as far as could be established. This finding is based on a desktop study of the available English titles of law and policy, as the official Angolan website is being translated into English and is available only in Portuguese at the moment. Although the texts of the legislation and policy were also available they were also available only in Portuguese and a request for English copies to the Ministry of Environment is still unanswered. See the website of the Angolan Ministry of Environment at <http://www.minamb.gov.ao/> [date of use 20 August 2014].

<sup>92</sup> KAZA SAP 59.

<sup>93</sup> Jones *KAZA Law and Policy Review* 71.

<sup>94</sup> Jones *KAZA Law and Policy Review* 71. Also see Cassidy *CBNRM and Legal Rights to Resources in Botswana* 1-48 and CBNRM Resource Center [www.cbnrm.bw/publications](http://www.cbnrm.bw/publications) [date of use 20 August 2014].

<sup>95</sup> Jones *KAZA Law and Policy Review* 71.

called “communal area conservancies”.<sup>96</sup> Similarly, living in parks is not provided for in Namibian legislation and is therefore subject to co-management agreements.<sup>97</sup> Zambia also prohibits access to and use of biodiversity in PAs, but does allow access and use in game management areas.<sup>98</sup> Zambia further provides no legal provision for people to live in parks.<sup>99</sup> Finally, Zimbabwe provides no legal rights for access, the use of resources, or people living in parks.<sup>100</sup> Accordingly, on these two important aspects of the KAZA (access to and use of biodiversity, and people living in parks) a clear need for harmonised approaches at national levels exists in order to give effect to and support aligned operational procedures and a Joint Conservation Plan (JCP).<sup>101</sup> These discrepancies in national law and policy are the reason why this thesis argues that harmonised approaches need to be informed by TFBC principles directing national legal and policy development.<sup>102</sup> Various other discrepancies between the national legal regimes are pointed out by the review, and further strengthen the argument for harmonisation.<sup>103</sup> Notwithstanding, the review remains optimistic that the legal frameworks are flexible enough to facilitate cooperation within the context of KAZA.<sup>104</sup> The fact that the KAZA relies on national law and policy to inform joint operational procedures and the difficulties involved in reaching common consensus between five member states may be a reason contributing to the fact that a JCP has not yet been finalised.<sup>105</sup>

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<sup>96</sup> Jones *KAZA Law and Policy Review* 71. On communal area conservancies see Weaver and Petersen 2008 *Best Practices in Sustainable Hunting* 48-52. Also see article 45 of the Communal Land Reform Act 5 of 2002. Although the Act does not make mention of use in PAs, it does provide local communities with access to land and resources for daily sustenance.

<sup>97</sup> Jones *KAZA Law and Policy Review* 71.

<sup>98</sup> A game management area can be described as an IUCN Category VI. This category is described as: “Protected areas that conserve ecosystems and habitats, together with associated cultural values and traditional natural resource management systems. They are generally large, with most of the area in a natural condition, where a proportion is under sustainable natural resource management and where low-level non-industrial use of natural resources compatible with nature conservation is seen as one of the main aims of the area.” See Dudley *Guidelines for Applying Protected Area Management Categories* 11-24 and specifically at 22-23.

<sup>99</sup> Jones *KAZA Law and Policy Review* 71.

<sup>100</sup> Jones *KAZA Law and Policy Review* 71.

<sup>101</sup> The JCP will be discussed below. See the remarks on harmonisation in para 2.2.3.1 above.

<sup>102</sup> This will be argued in full in chapter 6 below.

<sup>103</sup> Jones *KAZA Law and Policy Review* 63-69 and 72-74.

<sup>104</sup> Jones *KAZA Law and Policy Review* 63-69.

<sup>105</sup> At the time of writing, the JCP was being drafted but a date of publication could not be provided by the authors.

The SAP further states that the landscape dynamics in KAZA are to be restored and should be functional.<sup>106</sup> The actions required to restore landscape dynamics are a sensitivity analysis on biodiversity richness, habitat values, landscape sensitivity, cultural heritage, and animal production and health.<sup>107</sup> Once these analyses are complete, a better understanding of the landscape dynamics will inform the necessary steps to effectively conserve the biodiversity in the KAZA. Accordingly, the objectives of restoring and understanding landscape dynamics are to ultimately secure the sustainable management of biodiversity. This fits well into the two main drivers behind TFBC: biodiversity conservation and sustainable development as it (landscape dynamic) ultimately aims to marry the concepts of sustainable development and biodiversity conservation. The foregoing actions provide some insight into the complex nature of biodiversity conservation viewed from a conservation perspective. It should be noted, however, that the principle of sustainable use will be directly affected by landscape dynamics, and should therefore include a reference to the matter of landscape dynamics.<sup>108</sup>

The JCP is the next step flowing from an understanding of the landscape dynamics.<sup>109</sup> The JCP will facilitate the ideal of holistic management in the TFCA and is to contain the following aspects: a biodiversity and conservation management plan; a vegetation monitoring plan focused on endangered fauna and flora; a conflict management plan for predators; a wildlife production and health programme;<sup>110</sup> a plan for the identification and securing of critical habitats, dispersal areas and corridors; an aquatic ecosystem management plan for the harmonised utilisation of shared water resources; integrated cultural and heritage management plans; and a

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<sup>106</sup> KAZA SAP 16.

<sup>107</sup> KAZA SAP 16.

<sup>108</sup> This is argued on the basis that the nature and impact of the use allowed may be influenced by the sensitivity of the landscape. In areas with high sensitivity or rich and endangered biodiversity, use may be controlled more stringently or perhaps not allowed at all, for example. Similarly, it may also influence the type of resource being allowed for use.

<sup>109</sup> KAZA SAP 17.

<sup>110</sup> This programme is to be linked to the livestock sector in the TFCA and the SADC programme on animal health and production. SADC currently runs three regional livestock programmes. These are the Promotion of Regional Integration in the Livestock Sector (PRINT); the SADC Transboundary Animal Diseases Project (TADs); and the SADC Foot and Mouth Disease Programme (FMD). A discussion of these programs falls outside the scope of this thesis. For more information visit <http://www.sadc.int/themes/agriculture-food-security/livestock-production/> [date of use 20 August 2014].

master cultural and heritage plan.<sup>111</sup> As can be seen, the JCP will be all-encompassing and will deal with all aspects of biodiversity as defined in chapter 2.<sup>112</sup> Although the SAP refers to the JCP, it seems that it will become known as the Master Integrated Development Plan (MIDP) when drafted.<sup>113</sup> The MIDP will serve as a set of guidelines for all conservation initiatives that straddle international borders.<sup>114</sup>

The SAP further states that the KAZA needs to develop in line with the SADC regional development agenda.<sup>115</sup> Special emphasis is placed on tourism in this regard.<sup>116</sup> An important provision giving effect to free movement is the emphasis placed on the harmonisation of the movement of tourist across international borders within the KAZA.<sup>117</sup> The development of infrastructure within the TFCA is prioritised as an action that will facilitate the free movement of tourists.<sup>118</sup> The development of multilateral tourism protocols is also set as a required action by the SAP and these could go a long way in helping the free movement of tourists in the TFCA.<sup>119</sup>

Giving effect to equity and benefit sharing, the SAP requires what is termed “benefit flow benchmarking”.<sup>120</sup> This benchmarking proposes to measure the impact of the TFCA on local communities. To do this the benchmarking will conduct a baseline survey of the existing socio-economic indicators in the TFCA and identify benchmarks for various actors. These benchmarks will be monitored and assessed annually.<sup>121</sup> Importantly, the results are to be communicated to stakeholders. This benchmarking system is a positive development, as it may provide a practical way to

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<sup>111</sup> KAZA SAP 17.

<sup>112</sup> See para 2 above.

<sup>113</sup> This information was obtained from one of the authors of the MIDP, Paul Brewsher, Programme Manager at the Peace Parks Foundation. An e-mail with the said information is on file with author.

<sup>114</sup> KAZA SAP 21.

<sup>115</sup> KAZA SAP 27.

<sup>116</sup> Various actions are prescribed by the SAP to further tourism within KAZA and the SADC region. KAZA SAP 28-31.

<sup>117</sup> See “peace and security” above at 2.3.3.1. KAZA SAP 31.

<sup>118</sup> KAZA SAP 31

<sup>119</sup> KAZA SAP 32. Various other actions relevant to the movement of tourists are to be taken. These include: audits of transport and tourist infrastructure; the training of immigration and customs officials; the development of standardised operation procedures; and the provision of standard regulations to visitors, among other actions.

<sup>120</sup> KAZA SAP 33.

<sup>121</sup> KAZA SAP 34.

assess the impact of the TFCA on its stakeholders. More importantly, it provides a scientific measurement for the sharing of benefits. This can in turn lead to a calculable system for benefit sharing after having established the impacts on the local communities. Benefit sharing is termed “benefit flow” in the SAP.<sup>122</sup> Benefit flow aims to coordinate the efforts ensuring that benefits filter through to the relevant local communities.<sup>123</sup> The aforesaid efforts include: managing benefits to local communities; identifying key interventions for community enterprise development; analysing entrepreneurial skills and capacity (and building these); and identifying business opportunities for local communities.<sup>124</sup> The SAP also includes benefit flow for governments and the private sector. Actions facilitating benefit flow to government include: the implementation of beneficiation action plans; conducting a baseline survey of existing socio-economic conditions and tourism opportunities in partner countries; monitoring and documenting changes in socio-economic status in the TFCA; monitoring and documenting changes in socio-economic opportunities and benefits outside the conservation and tourism sector where the changes are triggered by the TFCA; and monitoring improvements and investments in infrastructure facilities resulting from the TFCA.<sup>125</sup> As for the private sector, the actions required to facilitate benefit flow are similar to those required for governments.<sup>126</sup>

The important issue of stakeholder engagement is divided into two main aspects: effective and efficient communication and a stakeholder engagement strategy.<sup>127</sup> Effective and efficient communication is further divided into three priority areas. Firstly, ensuring that internal and external communication is seamless and that all relevant stakeholders are reached with the necessary and relevant communication. Secondly, the development of an internal and external communication strategy is called for by the SAP.<sup>128</sup> Finally, the SAP indicates that stakeholders need to be engaged and the vision of KAZA needs to be advocated to them in order to gain their

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<sup>122</sup> KAZA SAP 34.

<sup>123</sup> KAZA SAP 34.

<sup>124</sup> KAZA SAP 34-35.

<sup>125</sup> KAZA SAP 35.

<sup>126</sup> See Table 21 in the KAZA SAP 36.

<sup>127</sup> KAZA SAP 39.

<sup>128</sup> As far as could be established, such a strategy does not yet exist.

support.<sup>129</sup> The second main aspect, a stakeholder engagement strategy, will be discussed separately below.<sup>130</sup>

By including the various aspects relevant to stakeholder engagement listed above, the SAP indicates that stakeholder engagement is a priority area within KAZA.<sup>131</sup> This bodes well for the principles of good governance and public participation being accomplished in the KAZA. Once stakeholder engagement becomes fully effective at grass-roots level, the KAZA could have a strong framework for participation and communication. A step towards this grass-roots implementation is the draft KAZA SES.

#### 5.1.5 KAZA SES

A draft of the KAZA SES was adopted in 2007,<sup>132</sup> giving effect to the principle of stakeholder engagement contained in the Treaty (then the draft Treaty) and the MoU. The purpose of the SES is to facilitate broad-based stakeholder engagement. This facilitation includes: the dissemination of information;<sup>133</sup> including stakeholders in the planning process;<sup>134</sup> garnering long term political, social and financial support;<sup>135</sup> and developing synergies between NGOs, institutions and potential partners.<sup>136</sup> The dissemination of information and process of including stakeholders in the planning process are very important in the African context specifically, as they give effect to the concept of effective participation as laid down by the African Commission in the Endorois case.<sup>137</sup> As formulated in the SES, the engagement

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<sup>129</sup> The SAP indicates that without the support of stakeholders, regional development and socio-economic development will be weakened. KAZA SAP 37.

<sup>130</sup> See para 5.1.5 below.

<sup>131</sup> These aspects are further elaborated on by the SAP. See table 22 of the KAZA SAP 38-39.

<sup>132</sup> The SES is not dated on the document itself, although all the indications on the KAZA Website are that the document was made available for public consumption in 2007. [www.kavangozambezi.org](http://www.kavangozambezi.org) [date of use 20 August 2014].

<sup>133</sup> Information pertaining to the principles of KAZA as well as updates about projects and activities. KAZA SES 6.

<sup>134</sup> This inclusion should ensure that project designs reflect the needs and priorities of target groups; that projects are appropriately designed; that implementation is successful and that benefits reach targeted groups; and that KAZA plans are approximated with the plans of other development partners. KAZA SES 6.

<sup>135</sup> In order to raise funds from governments and international donors and improve the various economies through the successful implementation of activities. KAZA SES 6.

<sup>136</sup> These synergies are purposed to avoid duplicity of effort and resources; to optimise resource utilisation; and to engage service providers to deliver on project objectives.

<sup>137</sup> See para 3.1.5 above.

specifically provides stakeholders with the possibility of influencing any project design.<sup>138</sup> In so doing, communication cannot be the issuing of information without providing the opportunity for discussion. It must be genuine two-way communication as prescribed by the Endorois case.<sup>139</sup> The inclusion of the foregoing measures for stakeholder engagement, as formulated in the SES, may give effect to the concept of effective participation if the provisions of the SES are implemented and enforced.

The SES further provides guiding principles to be used in stakeholder engagement. Most of these reflect the principles of good governance and public participation and add value to TFBC.<sup>140</sup> The KAZA Secretariat plays an important role in stakeholder engagement and is tasked (with partner countries) to do stakeholder mapping, which involves the identification and analysis of stakeholders.<sup>141</sup> Following the initial mapping of stakeholders, a comprehensive process is mapped resulting in the formalising of the relationship by the signing of a MoU, which is to be monitored and evaluated.<sup>142</sup> This formalisation is especially important, as it will concretise the procedural rights of stakeholders on paper. This makes it tangible and, depending on the content of the MoU, enforceable.

In sum, the SES provides a solid basis for stakeholder engagement in the KAZA TFCA. With this basis in place, effective public participation could be facilitated in KAZA.

#### *5.1.6 A synopsis of the TFBC principles in the KAZA framework*

To briefly capture the essence of the legal and policy framework relevant to KAZA is difficult, as a lot of the crucial documents (like the MIDP) are still under development.

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<sup>138</sup> KAZA SES 6.

<sup>139</sup> See para 3.1.5 above.

<sup>140</sup> The guiding principles are: inclusivity; transparency; the appropriateness of the strategy to the target groups; the clarity of the roles of the different players; comprehensiveness – a strategy should cover all stages of the project/programme; respect based on reciprocity between KAZA and its stakeholders/partners; trust and credibility essential for the creation and growth of partnerships and relationships; open dialogue and constant communication required for a sustained and healthy relationship with feedback mechanisms; value-added synergies which benefit all parties in a relationship and ultimately ensure that enhanced socio-economic flows reach the KAZA communities; and confidentiality of information. KAZA SES 7.

<sup>141</sup> KAZA SES 10.

<sup>142</sup> See figure 1 for the full procedure in the KAZA SES 9.

Although certain matters like the approach to drawing up a MIDP are subject to critique, the existing legal and policy framework largely gives effect to the principles of TFBC.<sup>143</sup> This is notwithstanding the fact that the SADC legal framework is deficient and only partly complementary to the drivers of TFBC.<sup>144</sup> As was done in chapter 4 above, a brief principle-by-principle analysis is now conducted to highlight the extent to which the KAZA governance framework facilitates the TFBC principles.

#### 5.1.6.1 Sustainable use

The principle of sustainable use is explicitly captured in both the KAZA MoU and the Treaty.<sup>145</sup> As pointed out above, sustainable use is defined in the KAZA Treaty as management and use for the benefit of current and future generations.<sup>146</sup> Sustainable use is further elaborated upon in article 5 of the Treaty and coupled with a duty of rehabilitation where species and habitats are lost or damaged.<sup>147</sup>

#### 5.1.6.2 Equity and poverty alleviation

The MoU specifically recognises the principle of equity and poverty alleviation as one of the objectives of the KAZA TFCA.<sup>148</sup> The KAZA Treaty also recognises equity and benefit sharing through its general principles in article 5 and further specifically through the objectives in article 6. Article 6 provides that programmes should be developed to enhance sustainable use through which local communities within and around the KAZA TFCA must derive benefits with the ultimate goal of alleviating poverty.<sup>149</sup> The Treaty further requires the facilitation of an economic environment enabling public-private-community partnerships.<sup>150</sup> Through the aforementioned partnerships, poverty alleviation may also be addressed through the possible socio-

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<sup>143</sup> See para 5.1.4 above.

<sup>144</sup> See para 4.2.10 and 4.3 above.

<sup>145</sup> See paras 5.1.2 and 5.1.3 above.

<sup>146</sup> Article 1 of the KAZA Treaty. Also see para 5.1.3 above. The MoU also defines sustainable use, although it does not explicitly couple it to the concept of inter and intragenerational equity. See para 5.1.2 above.

<sup>147</sup> Article 5(e) of the KAZA Treaty.

<sup>148</sup> Article 5(1)(e) of the KAZA MoU.

<sup>149</sup> Article 6(1)(e) of the KAZA Treaty.

<sup>150</sup> Article 6(1)(f) of the KAZA Treaty.

economic development of impoverished communities.<sup>151</sup> Further bolstering the provisions of the MoU and Treaty are the extensive provisions of the SAP on benefit flow benchmarking, as discussed above.<sup>152</sup> The provisions provide a methodology and calculable mechanism to measure and capture how benefit sharing should be approached in the KAZA TFCA. Complementing the benefit flow model in the SAP are the provisions in the SES stipulating how stakeholders should be effectively engaged.<sup>153</sup>

#### 5.1.6.3 CBDR

No explicit reference is made to the principle of CBDR. The principle of solidarity is provided for, however, in article 5 of the KAZA Treaty. The narrative of Hestermeyer (creating a nexus between solidarity the CBDR principle) is again put forward to provide implicit inclusion of the CBDR principle.<sup>154</sup>

#### 5.1.6.4 Precautionary principle

The precautionary principle is included in the KAZA Treaty only.<sup>155</sup> As formulated in the Treaty, the precautionary principle is based upon interdisciplinary research and traditional knowledge.<sup>156</sup> As argued above, the inclusion of traditional knowledge is a novel approach to the principle and would ensure that local communities are also consulted where decisions are to be taken.<sup>157</sup>

#### 5.1.6.5 Good governance

The elements of good governance are well-provided for the in the KAZA governance framework.<sup>158</sup> Starting with the MoU, an obligation is put on states to respect the

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<sup>151</sup> Also see Suich, Busch and Barbancho 2005 *Conservation International South Africa* 47-49.

<sup>152</sup> See para 5.1.4 above.

<sup>153</sup> See para 5.1.5 above. Also see KAZA SES 6-7.

<sup>154</sup> Hestermeyer *Reality or Aspiration? Solidarity in International and World Trade Law* 11. For a detailed discussion on the argument see para 4.2.10.3 above.

<sup>155</sup> Article 5(1)(e) of the KAZA Treaty.

<sup>156</sup> See para 5.1.3 above.

<sup>157</sup> See para 5.1.3 above.

<sup>158</sup> To see the elements as distilled in this thesis, see para 3.2.6 above.

rights of stakeholders under national and international law.<sup>159</sup> This duty recognises the rule of law as well as the protection of human rights. The MoU further provides for the settlement of disputes, although this applies only to inter-state dispute settlement and not to where local communities or other affected parties may be involved.<sup>160</sup>

The KAZA Treaty incorporates good governance as an explicit principle to be incorporated throughout the KAZA TFCA.<sup>161</sup> Moreover, as the KAZA has been provided with legal personality, the KAZA can potentially be held accountable by interested and affected parties.<sup>162</sup> The foregoing accountability applies not only externally but also internally, as the KAZA Secretariat is accountable to the KAZA JMC, which is responsible for ensuring that the Secretariat delivers against its expected objectives.<sup>163</sup> As measures to ensure accountability were argued to be lacking in the SADC legal framework above, the potential held by the provisions in the KAZA Treaty is welcomed and may positively contribute to good governance and therefore TFBC.<sup>164</sup> Dispute resolution is also included in the Treaty as a general principle.<sup>165</sup> Dispute settlement between state parties is provided for in more detail in article 25 yet, as with the MoU, no provision is made for disputes where other interested and affected parties may be involved. This is probably a flaw, especially as article 15 of the Treaty permits stakeholders (other than the states) to participate and potentially influence planning processes, planning documents and other decisions or policies in the TFCA.<sup>166</sup> Article 15 also affords local communities beneficiation rights and it would make sense to provide all interested and affected parties a right of recourse embedded in the Treaty, where their rights in terms of article 15 have been infringed.

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<sup>159</sup> Article 4(3) of the KAZA MoU.

<sup>160</sup> Article 13 of the KAZA MoU. Also see para 5.1.2 above. As the MoU is mainly geared towards the relationship between states the exclusion of other affected parties may be overseen. The fact that TFCAs (and therefore the MoU) may potentially encroach on the rights and responsibilities of other parties makes the extension of dispute settlement a priority, however.

<sup>161</sup> Article 5(1)(i) of the KAZA Treaty.

<sup>162</sup> See article 3 of the KAZA Treaty.

<sup>163</sup> Article 13(3)(e) of the KAZA Treaty.

<sup>164</sup> See the discussion on the lack of accountability in paras 4.2.10.5 and 4.2.10.8 above.

<sup>165</sup> Article 5(1)(c) of the KAZA Treaty.

<sup>166</sup> See article 15(b)-(f) of the KAZA Treaty. Also see the discussion in para 5.1.3 above.

The rights of other interested and affected parties are also encapsulated in the SAP, where the benefit flow benchmarking concept is explicitly supported by the principles of effective public participation and the exchange of information.<sup>167</sup> Moreover, the guiding principles of the SES almost entirely encapsulate the elements of good governance as described in this thesis.<sup>168</sup>

From the foregoing it is clear that good governance is well captured in the KAZA governance framework. The only potential point of critique is the lack of a mechanism or platform where interested and affected parties (other than states) may seek relief where their rights have been infringed upon.

#### 5.1.6.6 Cooperation

The principle of cooperation extends beyond inter-state cooperation in the KAZA governance framework. The MoU determines that cooperation among governmental authorities, communities, non-governmental organisations and the private sector must be facilitated by states in the KAZA TFCA.<sup>169</sup> Concretising the foregoing provision of the MoU, the Treaty also includes all interested and affected parties by providing for their effective participation.<sup>170</sup> As argued above, by using the term effective participation, the Treaty potentially brings the Endorois case into play.<sup>171</sup> With the Endorois case possibly relevant, the requirement of effective participation as laid out in the case will add value to the interpretation of the Treaty. Stakeholder engagement and participation as discussed above under the principle of good governance highlights the importance placed by the SAP and SES on

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<sup>167</sup> KAZA SAP 33. Also see the discussion on public participation and information exchange in para 5.1.4 above.

<sup>168</sup> The guiding principles are:” inclusivity; transparency; appropriateness of the strategy to the target groups; clarity of roles of the different players; comprehensiveness – a strategy should cover all stages of the project/programme; respect based on reciprocity between KAZA and its stakeholders/partners; the trust and credibility essential for the creation and growth of partnerships and relationships; the open dialogue and constant communication required for a sustained and healthy relationship with feedback mechanisms; value-added synergies which benefit all parties in a relationship” KAZA SES 7.

<sup>169</sup> Article 4(2)(a) of the KAZA MoU. Also see para 5.1.2 above.

<sup>170</sup> Article 5(1)(g) of the KAZA Treaty.

<sup>171</sup> See para 5.1.3 above.

cooperation.<sup>172</sup> Again, this cooperation is seen to extend beyond state-state cooperation.

#### 5.1.6.7 Sovereignty, environmental assessments, and integration

Sovereignty is covered in the KAZA MoU and Treaty. In the MoU, states are held responsible for the protection and management of the KAZA ecosystem falling within their jurisdiction.<sup>173</sup> The responsibility of protection and management is further coupled with the duty not to cause harm beyond their particular national jurisdictions.<sup>174</sup> The KAZA Treaty further recognises sovereignty as one of the general principles of the KAZA TFCA.<sup>175</sup> As argued above, the definition of natural resources in the Treaty leaves room for the possible application of custodial sovereignty, as natural resources are defined according to natural boundaries rather than political boundaries.<sup>176</sup> Environmental assessments are never explicitly mentioned in any of the documents analysed in the governance framework. Integration is also missing as an explicit principle in the governance framework.

#### 5.1.6.8 The extent of facilitation

Sustainable use is clearly encapsulated in the governance framework and further extended to include the rehabilitation of damaged biodiversity.<sup>177</sup> The explicit recognition provides a solid foundation for sustainable use and it should in theory be applied in decisions related to TFBC in the KAZA TFCA. Equity and poverty alleviation are also adequately covered in the governance framework.<sup>178</sup> The provisions on benefit-sharing require special recognition as they provide a method to facilitate effective benefit sharing and in so doing they should provide arrangements to help alleviate poverty.<sup>179</sup> The CBDR principle is not covered explicitly, although an argument for the tacit inclusion thereof, based on the principle of solidarity, was

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<sup>172</sup> See para 5.1.6.5 above.

<sup>173</sup> Article 4(1) of the KAZA MoU.

<sup>174</sup> Article 4(1) of the KAZA MoU. In general see the discussion on sovereignty in para 2.2.2 above.

<sup>175</sup> Article 5(1)(a) of the KAZA Treaty.

<sup>176</sup> See para 5.1.3 above. On custodial sovereignty see para 2.2.2.1 above.

<sup>177</sup> See para 5.1.6.1 above.

<sup>178</sup> See para 5.1.6.2 above.

<sup>179</sup> See paras 5.1.4 and 5.1.6.2 above. See specifically the discussion on the benefit flow model and benchmarking.

made.<sup>180</sup> As for the precautionary principle, a unique formulation thereof forms part of the KAZA Treaty.<sup>181</sup> As indicated above, the uniqueness lies in the fact that the principle allows traditional knowledge (and not only scientific knowledge) to be taken into consideration where decisions are concerned.<sup>182</sup>

Good governance is facilitated in the governance framework through various provisions, as was indicated above. All of the elements of good governance are facilitated save for the fact that the MoU and Treaty do not provide a dispute resolution mechanism applicable to stakeholders other than states.<sup>183</sup> Apart from this potential shortcoming, good governance is sufficiently acknowledged and incorporated in the governance framework of the KAZA TFCA. Cooperation is also well covered in the KAZA governance framework. The fact that cooperation is extended beyond inter-state cooperation reflects the needs of TFBC, as multiple stakeholders may be involved in the governance process. The fact that the governance framework facilitates cooperation beyond the inter-state paradigm again emphasises the flaw identified in dispute resolution, the flaw being that only states are afforded a platform for dispute resolution and not other interested and affected parties.

The principle of sovereignty is well embedded in the KAZA MoU and Treaty.<sup>184</sup> A strict interpretation of sovereignty is limited, however, by the no-harm principle in the MoU.<sup>185</sup> The only exclusions are environmental assessments and an explicit reference to the integration principle.

In sum, the KAZA governance framework facilitates the principles of TFBC adequately and it could be argued that the framework is exemplary in the SADC region, given the state of the AU and SADC legal and policy frameworks. As seen above, the only omissions are environmental assessments and the integration principle. The CBDR principle is also not explicitly recognised, although its implicit application is argued by this thesis. Since poverty is linked to biodiversity loss in the

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<sup>180</sup> See para 5.1.6.3 above.

<sup>181</sup> Article 5(1)(e) of the KAZA Treaty.

<sup>182</sup> See para 5.1.6.4 above.

<sup>183</sup> See paras 5.1.2, 5.1.3 and 5.1.6.5 above.

<sup>184</sup> See paras 5.1.2, 5.1.3, and 5.1.6.7 above.

<sup>185</sup> Article 4(1) of the MoU.

SADC region, the provisions for benefit flow and benchmarking may especially add value to any legal framework attempting to regulate TFBC.<sup>186</sup> The extent to which the principles of TFBC are facilitated in the KAZA governance framework emphasises their importance for TFBC. Moreover, the way in which the principles are formulated in the documents provides important insight into how they can be formulated and incorporated in a legal framework governing TFBC in SADC.

## 5.2 GLTP

### 5.2.1 Background

The first formal step towards the establishment of the GLTP was a meeting between Mozambique's former President, Joaquim Chissano, and the WWF South Africa in 1990.<sup>187</sup> This meeting addressed the feasibility of the establishment of the GLTP.<sup>188</sup> As a consequence, the Global Environmental Facility (GEF) funded a pilot project conducting feasibility studies initiated by the World Bank in 1996.<sup>189</sup> The pilot project was followed by the drafting of a Trilateral Agreement signed in 2000 between South Africa, Mozambique and Zimbabwe, stating the intent to establish and develop the GLTP.<sup>190</sup> Shortly thereafter the heads of state of the three partner countries signed the *Treaty Establishing the Great Limpopo Transfrontier Park* (GLTP Treaty) on 9 December 2002.<sup>191</sup> In 2006 the Giryondo tourist access facility between the Limpopo and Kruger National Parks was opened, encouraging visitors to visit both parks.<sup>192</sup> The translocation of approximately 5 000 animals from the Kruger National park to the Limpopo National Park combined with 50 km of fencing being dropped encourages more animals<sup>193</sup> to cross the border of their own accord.

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<sup>186</sup> See specifically SADC *RISDP* 62 and para 4.2.10.2 above.

<sup>187</sup> Zunckel *SADC TFCA Guidelines* 134.

<sup>188</sup> Zunckel *SADC TFCA Guidelines* 134.

<sup>189</sup> Zunckel *SADC TFCA Guidelines* 134.

<sup>190</sup> Zunckel *SADC TFCA Guidelines* 134.

<sup>191</sup> Zunckel *SADC TFCA Guidelines* 134. See also [www.peaceparks.org/tfca.php?pid=19&mid=1005](http://www.peaceparks.org/tfca.php?pid=19&mid=1005) [date of use 25 August 2014].

<sup>192</sup> [www.peaceparks.org/tfca.php?pid=19&mid=1005](http://www.peaceparks.org/tfca.php?pid=19&mid=1005) [date of use 25 August 2014].

<sup>193</sup> This includes more than a 1000 elephants and a 1000 buffalos. [www.peaceparks.org/tfca.php?pid=19&mid=1005](http://www.peaceparks.org/tfca.php?pid=19&mid=1005) [date of use 25 August 2014].

As to size, the GLTP spans over 37 572 km<sup>2</sup> (approximately the size of the Netherland) making it almost 14 times smaller than the KAZA.<sup>194</sup> The GLTP forms the core of the second phase TFCA, which will measure approximately 100 000 km<sup>2</sup>.<sup>195</sup> The different use of terms (“transfrontier park” versus “TFCA”) will be explained in the analysis of the Treaty below.<sup>196</sup> As stated earlier, the existence of the GLTP is the source of various conflicts, one of them being poaching, and this led to the adoption of a MoU between South Africa and Mozambique on *Cooperation in the Field of Biodiversity Conservation and Management*, 2014 (the MoU). The GLTP Treaty, the MoU and the draft *GLTP Integrated Development Plan*, 2013 (GLTP IDP) will form the legal and policy framework for the analysis in order to establish to what extent provision is made for the principles of TFBC.

### 5.2.2 GLTP Treaty

Article 1 of the Treaty deals with definitions and explains that the term “transfrontier park” refers to the GLTP as established in article 2, and that TFCA refers to the larger TFCA as provided for in article 3.<sup>197</sup> Article 2 establishes the GLTP with the purpose of conservation and socio-economic development, and refers to article 3 for a determination of the geographical delimitation. Article 3(1) sets out the area comprising the GLTP,<sup>198</sup> and article 3(2) sets out the areas adjacent to the GLTP that constitute (along with the GLTP) the TFCA.<sup>199</sup> As this thesis has shown thus far, local communities play an important role in TFBC. It is therefore important to consider that the Treaty defines local communities as:<sup>200</sup>

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<sup>194</sup> Zunckel *SADC TFCA Guidelines* 136.

<sup>195</sup> Zunckel *SADC TFCA Guidelines* 136. The enlarged area will include the Banhine and Zinave national parks as well as the Massingir and Corumana areas.

<sup>196</sup> See para 5.2.2 below.

<sup>197</sup> See article 1(d) and 1(e).

<sup>198</sup> In Mozambique this is the Limpopo national park; in South Africa the Kruger national park and the Makuleke region; and in Zimbabwe the areas: Gonarezhou national park; Malipati safari area, Manjinji pan sanctuary, and the community areas which constitute the biodiversity corridor linking Gonarezhou to the Kruger national park.

<sup>199</sup> The TFCA broadens the scope in Mozambique with the Banhine and Zinave national parks and Massingir and Corumana areas. In South Africa and Zimbabwe the areas that expand the GLTP are state- and privately-owned conservation areas bordering the GLTP that will be identified in future.

<sup>200</sup> Article 1(h) of the GLTP Treaty.

...groups of people living in and adjacent to the area of the Great Limpopo Transfrontier Park, bound together by social and economic relations based on shared interest.

Local communities in and adjacent to the GLTP are recognised by the Treaty and their shared interest is also recognised. The scope of local communities is defined only in relation to the GLTP and not to the larger TFCA. It is not clear why the Treaty would limit the definition to only those communities living within or adjacent to the geographical delimitation of the GLTP. Nevertheless, by recognising communities within and adjacent to the GLTP as well as their shared interest, the Treaty conveys the sense that the principle of public participation will enjoy attention.

Article 4 describes the objectives of the GLTP to be: the fostering of transfrontier cooperation to facilitate ecosystem management; the promotion of alliances; the management of biological resources by encouraging social and economic partnerships between stakeholders;<sup>201</sup> the harmonisation of environmental management procedures across borders and the removal of artificial barriers to facilitate the establishment of a sustainable sub-regional economic base; to develop of transfrontier ecotourism as a means of fostering regional socio-economic development; and the establishment of mechanisms to facilitate the exchange of scientific, technical and legal information for the joint management of the ecosystem. It is clear that the objectives are largely geared towards joint approaches facilitating the element of cooperation. Giving effect to the principle of equity and poverty alleviation is the objective of encouraging social and economic partnerships between the GLTP and local communities.<sup>202</sup> Harmonisation is also stated as an objective in the Treaty. This call for harmonisation focuses on environmental management procedures, however, and this differs from the general call for harmonisation in the KAZA Treaty.<sup>203</sup> The KAZA Treaty calls for the harmonisation of law, policy and approaches relevant to cultural and natural resources management. The approach of the KAZA is a broader approach towards harmonisation than the approach of the GLTP, and this broader approach arguably better suits the holistic ideal and broad scope of TFBC. The objective of establishing mechanisms facilitating the exchange of scientific, technical and legal information may implicitly give effect to the CBDR

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<sup>201</sup> This includes the private sector, local communities and NGOs. See article 4(b).

<sup>202</sup> Article 4(b).

<sup>203</sup> See article 6(1)(h) of the KAZA Treaty and para 5.1.3 above.

principle, should the ideology of this principle be used to interpret the objective. In other words, should the stronger states have a greater responsibility to share information that may benefit the weaker or lesser-developed states, the objective should support the ideology behind the CBDR principle. However, as currently formulated, the objective does not explicitly acknowledge the CBDR and the inclusion thereof remains up to the persons/body interpreting it.

Article 5 sets out three principles according to which the GLTP needs to be developed and managed, namely: respect for sovereignty, joint decision-making in terms of the Treaty and adherence to regional and international treaties and protocols. The principles as set out in the Treaty are significantly fewer (and less substantial in terms of content) than those contained in the KAZA Treaty.<sup>204</sup> For example, the KAZA Treaty contains principles such as effective participation and good governance which contain content that is potentially guiding for governance officials.<sup>205</sup> It would seem that the three principles in the GLTP Treaty are more geared towards political compromise, where sovereignty will always have the upper hand over joint management and international and regional law. This is seen in the formulation of the principle of sovereignty in the GLTP Treaty: “the sovereign rights of each Party shall be respected, *no Party shall impose decisions on another.*”<sup>206</sup>

In essence, this is the nature of supra-national law, and sovereignty can in most instances be played as a trump card.<sup>207</sup> However, bearing in mind the ideology behind TFBC and TFCAs in general, the principles of the GLTP may hinder cooperation should a particular party decide to fall back on the principle of sovereignty. This is where the concept of custodial sovereignty could add value to TFBC by placing the state in the role of the custodian of biodiversity rather than the owner thereof.<sup>208</sup>

Article 6 places a duty on states to manage the GLTP in line with the objectives formulated in article 4 and in particular the Joint Management Plan (JMP). It should

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<sup>204</sup> See para 5.1.3 above.

<sup>205</sup> See para 5.1.3 above.

<sup>206</sup> Article 5(1). Emphasis added.

<sup>207</sup> See the para 2.2 above.

<sup>208</sup> See para 2.2.2.1 above.

be noted that the JMP has not yet been drafted.<sup>209</sup> Article 6 further determines that the parties must consult and assist each other in the implementation of the Treaty and promote integrated management of the GLTP.<sup>210</sup> It was suggested above that the GLTP takes a narrow approach to harmonisation in that – when considering the objectives of the GLTP – it only mentions the harmonisation of environmental management plans as opposed to the approach taken by KAZA. However, Article 6 expands this narrow approach in providing that parties shall “use their best endeavours to harmonise legislation and policies” to facilitate integrated conservation and socio-economic development activities.<sup>211</sup> Why this approach to harmonisation is not included in the part of the Treaty dealing with “objectives” is unclear, as harmonisation is an important element enabling TFBC. Because of the importance of harmonisation, one would expect it to be one of the core objectives of the GLTP. Notwithstanding, the inclusion of an expanded view on harmonisation does allow for a broader interpretation of harmonisation than is contained in the KAZA Treaty.<sup>212</sup> Cooperation in the field of customs and immigration, security and border control, public health, and wildlife diseases are also stressed as important.<sup>213</sup> All of the aforementioned issues are elements potentially affecting the goal of peace and security as proposed by TFCAs, and are of crucial importance in the management of any TFCA, particularly the GLTP, given the existing conflicts.<sup>214</sup>

Article 7 further elaborates on the important issue of security and border control. In general article 7 emphasises the importance of border integrity and states that border control is to continue as permitted by domestic law.<sup>215</sup> The parties are also under a duty to take coordinated action where defence, police or other security forces undertake activities, and such activities are to be performed with sensitivity to the management objectives and ecotourism of the GLTP.<sup>216</sup> The contentious issue of defence, police or other security official crossing boundaries is addressed. In this

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<sup>209</sup> Information obtained from the International Coordinator for the GLTP, Piet Theron. Email on file with the author.

<sup>210</sup> Article 6(2)(a) and 6(2)(b).

<sup>211</sup> Article 6(2)(c).

<sup>212</sup> See para 5.1.3 above.

<sup>213</sup> Article 6(2)(d).

<sup>214</sup> See para 5.2.1 above.

<sup>215</sup> Article 7(1).

<sup>216</sup> Article 7(2). Article 7(3) makes provision for fences to be erected or maintained where such agreements are in place. Furthermore, the costs of erecting the fences and the maintenance thereof befall the authorities responsible for the constituent area.

context the respect for sovereign borders is emphasised by the Treaty and the aforementioned officials are not allowed to cross the border (even where fences are removed), unless an arrangement has been made with the relevant parties.<sup>217</sup>

As to the implementation of the Treaty, each party establishes a National Implementing Agency (NIA) to manage the areas of the GLTP in its own country according to its own management plans.<sup>218</sup> The Treaty further establishes the Ministerial Committee, the Joint Management Board (JMB), and the Coordinating Party. The Ministerial Committee is responsible for the overall policy guidance in the GLTP and for monitoring the effectiveness of the implementation of the JMP.<sup>219</sup> The JMB consist of two members from each NIA, one of each institution responsible for border control, and one person as appointed by each of the parties.<sup>220</sup> The JMB is responsible for the implementation and revision of the JMP, for administering the funds of the GLTP, for sourcing funds for the GLTP, and for reporting to the Ministerial Committee.<sup>221</sup> An interesting institutional mechanism in the form of a Coordinating Party is unique to the GLTP. It is appointed on a rotational basis for a period of two years.<sup>222</sup> The duties of the Coordination Party are to coordinate the management activities of the GLTP, to ensure that an effective JMB is maintained,<sup>223</sup> to coordinate with the full participation of relevant stakeholders the implementation and revision of a JMP, and to apply processes and procedures in accordance with regional and international treaties and protocols.<sup>224</sup> The Coordinating Party is important as it is tasked with one of the crucial areas of TFCAs and TFBC – the engagement of relevant stakeholders. Apart from defining local communities in article 1 of the Treaty discussed above, no other mention is made of the engagement of relevant stakeholders, making this duty of the Coordinating Party even more

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<sup>217</sup> Article 7(4). The relevant parties are the Joint Management Board of the GLTP or other mandated security or designated parties.

<sup>218</sup> Article 8(a) and article 14(1).

<sup>219</sup> Article 10(1)-(3).

<sup>220</sup> Article 11(1)(a)-(c).

<sup>221</sup> Article 11(2)(a)-(e).

<sup>222</sup> Article 12(1)-(4). This position is currently held by a former employee of South African National Parks, Mr Piet Theron.

<sup>223</sup> Article 12(5)(b). This includes ensuring that a full representation of members as required by article 11 is included and that the activities of the JMB are focused on the objectives of the GLTP Treaty as contained in article 4.

<sup>224</sup> Article 12(5)(a)-(d). Article 12(5)(e)-(g) further determines that the Coordination Party must prepare reports for the Ministerial Committee and the JMB, facilitate meetings to give effect to the Treaty, and liaise with parties to identify sources of possible funding.

important. Unfortunately, this engagement of stakeholders is not as expansive as provided for in the KAZA Treaty, and leaves a *lacuna* regarding an important principle of TFBC, namely public participation.

Where disputes arise regarding any aspect/s of the Treaty, the parties are to settle such disputes amicably through diplomatic channels or refer the disputes for mediation.<sup>225</sup> If a dispute is not settled in the aforesaid manner it is to be referred for arbitration in accordance with the *The Hague Permanent Court of Arbitration Optional Rules for Arbitrating Between Two States*, 1992.<sup>226</sup> It should be emphasised that the procedure for dispute settlement is geared towards disputes between states and does not explicitly provide a remedy for other stakeholders that have been affected by the implementation or interpretation of the Treaty. Accordingly, other stakeholders will have to revert to their respective national legal systems in order to find recourse. This can be attributed to the sparse recognition given to stakeholders and their rights in the Treaty. This failure to include dispute settlement for stakeholders other than states, is a repetition of the failure in both the KAZA MoU and KAZA Treaty.<sup>227</sup> Although the failure can be partly blamed on the fact that the GLTP Treaty (and the KAZA MoU and KAZA Treaty) are documents concluded between states and not documents between states and other stakeholders, dispute settlement remains an important issue in the GLTP and TFBC in general. Accordingly, provision needs to be made for effective dispute resolution between all relevant parties in order to effect the principle of good governance.<sup>228</sup>

### 5.2.3 *The draft GLTP IDP*<sup>229</sup>

The IDP serves as a document giving direction to the GLTP and the actions aiming to establish the broader TFCA.<sup>230</sup> The main components of the IDP address the alignment of constituent component plans; institutional arrangements; the extent of

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<sup>225</sup> Article 15(1).

<sup>226</sup> Article 15(2).

<sup>227</sup> See paras 5.1.2 and 5.1.3 above.

<sup>228</sup> See para 3.1.6 above.

<sup>229</sup> The draft GLTP *IDP* is not yet in the public domain and special permission to discuss the document was obtained from the Coordinating Party of the GLTP – Piet Theron. The draft IDP is currently undergoing extensive revision but this research is done on the draft as it is the only document that could be obtained with the permission of the GLTP.

<sup>230</sup> GLTP *IDP* 1.

the GLTP and broader TFCA; sustainable finance for cooperative actions; synergy between legislation and policy utilised;<sup>231</sup> sustainability and the restoration of ecosystem integrity; integrated and joint management; the monitoring and evaluation of development and management within the GLTP and TFCA; the implementation of joint development strategies, plans and programmes; and the provision of benefits to the region and its people.<sup>232</sup>

The IDP identifies the strategic objectives of the GLTP as formulated in the Treaty and repeats these.<sup>233</sup> The IDP goes on to identify the most important legal instruments in the legal and policy context of the GLTP. At the international level the CBD, CITES, and various SADC Protocols are identified.<sup>234</sup> In Mozambique the IDP identifies the *Constitution of Mozambique*, 2004 and the *Law on Forestry and Wildlife* 10 of 1999.<sup>235</sup> In South Africa the IDP lists the *Constitution of the Republic of South Africa*, 1996 and the *National Environmental Management: Protected Areas Act* 57 of 2003.<sup>236</sup> In Zimbabwe, the IDP identifies the *Constitution of Zimbabwe*, 2007 and the *Parks and Wildlife Act* of 1975.<sup>237</sup> The IDP takes the identified laws and policies to be the primary instruments to inform the drafting of the management plans according to which the various components of the GLTP are to be managed. It could be argued that this may not facilitate a holistic approach, as the various national jurisdictions may have different approaches to environmental governance. Yet, according to the IDP, the three countries have similar provisions regarding environmental management.<sup>238</sup> However, in terms of a project on policy harmonisation undertaken by the JMB in 2012, there is discord between the countries on the following issues: constitutional provisions; immigration and customs; firearms; criminal prosecution and procedures; extradition agreements or lack

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<sup>231</sup> With the proviso that due regard is given to sovereignty. This is in line with the emphasis given to sovereignty in the GLTP Treaty as discussed in para 5.2.2 above.

<sup>232</sup> GLTP IDP 1.

<sup>233</sup> See para 5.2.2 above. GLTP IDP 5.

<sup>234</sup> The Shared Watercourses Protocol, The Wildlife Protocol and the Tourism Protocol are identified. Interestingly, the *RISDP* and the *SADC RBS* are left out. See, in general, para 4.2 above.

<sup>235</sup> GLTP IDP 6.

<sup>236</sup> GLTP IDP 6.

<sup>237</sup> GLTP IDP 6.

<sup>238</sup> GLTP IDP 6. It is again stressed that an analysis of the various national legal regimes falls outside the scope of this thesis.

thereof; radio communication; and aviation.<sup>239</sup> The IDP further reiterates the institutional structure as established by the Treaty and repeats the duties of each body as set out in the Treaty.<sup>240</sup> However, the IDP does not provide any further information as to the operation and functioning of these bodies.

The IDP also describes the biodiversity and impressive landscape features of the GLTP and states that it is one of the few remaining areas in southern Africa that still contains areas deemed to have wilderness character.<sup>241</sup> Areas with wilderness character are areas that are not developed and have suffered little human impact and influence.<sup>242</sup> After making mention of the unique nature of the GLTP, the IDP establishes to what extent people are living in and around the GLTP. It is stated that no people live inside the Kruger National Park apart from staff, researchers and tourists.<sup>243</sup> Of crucial importance is the number of people living in the Limpopo National Park, as this is a source of considerable conflict in the GLTP.<sup>244</sup> It is estimated that approximately 1600 families reside in eight villages in the Limpopo national park.<sup>245</sup> These families are currently the subjects of a voluntary resettlement programme which is projected to be completed by 2016.<sup>246</sup> The resettlement programme is based on a written offer to resettle the families and to transport their goods.

In June 2014 a workshop on the resettlement was held by representatives of the provincial and district government and the Mozambique National Institute of Disaster

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<sup>239</sup> GLTP IDP 6. Bocchino C and Murphree MJ *GLTP Policy Harmonisation Workshop Report* 7-33. This document is not in the public domain but the author has a copy on file.

<sup>240</sup> GLTP IDP 7-8. Also see para 5.2.2 above.

<sup>241</sup> GLTP IDP 12.

<sup>242</sup> GLTP IDP 12.

<sup>243</sup> GLTP IDP 12.

<sup>244</sup> Webster and Suich "Transfrontier Conservation Initiatives in Southern Africa: Observations from the Great Limpopo Transfrontier Conservation Area" in Webster and Suich (eds) *Evolution & Innovation in Wildlife Conservation: Parks and Game Ranches to Transfrontier Conservation Areas* 379. Also see Muboko *Conflict and Sustainable Development: The Case of the Great Limpopo Transfrontier Park; Southern Africa* 179-240.

<sup>245</sup> GLTP IDP 12.

<sup>246</sup> The offer will contain the replacement of their existing house and different categories of houses are identified based on the size of the original house as well as the material used. See [www.krugerpark.co.za/krugerpark-times-3-3-limpopo-park-project-22036.html](http://www.krugerpark.co.za/krugerpark-times-3-3-limpopo-park-project-22036.html) [date of use 26 August 2014]. See also Alexander *President Chissano Visits Limpopo National Park* PPF News (28 January 2014) available at [www.peaceparks.org/news.php?pid=1365&mid=1378](http://www.peaceparks.org/news.php?pid=1365&mid=1378) [date of use 26 August 2014].

Management, which has been coordinating the resettlement process.<sup>247</sup> During the workshop the importance of resettlement in the light of the development of communities, human-wildlife conflict and poaching challenges, and to enable further tourism investment in the park was stressed.<sup>248</sup>

The resettlement programme aims to contribute to the socio-economic development of the local communities (those being relocated) by providing mortar-type houses, village water supplies, and school and irrigation schemes.<sup>249</sup> The programme further aims to include improved future employment opportunities in house construction, the GLTP development, and the Massingir sugar cane industry.<sup>250</sup>

The resettlement programme may potentially contribute to socio-economic development and at the same time be beneficial to the environment. The benefit to both the environment and to people will be the removal of people from areas where wildlife occurs. When this is done the wildlife will be less vulnerable to snares and hunting and the people will be better protected from injury or death. One concern is raised, however – the offer for resettlement is said to be a written offer.<sup>251</sup> Keeping in mind the Endorois case and its opinion on effective participation, local communities in rural Mozambique may not be able to effectively participate in this written offer.<sup>252</sup> This argument is based on the fact that these local communities may not have the necessary skill to understand and properly consider a written offer. In other words, literacy and a full understanding of the project at hand are essential in providing the local communities with an equal bargaining position.<sup>253</sup> If the

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<sup>247</sup> Alexander *Resettlement Review and Planning Workshop* PPF News (7 July 2014) available at <http://www.peaceparks.co.za/news.php?pid=1365&mid=1416&lid=1009> [date of use 26 August 2014]. The workshop was attended by the Ministry of Tourism, officials from Limpopo National Park, the KfW Bankengruppe (one of the external funders of the GLTP) and community leaders.

<sup>248</sup> Alexander *Resettlement Review and Planning Workshop* PPF News (7 July 2014) available at <http://www.peaceparks.co.za/news.php?pid=1365&mid=1416&lid=1009> [date of use 26 August 2014]. The workshop focused on house construction, community relations, the resettlement process management and overall programme planning, and reporting and budgeting.

<sup>249</sup> Alexander *Resettlement Review and Planning Workshop* PPF News (7 July 2014) available at <http://www.peaceparks.co.za/news.php?pid=1365&mid=1416&lid=1009> [date of use 26 August 2014].

<sup>250</sup> Alexander *Resettlement Review and Planning Workshop* PPF News (7 July 2014) available at <http://www.peaceparks.co.za/news.php?pid=1365&mid=1416&lid=1009> [date of use 26 August 2014].

<sup>251</sup> See [www.krugerpark.co.za/krugerpark-times-3-3-limpopo-park-project-22036.html](http://www.krugerpark.co.za/krugerpark-times-3-3-limpopo-park-project-22036.html) [date of use 26 August 2014].

<sup>252</sup> See the discussion on the Endorois case in para 3.2.5 above.

<sup>253</sup> Para 282 of the Endorois case. See para 3.2.5 above.

participation could be considered as effective in the light of the Endorois requirements, the resettlement programme could contribute to sustainable development, as it could contribute to all three pillars thereof.

The IDP identifies Key Performance Areas (KPAs) that are to enjoy attention in an Action Plan. The KPAs are: joint planning (KPA 1); legal status and institutional arrangements (KPA 2); sustainable financing (KPA 3); policy harmonisation (KPA 4); sustaining and restoring landscape dynamics (5); integrated management (KPA 6); integrated regional development (KPA 7); and benefit flow management (KPA 8).<sup>254</sup> KPA 1 aims to ensure that the collective planning regarding the individual GLTP components are aligned. KPA 2 aims to align all of the institutional arrangements and ensure that they are functional and representative of all stakeholders. Moreover, KPA 2 aims to clarify the legal status of the GLTP. As no mention is made in the Treaty of the legal status of the GLTP, it is uncertain what is meant by this aspect of KPA 2. No provision similar to that of the KAZA Treaty (establish the legal status of KAZA) is found in the GLTP Treaty, which is a shortcoming of the GLTP Treaty.<sup>255</sup> KPA 3 addresses sustainable financing so as to continue with the envisaged objective of the GLTP. This is to be done by the adoption of a Financial Sustainability Strategy.<sup>256</sup> KPA 4 aims to establish an environment conducive to synergy between the operational policies used in the different countries with respect to sovereignty. Sovereignty is emphasised where it could possibly undermine joint/holistic efforts to operationalise TFBC. It seems that sovereignty is written into such documents each time a harmonised approach is prescribed, almost as a political compromise. However, given the history of SADC and the reality of the global legal order, one needs to understand the desire to protect sovereignty and respect it. It is still argued, however, that there is room for the concept of custodial sovereignty, especially in the light of the needs of future generations.<sup>257</sup> KPA 5 aims to conserve ecosystem integrity and restore it where it is not intact anymore. KPA 5 is similar to the provision in the KAZA SAP, although it is not as elaborate in its

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<sup>254</sup> GLTP IDP 22.

<sup>255</sup> See para 5.1.3 above on the discussion of article 3 of the KAZA Treaty.

<sup>256</sup> GLTP IDP 24. This will be outsourced by means of a tender. The timeframe for KPA 3 is 3 - 4 years.

<sup>257</sup> See para 2.2.2.1 above.

description thereof.<sup>258</sup> The KAZA SAP listed issues that were to be addressed when considering conservation and restoration, such as a sensitivity analysis on biodiversity richness, habitat values, landscape sensitivity, cultural heritage, and animal production and health, for example. This list gives practical guidance to TFCA practitioners in implementing the KPA and is therefore important. KPA 6 emphasises the importance of integrated management between countries and aims to realise integrated management with the adoption of a Joint Operations Strategy.<sup>259</sup> KPA 7 aims to prepare and implement a strategy for the diversification of rural economies in the GLTP.<sup>260</sup> KPA 8 addresses the important aspect of benefit sharing and proposes the adoption of a strategy to facilitate benefit flow management in the GLTP. This strategy will include the identification of benefits, benefit flow plans, benchmarking surveys, monitoring and evaluation, and reporting.<sup>261</sup> KPA 8 is to be lauded as it could contribute to the principle of equity and poverty alleviation but again, when measured against the provisions of the KAZA SAP related to benefit flow management, the IDP's provisions seems weak, as it does not contain detailed information.<sup>262</sup> The KAZA SAP contains a scientific formula for the calculation of benefits, which provides concrete guidance for TFCA practitioners.<sup>263</sup>

In general the IDP provides some guidance relevant to TFBC, but for the most part it is clear that the document is still a draft. The draft is currently undergoing extensive revision and it may be untimely to criticise the document further, as many of the provisions could change.<sup>264</sup>

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<sup>258</sup> See para 5.1.4 above.

<sup>259</sup> GLTP *IDP* 25. The Joint Operations Strategy is to address amongst other matters security and law enforcement, tourism development, wildlife management, monitoring and evaluation, information management, and marketing and branding.

<sup>260</sup> GLTP *IDP* 25. This strategy will address awareness, integrated game-cattle programmes and wildlife-based livelihood programmes.

<sup>261</sup> GLTP *IDP* 26.

<sup>262</sup> See para 5.1.4 above.

<sup>263</sup> See para 5.1.4 above.

<sup>264</sup> This information was obtained from the Coordinating Party – Piet Theron. The draft of the document being revised is not yet available for scrutiny.

#### 5.2.4 The MoU

The 2014 MoU is the most recent document to complement the legal and policy framework of the GLTP, and is a direct result of rhino poaching in the area.<sup>265</sup> Although the GLTP is made up of three member states (South Africa, Zimbabwe and Mozambique) the MoU was concluded between South Africa and Mozambique only.<sup>266</sup> The preamble refers to the principles laid down by the CBD, CITES and the SADC Wildlife Protocol and clearly acknowledges that the poaching and trafficking of wildlife is a global challenge. Curiously, no mention is made of the Lusaka Agreement discussed in chapter 4.<sup>267</sup> This omission is odd, as the main aim of the Lusaka Agreement is to eliminate the illegal trade in wild fauna and flora and in so doing to conserve biodiversity leading to sustainable development.<sup>268</sup>

Article 1 states that the purpose of the MoU is to promote cooperation between the parties in the areas of management, conservation, the protection of biodiversity, law enforcement, and compliance with CITES and other relevant laws. This cooperation is to take place whilst encouraging social and economic partnerships between stakeholders and by promoting integrated planning, research, education, awareness raising and capacity building; sharing and disseminating information related to poaching; collaborating in the development of programmes to protect rhino and elephants; and providing financial, human and other resources to implement the MoU.<sup>269</sup> Article 2 identifies priority areas that is to enjoy attention through the implementation of the MoU. Sustainable use, adherence to the rule of law, exchange of information, and community development are among the areas identified.<sup>270</sup>

Article 2 elaborates on article 1 and reiterates the areas of cooperation.<sup>271</sup> Some of these areas give effect to the principles of TFBC. Sustainable use is specifically

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<sup>265</sup> See [https://www.environment.gov.za/mediarelease/sa\\_mozambique\\_signmou](https://www.environment.gov.za/mediarelease/sa_mozambique_signmou) [date of use 22 October 2014].

<sup>266</sup> The reason why Zimbabwe is not a part of the MoU is unsure.

<sup>267</sup> See para 4.1.6 above.

<sup>268</sup> See article 2 of the Agreement and para 4.1.5 above.

<sup>269</sup> Article 1(a)-(f).

<sup>270</sup> Article 2(b),(e),(f), and (h).

<sup>271</sup> These are: the management, conservation and protection of biodiversity; the promotion of sustainable use; compliance with CITES; the implementation of legislation on biodiversity;

included as an integral part of the conservation of species and ecosystems as well as to provide sustainable livelihoods for local people.<sup>272</sup> By emphasising that parties have a duty to comply with all relevant laws at international, regional, sub-regional and national levels, the principle of good governance is given effect to.<sup>273</sup> The CBD principle can in theory be deduced from the duty to jointly innovate in the development and increase of technology support in biodiversity conservation.<sup>274</sup> Here again, the stronger or more developed state will bear the heavier duty to support the lesser developed state in order to comply with the provision of the MoU. Although this is a submission based in theory, the SADC region needs stronger states to engage and help neighbouring states in order to protect their people by conserving their common concern, which is biodiversity. Finally, equity and poverty alleviation are given effect to in that communities should be developed through income generated from biodiversity and sustainable ways of life.<sup>275</sup> This should lead to communities benefitting from the income generated from sustainable biodiversity practices and the income generated should contribute to equity and poverty alleviation of the communities. This provision goes hand in hand with sustainable use, as discussed earlier. Article 3 addresses the forms of cooperation to be used by the parties. These include the exchange of information, visits by delegations, seminars and workshops, and the implementation of a framework facilitating article 2.<sup>276</sup> Although local communities are mentioned in article 2, no provision is made for a specific form of cooperation with them. This is a flaw in the MoU as their participation is of crucial importance, especially where sustainable use is concerned. Such cooperation, if provision is made in future, will need to be in line with the provisions laid down for effective participation in the Endorois case.<sup>277</sup>

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compliance with national law, regional law and sub-regional law; the exchange of information, intelligence, good practices and research on biodiversity; joint innovation in the development and increase of technology support; trade in wildlife; the management of conservation areas; community development through income generating from biodiversity and sustainable ways of life; and education and training in the management, conservation and protection of biodiversity. Article 2(a)-(i).

<sup>272</sup> Article 2(b) and 2(h).

<sup>273</sup> The element of the rule of law is given effect here. See para 3.1.6 above.

<sup>274</sup> Article 2(g).

<sup>275</sup> Article 2(h).

<sup>276</sup> Article 3(a)-(d).

<sup>277</sup> See para 3.1.5 above.

The implementation of the MoU is to be administered by a Joint Committee (JC) containing officials from both parties.<sup>278</sup> The JC will be responsible for preparing an annual work plan and for monitoring and evaluating the implementation of all programmes under the MoU.<sup>279</sup> The MoU further determines that it is to be implemented in accordance with the laws in force in the two countries.<sup>280</sup> However, the MoU does not prescribe a procedure to be followed where there is discord between the law of a country and the MoU. Given the strong emphasis placed on sovereignty in both the GLTP Treaty and the IDP, the possibility that sovereign interests will take precedence over the MoU is high.<sup>281</sup>

As for dispute settlement, the parties are required to settle disputes amicably through consultation and negotiation. Unfortunately, the trend of providing no mechanism for local communities to resolve disputes in terms of the Treaty continues.<sup>282</sup> This is again a flaw which could hinder the effective implementation of the principle of good governance.

#### *5.2.5 A synopsis of the TFBC principles in the GLTP framework*

The GLTP is an area where a great deal of conflict needs to be managed. Furthermore, because of the large number of local communities living in the GLTP (in the Limpopo national park), poverty alleviation, public participation, good governance, and sustainable use are of critical importance. The following discussion indicates the extent to which the principles of TFBC are found in the GLTP governance framework.

##### 5.2.5.1 Sustainable use

The GLTP Treaty mentions sustainable use only in its preamble. As sustainable use is an important principle of TFBC, its omission from the Treaty may be problematic.

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<sup>278</sup> Article 5(1).

<sup>279</sup> Article 5(1)(a) and (b).

<sup>280</sup> Article 6.

<sup>281</sup> This is also argued in the light of the high regard given to sovereignty in the SADC. See para 2.2.2 above.

<sup>282</sup> See the critique on the KAZA MoU and Treaty as well as the GLTP Treaty at paras 5.1.2; 5.1.3 and 5.2.2 above.

This statement is made with specific reference to the fact that many impoverished local communities live in and around the GLTP and are dependent on the biodiversity for their livelihoods.<sup>283</sup> As indicated by the SADC RBS, local communities have a direct impact on biodiversity and the principle of sustainable use is therefore important in the GLTP.<sup>284</sup> The MoU, on the other hand, specifically identifies sustainable use as an area of priority, as discussed above.<sup>285</sup> But it has limited scope of application in the GLTP, as Zimbabwe is not party to it.<sup>286</sup>

#### 5.2.5.2 Equity and poverty alleviation

Equity and poverty alleviation are addressed through various provisions in the GLTP governance framework. The Treaty sets out the objectives of the GLTP and one objective may specifically help alleviate poverty. This objective is to promote the co-management of biodiversity through social and economic partnerships with local communities, the private sector, and non-governmental organisations.<sup>287</sup> The Draft IDP further provides for benefit flow management as a KPA.<sup>288</sup> The idea of benefit flow management is similar to that in the KAZA SAP, yet it is less detailed and might, as currently formulated, not effectively contribute to poverty alleviation.<sup>289</sup> The inclusion of benefit flow management as a KPA is important, however, and is seen as a positive development in the governance framework. The MoU recognises the principles of equity and mutual benefit and through these principles encourage social and economic partnerships between stakeholders.<sup>290</sup> These partnerships could potentially foster economic growth and in the process potentially help alleviate poverty. Another provision in the MoU that may facilitate equity and poverty alleviation is community development. As described in the MoU, community development should be facilitated through income derived from biodiversity as well as sustainable ways of life.<sup>291</sup> The details of the income generation and what exactly

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<sup>283</sup> See the discussion on local communities in paras 5.2, 5.2.1 and 5.2.3 above.

<sup>284</sup> SADC *RBS* 10. Also see para 4.2.10.2 above.

<sup>285</sup> See para 5.2.4 above.

<sup>286</sup> See para 5.2.4 above.

<sup>287</sup> Article 4(b) of the Treaty. Also see para 5.2.2 above.

<sup>288</sup> See para 5.2.3 above.

<sup>289</sup> See para 5.2.3 above. For a discussion on the KAZA SAP and its take on benefit flow management, see para 5.1.4 above.

<sup>290</sup> Article 1(b) of the MoU.

<sup>291</sup> Article 2(h) of the MoU.

is meant by “sustainable ways of life” are not covered in the MoU. What is clear, however, is the fact that the MoU identifies community development as an area that should enjoy attention.

#### 5.2.5.3 CBDR

No explicit reference to the CBDR principle is found in the GLTP governance framework. The implicit recognition of the principle may potentially be facilitated by the duty to establish mechanisms to exchange technical, scientific and legal information.<sup>292</sup> Another potential implicit recognition is found in the MoU where joint innovation in the development and increase of technology support is called for.<sup>293</sup> By joint innovation and technology support, it could be expected that stronger states will provide help to weaker states in order to achieve the joint objectives of the MoU.<sup>294</sup> Nonetheless, without the explicit inclusion of the CBDR principle, uncertainty as to the application thereof will remain in the GLTP governance framework.

#### 5.2.5.4 Precautionary principle

The precautionary principle seems to be absent from the current GLTP governance framework. This is potentially a weakness in the governance framework as it currently stands, since the precautionary principle is an important principle in TFBC, especially since local communities are an integral part of governance in the GLTP. By having local communities in and adjacent to the GLTP, development and infrastructure initiatives will be (and are currently being) undertaken, requiring the precautionary principle to be applied.<sup>295</sup> It is therefore important that the precautionary principle be included in a legal framework regulating TFBC.

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<sup>292</sup> Article 4(f) of the Treaty. Also see the argument in para 5.2.2 above.

<sup>293</sup> Article 2(g) of the MoU.

<sup>294</sup> See the discussion on solidarity in para 4.2.10.3 above.

<sup>295</sup> See the relocation programme discussed in para 5.2.3 above, for example.

#### 5.2.5.5 Good governance

One of the elements of good governance – public participation – is implicitly recognised by the definition of local communities in the Treaty.<sup>296</sup> Article 1(h) of the Treaty determines that local communities are:

groups of people living in and adjacent to the area of the Great Limpopo Transfrontier Park, bound together by social and economic relations based on shared interest.

The argument for implicit recognition lies in the fact that the Treaty explicitly recognises the shared interests of local communities in the GLTP and therefore implicitly recognises their participation, as they have a shared interest in the GLTP. The only explicit reference to participation is related to the implementation and periodic revision of the JMP.<sup>297</sup> The draft IDP provides for the contentious resettlement programme where local communities are also engaged to participate in the process.<sup>298</sup> The question of effective participation, as raised above, is again raised, and still requires attention from the governance framework should public participation be deemed effective.

The MoU addresses two further elements: respect for the rule of law, and information exchange.<sup>299</sup> As for the rule of law, the MoU requires parties to respect and comply with national and international law.<sup>300</sup> As for the exchange of information, the MoU recognises the exchange of information, intelligence, good practices and research as priority areas where states should cooperate.<sup>301</sup>

Compared to the KAZA governance framework, the GLTP framework falls short in terms of its provisions for good governance.

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<sup>296</sup> Article 1(h) of the Treaty.

<sup>297</sup> Article 12(5)(c) of the Treaty.

<sup>298</sup> See para 5.2.3 above.

<sup>299</sup> Article 2(e) and (f) of the MoU.

<sup>300</sup> Article 2(e) of the MoU. Also see para 5.2.4 above.

<sup>301</sup> Article 2(f) of the MoU.

#### 5.2.5.6 Cooperation

The Treaty provides explicitly for transfrontier cooperation in biodiversity conservation.<sup>302</sup> The Treaty further, by means of far-reaching duties, requires parties to cooperate: in its implementation; in the promotion of the integrated and coordinated management of the GLTP; in the harmonisation of legislation; in required operational tasks; in synchronising development actions bordering each other; and in entering into further agreements that may effect the Treaty.<sup>303</sup> The MoU also places a general obligation on parties to cooperate in order to protect biodiversity within the scope and ambit of the MoU.<sup>304</sup>

#### 5.2.5.7 Sovereignty, environmental assessments, and integration

The only reference to sovereignty is found in article 5(1) of the Treaty. As stated above, the formulation of sovereignty in the Treaty is rigid and it seems clear that the respective states wish to keep their sovereign autonomy.<sup>305</sup> With this view of sovereignty, it will be difficult to apply the concept of custodial sovereignty in the GLTP. As with the KAZA governance framework, no explicit mention of environmental assessments and integration is found in the GLTP governance framework.

#### 5.2.5.8 The extent of facilitation

In general, the GLTP Treaty does not facilitate all of the principles for TFBC. A strong emphasis on sovereignty may potentially hamper holistic and joint management efforts.

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<sup>302</sup> Article 4(a) of the Treaty.

<sup>303</sup> Article 6(2)(a)-(f) of the Treaty.

<sup>304</sup> Article 1 of the MoU. Article 3 further describes the different forms of cooperation. These are encapsulated in article 3(a)-(e): "(a) exchange of relevant information and documents on the protection and conservation of biodiversity, enforcement and compliance with the law; (b) visits of delegations and experts from the two countries; (c) joint organisation of seminars, workshops and meetings with the participation of scientists, experts, regulators, legislators and stakeholders; (d) establishment of an implementation framework of the areas of cooperation set out in Article 2; and (e) other forms of cooperation as mutually agreed by the Parties in accordance with the legislation of each Party and the availability of funds."

<sup>305</sup> See para 5.2.2 above.

Sustainable use is explicitly covered in the Treaty and the MoU and therefore the principle may be expected to find application in decisions at grassroots level. Equity and poverty alleviation also enjoy explicit recognition, albeit only in the draft IDP. The recognition of poverty alleviation in the Treaty and MoU, as argued above, is implicit recognition and therefore creates uncertainty as to the real/potential application thereof.<sup>306</sup> Although poverty alleviation is explicitly included in the draft IDP, the provisions are not substantive enough to effect real change, especially when compared to the KAZA SAP.<sup>307</sup>

It was argued that the CBDR principle finds only implicit recognition, if at all. Again, this potential tacit recognition creates uncertainty as to the application of the principle in the governance framework. As analysed above, the precautionary principle is absent from the governance framework and its absence is seen as a weakness in the framework.<sup>308</sup> Some elements of good governance, such as adherence to the rule of law, public participation and dispute resolution (subject to the critique given above), are included. Compared to the KAZA governance framework, the GLTP governance framework is weak in relation to good governance.

Cooperation is explicitly and generously covered in the Treaty and MoU.<sup>309</sup> As stated earlier, the Treaty provides a strict formulation of sovereignty which may be incompatible with custodial sovereignty. Finally, no provisions for environmental assessment and integration are present in the GLTP governance framework.<sup>310</sup>

Although the some of the principles of TFBC are to be found throughout the framework discussed above, a lack of substantive content in relation to these principles does not favour the use of a holistic approach towards TFBC. This lack of substantive content is especially true when measuring the GLTP framework against that of the KAZA. The KAZA already has several substantive and implementable documents, where the GLTP has only the Treaty and a MoU between two of the three parties. Although the draft IDP is currently being revised, the lack of working

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<sup>306</sup> See paras 5.2.5 and 5.2.4 above.

<sup>307</sup> See para 5.2.3 above.

<sup>308</sup> See para 5.2.5.4 above.

<sup>309</sup> See para 5.2.5.6 above.

<sup>310</sup> See para 5.2.5.7 above.

documents is worrying since the GLTP has been up and running since 2002. Perhaps the lack of working documentation shows, to some extent, how complex the GLTP is. Notwithstanding, the Treaty is a solid foundation upon which the GLTP can build. Some similarities between the draft IDP and the KAZA SAP perhaps show some form of harmonisation of approaching the management of TFCAs in the SADC region. Hopefully, the revised IDP will contain more detail on important issues, as does the KAZA SAP, as pointed out above, and in so doing provide guidance for TFCA practitioners in the implementation of TFBC.<sup>311</sup>

The GLTP framework is an example of how TFCAs can benefit from attending to guiding principles effecting TFBC, as it does not sufficiently incorporate the principles in its governance framework.<sup>312</sup>

### **5.3 Summary**

Although both the AU and SADC legal and policy frameworks do not effectively encapsulate all of the principles of TFBC, both TFCAs show promise in incorporating certain principles of TFBC. The KAZA specifically shows promise in dealing with biodiversity conservation in general and public participation in particular. Good governance is also covered in the KAZA framework, although not directly and not comprehensively enough to cover all of the elements of good governance.<sup>313</sup> Considering the complexity of the KAZA, which consists of five member states, the progress made in terms of the governance framework is commendable. The GLTP governance framework, like the KAZA framework, incorporates most principles of TFBC. The framework of the GLTP, however, is subject to critique, as argued above.<sup>314</sup> It should again be emphasised that, due to the nature of the GLTP and the challenges therein, the description of the principles of public participation, good governance and sustainable use need more substantive content.<sup>315</sup>

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<sup>311</sup> See para 5.2.3 above.

<sup>312</sup> See para 3.1.2 above.

<sup>313</sup> See para 3.2.6 and 4.1.7 above.

<sup>314</sup> See para 5.2.5 above.

<sup>315</sup> See para 5.2.5 above.

In sum, both frameworks contain various principles of TFBC throughout. Nevertheless, as has been argued above, various challenges still exist. It is argued in this thesis that the principles for TFBC contained in a supra-national legal framework may support TFBC in TFCAs and help overcome these challenges. The role of the principles will primarily be to guide and inform the development of governance frameworks in SADC and ultimately to harmonise TFBC in TFCAs.

## Chapter 6 – Conclusion and recommendations

### 6 Conclusion

#### ***6.1 Overview of the problem statement, hypotheses, assumptions and research question***

Keeping in mind the loss of biodiversity currently being experienced and the findings of the SADC RBS specifically, this thesis has addressed the following question: Which legal principles should facilitate TFBC in the SADC, and to what extent does the current AU and SADC legal framework facilitate the implementation of these principles? In answering the questions, this thesis has employed hypotheses and assumptions that provided its argumentative structure.<sup>1</sup> The assumptions related to the threat to biodiversity globally and in SADC, as well as the transboundary nature of biodiversity. Furthermore, the thesis assumed that legal frameworks facilitate processes and procedures for decision making in general, and that the framing of supra-national law could facilitate biodiversity governance. The hypotheses that were tested in this thesis included that inadequate provision is made in the AU and SADC legal and policy framework to facilitate TFBC; that sustainable TFBC depends on a supra-national legal framework containing legal principles facilitating TFBC; and that legal principles, rather than rigid rules, are better suited to supra-national governance efforts in SADC.

More specifically, this thesis emphasised the central role played by biodiversity in human survival.<sup>2</sup> Flowing from this, the important role of biodiversity as a factor contributing to livelihoods specifically in the AU and SADC was highlighted.<sup>3</sup> Moreover, the scarcity and conservation status of biodiversity in the AU and SADC provides the impetus for current and future conservation measures to be implemented and governed in a sustainable manner.<sup>4</sup> This is especially true since six of the eight biodiversity hotspots found in Africa are situated in the SADC. The

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<sup>1</sup> See paras 1.3.1 and 1.3.2 above.

<sup>2</sup> See para 1.1 above.

<sup>3</sup> See paras 1.1 and 2.1 above.

<sup>4</sup> See paras 1.1 and 2.1.3 above.

thesis also indicated that PAs are seen as the cornerstone of biodiversity conservation,<sup>5</sup> and it was argued that the main goal of TFCAs in the SADC is biodiversity conservation.<sup>6</sup> Having established the link between PAs, TFCAs, and biodiversity conservation, the reasons for the drastic decline in biodiversity despite the exponential rise in PAs and TFCAs were considered.<sup>7</sup> This alarming fact – that the main mechanisms for biodiversity conservation are increasing while biodiversity is lost at a thousand times the background rate – prompts the question: why is biodiversity still being lost?<sup>8</sup> Reports indicate that the answer lies partly with decision-making challenges, policy constraints, and a lack of management plans regulating PAs.<sup>9</sup> The foregoing findings are supported by the SADC RBS, which indicates that the primary constraints to implementing regional biodiversity initiatives (like TFCAs) are weak institutional and legal frameworks.<sup>10</sup> It was argued that law and policy informed governance<sup>11</sup> and therefore play a crucial role in biodiversity governance, and thus TFBC. Moreover, the thesis made the assumption that legal frameworks facilitate processes and procedures for decision making in general.<sup>12</sup>

Accordingly, a legal framework facilitating TFBC in TFCAs is important when proposing to implement biodiversity conservation that must also lead to sustainable development. Considered in the context of PAs in general, TFCAs have a specific and unique attribute – they traverse political borders. This attribute is appropriate for biodiversity conservation, as biodiversity cannot be confined to political boundaries.<sup>13</sup> Accordingly, TFCAs have the potential to conserve biodiversity in its entirety in a particular biosphere. The facilitation of the foregoing holistic conservation approach is less likely to be catered for in fragmented country-based PAs that are bound by the fences of national parks and sovereign borders. It is acknowledged that facilitating TFBC in TFCAs exclusively is not the most advantageous approach, and that TFBC in the SADC region as a whole may be even better suited to holistic

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<sup>5</sup> See para 1.1.1 above.

<sup>6</sup> See paras 1.1.1 and 1.1.2 above. The thesis also later classified TFCAs as modern derivatives of PAs, and in so doing further emphasised the fact that biodiversity conservation stands central to their goals. See para 2.3 in general above.

<sup>7</sup> See the figures in para 1.1.2 above.

<sup>8</sup> See para 1.1.2 above.

<sup>9</sup> See para 1.1.2 above.

<sup>10</sup> See para 1.1.2 above.

<sup>11</sup> For the argument see para 4.1.6 above.

<sup>12</sup> See para 1.3.1 above.

<sup>13</sup> See the quote of Bowman and Redgwell in para 1.1 above.

biodiversity conservation. This is based on the premise that the environment (and therefore biodiversity) is seen as a single integrated unit.<sup>14</sup> The argument of expanding TFBC beyond the reach of TFCAs could continue *ad infinitum*, until the establishment of global TFBC has taken place. In an ideal world, a truly global TFBC approach would entail the total harmonisation of biodiversity conservation approaches. All countries would therefore follow the same principles towards biodiversity conservation and a fully holistic conservation effort would have been achieved. However, this idealistic notion of global TFBC falls outside the scope of the study and may never be feasible in practice because of issues such as sovereignty, as discussed above.<sup>15</sup> It may be more realistic and achievable to follow a bottom-up approach by starting such holistic endeavours at sub-regional level (like the SADC) and from there expanding it to the regional level (like the AU). In so doing, continent-specific challenges and needs could be better facilitated by the legal frameworks supporting TFBC.

The unique nature of TFCAs, in that they traverse borders, already provides certain challenges, all of which may hamper the implementation of a holistic approach to biodiversity conservation. In the light of the present research question, the most pressing challenge to holistic biodiversity conservation are differences in laws and policies. Different laws and policies influence the processes and procedures followed when conserving biodiversity.<sup>16</sup> This challenge was highlighted in the discussion of the KAZA SAP above.<sup>17</sup> When two or more countries propose to jointly and holistically conserve biodiversity (as is the case in TFCAs), the different laws and policies potentially create a challenge, as there may be a conflict between the prescribed conservation approaches as well as procedural and other rights of communities potentially affected. Accordingly, a supra-national framework that contains guiding principles for TFBC in the SADC becomes important in order to provide a holistic approach to TFBC and to reconcile and harmonise the potential conflict arising from a fragmented approach.

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<sup>14</sup> See para 2.1 above.

<sup>15</sup> See para 2.2.2 above.

<sup>16</sup> See para 2.2.2 above.

<sup>17</sup> See para 5.1.4 above. See specifically the study of Jones *KAZA Law and Policy Review* 71 in which legal and policy comparisons are drawn between the member states involved in the KAZA TFCA.

## **6.2 Key concepts and aspects**

In answering the research question of this thesis, some central concepts and aspects were clarified and discussed. These include:

### *6.2.1 Biodiversity<sup>18</sup>*

Biodiversity is defined in a holistic and inclusive sense, using the CBD as a starting point.<sup>19</sup> Based on the argument above, human beings form part of biodiversity and cannot be excluded in efforts directed at biodiversity conservation.<sup>20</sup> Including the human element in the definition of biodiversity is important to this thesis as local communities play a central role in TFBC in TFCAs.<sup>21</sup> Furthermore, the importance of biodiversity is also highlighted at global and SADC levels.<sup>22</sup> At SADC level the importance is exemplified by biodiversity hotspots as well as the economic and social importance of biodiversity. Biodiversity conservation is central to TFCAs and is one of central drivers behind TFBC in TFCAs.<sup>23</sup> As regards the legal framework in general, use of the term biodiversity is found to be largely absent and this leaves a weakness in the African legal framework as a whole. Policy, especially at SADC level, does however address biodiversity directly and more importantly calls for a SADC Biodiversity Protocol to be drafted and adopted.

### *6.2.2 Sustainable development<sup>24</sup>*

Sustainable development stands central to the achievement of the goals of the SADC and the AU.<sup>25</sup> In the SADC this importance is deduced from the RISDP as well as the Protocols and the SADC Treaty, and at the AU level the most important

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<sup>18</sup> See para 2.1 above for the full discussion of biodiversity.

<sup>19</sup> See para 2.1.1 above.

<sup>20</sup> See para 2.1.1 above.

<sup>21</sup> See para 2 above. Also see, in general, paras 3, 4 and 5 above.

<sup>22</sup> See paras 2.1.2 and 2.1.3 above.

<sup>23</sup> See para 2.4 above.

<sup>24</sup> For a full discussion on sustainable development see paras 2.4.1 and 4.1.6 above. Although the NEPAD does not pertinently provide a definition, it does refer to the main components normally constituting the definition of sustainable development.

<sup>25</sup> See 2.4.1 above.

document pertaining to sustainable development is the NEPAD. This thesis relies on the well-known three-pillar definition of sustainable development.<sup>26</sup> This thesis also scrutinised the NEPAD to deduce a definition of sustainable development from it (as a definition had not been pertinently provided), which was argued to be similar to prevailing definitions of sustainable development in the literature.<sup>27</sup> It is clear from the contextual and conceptual background of TFBC in TFCAs that three categories of issues are important to it: social, economic, and environmental considerations. This leads to the conclusion that these three aspects (the three pillars of sustainable development) constitute sustainable development as a driver behind TFBC in TFCAs. Accordingly, the main drivers of TFBC are a) sustainable development and b) biodiversity conservation.

### 6.2.3 *The need for TFBC*<sup>28</sup>

As TFCAs are premised on a holistic conservation approach (keeping drivers (a) and (b) above in mind), certain important issues in the SADC particularly create a need for TFBC. These include colonialism, sovereignty, and fragmentation. Colonialism has had a twofold effect. Firstly, it has led to fragmentation by creating political borders and therefore different political, social and economic regimes. Secondly, by creating these political borders, it has confined biodiversity conservation to manmade boundaries and not ecological boundaries. Accordingly, the fragmentation of both nature and political, social and economic systems has created a need for TFBC in order to holistically govern biodiversity for the benefit of present and future generations. Although the SADC can now be considered a post-colonial region, the effects of colonialism are profound. The most important effect related to TFBC in TFCAs is the residual rigid approaches towards sovereignty. This thesis acknowledges the importance of sovereignty to the extent that it is an essential requirement for statehood.<sup>29</sup> Notwithstanding, in the African context, an over-emphasis on sovereignty as a consequence of colonialism is problematic for law and policy making, as it makes it difficult to reach the required consensus for agreed legal instruments to enter into force. It was argued, however, that sovereignty in the

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<sup>26</sup> See figure 4 in para 2.4.1 above.

<sup>27</sup> See figure 5 in para 2.4.1 above.

<sup>28</sup> For a full discussion on all of the aspects of this paragraph see para 2.2 above.

<sup>29</sup> See para 2.2.2 above.

context of TFBC should be viewed from the context of the concept of custodial sovereignty.<sup>30</sup> When this is done, states become the custodians of biodiversity as opposed to the sole owners and exploiters thereof. This view also correlates with the fact that biodiversity cannot be confined to sovereign borders. Therefore, absolute sovereign ownership of biodiversity (from the TFBC in TFCA viewpoint) does not make sense. As a consequence, rigid or absolute approaches to sovereignty resulting in different national approaches towards biodiversity conservation are counterproductive.<sup>31</sup> All of the foregoing points to the critical need for harmonisation. Harmonisation is described by this thesis through the analysis of the viewpoints of various authors in the African context.<sup>32</sup> The thesis describes harmonisation as having the purpose of aligning the ideological outcomes of different legal systems.<sup>33</sup> This description aims to eradicate some of the legal challenges created by (post-)colonialism, fragmentation and sovereignty and is a crucial concept in establishing sustainable TFBC in TFCAs. Harmonisation is crucial as it may potentially align the different legal approaches followed by the relevant SADC member states towards biodiversity conservation. In so doing, harmonisation could facilitate a more appropriate legal platform (at national level) for TFBC. Importantly, it was pointed out that legal principles rather than rules could better facilitate harmonisation. This is an important insight, because this thesis relies on legal principles rather than on rules to facilitate sustainable TFBC in TFCAs.

#### *6.2.4 Legal principles<sup>34</sup>*

This thesis argues that the term “legal principle” should be interpreted generously and should include content of a narrow and open-ended nature. In this context, legal principles are the ideal building blocks for supra-national legal frameworks as they may be able to give both direction for the creation of new law and they may serve as concrete legal rules depending on their content. The procedural aspects such as access to information, public participation and environmental assessments are more

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<sup>30</sup> See para 2.2.2.1 above.

<sup>31</sup> See the example of how the different legal frameworks of member states can influence TFBC in para 6.1 above.

<sup>32</sup> See para 2.2.3.1 above.

<sup>33</sup> See para 2.2.3.1 above.

<sup>34</sup> See para 3.1.2 above.

concrete (almost rule-like)<sup>35</sup> and may be interpreted as legal principles with a more concrete nature. To keep the TFBC principles within the scope of TFBC this thesis distilled them against the backdrop of what is argued to be the two main drivers of TFBC: biodiversity conservation and sustainable development. The TFBC principles are: sustainable use; equity and poverty alleviation; CBDR; the precautionary principle; good governance (and its constituting elements); cooperation; and sovereignty, environmental assessments, and integration.<sup>36</sup>

### **6.3 Summary of the analysis in each chapter**

As stated above, the thesis first determined which principles should inform a legal framework facilitating sustainable TFBC in TFCAs. In answering the central research question the thesis first provided a theoretical basis for TFBC in the SADC by investigating the contextual and conceptual background of TFCAs in the SADC. Chapter 2 investigated the following aspects:

- a definition of biodiversity and its relationship with PAs and TFCAs;
- the need for TFBC in the SADC, by specifically looking at the aspects of colonialism, sovereignty, fragmentation, and harmonisation;
- the nature and scope of TFCAs, by investigating TFCAs as a manifestation of an evolved form of PAs, as well as an investigation into the definitions of TFCAs; and
- the main drivers behind TFCAs in SADC.

After having established the main drivers behind TFBC from the conceptual and contextual background, the thesis argued that the drivers had a mutual symbiotic relationship and that they complement each other.<sup>37</sup> With the drivers identified, the thesis distilled the relevant legal principles of TFBC. The drivers identified for TFBC were sustainable development and biodiversity. The drivers provided the basis upon which the principles could be distilled. The drivers further provided the scope and focus for the distillation process in order to keep the principles relevant for TFBC.

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<sup>35</sup> See the discussion on legal principles and the different interpretations thereof in para 3.1.2 above.

<sup>36</sup> See chapter 3 above.

<sup>37</sup> See para 2.4.2 above.

In chapter 3 the thesis distilled the TFBC principles by focusing specifically on two instruments: the New Delhi Declaration and the UNEP Principles.<sup>38</sup> The New Delhi Declaration specifically provides guiding principles related to the drivers of sustainable development and the UNEP Principles do the same specifically for the governance of shared natural resources, including biodiversity. Although both of these instruments are viewed as soft law, a justification for their use was presented.<sup>39</sup>

Chapter 3 further interpreted certain biodiversity-related instruments in the African context by using the jurisprudence of the African Commission. A specific emphasis was placed on two cases: SERAC and Endorois.<sup>40</sup> By way of analogy: it was shown that TFCAs involve many stakeholders.<sup>41</sup> Accordingly, the principle of public participation (also identified as a TFBC principle) should play an important role in a legal framework for TFBC in TFCAs. Interpreting the principle of public participation, the African Commission in the Endorois case stated that participation must be effective.<sup>42</sup> The Commission provided important guidance as to what “effective participation” would entail. The requirements for participation to be effective, according to the Commission, are an equal bargaining position (facilitated by literacy and an understanding of the project at hand); both the acceptance and dissemination of information (to allow stakeholders to influence decision making); communication in good faith; and communication through culturally appropriate procedures.<sup>43</sup> The importance of these requirements laid down by the Commission (although they cannot be seen as binding) is that they provide specific guidance as to what public participation at AU and SADC level should entail. This brings the principle of public participation closer to home, as it were, by providing a specifically African interpretation to it. When considering public participation as a principle of TFBC, the Endorois case provides guidance specifically tailored for the African context which may be of benefit to TFBC, as the case potentially enriches the content of the principle.<sup>44</sup>

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<sup>38</sup> See para 3 in general above.

<sup>39</sup> See paras 3.1.1 - 3.1.3 above.

<sup>40</sup> See paras 3.1 and 3.2 in general.

<sup>41</sup> See para 2 in general and paras 3.2.5, 4 and 5 above.

<sup>42</sup> Para 281 of the Endorois case. See para 3.2.5 above.

<sup>43</sup> See paras 281-289 of the Endorois case and para 3.2.5 above.

<sup>44</sup> See paras 281-289 of the Endorois case and para 3.2.5 above.

Chapter 4 analysed the AU and SADC legal and policy frameworks directly and indirectly pertaining to biodiversity governance in order to establish to what extent the framework facilitates the legal principles of TFBC in the SADC. It was found that some principles as distilled for TFBC are found in the AU and the SADC legal frameworks.<sup>45</sup> The fact that some of the principles are found in the legal framework is testimony to the potential of the framework to facilitate TFBC in TFCAs. Notwithstanding, it must be emphasised that none of the principles found in the AU and SADC frameworks relate directly to TFBC in TFCAs. This could partly be due to the generic nature of the principles. Where principles of TFBC were found, they were not contained in a single legal or policy document, but were scattered across various legal documents. This haphazard and fragmented provision of the TFBC principles creates legal uncertainty, which in turn may create confusion where decisions for TFBC must be taken. This legal uncertainty may furthermore negatively affect the establishment of TFCA-level governance frameworks as no coherent guidance for TFBC is found in the SADC legal framework. The foregoing challenges further support the case for the development and adoption of a single and coherent instrument containing the legal principles for TFBC in SADC. Moreover the recognition of the RBS that there is no “clear underlying policy framework on biodiversity issues” in the SADC emphasises the need for clarity and guidance in relation to biodiversity governance in a single instrument.<sup>46</sup>

At AU level, the only framework document related to environmental governance is the African Convention, but this Convention is outdated (1968) and without a COP or Secretariat.<sup>47</sup> The African Convention was revised in 2003, but the revised Convention is yet to enter into force.<sup>48</sup> At the SADC level no framework law for biodiversity conservation exists. Furthermore, the only Protocol directly dealing with TFCAs is the Wildlife Protocol.<sup>49</sup> This Protocol primarily focuses on one component of biodiversity, namely wildlife, and does not take a holistic approach towards biodiversity conservation, as one would expect in the TFCA context. As the Protocol

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<sup>45</sup> See para 4.3 above.

<sup>46</sup> SADC RBS 26.

<sup>47</sup> See para 4.1.2 above.

<sup>48</sup> See para 4.1.2 above.

<sup>49</sup> See para 4.2.2 above.

defines TFCAs and provides for the establishment of the WSTCU (to enforce the Protocol and oversee the implementation of TFCAs), the narrow scope of the Protocol is not aligned with the larger and more encompassing endeavour of TFBC in TFCAs. Furthermore, the TFBC principles are found in various other sector-specific protocols, leaving the environmental governance of biodiversity in a fragmented state. This does not foster connectivity and it is counterproductive to the holistic nature of TFBC as well as to the ideal of the harmonisation of law and policy in the SADC.<sup>50</sup> Against this background the RBS and the RBAP (the two most prominent policy documents related to biodiversity) call for the establishment of a biodiversity Protocol.<sup>51</sup> Again, the establishment of a single instrument is put forward as a possible answer to biodiversity governance challenges in the SADC. It should be stated that the adoption of an instrument regulating biodiversity conservation, as called for by the RBS and RBAP, will not necessarily solve the fragmentation challenge. A single instrument may, however, provide a platform from which it may be easier to achieve an integrated and holistic governance approach as opposed to many instruments informing TFBC. A single instrument could counteract some of the negative effects of fragmentation.<sup>52</sup> A single instrument may further aid the process of harmonisation and in so doing also contribute to aligning fragmented national laws and policies relevant to TFBC. Moreover, a single instrument providing guidance for TFBC may centralise the diverse issues to be facilitated in TFBC and therefore it could be the normative foundation of modern and emerging models of PAs, including TFCAs. The adoption of such a single instrument is, however, a recommendation to be considered as a long-term solution. This will be explained in detail below.

As for harmonisation, an important aim of the SADC, the protocols disappoint as no mechanisms or guidelines for harmonisation are found. This critique is tempered by the potential shown specifically by the Watercourses Protocol and the Benguela Current Convention formed by the BCC under the Fisheries Protocol.<sup>53</sup> The Benguela Current Convention is an example of an instrument facilitating integrated governance at the SADC level through the mandate of the Fisheries Protocol.

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<sup>50</sup> See paras 2.2.3 and 4.3 above.

<sup>51</sup> This process is currently underway but no date for completion could be obtained.

<sup>52</sup> See para 2.2.3 above.

<sup>53</sup> See para 4.2.5 above.

Furthermore, the Benguela Current Convention emphasises the relevance of a principle-based approach in a supra-national instrument (as is recommended by this thesis). The Benguela Current Convention uses principles similar to the TFBC principles as guidance for the shared governance of the marine ecosystem including: cooperation, collaboration and sovereign equality; sustainable use and management; the precautionary principle; prevention, avoidance and mitigation of pollution; the polluter pays principle; and the protection of biodiversity in the marine ecosystem.<sup>54</sup> In sum, it was found that the AU and SADC legal frameworks only partly support the principles required to facilitate sustainable TFBC in TFCAs. The facilitation was, in most cases, found to be potential tacit inclusions of the TFBC principles rather than explicit inclusions.<sup>55</sup> The effect of these tacit inclusions is that their reticence might bring about uncertainty in the interpretation and decision making processes.<sup>56</sup> This was especially true in the AU framework.<sup>57</sup>

Although some positive aspects are drawn from the AU framework, the extent to which the principles of TFBC are facilitated is inadequate in the context of the necessity of legal certainty for transfrontier governance.<sup>58</sup> The TFBC principles were found to be incorporated in the AU framework only when using assumptions and inferences. Most of the time the TFBC principles were also found in non-binding documents. Consequently the African legal framework (especially the hard law documents) urgently requires updating to cater for contemporary environmental challenges and for modern environmental initiatives with a view to fostering sustainable development in a transfrontier context as far as it relates to biodiversity.

In general, the SADC framework provides for most of the principles, whether directly or indirectly.<sup>59</sup> Sustainable use is covered throughout the SADC legal framework and is well embedded in the framework analysed. Equity and poverty alleviation is mentioned as one of the main guiding principles in the SADC Treaty.<sup>60</sup> The Wildlife Protocol and Watercourses Protocols fail to effectively provide for measures to

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<sup>54</sup> See para 4.2.5 above.

<sup>55</sup> See paras 4.1.7.8 and 4.2.10.8 above.

<sup>56</sup> See paras 4.1.7.8, 4.2.10.8 and 4.3 above.

<sup>57</sup> See para 4.1.7.8 above.

<sup>58</sup> See para 4.1.7.8 above.

<sup>59</sup> See para 4.2.10.1 above.

<sup>60</sup> See para 4.2.10.2 above.

engage local communities in order to alleviate poverty.<sup>61</sup> In contrast, the Forestry and Fisheries Protocols provide for local communities to benefit from the local biodiversity and in so doing, they potentially create juridical opportunities to alleviate poverty.<sup>62</sup> The CBDR principle is facilitated only tacitly, but it could be argued (through the standpoint of Hestermeyer) that the CBDR principle should apply through the entire SADC legal framework based on its connection with the principle of solidarity.<sup>63</sup>

The precautionary principle is explicitly mentioned only in the Forestry Protocol.<sup>64</sup> The rest of the framework makes either no mention of the principle, or the application thereof is to be deduced from other provisions.<sup>65</sup> The Benguela Convention, which was adopted by the BCC in terms of the Fisheries Protocol, does however, explicitly provide for the precautionary principle as one of the guiding principles of the Convention.<sup>66</sup> This is despite the fact that the Fisheries Protocol does not include the precautionary principle.

The elements of good governance are generally covered in most of the framework, although the phrase “good governance” is referred to only in the policy documents. One matter that stands out is the fact that, where participation is concerned, it is normally not extended beyond the state-state paradigm. In line with modern and emerging governance models, the Forestry and Fisheries Protocols extend participation to include all relevant stakeholders – specifically local communities. One matter the SADC legal framework fails to address in its entirety is accountability. Although certain procedures for dispute resolution exist, most of these depended on the SADC Tribunal, which is not in operation at the moment. Accountability, an important element of good governance, is therefore absent, and without the element of accountability it cannot be said that good governance – as a complete package –

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<sup>61</sup> See para 4.2.10.2 above. The Wildlife Protocol does mention CBNRM but does not provide details as to how communities could/should derive benefits from this. The Watercourses Protocol fails to make any provisions for poverty alleviation (despite the fact that poverty alleviation is a goal in the Protocol).

<sup>62</sup> See para 4.2.10.2 above.

<sup>63</sup> See para 4.2.10.3 above.

<sup>64</sup> See para 4.2.10.4 above.

<sup>65</sup> See para 4.2.10.4 above.

<sup>66</sup> See para 4.2.10.4 above.

is catered for in the SADC in a comprehensive, normative sense; especially considering that accountability is one of the primary aims of good governance.

Cooperation is provided throughout the entire legal framework although it is confined to the scope and application of the specific protocol in question. It is here that the RBS provides valuable input in recognising cooperation as a cross-cutting issue. Moreover, the RBS recognises that successful environmental governance (in this case related to TFBC) depends on cooperation beyond mere sector-based (or protocol-based) cooperation. This cross-cutting cooperation is supposed to be facilitated by a holistic environmental protocol that was due in 2006.<sup>67</sup> This protocol has not yet come about.

State sovereignty is protected in the legal framework and it was argued that sovereignty may be “softened” by the principle of sustainable use.<sup>68</sup> Sovereignty is seen as one of the most important principles in the SADC and as it is intruded on by TFBC, as it were, it should be dealt with carefully in a legal framework, as member states hold sovereignty in high regard.<sup>69</sup> Furthermore, environmental assessments are not explicitly covered in the legal framework. As for integration, although the principle may not be as concrete as sustainable use or precaution, the integration principle is crucially important in achieving sustainable TFBC. As the current SADC legal framework stands, the integration principle is potentially undermined by fragmented approaches towards environmental governance and the lack of an environmental protocol. The inclusion thereof in a legal framework for TFBC should therefore be non-negotiable in order to help facilitate sustainable development in TFBC initiatives.

As against the AU framework, the analysis in this chapter indicates that the TFBC principles are more readily found in the SADC framework. The reason why they are more prevalent in the SADC is unknown, and an investigation of the reasons falls outside the scope of this study. The facilitation of the TFBC principles in the SADC

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<sup>67</sup> SADC *RISDP* 62.

<sup>68</sup> See para 4.2.10.7 above.

<sup>69</sup> See the comments on equal national capacity in para 4.2.10.7 above. Also see para 2.2.2 above.

framework is still subject to considerable critique.<sup>70</sup> This critiques include the fact that the facilitation is spread through many legal and policy documents, making it difficult to govern TFBC in an integrated manner. The fragmented facilitation of the principles through the sector-specific legal documents further hampers the cross-cutting cooperation – as called for in the RISDP – that is needed to facilitate transboundary governance in general.<sup>71</sup> Moreover, as indicated above, where principles are not explicitly included, legal certainty cannot be ensured. In essence, the frameworks of both the AU and the SADC do not provide a single, integrated, and clear mandate for TFBC.

Chapter 5 investigated two specific TFCAs and their governance frameworks in order to establish to what extent the principles are found at grass-roots level and in practice in two TFCAs in Southern Africa. The chapter analysed MoUs, treaties, IDPs and various other relevant documents. Like the AU and SADC legal frameworks, the TFCAs' documents provide for only some of the principles of TFBC.<sup>72</sup> The KAZA framework excelled in its facilitation all of the principles with the exception of CBDR.<sup>73</sup> The provisions related to the principle of equity and poverty alleviation were found to be specifically substantial in nature, as they set out mechanisms for benefit-flow management and benchmarking.<sup>74</sup> On balance, the KAZA framework provides a fairly solid platform for TFBC and can arguably only improve as the MIDP is still under development. The MIDP could provide an even more holistic perspective on the governance of the KAZA and, depending on the content thereof, could foster the integrated governance of biodiversity in the KAZA. As it is currently being drafted, it remains to be seen to what extent holistic transfrontier governance and the principles of TFBC will be incorporated into the MDIP.

The principles of TFBC are found in the framework of the GLTP, but a lack of substantive content (such as the substantive content of good governance, for

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<sup>70</sup> See para 4.2.10.8 above.

<sup>71</sup> SADC *RISDP* 62. Also see paras 4.2.7 and 4.2.10.6 above.

<sup>72</sup> See paras 5.1.6 and 5.2.5 above.

<sup>73</sup> See para 5.1.6 above.

<sup>74</sup> See the discussion on benefit flow and benchmarking in paras 5.1.4 and 5.1.6.2 above.

example)<sup>75</sup> in relation to these principles potentially weakens the possibility of their application in decision making and other governance aspects.<sup>76</sup> When measuring the GLTP framework against that of the KAZA, this lack of substantive content becomes clear. In this regard, KAZA already has several substantive and implementable documents, whereas the GLTP has only the Treaty, the MoU, and the draft IDP.<sup>77</sup> Although the draft IDP is currently being revised, it is noted that the lack of working documents is worrying, since the GLTP has been in operation since 2002. As was indicated above, however, the GLTP is highly complex. This influences the reaching of consensus on policy-making.<sup>78</sup> It was indicated that similarities between the draft IDP and the KAZA SAP exist (conservation, restoration, and benefit flow management, for example), and it was argued that this bodes well for the GLTP.<sup>79</sup> The similarities may also point to some form of harmonisation of governance of TFCAs in the SADC region, whether it was with deliberate intent or not. TFBC in the KAZA is not clearly delimited by the principles and therefore not clearly directed towards the drivers of TFBC, namely, sustainable development and biodiversity. The extent of facilitation is not sufficient, especially compared to the KAZA TFCA, and it may therefore be difficult to fully give effect to TFBC through the current governance framework of the GLTP.

#### **6.4 Recommendations**

Various findings were made in this thesis as regards the state of TFBC in TFCAs. These remarks were specifically based on the nature and scope of biodiversity and sustainable development, the nature and scope of TFCAs, the need for TFBC, and an analysis of the relevant frameworks (the AU, the SADC and two selected TFCAs) against the distilled principles. Nine legal principles were distilled that may facilitate TFBC in the SADC context and it was found that the extent to which the distilled legal principles are currently facilitated in the relevant legal frameworks is not adequate. This finding is further supported by the findings and recommendations of the RISDP, the RBS, and the RBAP. All of the foregoing documents recognise the

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<sup>75</sup> See para 5.2.5.5 above.

<sup>76</sup> See para 5.2.5 above.

<sup>77</sup> The MoU is between only South Africa and Mozambique, and Zimbabwe is not party thereto. See para 5.2.4 above.

<sup>78</sup> See para 5.2 in general.

<sup>79</sup> See para 5.2.3 above.

weakness of the SADC legal framework related to biodiversity governance.<sup>80</sup> As this thesis specifically focus on TFBC in the SADC, the recommendations it now sets out apply to the SADC only and not at the higher level of the AU.

To keep the recommendations as realistic and reasonable as possible, they will be packaged as short-, medium-, and long-term recommendations. The main reasoning behind this is that this thesis proposes legislative reforms (in the form of amendment and/or creation of new legislation). These reforms may have different timeframes depending on where and what is recommended and the recommendations are accordingly sequential and range from those that are easier to achieve in the short term, to those that are more difficult to achieve in the long term. Although this thesis will ultimately recommend the ideal solution (a single protocol incorporating all of the TFBC principles as a long-term solution), it would be short-sighted not to acknowledge that short- and medium-term solutions may also benefit TFBC in SADC, and that they may be more easily implementable than the ideal long-term scenario.

#### *6.4.1 Short term*

The documents closest to the governance structures of TFCAs are the JMPs, IDPs, and SAPs.<sup>81</sup> These documents are normally drafted, amended and executed by the managing authorities of the relevant TFCAs.<sup>82</sup> Although the foregoing authorities are created by political and then legislative processes (either by their establishment through national legislation or through the MoU or Treaties), the grass-roots management documents are relatively severed from any high-level political or state influence. It is important to emphasise the use of the words “relatively severed” in the previous sentence, as the relevant ministers of the environment (or the like) will usually approve the documents.<sup>83</sup> By having the power to approve the documents states still have a say in the validity of the documents. This is aside from the fact

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<sup>80</sup> See paras 4.2.7, 4.2.8, and 4.2.9 above.

<sup>81</sup> It seems that different TFCAs prefer to give these documents different titles. See paras 5.1 and 5.2 above. Notwithstanding, these document all aim to guide the day-to-day governance activities of the TFCAs.

<sup>82</sup> As an example, see the preambular provisions of the KAZA SAP and GLTP IDP. Also, these normally include the relevant national parks authorities.

<sup>83</sup> As an example see the GLTP IDP ii and article 14 of the KAZA Treaty.

that they may not be directly involved with the drafting thereof. In theory, taking away the political actors from the drafting process should make the drafting of these documents faster and consensus as to the content should be easier to obtain. It would therefore make sense to recommend, as a short-term solution, that the principles of TFBC be incorporated into the grass-roots governance documents such as JMPs, IDPs, and SAPs.

The following aspects may have to be considered when these principles are included in grass-roots governance documents:

- The governance documents discussed in this thesis (those of the KAZA and GLTP) do not contain sections allowing or prescribing how the documents can be amended, like the relevant treaties and MoUs. The documents, however, do mention that they can be periodically revised.<sup>84</sup> It could be through such periodical revision that the TFBC principles could be integrated into the governance framework;
- Some of the TFBC principles, like CBDR and sovereignty, may be foreign to non-state actors, and the meaning and use thereof for TFBC could be lost should the principles not be contained in governance frameworks situated higher up the regulatory hierarchy. TFCA practitioners can, for example, do nothing about state sovereignty and the way in which a state chooses to view and interpret it. Custodial sovereignty will require explicit buy-in from governments to have any grass-roots effect. States will therefore be responsible for adopting a concept such as custodial sovereignty (in a MoU, treaty, or protocol) and provide clarity for decision-makers as to the effect of the concept on their daily governance activities. The same argument applies to CBDR, as it is a principle developed and understood specifically in the context of developed and less-developed states. Should this principle be adopted in a MoU, treaty, or protocol, the scope of its application to and between the specific states will need to be clarified. This clarification could occur in documents like the IDPs, JMPs, and SAPs, as these documents normally contain considerable detail and can clearly set out the required

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<sup>84</sup> See, for example, the GLTP *IDP* 7.

assistance among the parties.<sup>85</sup> Should South Africa, for example, be required to assist Mozambique in certain aspects of the management of the GLTP in accordance with the CBDR principle, the relevant joint governance agreement should regulate the detail of the said assistance. An example would be where South Africa would be required to offer veterinary assistance or expertise in a case where Mozambique may not have the required expertise, or vice versa;

- The principle of good governance will also require recognition in the higher governance frameworks in order to more fully contribute to TFBC. The following aspects of good governance, i.e., public participation, adherence to the rule of law, information exchange, and access to justice, all need to be firmly imbedded in a legal framework of some sort to be enforceable. Accordingly, including the elements of good governance in a TFCA joint governance agreement would be fruitless without the possibility of legal recourse to enforce these elements.

Although amending or revising the joint management governance instruments of TFCAs could provide a short-term solution, the solution remains *ad hoc* and does not address TFBC in the whole SADC region. To address TFBC in the SADC as a whole would be the ideal solution, and following the medium-term approach below could go a step further in realising this ideal. It should be stressed that the recommendations in this thesis are not put forward in an either/or fashion but that reforms could begin with the short term, then move to the medium term and finally end in the long-term recommendation. By following such an approach (starting with the short term) it could make the long-term recommendation easier to achieve.

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<sup>85</sup> The content of these documents is much more detailed and contains specific provisions. This is in contrast to the vague and generic provisions of TFCA MoUs and treaties. MoUs and treaties normally contain specific provisions related to institutional mechanisms and the responsibilities of these mechanisms. The finer detail is left to be developed within JMPs, IDPs and SAPs within the content and scope of the MoUs and treaties.

#### 6.4.2 Medium term

Two recommendations are made under the medium-term category. These recommendations are classified as medium-term as the processes involved may take longer than those recommended under the short-term category. The first recommendation takes the form of amending the SADC legal framework and the second recommendation takes the form of amending the TFCA MoUs and/or treaties. Amending in terms of both recommendations entails the incorporation of the TFBC principles into the relevant documents. The recommendations are as follows:

- First, it was shown that the SADC framework does not contain all of the distilled TFBC principles. It therefore makes sense to amend the protocols where they were found lacking and to include the TFBC principles;
  - This should also be done where the principles of TFBC were found to be implicitly included. In other words, explicit inclusion of the TFBC principles in all of the relevant protocols is recommended in order to ensure legal certainty;
  - One of the principles does, however, provide a challenge in the SADC legal framework – good governance. Without an effective SADC Tribunal that is capable of hearing individual complaints and providing some guarantees for good governance, governance of TFBC will have little legal purchase or legitimacy. It is therefore recommended that the SADC Tribunal be reinstated. If the Tribunal is not reinstated one could, after meeting all of the requirements for *locus standi*, approach the African Court, should the matter at hand be deemed a human rights issue.<sup>86</sup> It was argued in this thesis that most of the TFBC principles contain elements relevant to human rights, a fact which makes an application to the African Court theoretically possible;<sup>87</sup>
  - Should the TFBC principles be explicitly incorporated in the SADC protocols, it will provide a basis from which measures, actions and

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<sup>86</sup> See para 3.3.5 above.

<sup>87</sup> See para 3.3.5 above. The only concern in an application to the African Court would be whether or not the state/s in question have ratified the *Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights*, 1998. To date only 27 of the 54 African countries have ratified the Protocol.

decisions can be aligned, as the protocols will prescribe the same principled approach. This is, however, still not the ideal situation, because although the principles will be the same, the scope and aims of each protocol will still differ. This may potentially perpetuate fragmentation, should actual governance practices not be aligned by the people who govern. The Shared Watercourses Protocol will focus on shared watercourses and the Wildlife Protocol will focus on wildlife, for example. Without an integrative mechanism to align shared and holistic governance among the protocols, the protocols are likely to operate in isolation – with or without the TFBC principles. Accordingly, an institutional mechanism in the SADC will have to bear the responsibility of aligning and integrating biodiversity governance efforts. The current Food, Agriculture and Natural Resources Directorate (FANR) could be tasked with this;

- Second, it might be possible to incorporate the TFBC principles in the MoUs and/or Treaties. It would make most sense to amend the treaties to incorporate the TFBC principles where the treaties are already finalised and in force. The reason for this is that the MoUs normally serve as a forerunner to the adoption of the treaties, and where treaties exist the original MoUs become dormant.<sup>88</sup> It is extremely important, however, that where new TFCAs are planned or designed the TFBC principles are included in the MoUs. When the principles are included in the MoUs, they are likely to be incorporated in the establishing treaties, and will therefore inevitably apply to and inform the biodiversity governance framework.

#### 6.4.3 Long term

The ultimate and ideal scenario would be the adoption of a single instrument at SADC level regulating TFBC in its entirety. This is described as a long-term goal as the drafting and adoption of any supra-national law is a time-consuming, tedious and politically-fraught process requiring the consensus of all state parties involved. The notion of recommending the adoption of a protocol regulating TFBC in the SADC

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<sup>88</sup> This is apart from the fact that they can be used as interpretative material.

(based on the TFBC principles) originates from the critique of the SADC legal framework. This critique was mainly centred on the fragmented way in which the principles were found throughout the legal framework.<sup>89</sup> Since TFBC aims to integrate a diverse range of aspects (environmental, social, and economic),<sup>90</sup> a holistic approach to TFBC requires the integration of all of the aspects to fully effect sustainable TFBC. A single legal instrument containing all of the legal principles should create a platform for the integrated governance of TFBC. Having a single instrument such as this may simplify integrated governance as opposed to having to refer to a number of instruments containing the principles in a haphazard fashion. A single instrument geared towards TFBC may also provide legal certainty for TFCA practitioners and for the development of individual governance frameworks for existing and new TFCAs. It is argued that this single instrument for TFBC should take the form of a SADC protocol, because the SADC as a regional governance body is familiar with protocols and because the SADC contains various TFCAs that may benefit from such an instrument.

- In recommending the drafting of a protocol containing principles, room is left for TFCAs to interpret and develop their governance frameworks according to their own needs and circumstances. Some of the TFBC principles, like the precautionary approach, good governance, and environmental assessments could be argued to have the form and nature of rules, as their content may be deemed to be more precise and certain.<sup>91</sup> Although the foregoing characteristics stand opposed to the open-ended and flexible description of legal principles,<sup>92</sup> they are still deemed to be legal principles.<sup>93</sup> This attribute of legal principles – to be interpreted either as precise or open ended – makes them ideal for creating a concrete and flexible guiding environment for the diverse issues of TFBC;
- By adopting a SADC protocol for TFBC, TFCAs could over time harmonise their governance approaches towards TFBC, which in turn could lead not only

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<sup>89</sup> See para 6.3 above.

<sup>90</sup> See paras 2.2, 2.3, and 2.4 above.

<sup>91</sup> See para 3.1.2 above.

<sup>92</sup> For a full discussion on legal principles and the two interpretations that can be coupled to principles see para 3.1.2 above.

<sup>93</sup> See para 3.1.2 above.

to aligned governance efforts in areas like TFCAs, but in the whole of the SADC;

- The analysis and proposals in this thesis are centred on the nine principles distilled for TFBC. It is therefore argued that the principles (both precise or rule-like and open-ended)<sup>94</sup> should form the core content of the recommended protocol, and that they should at least be included in the introductory part of the protocol and set out as guiding measures for the interpretation and application of the protocol as well as for any state actions leading from the obligations of the protocol. A brief exposition of each principle is needed, however, in order to provide contextual clarity as to what could be required of each principle in the TFBC context. This exposition is provided against the backdrop of the discussion in chapter 3, which should also be taken into consideration although, to avoid repetition, it will not be explicitly discussed here.
  - Sustainable use, as defined in this thesis, should be encapsulated and provided for to incorporate present and future generations. It should furthermore be interpreted to allow local communities to use and derive benefits from biodiversity in order to alleviate poverty – which in turn should theoretically enhance the state of biodiversity in SADC. It is further recommended that the principle of sustainable use be supplemented with a rehabilitation duty as is done in the KAZA Treaty.<sup>95</sup> The duty to rehabilitate could bolster the principle of sustainable use as it could positively influence damaged or polluted natural resources. It may further serve as a measure preventing parties from causing harm if they know that the consequence could entail expensive rehabilitative measures;
  - Equity and poverty alleviation should form an integral part of the recommended protocol as local communities have generally been neglected in conservation efforts.<sup>96</sup> As local communities have a direct impact on biodiversity and poverty has been shown to negatively affect biodiversity, local communities and poverty alleviation should enjoy

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<sup>94</sup> See paras 3.1.2 and 6.2.4 above.

<sup>95</sup> Article 5(1)(e) of the KAZA Treaty and para 5.1.6.1 above.

<sup>96</sup> See para 2 above.

formal and strong recognition. The principle, at its core, deals with inter- and intragenerational equity. As biodiversity is a common concern of mankind, the benefits thereof in the TFBC setting should also be distributed equally. It is recommended that the benefit flow and benchmarking system developed for the KAZA, be attached to the principle in order to provide a calculable measure for benefit sharing and poverty alleviation. Equity and poverty alleviation is furthermore argued to be closely linked to good governance, as local communities (or any other stakeholders) should be able to participate, have access to justice, and have their human rights protected in order to give full effect to the principle;

- The CBDR principle, largely found to be absent from the legal frameworks (apart from implicit and theoretical recognition), is argued to be an essential inclusion in the SADC context. This is due to the fact that, in the SADC, disparities related to economic strength, infrastructure, and capacity are commonplace. The application of the CBDR principle could therefore help to build regional capacity and in so doing strengthen sustainable TFBC, since biodiversity is not confined to political borders. The CBDR principle will need more concrete and guiding rules for its implementation between member states in the TFCA-specific governance documents, as mentioned above;<sup>97</sup>
- The precautionary principle should be included, as described in chapter 3 above. One addition to the precautionary principle is recommended, however, and it is taken from an innovative precautionary approach as encapsulated in the KAZA Treaty. As formulated in the Treaty, the precautionary principle is based upon interdisciplinary research (science and humanities) and traditional knowledge.<sup>98</sup> By including traditional knowledge, the principle includes the potential participation of local communities in the decision-making process and therefore may also facilitate public participation;
- The principle of good governance must include various aspects. As described above, these include: democratic institutions that are

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<sup>97</sup> See para 6.4.1 above.

<sup>98</sup> Article 5(1)(e) of the KAZA Treaty.

responsive to the needs of the people; adherence to the rule of law; participation, transparency and accountability; appropriate devolution of authority; anti-corruption and effective compliance measures; appropriate conflict and dispute resolution as well as access to the latter; accountability; transparency; and human rights protection.<sup>99</sup> As for the element of participation, it is further recommended that participation should be described as effective participation in the light of the Endorois case.<sup>100</sup> An important aspect to be addressed in a TFBC protocol is also accountability. Without accountability as a measure to enforce implementation and the protection of rights, it may be difficult to give effect to good governance and TFBC. Accountability may be included in a mechanism for a dispute resolution body that can take decisions binding on all parties involved. The fact that local communities and other stakeholders are, for the most part, left out of mechanisms facilitating dispute resolution in the frameworks discussed was the subject of much critique.<sup>101</sup> It is therefore recommended that, through the principle of good governance, a mechanism be established by a protocol for TFBC to resolve disputes (should the SADC Tribunal not be reinstated) among all interested and affected parties. This task may also be delegated to the FANR directorate. The African Court could also be used as last resort as a mechanism for dispute resolution where human rights infringements occur;<sup>102</sup>

- Cooperation is to be included based on “equal footing.”<sup>103</sup> Equal footing would imply, as interpreted in this thesis, an application of the CBDR principle to cooperation.<sup>104</sup> Stronger states may therefore be required to assist and cooperate with weaker states to reach the aims of a TFBC protocol. It is again noted that cross-cutting cooperation is of critical importance and cooperation should be treated as such. In other words, cooperation should not be isolated towards specific aspects or issues in the protocol but it should be malleable and be able

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<sup>99</sup> See para 3.2.6 above.

<sup>100</sup> See para 282 of the Endorois case and paras 3.2.5 and 3.2.6 above.

<sup>101</sup> See paras 5.2.5.5, 5.1.6.5, 4.2.10.5, and 4.1.7.5 above.

<sup>102</sup> See the comments on the African Court in para 6.4.1 above.

<sup>103</sup> See para 3.3.1 above.

<sup>104</sup> See para 3.3.1 above.

to extend across the diverse range of issues catered for in TFBC. Cooperation should thus be one of the pillars of the protocol extending through and to all of its provisions. This could be achieved by a coordinating party (similar to that of the GLTP) who will be responsible for overseeing cooperation and integration between all of the relevant sectors;<sup>105</sup>

- Sovereignty may be one of the most important principles in a protocol for TFBC as the primary concern of such a protocol will be the governance of shared resources. In essence, TFBC will be intrusive on permanent sovereignty - a principle held in high regard in the SADC.<sup>106</sup> A strict approach to sovereignty, however, will not be beneficial to TFBC and will re-erect the political fences in TFCAs. When formulating sovereignty in a TFBC protocol, then, it is necessary to recognize the fact that biodiversity traverses borders and that states are obliged to adhere to the principle of sustainable use and furthermore to the no-harm principle. The best scenario would be to formulate the principle in such a way as to include the concept of custodial sovereignty. It is recommended that joint sovereignty is given to the states involved in terms of which they will become joint custodians. This joint sovereignty will have to be balanced with the recognition that states still remain the sovereign owners of their respective jurisdictions so as not to deprive them of their sovereign territory. The net effect will thus be that a restriction will be placed on their sovereignty within a TFCA. The provision on sovereignty will most likely be a deal breaker for many states. It should be left open for interpretation, and it must be malleable should such a protocol ever be considered;
- Environmental assessments should be included and a mechanism must be provided to conduct the assessments in a single, integrated manner. The principle should provide for a mechanism where an assessment panel can be created in each TFCA (or other area) consisting of all relevant stakeholders (state parties and other

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<sup>105</sup> Article 12(1)-(4) of the GLTP Treaty. Also see the discussion in para 5.2.2 above.

<sup>106</sup> See para 2.2.2 above.

interested and affected parties). This panel should then adopt a legal system (the law in that system relevant to assessments) in terms of which the environmental assessment can be done. The choice of legal system can be done *ad hoc* according to the location and needs of the proposed project/development. The primary idea behind this recommendation is that one panel can make a decision based on one set of rules. This recommendation is to prevent the challenges described with assessments in the MDTP above;<sup>107</sup>

- The principle of integration is similar to cooperation in that it requires a cross-cutting approach to TFBC. It should be incorporated in a protocol for TFBC to integrate all of the legal principles discussed in this section. In order to facilitate this integration, reference is again made to the coordinating party of the GLTP. The same mechanism can be used to give effect to the principle of integration in TFBC;
- The scope of application of the recommended protocol would first and foremost be confined to TFCAs. As biodiversity is not limited to political boundaries, however, it is also not confined to TFCAs. This is one of the reasons this thesis employed the term TFBC and did not merely refer to the governance of TFCAs. In order for biodiversity to be conserved sustainably, it does not make sense to restrict conservation efforts to TFCAs, and the SADC region is in need of a holistic approach covering the whole area. Accordingly, should such a protocol be adopted, it is recommended to serve as an instrument for application across the SADC region and not only in areas where TFCAs are found; and
- The question of who should draft the protocol is important in the recommendation, as it was stated that the drafting of a protocol can *inter alia* be time consuming. This is evidenced by the biodiversity protocol's not yet having been finalised.<sup>108</sup> It is recommended that the SADC put the project out to tender (as it did with the TFCA Guidelines) for private companies/individuals. It may be advantageous in terms of speed as these individuals/companies to work against a set deadline (as per the tender) and they will further not be hampered with the normal governmental bureaucracy.

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<sup>107</sup> See para 2.2.3 above.

<sup>108</sup> See para 4.3 above.

## 6.5 Conclusion

In conclusion, this thesis emphasises that the adoption of a protocol as recommended should by no means be interpreted as a “cookbook approach” proposing to solve and govern all challenges related to TFBC.<sup>109</sup> Like Paterson’s approach to TFBC, this study has taken a step back and reflected critically on which ingredients are needed in the recipe to achieve sustainable TFBC.<sup>110</sup> In so doing it has determined *what* needed to be governed in TFCAs.<sup>111</sup> Accordingly, the principles of TFBC were distilled, and it is claimed that these principles are generous enough to cater for the diverse needs of TFCAs in SADC. Although the principles may be seen as ingredients in a TFBC recipe, they are geared towards two diverse and all-encompassing drivers: sustainable development and biodiversity. Accordingly, the principles could provide guidance for TFBC, but this guidance can and should be interpreted according to the particular needs of and circumstances prevailing in each TFCA. When seen as ingredients in a recipe for TFBC, the principles may constitute crucial factors prompting sustainable TFBC in TFCAs. Essentially, these principles could contribute to:<sup>112</sup>

ensur[e] that the recipes are “effective”, that they produce a balanced “connection” between the vast array of available flavours, and ultimately produce an “equitable” array of dishes which are palatable to the diverse eventual consumers.

In researching the topic of TFBC, this study found that the disciplines of law and science intersected at various junctures. It will therefore become crucially important for future research in this area to be of a transdisciplinary nature. Collaboration between legal and scientific scholars will become more important in order for research to be relevant at a grass-roots level.

As a follow-up to this study, further research at post-doctoral level will be undertaken to better understand the linkages between law and science in the quest to pragmatically contribute to biodiversity conservation in the SADC region and in Africa more generally.

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<sup>109</sup> Lausche *Guidelines for Applying Protected Areas Legislation* 267.

<sup>110</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 202.

<sup>111</sup> See para 2 above.

<sup>112</sup> Paterson “Protected Areas Governance in a Southern African Transfrontier Context” 203.

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