

**An analysis of the environmental law framework
regulating cross-border biodiversity conservation in
the Maloti-Drakensberg Transfrontier Park**

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by

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ABSTRACT

Cross-border biodiversity conservation is a recent development in Southern Africa. Considering the rapidly growing numbers in transfrontier parks, a question of sustainable governance arise. Currently, all transfrontier parks within the Southern African region rely mostly on Memoranda of Understanding (MoU) or bi-lateral agreements between the respective parities to facilitate issues relating to the governance thereof. Specific legislation to regulate cross-border biodiversity conservation does not seem to exist and the existing MoU's does not sufficiently provide for all aspects necessary. This may lead to ineffective governance, legal uncertainty and unsustainable biodiversity conservation within these parks.

This dissertation focuses on and explores a legal framework for cross-border biodiversity conservation in the Maloti-Drakensberg Transfrontier Park (MDTP). The MDTP straddles the borders between South Africa and Lesotho. The dissertation focuses on the international, regional, sub-regional and the respective national legal frameworks in order to ascertain which legal norms and rules exist to regulate cross-border biodiversity conservation.

This dissertation examines the relevant legal norms and rules for cross-border biodiversity conservation and concludes with some recommendations as to the status of the existing legal framework and points out certain deficiencies and *lacunae* that may cause a lack in legal certainty regarding cross-border biodiversity conservation in the MDTP.

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Afrikaans Summary

Hierdie navorsing stel ondersoek in na die bestaande regsraamwerk in Suid-Afrika en Lesotho rakende die oorgrensbewaring van biodiversiteit. Die navorsing fokus spesifiek op die Maloti-Drakensberg Oorgrenspark, geleë tussen Suid-Afrika en Lesotho. Die raamwerk wat ondersoek word, word saamgestel uit internasionale, regionale, sub-regionale asook nasionale wetgewing. Aspekte wat aangeraak word sluit onder andere in: kolonialisme, staatsoewereiniteit, fragmentasie en 'n vergelyking tussen Suid-Afrika en Lesotho se wetgewing. Die navorsing kom tot die gevolgtrekking dat die bestaande regsraamwerk gefragmenteer, onduidelik en dupliserend van aard is. Dit gee ook aanleiding tot 'n gebrek aan regsekerheid en *lacunae* in die bestaande raamwerk, wat die volhoubaarheid en effektiwiteit van die bestuur van die Oorgrenspark negatief beïnvloed. Die skripsie sluit af met opmerkings en voorstelle wat oorweeg sou kon word in enige proses om die huidige raamwerk meer effektief en volhoubaar te maak.

List of abbreviations

AEC	African Economic Community
AG	Africa Geographic
AHRLJ	African Human Rights Law Journal
AMU	Arab Maghreb Union
Asl	Above sea level
AU	African Union
CBD	Convention on Biological Diversity
CILSA	Comparative and International Law Journal of Southern Africa
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COMESA	Common Market for East and Southern Africa
CONSAS	Constellation of Southern African States
COP	Conference of Parties
EA	Environment Act (Lesotho)
ECB	Environment Conservation Bill (Eastern Cape)
ECCAS	Economic Community of Central African States
ECOWAS	Economic Community of West African States
EF	Ecological Footprint
FSECB	Free State Environment Conservation Bill
FSNCO	Free State Nature Conservation Ordinance
IA	Impact Assessment
ICJ	International Court of Justice
IUCN ROSA	International Union for the Conservation of nature and Natural Resources Regional Office of Southern Africa
JMAS	Journal of Modern African Studies
KZN	Kwazulu Natal
LPCC	Lesotho Project Coordination Committee
LPI	Living Planet Index
MDTP	Maloti Drakensberg Transfrontier Project

MqJICEL	Macquarie Journal of International and Comparative Environmental Law
NCD	Nature Conservation Division
NCO	Nature Conservation Ordinance (Kwazulu Natal)
NHB	National Heritage Bill (Lesotho)
NEMA	National Environmental Management Act 107 of 1998
NEMBA	National Environmental Management: Biodiversity Act 10 of 2004
NEMPA	National Environmental Management: Protected Areas Act 57 of 2003
NFA	National Forests Act 84 van 1998
NHRA	National Heritage Resources Act 25 of 1999
NWA	National Water Act 36 of 1998
NYU ELJ	New York University Environmental Law Journal
OAU	Organisation for African Unity
PER	Potchefstroom Elektroniese Regstydskrif
PBA	Protected Areas Bill (Eastern Cape)
PLAAS	Programme for Land and Agrarian Studies
PPBA	Provincial Parks Board Act 12 of 2003 (Eastern Cape)
PPC	Protection and Preservation Commission
RECs	Regional Economic Communities
QUTLJJ	Queensland University of Technology Law and Justice Journal
SA	South Africa
SADC	Southern African Development Community
SADCC	Southern African Development Coordination Conference
SAHRA	South African Heritage Resource Agency
SAJELP	South African Journal for Environmental Law and Policy

SANPAD	South Africa and Netherlands research Project on Alternatives in Development
SAPCC	South African Project Coordination Committee
SAPL	South African Public Law
Stell LR	Stellenbosch Law Review
THRHR	Tydskrif vir die Hedendaagse Romeins Hollandse Reg
UDEAC	Customs and Economic Union of Central Africa
UEMOA	Economic and Monetary Union of West Africa
UNCCD	United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particular in Africa
UNEP	United Nations Environmental Programme
WHCA	World Heritage Convention Act 49 of 1999
WHC	World Heritage Convention
WSSD	World Summit on Sustainable Development

1 Introduction

The *Charter of the United Nations*, adopted in 1945, urges states to co-operate so as to promote peace and mutual respect across their respective borders.¹ This need for collaboration is further enshrined in some of the basic principles of international law. These principles include, *inter alia*, sovereignty, state responsibility and good neighbourliness.² In Southern Africa, the *Southern African Development Community (SADC) Treaty*, adopted in 1992,³ sets the basis for co-operation between member states.⁴ The SADC Treaty recognises the above international law principles which include: sovereign equality of member states; solidarity, peace and security; human rights, democracy and rule of law; equity, balance and mutual benefit; and peaceful settlement of disputes.⁵

Transboundary environmental conservation as a mechanism to facilitate co-operation and relations between states is becoming increasingly important.⁶ In South Africa (SA) there are already five established transfrontier parks. These include: the Richtersveld Transfrontier Park (SA and Namibia), the Kgalagadi Transfrontier Park (SA and Botswana), the Limpopo/Shashe Transfrontier Park (SA, Botswana and Zimbabwe), the Great Limpopo Transfrontier Park (SA, Mozambique and Zimbabwe) and the Maloti-Drakensberg Transfrontier Conservation Area (SA and Lesotho).

1 IUCN ROSA *Legal Framework* 12.

2 Dugard *International Law* 391-398 see also Glazewski *Environmental Law* 12-20 and IUCN ROSA *Legal Framework* 12. For a discussion of these principles see Nanda and Pring *International Environmental law* 17-20.

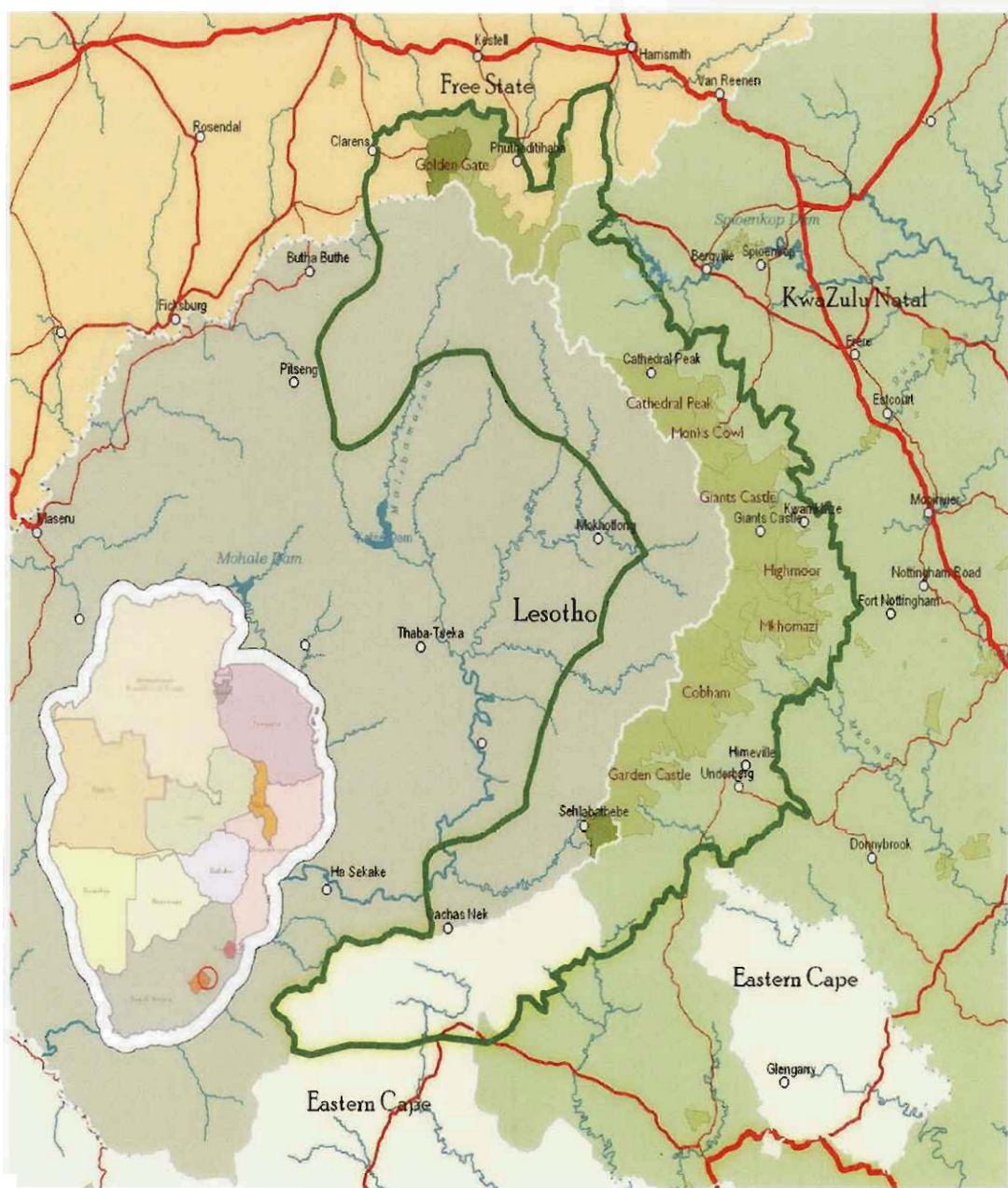
3 SADC was formed in Lusaka, Zambia on 1 April 1980, initially as a Coordination Conference, known as the Southern African Development Coordination Conference (SADCC). The primary goal for its establishment was to stop South Africa from forming the Constellation of Southern African States (CONSAS) and to liberate Southern African states from economic dependence of the former apartheid government of South Africa.

4 Currently, the Member states are Angola, Botswana, the Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The SADC headquarters are in Gaborone, Botswana. See further www.sadc.int 10 July.

5 Chapter 3, article 4 of the Declaration and Treaty of SADC. See also IUCN ROSA *Legal Framework* 12.

6 Tanner *et al* 2004 *SAJELP* 170. See also Van Amerom and Büscher 2005 *JMAS* 166-167.

The focus of this dissertation is on the Maloti-Drakensberg Transfrontier Area (MDTP).⁷



A graphic illustration of the MDTP⁸

7 The reason for the enquiry being limited to the MDTP is due to the specific research scope of the South Africa and Netherlands Research Project on Alternatives in Development (SANPAD Project): Improving transboundary environmental governance in South Africa, Lesotho, Swaziland and Mozambique: A Legal Analysis. This dissertation is one of the outputs of the SANPAD project. Length restrictions for a mini dissertation in an LLM degree by course-work also contribute in limiting the study's scope.

8 See www.peaceparks.org 2 March.

On 11 June 2001 a MoU was signed between South Africa and Lesotho initiating the MDTP.⁹ The opportunity for cross-border conservation became a reality between South Africa and Lesotho for the first time, across 13 000 km². On 22 August 2003 the MDTP was formally launched in Mokhotlong, Lesotho, by both of the Ministers of the Environment of Lesotho and South Africa, marking the beginning of a five year implementation plan funded and implemented by the World Bank.¹⁰

The MDTP does not consist entirely of provincial and national nature reserves, but also encompasses other land-uses such as towns.¹¹ For this reason, projects like the MDTP are often referred to as trans-frontier conservation areas (TFCA).¹² Due to the different types of land-use, the MDTP forms a complex and intertwined system of which biodiversity conservation forms only a small ingredient. The focus of this dissertation, however, is¹³ confined to cross-border biodiversity conservation and the legal framework.¹⁴

One of the incentives behind the establishment of transfrontier parks is sustainable resource management.¹⁵ Central to the accomplishment of sustainable resource management is good governance.¹⁶ Good governance, in turn, requires two aspects to be successful. Firstly, integrated and structured processes of decision-making, and secondly,

9 See www.peaceparks.org 28 February.

10 See www.peaceparks.org 28 February.

11 See graphical illustration above.

12 Hanks 'Transfrontier Conservation Areas' in Goodale *et al Transboundary Protected Areas* 128-129.

13 See paragraph 1 below.

14 'Legal framework' is a term used to describe all the applicable legal instruments and mechanisms that are surveyed throughout this paper.

15 Hamilton *et al Transborder Protected Area Cooperation* 3.

16 According to Borrini-Feyerabend *et al* 7, good governance depends on the legitimacy of the political system and on the respect of local people for its institutions. Capacity of institutions to respond to problems also plays a role. Accordingly, the authors define governance as 'the complex of ways by which individuals and institutions, public and private, manage their common concerns'. See also Ogendo 'Governance and Sustainable Development' in Ginther *et al Good Governance* 105-110 and Bray 2005 *THRHR* 211-212 for and elaboration on the concept of governance.

implementation of decisions taken.¹⁷ These processes and instruments for implementation are provided by a legal framework consisting of international, regional, sub-regional and national law.¹⁸ In South Africa, no dedicated national legislation governing transfrontier parks exists, leaving the governance of transfrontier parks in the hands of a fragmented legal regime.¹⁹ This may lead to lack of legal certainty, *lacunae*, and lack of availability of a regulatory framework and mechanisms to facilitate sustainable transfrontier environmental governance as well as sustainable resource management. Governance of these parks rests largely on their establishing agreements.²⁰ In addition to these agreements, a variety of conventions and treaties of international, regional and sub-regional nature may be applicable.²¹

In Lesotho, the current legal regime regulating protected areas is also fragmented²² and there is a lack of legal certainty concerning protected areas.²³ To address this concern the draft Nature Conservation Bill was adopted in 2005.²⁴ This Bill will repeal all the existing fragmented legislation and also proposes to implement a holistic effort for natural resource governance.²⁵ It is noteworthy that the Bill was developed specifically in light of the Maloti-Drakensberg project. Considering that transborder cooperation can lead to many benefits, as will be discussed below,²⁶ it is important to note that transborder conservation and cooperation does not merely imply unilateral action, but true bilateral cooperative efforts.²⁷ For effective cooperation, like-mindedness in the

17 IUCN ROSA *Legal Framework* 17. This paper does not pose to define good governance or to examine the many intricacies thereof.

18 Fourie and Fakir *Development Effectiveness* 5.

19 See paragraphs 6.1 and 6.2 below.

20 See paragraph 7 below.

21 See paragraphs 4 and 5 below.

22 Nkiwane 'Environmental law in Lesotho' UNEP *Teaching Environmental law in African Universities* Volume 1 UNEP Publication 371.

23 Büscher 2005 *PLAAS Policy Brief* 3. For a general discussion on the current status on environmental legislation in Lesotho see Nkiwane 'Environmental law in Lesotho' in *Teaching Environmental law in African Universities* Volume 1 UNEP Publication 370.

24 Büscher 2005 *PLAAS Policy Brief* 3.

25 Büscher 2005 *PLAAS Policy Brief* 3.

26 See paragraph 2 below.

27 Hamilton *et al* *Transborder Protected Area Cooperation* 2.

values and goals that drives conservation efforts is important.²⁸ These values and goals are reflected in policy-making and enforcement of laws.²⁹ Accordingly, for effective cooperation, policies, legislation and implementation strategies need to be aligned.

The research question posed in this dissertation is as follows: what are the relevant international, regional, sub-regional and national legal frameworks applicable to the conservation of biodiversity in the MDTP? Accordingly, it is the purpose of this study to analyse the relevant and applicable international, regional and national environmental law frameworks applicable to biodiversity in the MDTP, in order to identify gaps and/or weaknesses within this framework and make recommendations for the improvement thereof. The reason for focussing on biodiversity can be found in the Memorandum of Understanding (MoU) between South Africa and Lesotho, which states that conservation of biodiversity is the key objective of the MDTP project.³⁰

In an attempt to answer the research question posed above, the dissertation discusses:

- The need for cross-border conservation;
- Biodiversity and the significance thereof in the MDTP;
- Applicable international, regional, sub-regional and national legal regimes;
- The bilateral MoU; and
- Conclusions and recommendations as to the current position of the legal framework.

28 Sandwith *Transboundary Protected Areas* 7.

29 Sandwith *Transboundary Protected Areas* 7-9.

30 See IUCN ROSA *Legal Framework* 78 and Sandwith 'Overcoming barriers' in Goodale *et al Transboundary Protected Areas* 155. See also www.maloti.org 27 June and www.peaceparks.org 27 June. The author acknowledges that biodiversity is not the only environmental issue in the MDTP. Issues such as, amongst other, the role of indigenous communities, land tenure and poverty alleviation also play a role in environmental conservation and their roles are not denied. However, due to constraints on this dissertation referred to earlier, only biodiversity is investigated.

2 The need for cross-border conservation

This section aims to analyse why a need for cross-border conservation exists. In doing so, challenges, historic problems and issues are identified and investigated in order to explain the current dilemma and consequently the urgent need for integrated cross-border conservation. The issues of colonialism and state sovereignty are also investigated and the discussion thereof culminates into the central issue of fragmentation.

2.1 Colonialism

From a legal point of view, environmental conservation can be divided into, *inter alia*, four levels, namely international, regional, sub-regional and national.³¹ Conservation on a regional and sub-regional level in Africa was problematic as colonialism led to a geographical and jurisdictional fragmentation of Africa. The Berlin Conference, held in 1884, resulted in Africa being divided into fifty countries. From 1950 colonial rule faded from Africa. By 1960 Africa, once again, regained independence and after the colonial powers left there was a mutual need for unity in Africa.

Even before the establishment of the *Organisation for African Unity*³² (OAU), African heads of state realised that there was a need for integration of economies. The need for combining economies into sub-regional markets was essential to form 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 to promote international relations within the framework of the United Nations.³³

31 Van der Linde and Basson 'Environment' in Chaskalson *Constitutional law* 50-1.

32 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.

33 African Union www.au.org 30 March.

In 1980, the OAU Extraordinary Summit adopted the Lagos Plan of Action to address the need for economic cohesiveness - this lack of cohesiveness being a direct result of Africa 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.³⁴ The Treaty establishing the African Economic Community provides for the establishment of new Regional Economic Communities (RECs) and the strengthening of existing RECs.³⁵ The repercussions of colonialism can be explained in two arguments. 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 shared resources and could thus negatively affect such management. Secondly, in fear of renewed colonialism, states hold in high regard the principle of state sovereignty which, in turn, has a negative effect on uniform and integrated approaches towards the management of shared resources. Despite this fear of renewed colonialism, management of shared resources demands an integrated approach to be followed that still respects state sovereignty.³⁶

2.2 Sovereignty of states

34 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.

35 Article 28 of the Treaty establishing the African Economic Community. Existing communities, when the Treaty was signed in 1991, include: 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) the Southern Region, 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 <http://www.panafricanperspective.com/aec.htm> 2 May.

36 In recent developments, transboundary protected areas have been used to further good relations between countries on a different level than traditional economic relations namely, sustainable management of shared natural resources. These areas are thus also referred to as 'peace parks'. See also <http://www.peaceparks.org> 1 June. See also Büscher 2005 *PLAAS Policy Brief* 1 and IUCN *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 *et al Transborder Protected Area Cooperation* 1.

The principle of state sovereignty implies that states can govern their respective jurisdictions according to their domestic legislation and policies.³⁷ In environmental context, this principle is diluted by the condition that territories must be so used as not to harm other neighbouring states.³⁸

The problem with this principle is that it often confines natural resources, including biodiversity, to man-made boundaries. A common trait among protected areas sharing the same borders is that they often share common problems.³⁹ These protected areas can share the same objectives and values even whilst being divided by international borders.⁴⁰ Accordingly, a high level of cooperation between protected areas makes sense to ensure sustainable resource management and regulation of biodiversity.⁴¹ Biodiversity and the successful conservation thereof cannot be confined to politically imposed boundaries.⁴² Bowman⁴³ remarks in this regard that:

It 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.⁴⁴

37 Benvenisti *Sharing Resources* 22. See also article 3 of the *Convention on Biological Diversity* (CBD) concluded in Rio de Janeiro, June 1992. The Memorandum of Understanding (MoU) concluded between South Africa and Lesotho for the MDTP enshrines this principle in that: 'the sovereign right to exploit their own resources pursuant to their own environmental and development policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause harm to the environment of other states or of areas beyond the limits of national jurisdiction.' The MoU is available on the Internet at <http://www.maloti.org.za> 1 July. See also Benvenisti *Sharing Resources* 22 in this regard.

38 *Trail Smelter Arbitration US v Canada* Rob *International Environmental Law* Reports 231. See also Glazewski *Environmental Law* 36; Harris *International Law* 537 and Benvenisti *Sharing 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* 126-134 for further reading.

39 Hamilton *et al Transborder Protected Area Cooperation* 1.

40 Hamilton *et al Transborder Protected Area Cooperation* 1. Sandwith *Transboundary Protected Areas* 7.

41 Hamilton *et al Transborder Protected Area Cooperation* 1.

42 Büscher 2005 *PLAAS Policy Brief* 1. See also Mayoral-Phillips *Transboundary Areas in Southern Africa* 2 and IUCN *Forging Linkages* 23.

43 Bowman and Redgewell *International Law and Biodiversity* 12.

44 Cross-border conservation in the form of transfrontier parks may serve as these 'overtly collectivist approaches' as described by Bowman.

It is thus ironic that for states to use and conserve their own biodiversity in a sustainable way, it is not independence and non-intervention that will further the principle of sovereignty, but indeed cooperation.⁴⁵

Colonialism and state sovereignty has led countries to develop and exist in isolation of each other.⁴⁶ Policies, legislation and structures for implementation and governance have therefore developed in isolated spaces with little similarities to be drawn between respective countries. The result is a culmination into one central problematic phenomenon: fragmentation.

2.3 Fragmentation

Fragmentation is a phenomenon constraining holistic or integrated efforts of governance.⁴⁸ Fragmentation can be identified in different spheres of government, legislation, departments of government, and processes and mechanisms. When all of the above governs (or attempt to govern) a single substantive issue, 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. This is referred to as

45 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.

46 Du Plessis 2001 *THRHR* 458.

47 Scholtz 2005 *MqJICEL* 30.

48 With regard to the South African legal system, Bray identifies some stumbling blocks hampering 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. See also Kotze *Integrated Environmental Governance* 23.

geographical fragmentation. The essence of this fragmentation, on a cross-border level, lies within *different* policies, legislation, ideals and goals between the respective countries.⁴⁹ For example, when a new development is proposed inside the MDTP, certain processes need to be followed in terms of various laws. Should the development, for example, pose a potential threat to cultural heritage, a heritage impact assessment must be done under the *National Heritage Resources Act* of South Africa.⁵⁰ The evaluation of the assessment is done by the South African Heritage Resources Agency (SAHRA). However, being a cross-border area, the laws of Lesotho pertaining to cultural heritage also have equal stand in the matter; in this case, the *Historical Monuments, Relics, Fauna and Flora Act*.⁵¹ In terms of this Act, written consent must be obtained from the Preservation and Protection Commission (PPC) that is established under the Act. The challenge: one substantive issue is governed by two different processes (the aforementioned Acts) and the outcome lies in the hands of two different authorities (SAHRA and PPC).

The negative effects, specifically related to cross-border conservation are, amongst others, incompatible or different policies towards conservation,⁵² no specific provision for integrated cross-border conservation, mismatched legislation,⁵³ duplication of processes, time delays and costly and uncertain governance processes.⁵⁴ These negative effects hamper cooperation and makes cross-border conservation extremely difficult, if not impossible, because of legal incompatibility and uncertainty.⁵⁵ Moreover, 'biodiversity' embraces a holistic and integrated approach towards conservation and

49 For a comprehensive discussion of fragmentation and the disadvantages thereof in the South African legal system see Kotze *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.

50 See paragraph 6.1.4 below. Section 38 of the Act.

51 See paragraph 6.3.3 and 6.3.4 below.

52 See paragraph 6 below.

53 See paragraph 6 below.

54 See Kotze 2006 *PER* 1-36 available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006x1x_Kotze_art.pdf 1 March.

55 See paragraph 1 above.

therefore the existence of fragmentation can be seen as a major stumbling block in the way of sustainable cross-border biodiversity conservation.⁵⁶

3 Biodiversity⁵⁷

In 2002 at the World Summit on Sustainable Development (WSSD)⁵⁸ participating states agreed towards a concerted effort to reduce the loss of biodiversity by 2010.⁵⁹ In 2004 at the United Nations Convention on Biological Diversity, held in Kuala Lumpur, governments agreed to set national and regional targets for the creation of new protected areas which will lead to greater protection against biodiversity loss.⁶⁰

The importance of this global recognition can be extracted from the findings of the Living Planet Report of 2004 (the Report). The two measures used are the Living Planet Index (LPI) and Ecological Footprint (EF). The LPI can broadly be described as a biodiversity indicator.⁶¹ The second indicator, EF, is described by the Report as a measure of environmental sustainability.⁶² The Report indicates that from 1970-2000 there was a 40% decrease in the earth's biodiversity. Furthermore, the EF indicates that humanity currently exceeds the ecological carrying capacity of the

56 For further reading see Scholtz 2005 *MqJICEL* 11; Birnie and Boyle *International Law* 545, Glazewski *Environmental Law* 257 and Sands *International Environmental Law* 499.

57 Biodiversity is an extremely comprehensive term. It seems that most authors agree that biodiversity is a non-renewable resource consisting of three key elements. These elements exist in a hierarchical relationship. They are: genetic diversity, species diversity and ecosystem diversity. See Scholtz 2005 *MqJICEL* 11, Birnie and Boyle *International Law* 545, Glazewski *Environmental Law* 257 and Sands *International Environmental Law* 499.

58 Held in Johannesburg, South Africa.

59 Living Planet Report 2004 <http://assets.panda.org/downloads/lpr2004.pdf> 28 April.

60 Living Planet Report 2004 <http://assets.panda.org/downloads/lpr2004.pdf> 28 April. South Africa and its neighbouring countries are committed greatly towards such a goal. Already, 5 transfrontier conservation areas have been established between South Africa and its neighbours. See paragraph 1 above.

61 This indicator measures the overall population of wild species around the world. See *Living Planet Report 2*. See Wackernagel and Rees *Ecological Footprint* 7-28.

62 This indicator can further be described as the burden of man on the environment or the earth's ecological carrying capacity. See *Living Planet Report* 10. See Wackernagel and Rees *Ecological Footprint* 7-28.

earth by 20%.⁶³ Given this global predicament and the fact that the MDTP is rich in endemic biodiversity, it is no surprise that the conservation of biodiversity is the key objective of the MDTP project.⁶⁴

3.1 Biodiversity in the MDTP⁶⁵

It is not the intention of this study to explore the scientific nature of biodiversity but rather legal provisions pertaining thereto. For the sake of completeness, however, a brief investigation as to the specific biodiversity of the MDTP follows hereafter.

Recent studies⁶⁶ indicate that the Maloti-Drakensberg Mountains possess globally significant fauna and flora⁶⁷ biodiversity.⁶⁸ The mountains in the

63 Loss of biodiversity is neither a new phenomenon, nor is it only due to the influence of mankind. Loss of biodiversity occurs naturally although not at such an alarming rate as the above. See paragraph 3 above. See also Sands *International Environmental Law* 499-501.

64 IUCN ROSA *Legal Framework* 78. See also the MDTP website www.maloti.org 27 June and the Peace Parks Foundation www.peaceparks.org 27 June.

65 The specific environmental characteristics that contribute to the biodiversity of the MDTP fall outside the ambit of this study. What follows is a short evaluation of characteristics extracted from papers of a more scientific nature.

66 Sandwith 'Overcoming barriers' in Goodale *et al Transboundary Protected Areas* 150-152. An extract from the MDTP website states:

According to Dr Carbutt, the Drakensberg Alpine Centre (the ~ 40 000 Km² of the bioregion mostly >1800m a.s.l.) contains 2520 angiosperm (or flowering) plant species, 334 (representing 41 families and 119 genera) of which are endemic to the bioregion, with a further 594 near-endemic species (representing 56 families and 188 genera). To place this in context, it means that 37% of the angiosperm flora, well over 1/3 of the species, of this bioregion is only to be found in southern Africa, with 13% of the species occurring only in these mountains and nowhere else in the world. Some 11% of these endemic and near-endemic species are currently listed as red data species (i.e. highly threatened or localized) and there are undoubtedly many more that will join them as our understanding of the diversity of this flora improves.

Article published on the Internet on the MDTP website www.maloti.org 27 June.

67 The animal diversity can be explained by the following extract from the Peace Parks Foundation's website:

Although numbers of game are generally low, the area is home to a variety of ungulates, including bushbuck, eland, blue duiker, reedbuck, mountain reedbuck, grey rhebok, klipspringer and oribi. In addition, blesbok, red hartebeest and black wildebeest have been re-introduced to some areas. Other larger mammals include baboons, black backed jackal, aardwolf and serval. About 246 species of birds have been recorded. Of these, 14 species are listed in the Red Data Book. The bearded vulture (or lammergeyer) whose distribution in southern Africa is largely restricted to the Drakensberg is found here as is the southern bald ibis, which is listed as rare in the Red Data Book. Other important species are the wattled crane, white stork, blackheaded heron, orangebreasted rock jumper and the Cape vulture. The Tsoelikana River harbours the threatened Maloti/Drakensberg minnow, *Oreodaimon zuathlambae* that was feared to be extinct.

area play host to the largest and most concentrated group of rock paintings in Africa south of the Sahara.⁶⁹ Furthermore, the region serves as one of the most important water catchments areas for the people of Lesotho and South Africa.⁷⁰ Additionally, the uKhahlamba Drakensberg Park is also a Ramsar Site as well as a recognised world heritage site.⁷¹

4 Applicable International law

This section aims to identify the international law applicable to biodiversity in the MDTP. The enquiry is limited to treaties and conventions⁷² which both South Africa and Lesotho are party to.⁷³ Some principles of international law that have emerged over time and that may be relevant in the conservation of biodiversity are also surveyed.

4.1 Principles of international law

In light of article 38(1) of the *Statute of the International Court of Justice* (ICJ), the principles of international law may be relevant to an integrated legal framework for the MDTP. Article 38(1) instructs the ICJ to apply

See the Peace Parks Foundation www.peaceparks.org 22 June.

68 Furthermore, the typography of the area contributes to unique habitat for animals and plants. For this reason a high level of endemism can also be found in the area. See the MDTP website www.maloti.org 27 June. See also Sandwith 'Overcoming barriers' in Goodale *et al Transboundary Protected Areas* 150-152.

69 According to the Peace Parks Foundation some 600 sites are known to exist and contain between 35 000 - 40 000 individual images painted by the San people. Some of these images are believed to be as old as 4 000 years. See The Peace Parks Foundation www.peaceparks.org 22 June.

70 Two of the largest civil engineering projects in Southern Africa, the Tugela-Vaal Scheme and the Lesotho High-lands Water Project, carry water from the mountains of this area to the province of Gauteng. See the MDTP website www.maloti.org 27 June.

71 The uKhahlamba Drakensberg Park was designated as a world heritage site in 2000. See the World Heritage Committees' website http://whc.unesco.org/pg.cfm?cid=31&id_site=985 27 July. The uKhahlamba Drakensberg Park is also a Ramsar site under the Convention on Wetlands, see <http://www.wetlands.org/rsis/> 27 July.

72 For a description on the nature and different types of treaties and conventions see Dugard *International Law* 28.

73 The treaties and conventions to be discussed are the following: the CBD; the Convention on Wetlands; the Convention Concerning the Protection of the World and Cultural Heritage; the Convention on the Conservation of Migratory Species of Wild Animals; the United Nations Convention to Combat Desertification and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. Due to length constraints the aforementioned documents will only be discussed briefly.

‘international custom, as evidence of general practice accepted as law’. The result of article 38(1) is that principles, as discussed below, can become custom and thus binding international law.⁷⁴ The principles, or in some instances, emerging principles, also form the basis of most conventions and treaties. Moreover, these principles may play an important role where the existing regulatory framework (in the form of treaties, conventions or national laws) is deficient or contradicting in which case the principles can serve as a fall-back mechanism. For example: a development is proposed in the MDTP. Various legal processes have to be followed of which one will be an environmental impact assessment (EIA). Should South Africa, hypothetically speaking, prescribe rigid and conservative measures as to IA and the Lesotho mechanisms are very vague and less strict, it could be argued that in light of the precautionary principle, that the South African measures should be followed. Another example would be where neither South Africa nor Lesotho has legislation regarding pollution of the shared watercourses within the MDTP. In such a case the polluter pays principle may serve to fill the *lacuna*. What follows is a very brief discussion of these principles that may find application within a transfrontier context.

The precautionary principle: In short, this principle provides guidance when sufficient scientific knowledge is absent relating to the adverse environmental impacts that a project may have.⁷⁵ The principle prescribes a risk averse or cautious approach when knowledge of the negative impact is absent.⁷⁶

The preventive principle: The essence of this principle can be captured in the proverb ‘prevention is better than cure’. Thus, environmental damage

74 ‘Principles becoming customary law’ is a complex issue and the discussion thereof falls outside the ambit of this study. The author does not suggest that any of the principles discussed are binding international law nor that they are not. For further reading on the issue of customary international law and the intricacies thereof see Birnie and Boyle *International Law* 16-18 and Dugard *International Law* 29-33.

75 Glazewski *Environmental Law* 18. Sands *International Environmental Law* 195.

76 See Principle 15 of the Rio Declaration on Environment and Development, adopted at The United Nations Conference on Environment and Development, Rio de Janeiro, June 1992.

is to be countered at the earliest possible stage or ideally, before damage could occur.⁷⁷

The polluter pays principle: In simple terms, the principle prescribes that those who pollute must pay to remedy the effects of pollution and compensate those who suffer the negative consequences of pollution.⁷⁸ Kotze and Du Plessis⁷⁹ argue that 'the main rationale behind the principle is to internalise environmental externalities'.⁸⁰ The authors further indicate that the principle 'is essentially an economic principle stemming from international environmental law',⁸¹ and aims to hold polluters liable for harmful effects of their polluting activities.

Common but differentiated responsibility: This contemporary principle is gaining momentum in international environmental law and relates to certain assets or concerns being a 'common concern' or 'common heritage' of mankind.⁸² This principle allows for states being responsible for, amongst others, conservation of these common concerns or common heritage according to their respective levels of development and capacity. This principle is also reiterated in the *United Nations Conference on*

77 Glazewski *Environmental Law* 18. See also De Lone 1998 *NYU ELJ* 6.

78 See also Sands *International Environmental Law* 279, Rao *International Environmental Law* 277-279, and Kiss and Shelton *International Environmental Law* 212-213.

79 Kotze and Du Plessis Absolving historical polluters from liability through restrictive judicial interpretation: Some thoughts on *Bareki NO v Gencor Ltd* (To appear in *Stell LR* 2007).

80 See also Hunter *et al International Environmental Law* 130-141, and Barry 'Ecological Modernisation' in Page and Proops *Environmental Thought* 197.

81 Although this principle finds its roots in international law, it is not only applicable in the international arena, but also finds application domestically. Testament to domestic application is principle 16 of the Rio Declaration which provides that: National authorities should endeavour to promote the internalisation of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the costs of pollution, with due regard to the public interests and, without distorting international trade and investment.

See further Glazewski *Environmental Law* 18.

82 Hunter *et al International Environmental Law* 934. During the negotiations of the Convention of Biological Diversity (hereinafter referred to as the CBD). Southern countries were concerned that biodiversity as common heritage could lead to unrestricted access to their biodiversity rich frontiers. In turn, Northern countries feared that common heritage could lead to open the floodgates to benefit sharing and transfer of technology. Accordingly, common concern was opted to describe biodiversity as it was a lesser diluting ingredient to the principle of state sovereignty. See also Nanda and Pring *International Environmental law* 35-36.

*Environment and Development*⁸³ and subsequently included in principle 7 of the *Rio Declaration on Environment and Development*⁸⁴ (Rio Declaration).

Sustainable development: Sustainable development fuses environmental concerns with developmental concerns and therefore assumes a complex and multidisciplinary form.⁸⁵ The substance of this principle is vague and uncertain.⁸⁶ Sustainable development strives to reach equilibrium by the integration of social, environmental and economic factors.⁸⁷ This equilibrium can arguably be created by means of, *inter alia*, governance or integrated cross-border governance. Sustainable development can further be seen as an ideal that must be reached by the integration of the aforesaid factors. The MDTP sets the perfect stage for the integration of social, environmental and economic considerations by means of transfrontier governance. Because of the various types of land-use found in the MDTP,⁸⁸ environmental issues are not the only concern. Local community involvement plays a central role in establishing the MDTP and adds a social and economic flavour into the mix. When all of the aforementioned factors can be balanced by way of transfrontier

83 Held in Rio de Janeiro, 3-14 June 1992.

84 Principle 7 of the Rio Declaration states: '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 in view of the pressures their societies place on the global environment and of the technologies and financial resources they command.' It is argued by Nanda and Pring that this inclusion of common but differentiated responsibility in principle 7 serves as 'significant strides' to solve the 'North-South dichotomy' Nanda and Pring *International Environmental law* 39.

85 The most popular definition of sustainable development can be found in the 1987 Brundtland Report. The Brundtland Report defines sustainable development as follows: 'Sustainable development is development that meets the needs of the present without compromising the ability of future generations to meet their own needs.' The Brundtland Report can be obtained on the Internet http://www.are.admin.ch/are/en/nachhaltig/international_uno/unterseite02330/ 27 June.

86 See Kotze *Integrated Environmental Governance* 16-18. See also Birnie and Boyle *International Law* 47.

87 See Kotze *Integrated Environmental Governance* 20.

88 See figure 1 above.

governance, an equilibrium or desired state will be reached in the form of sustainable development.⁸⁹

4.2 Summary

The principles constitute a type of *grundnorm* against which all environmental law can be based and measured.⁹⁰ In the absence of regulating measures or in the case of deficient regulatory frameworks as in the aforementioned examples, these principles can serve as minimum standards of environmental law. Serving as a *grundnorm*, the principles form the foundation of, and pave the way for, international treaties and conventions discussed hereafter. Insofar as these principles can be considered to be part of international environmental law, in particular, customary international law, they will also be applicable to an integrated framework for the MDTP.

4.3 Conventions and treaties

4.3.1 The CBD

89 Considering the holistic and integrative approach followed by the principle of sustainable development it is not far fetched to extend its working across borders. In other words, using transfrontier governance to achieve the desired equilibrium. Seen in this light, transfrontier governance may also directly contribute to the principle of intra generational equity which forms an integral part of sustainable development. Intra generational equity refers to the inequities that must be nullified between developed and developing countries. In the context of the MDTP, South Africa can be argued to be a developed country and Lesotho a developing country. Transfrontier governance can provide an atmosphere for transfer of technology and environmental capacity building as well as environmental education which will further the principle of intra generational equity. This point is reiterated by Birnie and Boyle: Both the Brundtland Report, and in Agenda 21, there is no doubt that redressing the imbalance in wealth between the developed and developing worlds and giving priority to the needs of the poor are important policy components of sustainability. Birnie and Boyle *International Law* 91

90 *Grundnorm* or 'basic norm' was developed by the legal philosopher and jurist Hans Kelsen. Kelsen used this word to denote the basic norm underlying the basis for a legal system. The theory seeks to find a point of origin for all law from which to gain their legitimacy. This study contends that this theory can apply, *mutatis mutandis*, to environmental norm setting. Information on Kelsen obtained on the Internet <http://en.wikipedia.org/wiki/Grundnorm> 24 June.

The CBD is arguably the primary international instrument for the conservation of biodiversity.⁹¹ The CBD encapsulates the need for a holistic approach towards conservation as opposed to the conservation of a single species.⁹² In the preamble to the CBD, biodiversity is regarded as a common concern of humankind.⁹³

Article 1 of the CBD stipulates the main objectives of the convention and emphasis is placed on the conservation, sustainable use and sharing of benefits derived from biodiversity.

Article 3 concerns the sovereign right of states to exploit their resources according to their own environmental laws. This must be done in a way not causing harm to other states.⁹⁴ In contrast to the sovereign notion 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.⁹⁵ Biodiversity and the conservation thereof cannot be confined to national borders and thus the notion of state sovereignty can not be absolute.⁹⁶ This finding can be substantiated by the following important provisions extracted from the CBD which dilute the notion of absolute state sovereignty.

91 Entered into force on 29 December, 1993. It is noteworthy to consider that the required 30 ratifications for entry into force were acquired in a relative short space of time. This can be seen as a sign of governments recognising the importance to protect biodiversity.

92 Glazewski *Environmental Law* 259. See also Sands *International Environmental Law* 499-501 and Hunter *et al International Environmental Law* 911-914.

93 See the discussion on common but differentiated responsibility in paragraph 4.1 above.

94 Article 3 of the CBD.

95 See paragraphs 2.1, 2.2 and 2.3 above.

96 Bowman and Redgewell *International Law and Biodiversity* 12.

Article 4 defines the jurisdictional scope of the CBD and stipulates that the provisions of the CBD can apply 'beyond the limits of national jurisdiction'.⁹⁷ Importantly, in the light of cross-border conservation of biodiversity in the MDTP, article 4 implicitly requires cooperation between states. Moreover, article 5 places a duty on contracting parties to cooperate when matters of cross-border importance arise.⁹⁸ Article 6 contributes to the dilution of absolute sovereignty by ordering integration and sustainable use as well as conservation of biodiversity into sectoral or cross-sectoral plans, programmes and policies.

Articles 8 and 9 also contribute to the above and specifically provide measures for conservation. Article 8 deals with *in situ* conservation. This refers to conservation of biodiversity within its natural surroundings which may include an area traversing a border should the 'natural surroundings' indeed extend beyond a national border. Article 9 deals with *ex situ* conservation, referring to the conservation of biodiversity outside their natural habitats. This article could hold an interesting interpretation and could mean that even if the 'natural surroundings' do not extend across a border, conserving it across the border could be possible.⁹⁹ When considering articles 8 and 9 together it may be derived that the CBD prescribes a holistic and integrated approach towards the conservation of biodiversity even across borders.

Further incentives for cooperation can be extracted from provision made for information exchange¹⁰⁰ and technical and scientific cooperation.¹⁰¹ This provision seems to form an integral part of the principle of common but differentiated responsibility in that it recognises the special needs of

97 Clearly the CBD does not confine itself to be an instrument limited to the respective national borders of countries and therefore implicitly emphasises cooperation between states.

98 Article 5 states:
Each Contracting Party shall, as far as possible and as appropriate, cooperate with other Contracting Parties, directly or, where appropriate, through competent international organizations, in respect of areas beyond national jurisdiction and on other matters of mutual interest, for the conservation and sustainable use of biological diversity.

99 Of course with such an interpretation, respect for state sovereignty must be heeded as contained in the CBD. See article 3 of the CBD.

100 Article 17 of the CBD.

101 Article 18 of the CBD.

developing countries.¹⁰² Transfer of technology and information exchange, contributes to capacity building and in turn lead to greater capacity for the conservation of biodiversity across borders.

From the discussion above it can be observed that in the quest for sustainable use and conservation, a great emphasis is placed on cooperation, especially in the form of cross-border biodiversity conservation.

4.3.2 *Convention on Wetlands*

The *Convention on Wetlands of International Importance Especially as Waterfowl Habitat*¹⁰³ (Ramsar Convention) is applicable to the MDTP. This is because the uKhahlamba Drakensberg Park is a recognised Ramsar Site. The Ramsar Convention places a duty on parties to further the conservation of biodiversity by establishing nature reserves on wetlands traversing borders.¹⁰⁴ Cooperation between parties is held in high regard since states must encourage research, exchange of data and publications regarding wetlands and their fauna and flora.¹⁰⁵ In transfrontier context, article 5 is specifically applicable as there is a duty on parties to consult about the obligations arising from the Ramsar Convention where a wetland crosses national boundaries or where a water system is shared.¹⁰⁶ The parties must further 'coordinate and support' future and present policies regarding the conservation of biodiversity which may include arrangements relating to transfrontier parks such as the MDTP.¹⁰⁷

102 See paragraph 4.1 above.

103 Entered into force on 21 December 1975.

104 Article 4(1) of the Ramsar Convention.

105 Article 4(3) of the Ramsar Convention.

106 Article 5 states that:

The Contracting Parties shall consult with each other about implementing obligations arising from the Convention especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties. They shall at the same time endeavour to coordinate and support present and future policies and regulations concerning the conservation of wetlands and their flora and fauna.

107 Article 5 of the Ramsar Convention.

4.3.3 *Convention Concerning Natural and Cultural Heritage*

The *Convention Concerning the Protection of World Cultural and Natural Heritage*¹⁰⁸ (WHC) also applies to the MDTP since part of the MDTP is a world heritage site.¹⁰⁹ In terms of the WHC parties must ensure, amongst others, the protection, conservation, and transmission to future generations of natural and cultural heritage.¹¹⁰ Parties must do this to the utmost of their own resources, but where appropriate, international assistance and cooperation in financial, artistic, scientific and technical assistance and cooperation can be obtained.¹¹¹ Again, cooperation across borders is encouraged and the traditional notion of sovereignty diluted.

4.3.4 *CITES*

By eliminating and regulating international trade, the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*¹¹² (CITES) strives to conserve endangered species. The provisions of CITES will thus apply when endangered species will be traded in the MDTP. Strangely, explicit provisions for cooperation between parties seem to be absent from CITES. Trade in endangered species is indeed a great problem in Africa and is an issue that can arguably not be tackled without cross-border cooperation and integration of legislation and policies.¹¹³

4.3.5 *Convention on Migratory Species of Wild Animals*

The *Convention on the Conservation of Migratory Species of Wild Animals*¹¹⁴ (Convention on Migratory Species) deals with species that

108 Entered into force on 17 December 1975.

109 See paragraph 3.1 above.

110 Article 4 of the WHC. See also paragraph 3.1 above.

111 Article 4 of the WHC.

112 Entered into force on 1 July 1975. This document and other relevant information can be obtained from the CITES website. www.cites.org 23 July.

113 For further reading on CITES and the problems within Africa, see Roic 2006 AG 38-43.

114 Entered into force on 1 November 1983. This document and other relevant information can be obtained from their website. www.unep-wcmc.org/cms/ 3 July.

migrate across national borders.¹¹⁵ Again, cooperation between parties is stressed and collaborative efforts in research and protection must be promoted.¹¹⁶ Conclusion of agreements for conservation and management are also encouraged between countries.¹¹⁷

4.3.6 *UN Convention to Combat Desertification*

The *United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa*¹¹⁸ (UNCCD) aims to mitigate the effects of drought and to combat desertification. To achieve this, parties need to improve cooperation and coordination at regional, sub-regional and international levels.¹¹⁹ Duties of developed countries in relation to developing countries are set out in article 6.¹²⁰ Cooperation, according to the UNCCD, includes transfer of technology, scientific research and development, information collection and dissemination, and financial aid.¹²¹ In light of the principle of common but differentiated responsibility discussed above,¹²² cooperation places a duty on South Africa to assist Lesotho where insufficient technology, lack of funds, as well as lack of scientific knowledge and information may hamper its conservation efforts. Specifically in light of the MDTP cooperation plays a vital role in cross-border conservation.

4.4 **Summary**

115 Article I(a) of the Convention on Migratory Species.

116 Article II(3) of the Convention on Migratory Species.

117 Article II(3)(c) of the Convention on Migratory Species. The MoU between South Africa and Lesotho may serve as such an agreement. See paragraph 7 below.

118 Entry into force 26 December 1996. This document and other relevant information can be obtained from their website. www.unccd.int 23 July.

119 Article 3(b) of the UNCCD.

120 In the MDTP context, South Africa can be considered to be economically more self-sustaining than Lesotho. Accordingly South Africa, under the UNCCD, has a duty to actively support Lesotho in their pursuance of the obligations of the UNCCD set out in article 4 thereof.

121 Article 12 of the UNCCD. The finer details of cooperation can be found in articles 13-21.

122 See paragraph 4.1 above.

It may be derived from the foregoing that a comprehensive international framework exists for the conservation of biodiversity in transfrontier parks. In this framework, however, no dedicated instrument exists to conserve biodiversity at a cross-border level. The instruments discussed all relate to biodiversity and similarly to protected areas which may facilitate cross-border conservation. One thus observes a mutual symbiotic relationship between the conservation of biodiversity and protected areas in terms of the international framework.¹²³ The international environmental law regime creates broad, and in many instances vague norms which need to be moulded and sculpted into substantive provisions at regional, sub-regional, national and provincial levels.

From the international framework, the following important facts emerge:

- Various instruments exist facilitating cross-border biodiversity conservation at international level;
- International cooperation is inevitable in achieving cross-border biodiversity conservation; and
- Assistance, transfer of technology as well as information sharing is required for cross-border biodiversity conservation, which, in turn, all may contribute to improved integration and cooperation.

This enquiry now turns to investigate the regional and sub-regional provisions relating to the conservation of biodiversity in the MDTP.

¹²³ Following that both South Africa and Lesotho are parties to all of the conventions and treaties discussed, the norms and standards crystallising from them are applicable to the MDTP.

5 Applicable Regional and Sub-Regional law

Moving from the international arena, this section identifies documents relevant to cross-border conservation of biodiversity specifically in the African and Southern African regions.

5.1 Regional

Numerous regional and sub-regional instruments exist from which cross-border conservation obligations may be derived.¹²⁴

5.1.1 African Charter

The *African Charter on Human and Peoples' Rights*¹²⁵ (African Charter) has been ratified by all 53 African states.¹²⁶ The Charter includes a pioneering¹²⁷ provision in article 24 which states that:

All peoples shall have the right to a general satisfactory environment favourable to their development.

Van der Linde¹²⁸ indicates the significance of this inclusion as this was the first international recognition of an environmental right.¹²⁹ This significance is reflected by the crystallisation of such a right into some African national laws.¹³⁰ As far as could be established, already 35 countries in Africa have

124 The instruments that are discussed include the following: African Charter on Human and Peoples' Rights, Convention on the Conservation of Nature and Natural Resources and the Treaty establishing the African Economic Community. Provisions concerning biodiversity are scarce and thus provisions relating to environmental cooperation will also be extracted.

125 Adopted at the Eighteenth Ordinary Assembly of the OAU held in Nairobi, Kenya, 1981. The African Charter entered into force on 21 October 1986.

126 Information obtained from the Internet on the AU website <http://www.africa-union.org/root/au/Documents/Treaties/htm> 1 April.

127 The significance of this inclusion is that it was the first international recognition of a right to the environment. Van der Linde 2002 *CILSA* 99.

128 Van der Linde 2002 *CILSA* 99.

129 For an in-depth discussion on the interpretation of article 24 see Van der Linde and Louw 2003 *AHRLJ* 167-187.

130 See paragraphs 6.1.1 and 6.3 below.

included an environmental right in their constitutions.¹³¹ In the context of the MDTP, this right to a general satisfactory environment can be seen as a duty placed on member states of the AU to strive towards a satisfactory state of the environment in Africa as a whole. Given this holistic approach it may be hard to find a better tool than cross-border conservation to give effect to this obligation and to increase the level of environmental satisfaction on the African continent.

5.1.2 African Convention

The *Convention on the Conservation of Nature and Natural Resources*¹³² (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. 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.¹³³

Specific reference is also made to protected species, traffic in specimens, trophies and conservation areas. Regarding protected species, the Convention places a duty on states to recognise endangered species and their habitats.¹³⁴ A 'higher' responsibility is placed on states where a specific endangered species is regarded as endemic to that state.¹³⁵ Conservation areas are also covered by the Convention.¹³⁶ A duty is placed on states to protect existing conservation areas and to establish new ones, taking into account land-use planning programmes.¹³⁷ Reference to inter-state co-operation is also made.¹³⁸ As a whole, the Convention serves as a

131 Bruch and Coker 1999 Innovation 2. This means that 66% of African countries have recognised a right to the environment in their highest form of law. See also Ebeku 2003 *AHRLJ* 149-166.

132 Adopted in Algiers, Algeria 1968.

133 Article II of the African Convention.

134 Article II of the African Convention.

135 Article II of the African Convention. Considering the discussion in paragraph 3.1 above regarding the high level of endemism in the MDTP, this article finds particular relevance.

136 Article X of the African Convention.

137 Article X of the African Convention.

138 Article XVI of the African Convention.

guiding instrument as to what laws should be adopted by African states. As would be expected at regional level, cooperation between states is stressed again and the importance of cooperation plays a central role through all of the AU documents.

A more comprehensive and revised version of the African Convention has been tabled to address some of the shortcomings of the original.¹³⁹

5.1.3 *Treaty of the African Economic Community*

The *Treaty Establishing the African Economic Community*¹⁴⁰ (AEC Treaty) contains various environmental provisions which may be relevant to cross-border conservation of biodiversity.

Article 54 of the AEC Treaty provides that member states must harmonise and integrate their policies and programmes with regard to energy and

139 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 were 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 15 states to ratify it before entry into force. To date, 34 states have signed but only 4 ratified the revised Convention. Thus the revised Convention still requires the ratification of 11 states before it will enter into force. The new revision seems to be in line with contemporary international environmental law. Improving on the 1968 African Convention, a Conference of Parties (COP) and a Secretariat will be established. The COP is the decision making organ of the revised Convention. The COP is also responsible for the successful implementation of the convention and specific duties are laid down for it. The Secretariat being responsible for general administration and implementation of decisions taken by the COP is established by article XXVII of the Revised Convention. 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. This provision will only be efficient once the Court of Justice has been established. The Protocol of the Court of Justice to this date only has 37 signatories and only 9 of these signatories have ratified the Protocol. The Protocol requires 15 ratifications to enter into force. Considering that the Court of Justice will have considerable power, it remains to be seen whether the remaining 6 ratifications will be acquired. For more information and to obtain the revised Convention see the AU website on the Internet. www.africa-union.org 24 April. For critique on the current African Convention see also Van der Linde 2002 *AHRLJ* 42.

140 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.

natural resources.¹⁴¹ Article 56 sets out guidelines for cooperation in the fields of energy and natural resources. To conserve biodiversity across any two or more borders will need cooperation and like-mindedness.¹⁴² Article 54 therefore strives for the integration and harmonisation of national policies and programmes relating to natural resources. Harmonisation and integration of the aforesaid is an integral part to like-mindedness and cooperation. Accordingly, this article and its implementation are of critical importance to cross-border conservation.

Article 58 deals with the environment. In terms of this article, Member States must promote a healthy environment. No reference to what a healthy environment consists of or how it is to be promoted is made.¹⁴³ This vagueness seems to be the trend when affording such a 'right' to the environment.¹⁴⁴ Like the African Charter discussed above,¹⁴⁵ it is difficult to construe direct relevance from this article to the MDTP except that cross-border conservation may also promote a healthy environment. The treaty is a norm-setting instrument that sub-regional and national policy and programmes should interpret and give substantive meaning thereto.

It may be derived from the above discussion that it is clear that no explicit provisions relating to cross-border conservation of biodiversity exist in this document. The provisions discussed above may, however, indirectly contribute to cross-border conservation when substantive form is given to the provisions of the AEC Treaty at sub-regional and national levels. The provisions set general norms, and through protocols¹⁴⁶ and policies on sub-regional and national level, these norms can be given substantive form to be implemented.

141 Article 55 deals with energy and sets out the different fields of cooperation. The aspects covered being: mineral and water resources, nuclear energy, and renewable and new energy. Article 55(2) deals with the proper or sustainable use of energy resources.

142 See paragraph 1 above.

143 See Van der Linde and Louw 2003 *AHRLJ* 167-187.

144 See article 24 of the African Charter on Humans and Peoples' Rights and section 24 of the *Constitution of the Republic of South Africa*, 1996. For a discussion on article 24 of the African Charter see Van der Linde and Louw 2003 *AHRLJ* 167-187.

145 See paragraph 5.1.1 above.

146 Provided for in articles 57 and 60 of the AEC Treaty.

5.2 Sub-regional

SADC and the other RECs play a central role in the establishment of the AEC.¹⁴⁷ These RECs lie at the very centre of the goals and principles of the AEC. The SADC protocols, together with international and regional instruments, make provision for environmental protection and conservation within the SADC region.

5.2.1 Protocol on Forestry

One of the key-objectives of the *SADC Protocol on Forestry*¹⁴⁸ (Forestry Protocol) is to ensure effective environmental protection to safeguard the interests of both present and future generations.¹⁴⁹ The Forestry Protocol urges states to adopt and use similar criteria and indicators for sustainable forest management in order to, amongst other, evaluate biodiversity in forests.¹⁵⁰ In order to achieve the goals of the Forestry Protocol, provision is made for research and development¹⁵¹ as well as exchange of information.¹⁵² Cooperation between member states, in order to give effect to the objectives of the Forestry Protocol, is emphasised in article 20.¹⁵³

147 Article 28(1) of the AEC Treaty.

148 Adopted in Luanda, Angola, 3rd of October, 2002.

149 Article 3(1)(c) of the Forestry Protocol.

150 Article 8(4)(b) of the Forestry Protocol. Specific provision for the protection and cooperation in transboundary forests is made in article 14 of the Forestry Protocol.

151 Article 20 of the Forestry Protocol.

152 Article 21 of the Forestry Protocol.

153 Article 20 states:

1. State Parties shall endeavour to obtain the assistance and co-operation of other states and organisations in achieving the objectives of this Protocol. 2. State Parties shall, where appropriate, co-operate with other Member states that are not party to this Protocol.

5.2.2 Protocol on Shared Watercourses

The main objective of the *Revised Protocol on Shared Watercourses*¹⁵⁴ (Watercourses Protocol) is to:

...foster closer cooperation for judicious, sustainable and co-ordinated management, protection and utilisation of shared watercourses...

Water in the MDTP plays host to and supports biodiversity. Biodiversity can not exist without this resource.¹⁵⁵ The region serves as one of the most important water catchments areas for the people of Lesotho and South Africa.¹⁵⁶ Additionally, the uKhahlamba Drakensberg Park is also a Ramsar site making it internationally significant for the conservation of its water resources.¹⁵⁷ The emphasis of the Watercourses Protocol is on cooperation between Member States. This emphasis crystallises in the 'specific provisions' encapsulated in article 4 of the Protocol.¹⁵⁸ One of these specific provisions, article 4(2)(a), applies directly to the MDTP in stating that:

State Parties shall, individually and, where appropriate, jointly, protect and preserve the ecosystems of a shared watercourse.

This provision places a mutual and reciprocal duty on both South Africa and Lesotho to conserve the ecosystems surrounding the shared watercourses within the MDTP. Measures relating to pollution control and prevention,¹⁵⁹ alien or invasive species,¹⁶⁰ protection of the aquatic environment¹⁶¹ and the management¹⁶² of shared water courses are also addressed. Again, absolute state sovereignty gives way to a notion of

154 Adopted in Windhoek, Namibia 7th of August, 2000.

155 See paragraph 3.1 above.

156 Two of the largest civil engineering projects in Southern Africa, the Tugela-Vaal Scheme and the Lesotho High-lands Water Project, carry water from the mountains of this area to the province of Gauteng. Information obtained on the Internet from the MDTP website www.maloti.org 27 June.

157 See paragraph 3.1 above.

158 The specific provisions include, amongst other, provisions for planned measures:

(a) Information concerning planned measures State Parties shall exchange information and consult each other and, if necessary, negotiate the possible effects of planned measures on the condition of a shared watercourse.

159 Article 4(2)(b).

160 Article 4(2)(c).

161 Article 4(2)(d).

162 Article 4(3).

cooperation in an effort to govern cross-border issues directly or indirectly related to shared water courses.¹⁶³

5.2.2 *Protocol on Wildlife*

The scope of the *Protocol of Wildlife Conservation and Law Enforcement*¹⁶⁴ (Wildlife Protocol) is limited to the conservation and sustainable use of wildlife.¹⁶⁵ Wildlife is a primary component of biodiversity and therefore the sustainable use and conservation thereof contributes to the conservation of biodiversity. Again, cooperation can be identified as a primary means to achieve conservation and sustainable use of wildlife. Member States are urged to adopt common approaches to conservation and sustainable use of wildlife.¹⁶⁶ Furthermore, Member States must, amongst other, harmonise legal instruments, and exchange information in order to affect the objectives of the Wildlife Protocol.¹⁶⁷ Specific provisions regarding exchange of information and cooperation in law enforcement are made to foster this foundation of cooperation between Member States to achieve conservation and sustainable use of wildlife.¹⁶⁸

5.2.4 *Protocol on Fisheries*

The *Protocol on Fisheries*¹⁶⁹ (Protocol on Fisheries) aims to promote responsible and sustainable use of aquatic ecosystems.¹⁷⁰ Aquatic ecosystems form an integral part of biodiversity. Akin to the other SADC Protocols, cooperation between Member States is central to achieving its

163 See also for further reading Dombrowsky and Grey 'The Status of River Management in Africa' in Al Baz *et al* *Co-operation on Transboundary Rivers* 85-86 and Thomashausen 2002 *CILSA* 26-37.

164 Adopted in Maputo, Mozambique 18th of August, 1999.

165 Article 2 of the Wildlife Protocol. Forestry and fisheries are excluded from the Wildlife Protocol as these aspects are covered by the Forestry Protocol and Protocol on Fisheries.

166 Article 4(1) of the Wildlife Protocol.

167 Transfrontier Conservation Areas are also covered in article 4(2)(f): This article states that '[to] promote the conservation of shared wildlife resources through the establishment of transfrontier conservation areas'.

168 See in this regard articles 4(2)(c), 4(2)(d), as well as articles 8 and 9.

169 Adopted in Blantyre, Malawi, 14th of August, 2001.

170 Article 3 of the Protocol on Fisheries.

objectives.¹⁷¹ Measures for management and cooperation with regard to shared fish resources are set out in article 7.¹⁷² In order to foster cooperation in the management of shared resources, fisheries legislation of Member States must further be harmonised.¹⁷³ The inclusion of measures for cooperation and harmonisation again underlines the importance thereof.

5.3 Summary

The process of norm setting at international level is repeated at regional and sub-regional level. The AU sets the broad norms, and at SADC level, more substantive form is given in the form of protocols. Substantive provisions on transboundary biodiversity conservation, especially at AU level, are very scarce. This may be attributed to, *inter alia*, the repercussions of colonialism.¹⁷⁴ African states are still very protective of their respective jurisdictions and they hold the principle of state sovereignty in high regard.¹⁷⁵ Notwithstanding, it is clear that a comprehensive, albeit fragmented, legal framework at international, regional and sub-regional levels exists providing for cross-border biodiversity conservation, protected areas, incidental matters thereto and cooperation in conservation efforts.¹⁷⁶

The study now turns to whether South Africa and Lesotho facilitate and accommodate the provisions of the frameworks discussed above. It is only on these national levels that real effect can be given to the provisions in

171 Article 4(1) of the Protocol on Fisheries.

172 These measures include, but are not limited to, information exchange, instruments for coordination, management plans and participation of all stakeholders.

173 Harmonisation of legislation is provided for in article 8 of the Protocol on Fisheries. Article 17 of the Protocol on Fisheries provides for cooperation in the field of science and technology. Exchange of information between members states are covered by article 18 of the Protocol on Fisheries.

174 See paragraphs 2.1 and 2.2 above.

175 See paragraphs 2.1 and 2.2 above. The unwillingness of states to ratify documents with substantive provisions is clear from the lessons learnt from the Bamako Convention and it seems that the Revised African Convention may follow suite. See paragraph 5.1.2 above.

176 It is important to note that no integrated, international, regional or sub-regional mechanism exist to govern cross-border biodiversity conservation. Notwithstanding, guidelines and mechanisms do exist to form a legal framework at the aforementioned levels.

order to accommodate sustainable transboundary governance of biodiversity resources in the MDTP.

6 Applicable national and provincial law

This section aims to identify the relevant national and provincial laws in South Africa and Lesotho causal to the conservation of biodiversity in the MDTP.¹⁷⁷ This discussion is divided into separate discussions on South Africa and Lesotho. Provincial legislation is only discussed under the South African section, as Lesotho does not have any provincial acts.¹⁷⁸

6.1 National legislation in South Africa

6.1.1 The Constitution and NEMA

The basis from which domestic environmental governance derives its power and mandate, is situated in section 24 of the *Constitution of the Republic of South Africa*, 1996 (Constitution). Section 24 of the Constitution affords everyone the right to an environment that is protected and not harmful to their health and well-being.¹⁷⁹ This must be done by reasonable legislative and other measures including, amongst others, pollution regulation¹⁸⁰ and conservation.¹⁸¹

177 The author recognises the existence of local bylaws which may also find application in a legal framework regarding the conservation of biodiversity. Due to length and scoping restrictions a discussion of these bylaws falls outside the ambit of this discussion.

178 In South Africa, the MDTP straddles across the borders of Kwazulu Natal, the Eastern Cape and the Free State Provinces.

179 Section 24 states:

Everyone has the right to an environment that is not harmful to their health or well-being; and to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that i) prevent pollution and ecological degradation; ii) promote conservation; and iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.

For a discussion on section 24 see Van der Linde and Basson 'Environment' in Chaskalson *Constitutional law* 50-9-50-27, Glazewski *Environmental Law* 72-80 and Ebeku 2003 *AHRLJ* 149-166. See also Feris and Tladi 'Environmental rights' in Brand and Heyns *Socio Economic Rights in South Africa* 249-264.

180 Section 24(b)(i) of the Constitution.

The *National Environmental Management Act*¹⁸² (NEMA) was promulgated to give effect to section 24. The aim of NEMA is to create the legal framework in terms of which the rights encapsulated in section 24 can be given effect.¹⁸³ NEMA establishes governmental institutions and processes to ensure proper environmental protection.¹⁸⁴

NEMA also establishes environmental management principles which apply to all actions that may have an effect on the environment.¹⁸⁵ The importance of these principles can be found in the fact that they serve as a contextual backdrop against which all environmental legislation must be interpreted, administered and implemented.¹⁸⁶ The principles follow an anthropocentric approach because people and their needs are put at the forefront of environmental concerns.¹⁸⁷ Adding to this anthropocentric flavour is the reference to sustainable development.¹⁸⁸ Balancing this anthropocentric approach are the factors included to be considered along with sustainable development.¹⁸⁹ These factors include, amongst others, that loss of biodiversity, pollution, and degradation to the environment must be avoided or minimised.¹⁹⁰ Akin to the international principles discussed

181 Section 24(b)(ii) of the Constitution. For further reading see Glazewski *Environmental Law* 72-80 and Ebeku 2003 *AHRLJ* 149-166. In the context of cross-border conservation section 24 places a duty on the state to take reasonable legislative measures to accommodate and facilitate conservation across South Africa's sovereign borders.

182 Act 107 of 1998.

183 See Van der Linde *Compendium* 31, Nel and Du Plessis 2001 *SAJELP* 1-37 and Van der Linde and Basson 'Environment' in Chaskalson *Constitutional law* 50-9-50-27.

184 Chapter 2 of NEMA. Relevant to pollution section 28 of NEMA establishes an extensive duty of care. This duty of care links to past, present and future pollution and is coupled with remediation of damage. See Van der Linde and Basson 'Environment' in Chaskalson *Constitutional law* 50-14 and Kotze and Du Plessis *Absolving historical polluters from liability through restrictive judicial interpretation: Some thoughts on Bareki NO v Gencor Ltd* (To appear in *Stell LR* 2007). See also Nel and Du Plessis 2001 *SAJELP* 1-37.

185 Section 2 of NEMA. See also paragraph 4.1 above.

186 Section 2(1)(e) of NEMA.

187 Section 2(2) of NEMA.

188 Section 2(3) of NEMA.

189 Section 2(4)(a).

190 Section 2(4)(a).

above,¹⁹¹ the NEMA principles act as guiding norms for all facets of environmental governance.

NEMA introduces co-operative governance by establishing governmental institutions that aim to ensure proper enforcement of environmental protection.¹⁹² In the case of the MDTP this is a very important inclusion. As will be seen below,¹⁹³ the MDTP straddles the borders of the Eastern Cape, Free State and Kwazulu Natal. This creates institutional fragmentation and increases the need for co-operative governance.¹⁹⁴ Co-operative governance, in light of the provisions extracted from the international, regional and sub-regional discussions above, must also take up a new dimension. Cross-border cooperation implies that co-operative governance should transcend borders and can not be confined to sovereign borders.¹⁹⁵

Chapter 6 of NEMA deals with international agreements and obligations. For an international instrument to be of effect in the Republic, compliance with section 231 of the Constitution is necessary.¹⁹⁶ After such compliance the Minister may issue legislation and regulations relating to the international instrument. These provisions ensure that international instruments will eventually be domestically enforceable and incorporates international instruments into the SA domestic legal system. The content of the legislation may relate to, amongst other, the following: coordination and implementation as well as compliance with the provisions of the instrument.¹⁹⁷

191 Discussed in paragraph 4.1 above.

192 Section 2 of NEMA. See also Kotze *Integrated Environmental Governance* 95-126.

193 Paragraph 6.2 below.

194 See paragraph 2.3 above.

195 See Bray 2005 *THRHR* 211-212 and Bray 1995 *SAPL* 173-174.

196 See section 6.1.2 below.

197 Section 231(4) of the Constitution states:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Taking into account section 231(4) of the Constitution, it is clear that for an international agreement (and subsequently, the norms contained within it) to become law in South Africa, enabling legislation must exist. This is reiterated in section 25(3)

Chapter 7 of NEMA sets out measures for compliance, enforcement and protection. Part 2 of chapter 7 deals with enforcement of NEMA and other specific environmental management acts, including NEMPA and NEMBA. In an innovative move, provision is made for the appointment of environmental management inspectors.¹⁹⁸ The duties of these inspectors include, amongst others, the investigation of any acts or omissions whereby the contravention of any of the provisions of specific NEMA acts are reasonably suspected.¹⁹⁹

No explicit provisions regarding environmental governance generally and more specifically, transboundary biodiversity conservation is to be found in NEMA. This absence is of great significance as NEMA serves as a framework act and should accommodate most, if not all, environmental considerations. This absence leaves a significant *lacuna* in NEMA that needs to be addressed. When NEMA does not provide for certain issues as a framework act, it is unlikely that the issue will be addressed in the rest of the NEMA framework. This creates a deficient regime. Perhaps an over-inclusive approach might serve a framework act like NEMA better than an under-inclusive approach.²⁰⁰

of NEMA. See Kotze and Du Plessis *The Inception and Role of International Environmental Law in Domestic Biodiversity Conservation Efforts: The South African Experience QUTLJJ* to be published 2007.

198 Sections 31B and 31C.

199 Sections 31G(i)-(iii). They further have powers to question a person where a contravention as above is reasonably suspected. Powers of seizure are also awarded in terms of section 31I. Powers to search and enter vehicles, vessels and aircraft without a warrant is also awarded to inspectors. Section 31J. For purposes of compliance with relevant legislation, powers for routine inspections without a warrant are also awarded. Section 31K. In terms of any offence regarding NEMA and its other acts, the South African Police Service members will have the same powers as the environmental inspectors except for routine inspections and the issuing of compliance notices. Section 31O. When fully operational and when enough of these inspectors can be deployed into the field, this could truly be an effective mechanism enhancing compliance with and enforcement of the NEMA regime. See also Feris 2006 *PER* 1-18 available at http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/issues/2006_3_Feris_art.pdf 1 March.

200 Although the provisions on co-operative governance, the environmental management principles as well as other provisions discussed in paragraph 6.1.1 above may find indirect relevance to cross-border biodiversity conservation, no specific provisions exist in relation thereto.

This deficiency may also have led to the absence of dedicated legislation relating to transfrontier biodiversity conservation. Accordingly, provisions relevant to cross-border conservation must be extracted from the legal framework under NEMA and other relevant environmental legislation in order to establish a legal framework. These are discussed below.

6.1.2 NEMA Biodiversity Act

The main instrument regulating conservation of biodiversity in South Africa is the *National Environmental Management: Biodiversity Act*²⁰¹ (NEMBA). The focus of NEMBA falls on conservation and sustainable use of biodiversity and is therefore directly applicable to the MDTP.²⁰² NEMBA gives effect to all ratified international agreements affecting biodiversity.²⁰³ The application of NEMBA must be done in accordance with the environmental management principles contained in NEMA.²⁰⁴ Chapter 3 of NEMBA provides for biodiversity planning and monitoring.²⁰⁵ This includes the establishment of a national biodiversity framework for an integrated and coordinated approach to biodiversity management across different spheres of government.²⁰⁶ This provision is of great importance to the MDTP, on the South African side, as a national biodiversity framework will arguably imply alignment and harmonisation of the different provincial frameworks. This may even include national and possibly, international frameworks. Chapter 3 also provides for the establishment of bioregions where

201 Act 10 of 2004.

202 Section 2 of NEMBA.

203 See paragraph 4.2.1 above. Section 5 of NEMBA. All the international agreements discussed above have been ratified by South Africa and is thus binding on the Republic. Section 231(4) of the Constitution states:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Taking into account section 231(4) of the Constitution, it is clear that for an international agreement (and subsequently, the norms contained within it) to become law in South Africa, enabling legislation must exist. This is reiterated in section 25(3) of NEMA. See Kotze and Du Plessis *The Inception and Role of International Environmental Law in Domestic Biodiversity Conservation Efforts: The South African Experience QUTLJJ* to be published 2007.

204 Section 7 of NEMBA. See paragraph 6 above.

205 Sections 37 – 47 of NEMBA.

206 Sections 38 and 39 of NEMBA.

concentrated biodiversity is resident as is the case in the MDTP.²⁰⁷ The importance of this provision lies in the fact that agreements may be entered into with neighbouring countries to successfully implement the conservation of biodiversity within these bioregions. It can be derived from this provision that bioregions may be established to transcend borders and thus the provision allows directly for cross-border conservation.

Chapter 4 of NEMBA deals with, amongst others, the protection of threatened ecosystems²⁰⁸ and species.²⁰⁹ Effect is given to CITES in that provision is made for the regulation of trade in threatened or protected species.²¹⁰ Ecosystems and species form part of the definition of biodiversity.²¹¹ The conservation and protection thereof, as mentioned above, accordingly forms an integral part of biodiversity conservation and is thus very important to the MDTP.

Although setting the benchmark for the conservation of biodiversity at national level in South Africa, NEMBA fails to identify sufficient provisions to clarify and explicitly accommodate the position regarding transboundary conservation.²¹² Some of the positive aspects of NEMBA includes that it is a good integrated mechanism to conserve biodiversity. Sufficient provision for all aspects of biodiversity further seems to be made. As discussed above, some of the provisions may even find application to a cross-border setting. Unfortunately, by not including dedicated and substantive provisions for cross-border biodiversity conservation, legal uncertainty may lead to NEMBA remaining a sovereign national instrument not applied beyond our borders.

207 Section 40 of NEMBA. Special bioregional plans must be established for the conservation of biodiversity within these bioregions. Where effective implementation of the bioregional plan will be supported by an agreement with a neighbouring country, the Minister may enter into such agreement. Section 40(4)(a) of NEMBA. A similar provision is contained in the Lesotho NCB see paragraph 6.3.2 below.

208 Sections 52 – 54 of NEMBA.

209 Sections 56 – 57 of NEMBA.

210 Sections 59 – 62 of NEMBA.

211 See chapter 3 above.

212 Although NEMBA fails to identify specific provisions for transboundary conservation, it finds application in the MDTP albeit only within South African jurisdiction.

6.1.3 National environmental management: Protected Areas Act

The *National Environmental Management: Protected Areas Act*²¹³ (NEMPA) was promulgated to regulate protected areas.²¹⁴ Protected areas, as described in section 9 of NEMPA, include, amongst others, national parks, nature reserves, world heritage sites and mountain catchment areas.²¹⁵ The MDTP (on the South African side) is home to various protected areas and NEMPA would be applicable in these areas.²¹⁶ It is important to note that the MDTP as a whole is not a protected area as described under NEMPA and therefore NEMPA only applies to fragments of the MDTP.²¹⁷ NEMPA must be read in conjunction with both NEMA and NEMBA.²¹⁸ Similar to NEMBA the environmental management principles contained in NEMA also find application in all areas concerning NEMPA.²¹⁹ The relevance of NEMPA in relation to biodiversity conservation in the MDTP can be found in the description of the purpose of protected areas.²²⁰

213 Act 57 of 2003.

214 Section 2(c) of NEMPA.

215 Mountain catchment areas must be declared under the *Mountain Catchment Areas Act* 63 of 1970. See section 9(e) of NEMPA.

216 The following protected areas fall within the ambit of NEMPA: the uKhahlamba Drakensberg Park, Sterkfontein Nature Reserve, Qwa Qwa Nature Reserve, Golden Gate Highlands National Park, Coleford Nature Reserve, Royal Natal National Park and the Ongeluksnek Nature Reserve. These areas are also classified as IUCN category II, IV and VI protected areas. See Sandwith 'Overcoming barriers' in Goodale *et al Transboundary Protected Areas* 156.

217 By 'fragments' the author does not mean that NEMPA finds little application in the MDTP. On the contrary, most of the MDTP consists of protected areas as described in NEMPA. For a graphical example of the layout of the MDTP see figure 1 above as well as Sandwith 'Overcoming barriers' in Goodale *et al Transboundary Protected Areas* 156.

218 Sections 5 and 6 of NEMPA, respectively.

219 Section 5(1)(a) of NEMPA.

220 Section 17 of NEMPA states:

The purposes of the declaration of areas as protected areas are-(a) to protect ecologically viable areas representative of South Africa's biological diversity and its natural landscapes and seascapes in a system of protected areas;(b) to preserve the ecological integrity of those areas;(c) to conserve biodiversity in those areas(d) to protect areas representative of all ecosystems, habitats and species naturally occurring in South Africa;(e) to protect South Africa's threatened or rare species;(f) to protect an area which is vulnerable or ecologically sensitive;(g) to assist in ensuring the sustained supply of environmental goods and services;(h) to provide for the sustainable use of natural and biological resources;(i) to create or augment destinations for nature-based tourism;(j) to manage the interrelationship between natural environmental biodiversity, human settlement and economic development;(k) generally, to contribute to human, social, cultural, spiritual and economic development; or(l) to rehabilitate and restore degraded ecosystems and promote the recovery of endangered and vulnerable species.

In this description, the conservation and sustainable use of biodiversity seems to be the main incentive behind the establishment and regulation of protected areas.²²¹

A deficiency of NEMPA is that no specific reference can be found that relates to transboundary protected areas. As this is South Africa's principal act dealing with protected areas one would expect such an inclusion. Accordingly it is also not surprising that provisions for cross-border conservation of biodiversity are absent. Provisions for co-management of protected areas are included and may find indirect relevance to the MDTP.²²² Co-management agreements can be entered into between the managing authority and any other party.²²³ The wording 'any other party' and 'management authority' seems to be wide enough to accommodate the agreements being entered into across borders.²²⁴ Should such wide definition be afforded, this provision may be interpreted to allow for co-management of parks or areas traversing national borders and may be applicable to the MDTP.

NEMPA further makes provision for management criteria and plans for effective management of protected areas.²²⁵ The effective management of protected areas may directly serve the cause of conserving and protecting biodiversity.²²⁶ Effective management, in turn, requires a precise and unambiguous framework of law as well as (especially in a transboundary park) cooperation between all interested parties.

221 Section 17 of NEMPA.

222 Section 42 of NEMPA.

223 Section 42(1)(a) of NEMPA. In terms of section 1 of NEMPA 'management authority' is defined as follows: '...means the organ of state or other institution or person in which the authority to manage the protected area is vested.' Considering the wording of article 42(1)(a) of NEMPA, there seem to be no reason why this co-management cannot extend across national boundaries.

224 In terms of section 1 of NEMPA 'management authority' is defined as: '...the organ of state or other institution or person in which the authority to manage the protected area is vested.' Considering the wording of article 42(1)(a) of NEMPA, there seem to be no reason why this co-management cannot extend across national boundaries.

225 Article 40 and 41 of NEMPA, respectively.

226 See paragraph 1 above.

6.1.4 Other relevant legislation

Considering the fact that the MDTP possesses water in abundance²²⁷ the *National Water Act*²²⁸ (NWA) may also apply to the MDTP. The purpose of the NWA, amongst others, is to protect aquatic environments and their associated ecosystems and biological diversity.²²⁹ This protection includes wetlands²³⁰ as they are defined in section 1(1) of the NWA.²³¹ International water management is covered in chapter 10 of the NWA. The minister may establish bodies to implement international agreements relating to, amongst others, investigating, managing, monitoring and protecting water resources²³² and regional cooperation.²³³ The provisions of the NWA are of critical importance to the MDTP as water serves as the basis of biodiversity and without it ecosystems and species can not survive.²³⁴ The MDTP furthermore plays host to two of the largest civil engineering projects in Southern Africa supplying water to both Lesotho and South Africa and thus contributing directly to the livelihood of both countries.²³⁵

The *National Forest Act*²³⁶ (NFA) may be relevant to the protection of forest and trees. Protection of forests and trees are provided for in chapter 3 of the NFA.²³⁷ The provisions relating to forests are not as significant as the

227 Discussed in paragraph 3 above.

228 Act 36 of 1998.

229 Section 2(g) of the NWA.

230 With regard to wetlands the NWA may apply as the uKhahlamba Drakensberg Park is a recognised Ramsar site. See paragraph 4.2.2 above.

231 Glazewski points out that no dedicated legislation as to the protection of wetlands exists. Although the *Conservation of Agricultural Resources Act* 34 of 1983, also provides for protection of wetlands, this Act, according to Glazewski, does not apply in urban areas where most wetlands can be found. Glazewski *Environmental Law* 447.

232 Section 102(a) of the NWA.

233 Section 102(b) of the NWA.

234 See paragraph 5.2.2 above. The *Mountain Catchment Areas Act* 63 of 1970 may also apply as the MDTP serves as a catchment area as described in paragraph 3.1 above. The purpose of this Act is to provide for the management, use, conservation of land situated in mountain catchment areas. See Glazewski *Environmental Law* 397.

235 See paragraph 3.1 above.

236 Act 84 of 1998.

237 The provisions relating to forests are not as significant as the majority of the MDTP is situated above 2500 meters above sea level which normally contains little if any forest. See paragraph 3.1 above. Where natural forest is found, Chapter 3: Part 1 of the NFA contains provisions to prohibit the destruction thereof. In terms of Chapter 3:

majority of the MDTP is situated 2500 meters above sea level which normally contains little if any forest.²³⁸ However, where natural forest is found, chapter 3 part 1 of the NFA contains provisions to prohibit the destruction of natural forest. Chapter 3, part 3 deals with the protection of trees and chapter 3, part 4 deals with measures to control and remedy deforestation.

The *National Heritage Resources Act*²³⁹ (NHRA) applies to the management and conservation of the uKhahlamba Drakensberg Park.²⁴⁰ Although, *prima facie*, it would seem that the NHRA would be irrelevant to the conservation of biodiversity in the MDTP, conservation of this heritage also conserves the habitat of the various fauna and flora in the MDTP.²⁴¹ Moreover, cultural heritage resources form part of the natural environment. Accordingly, the NHRA may contribute to the conservation of biodiversity. To add strength to the NHRA, the *World Heritage Convention Act*²⁴² (WHCA) was adopted to accommodate the enactment of the WHC.²⁴³ The WHCA provides for the implementation and enforcement of the WHC in South Africa and its provisions thus apply to the MDTP.²⁴⁴

Part 3 deals with the protection of trees and Chapter 3: Part 4 deals with measures to control and remedy deforestation

238 See paragraph 3.1 above.

239 Act 25 of 1999.

240 See paragraph 3.1 above.

241 The NHRA defines 'heritage resource' as follows: 'any place or object of cultural significance'. Section 2(xvi) of the NHRA. 'Place' is further defined to include, amongst other, a site, area or region. Section 2(xxxii)(a) of the NHRA. As the uKhahlamba Drakensberg Park is a World Heritage site (see paragraph 3.1 above) and fall within the protection of the NHRA, the preservation of this heritage (place, area or region) will indirectly contribute to the resident biodiversity. Sandwith identifies poor management of cultural heritage as one of the 'principal threats' to biodiversity. See Sandwith 'Overcoming barriers' in Goodale *et al Transboundary Protected Areas* 157-158.

242 Act 49 of 1999.

243 See paragraph 4.2.3 above. Section 231(4) of the Constitution states:

Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament.

Taking into account section 231(4) of the Constitution, it is clear that for an international agreement (and subsequently, the norms contained within it) to become law in South Africa, enabling legislation must exist. This is reiterated in section 25(3) of NEMA. See Kotze and Du Plessis *The Inception and Role of International Environmental Law in Domestic Biodiversity Conservation Efforts: The South African Experience QUTLJJ* to be published 2007.

244 The main objective of the WHCA as described in section 3(a) is to provide for:

6.2 Provincial legislation in South Africa

The MDTP extends across the borders of the Eastern Cape, Kwazulu-Natal and the Free State and therefore their respective legal regimes will also apply in the MDTP.²⁴⁵ What follows is a short overview of provincial-specific legislation which may, in addition to international, regional, sub-regional and national legislation, also be applicable and contribute to cross-border conservation of biodiversity.

6.2.1 Eastern Cape

The Eastern Cape government enacted the *Provincial Parks Board Act* (PPBA).²⁴⁶ The PPBA provides for a Provincial Parks Board to be established, as well as provisions for the declaration and management of provincial parks. A new development in relation to protected areas is the *Protected Areas Bill, 2002* (PAB). The PAB seems to be in pace with modern developments as it incorporates and gives effect to NEMA and international environmental law.²⁴⁷ The PAB provides for the Eastern Cape Parks Board to be established²⁴⁸ and for the declaration of protected areas within the Province.²⁴⁹ The PAB shows much likeness to the NEMPA discussed above.²⁵⁰ In the context of the MDTP this is a welcome

(i) the cultural and environmental protection and sustainable development of, and related activities within, World Heritage Sites; and (ii) giving effect to the values of the Convention.

Section 4 of the WHCA lays down the 'fundamental principles' to be applied in world heritage sites. Principles like sustainable development are included. Chapter IV of the WHCA provide for integrated management plans and Chapter V deals with purchase, expropriation and transfer of land with relation to world heritage sites. See paragraphs 3.1 and 4.2.3 above.

245 See the discussion on fragmentation in paragraph 2.3 above.

246 Act 12 of 2003 (Eastern Cape).

247 Section 2 states: 'The objectives of this Act are- (a) to provide, within the framework of the National Environmental Management Act, for the declaration and management of protected areas; (b) to give effect to international agreements on protected areas which are binding on the Republic; and (c) to provide for co-operative governance in the declaration and management of protected areas.'

248 Chapter 2.

249 Chapter 3 allows for limited development areas, special nature reserves, Provincial parks, Nature reserves and sites of ecological importance to be declared as protected areas. Chapter 5 of the PBA (Eastern Cape) provides for the management of the protected areas.

250 See paragraph 6.1.3 above.

development as the PAB aligns with, and gives effect to NEMPA, thus minimising fragmented approaches and contributes to legal certainty.

In relation to nature conservation, the *Ciskei Nature Conservation Act*²⁵¹ still applies in the part of the Eastern Cape formerly known as Ciskei. In addition, the *Nature and Environmental Conservation Ordinance*²⁵² also regulates nature conservation.²⁵³ Another contemporary development in pace with modern trends is the *Environment Conservation Bill, 2002* (ECB). The ECB covers a comprehensive range of environmental issues from pollution control,²⁵⁴ to protective measures for caves and cave formations.²⁵⁵ Directly relevant to the conservation of biodiversity in MDTP though, is the provisions relating to the protection of wild animals,²⁵⁶ the protection of fish in inland waters,²⁵⁷ the protection of flora,²⁵⁸ CITES²⁵⁹ and mountain catchment areas.²⁶⁰ Protection of these issues directly contributes to biodiversity conservation as they form part of biodiversity.²⁶¹ When the ECB enters into force, the *Ciskei Nature Conservation Act* and the *Nature and Environmental Conservation Ordinance* will be repealed in their entirety.²⁶² This is a welcome development as the ECB allows for a more holistic and integrated conservation strategy more adapt to the conservation of biodiversity in the Province.

6.2.2 Kwazulu-Natal

Protected areas and conservation in Kwazulu-Natal are regulated by the *Kwazulu-Natal Nature Conservation Management Act*²⁶³ (KZN

251 Act 10 of 1987.

252 Ordinance 19 of 1974.

253 For a discussion see Glazewski *Environmental Law*.

254 Chapter 11. Waste management and littering are covered in this chapter.

255 Chapter 9.

256 Chapter 5.

257 Chapter 6.

258 Chapter 7.

259 Chapter 8. Chapter 8 provides the provisions of CITES to be applicable on provincial level and incorporates them into the ECB. See paragraph 4.2.4 above.

260 Chapter 10.

261 See paragraphs 3, 3.1 and 6.1.2 above.

262 Schedule 7.

263 Act 9 of 1997.

Conservation Act). The KZN Conservation Act underwent extensive amendments by the *Kwazulu-Natal Nature Conservation Management Amendment Act*.²⁶⁴ The KZN Conservation Act (as amended) provides for the declaration and management of provincial protected areas. The Act fails to provide for substantive provisions relating to the conservation of biodiversity and cross-border conservation. The Act, however, sets the protection of biodiversity as a goal in categories 1,2,4,5 and 6 protected areas.²⁶⁵ The MDTP contains protected areas of categories 2, 4 and 6.²⁶⁶ Although setting conservation of biodiversity as a goal, the Act still disappoints by not including any substantive provisions therefore. The act replaces the *Nature Conservation Ordinance (NCO)*²⁶⁷ although the latter is still in force.²⁶⁸ Provisions in the NCO that may find application in the conservation of biodiversity in the MDTP are provisions relating to game,²⁶⁹ mammals,²⁷⁰ amphibians, reptiles and invertebrates,²⁷¹ wild birds,²⁷² freshwater fish²⁷³ and indigenous plants.²⁷⁴ These provisions may directly contribute to the conservation of biodiversity as the aforesaid elements form an integral part of biodiversity.²⁷⁵ Unfortunately the Act fails to accommodate any provisions relating to cross-border biodiversity conservation.²⁷⁶

264 Act 5 of 1999.

265 See Schedule 3 of the Kwazulu-Natal Nature Conservation Management Amendment Act.

266 For a graphical example of the layout and for an explanation of these categories see Sandwith 'Overcoming barriers' in Goodale *et al Transboundary Protected Areas* 156

267 Ordinance 15 of 1974.

268 The KZN Conservation Act repeals sections 2 to 11, inclusive section 11 A, sections 12 to 14, sections 17 and 18 and section 28.

269 Chapter III.

270 Chapter V.

271 Chapter VII.

272 Chapter VIII.

273 Chapter IX.

274 Chapter XI.

275 See also paragraphs 6.2.1, 6.1.4 and 6.1.2 above.

276 Cross-border conservation in this sense means both extending across provincial and national boundaries.

6.2.3 Free State

Conservation in the Free State Province still operates under the *Nature Conservation Ordinance* (FSNCO).²⁷⁷ FSNCO provides for biodiversity conservation in almost exactly the same way as the Kwazulu Natal NCO.²⁷⁸ The FSNCO provides for the protection of wild animals,²⁷⁹ fish,²⁸⁰ indigenous plants,²⁸¹ and regulation of nature reserves.²⁸² Development in the form of the *Free State Environmental Conservation Bill* (FSECB)²⁸³ will aim to replace the FSNCO. In terms of the FSECB, policies for environmental conservation must further the protection of, amongst others, ecological processes and the preservation of biodiversity in the natural environment.²⁸⁴ This development will be a shift from a one-sided species conservation approach towards a holistic biodiversity conservation approach. The aforesaid protection is given substantive meaning by providing for the establishment of protected natural environments and nature reserves.²⁸⁵ This emphasises the importance and the role that protected areas play in the conservation of biodiversity. Although the FSECB may potentially provide for biodiversity conservation within the Free State, it fails to provide for provision relating to cross-border conservation.²⁸⁶ Moreover, having been tabled in 1998, it is disappointing that the FSECB have not yet taken the form of binding legislation.

277 Ordinance 8 of 1969 (Orange Free State). The *Nature Conservation Ordinance* has under the *General Laws Repeal Act* 6 of 2005, promulgated in *Provincial Gazette* 125 of 2 December 2005, been assigned to the whole Free State Province with effect from 2 December 2005. Glazewski, 374, points out that the *Qwaqwa Nature Conservation Act* 5 of 1976 (Orange Free State) also still finds application. As far as the author could establish however, the *Qwaqwa Nature Conservation Act* have been repealed in its entirety by the *General Laws Repeal Act* 6 of 2005 (Free State).

278 See paragraph 6.2.2. Glazewski emphasises the similarities between the different Provinces' Ordinances. See Glazewski *Environmental Law* 374.

279 Chapter II.

280 Chapter III.

281 Chapter IV.

282 Chapter V.

283 *General Notice* 21 of 1998 (Free State).

284 Section 2(1)(a).

285 Chapters III and VI respectively. The topical issue of pollution is also covered in chapter IV.

286 Cross-border conservation in this sense means both traversing provincial and national boundaries.

It seems, from the discussion above, that no explicit provisions for transboundary biodiversity conservation is to be found in any of the provincial acts. This is perhaps not surprising as no concrete and substantive provisions relating to cross-border biodiversity conservation could be drawn from the South African national framework.²⁸⁷

6.3 National legislation in Lesotho

Section 36 of the *Constitution of Lesotho*, 1993²⁸⁸ provides for environmental protection.²⁸⁹ Both constitutions strive to provide a protected environment to both present and future generations.²⁹⁰ A similar provision is also found in the *Environment Act* (EA) which serves as environmental framework legislation.²⁹¹ Various provisions regarding biodiversity are made in the EA which are discussed below. Contributing to the framework, the draft *Nature Conservation Bill*²⁹² will repeal all the existing fragmented

287 See paragraph 6.1 above.

288 This document was adopted in 1993 but subsequently amended in 1996, 1997, 1998, 2001, and 2003/4.

289 Nkiwane 'Environmental law in Lesotho' in *Teaching Environmental law in African Universities* Volume 1 UNEP Publication 370. Section 36 states:

Lesotho shall adopt policies designed to protect and enhance the natural and cultural environment of Lesotho for the benefit of both present and future generations and shall endeavour to assure to all citizens a sound and safe environment adequate for their health and well-being.

A possible drawback of the Constitution is the wording 'policies'. This could restrain (if interpreted strictly) the making of legislation to protect and enhance the environment. The use of the word 'enhance' is a potentially powerful inclusion. This word may mandate improvement of the current state of the environment and can therefore the principle of continual improvement is tacitly built into section 36.

290 See paragraph 6.1.1 above and section 36 of the Lesotho Constitution. Opposed to the South African Constitution, the Lesotho Constitution does not emphasise the socio-economic aspect of the environmental right. The South African Constitution reflects on justifiable economic and social development where no mention thereof is made in the Lesotho Constitution. This is ironic as Lesotho may be seen as a developing country and therefore the recognition of socio-economic rights are very important to them.

291 Promulgated in 2001. Section 4(1) of the EA states: 'Every person living in Lesotho- (a) has a right to a clean and healthy environment; and (b) has a duty to safeguard and enhance the environment including the duty to inform the Authority of all activities and phenomena that may affect the environment significantly.' See also Du Plessis 2001 *THRHR* 459.

292 See paragraph 1 above.

environmental legislation and proposes to implement a holistic effort for governance of natural resources.²⁹³

6.3.1 *Environment Act*

As the EA is the first real all-inclusive attempt to provide for environmental protection, and a broad amount of provisions relate to institutional arrangements.²⁹⁴ The EA is an attempt to establish a framework act in order to provide for effective and structured environmental governance.²⁹⁵ An environmental action plan, to be revised every 5 years, also compliments the EA and serves as implementation tool for environmental planning.²⁹⁶ Environmental impact assessments²⁹⁷ and pollution control²⁹⁸ also form part of the EA framework.

Provision is further made for the establishment, by the Lesotho Environmental Authority, of environmental quality standards for, amongst others, water, air, waste and soil.²⁹⁹ Part VIII of the EA deals with environmental management.³⁰⁰ Of specific importance to biodiversity conservation in the MDTP, provisions for conservation of mountainous areas,³⁰¹ rivers and wetlands³⁰² as well as forests³⁰³ are provided for.³⁰⁴ Guidelines and measures for the conservation of biodiversity can be issued

293 The Bill has been approved by Parliament and a date for entry into force is awaited. Kumar Interview October 2006.

294 Part III, sections 5 to 24 of the EA.

295 Du Plessis 2001 *THRHR* 459.

296 Part IV of the EA.

297 Part V of the EA.

298 Part VII of the EA.

299 Part VI of the EA.

300 No definition of 'environmental management' is provided in the EA. Environmental management however, is to comply to the environmental management principles set out in section 3(2)(a)-(o) of the EA. These principles include, amongst others, the notion of sustainable development, to reclaim lost ecosystems where possible and reverse the degradation of natural resources, and to promote co-operation with other governments and relevant national, international and regional organisations and other bodies concerned with the protection of the environment. These principles show some likeness to the environmental management principles set out in section 2 of NEMA. NEMA however, contains more in number and is more detailed in the description of these principles. See paragraph 6.1.1 above.

301 Sections 60 and 61 of the EA.

302 Section 62 of the EA.

303 Section 64 of the EA.

304 See paragraph 3.1 above.

by the Lesotho Environment Authority.³⁰⁵ Measures regarding *in situ*³⁰⁶ and *ex situ*³⁰⁷ conservation of biodiversity are also provided.³⁰⁸ In relation to international law, part XI of the EA deals with international agreements and provides for their implementation at national level.³⁰⁹

Although provision for biodiversity conservation is made, the cross-border conservation thereof is not explicitly provided for. Again, because the EA serves as framework legislation, this *lacuna* may cause cross-border conservation to be neglected in the rest of the EA regime.

6.3.2 Nature Conservation Bill

The Nature Conservation Bill (NCB) shows some likeness to NEMBA and NEMPA. The aim of the Bill is

...to provide for the management and conservation of Lesotho's biodiversity within the framework of the Environment Act, 2001.

Provision for the establishment of a Nature Conservation Division (NCD) is accommodated in the NCB.³¹⁰ The NCD will be the successor to various fragmented bodies that previously dealt with matters regarding conservation.³¹¹ Provision for the declaration and management of

305 Section 66(1) of the EA. The Lesotho Environment Authority is established under section 9 of the EA. The Lesotho National Environmental Policy sets guidelines for biodiversity conservation. Paragraph 4.10 states that:

1. Biodiversity has intrinsic values and is vital for agriculture, medicine, scientific research, cultural practices, tourism, and other socio-economic developments. 2. By involving the people who live close to and use biological resources, conservation of biological diversity becomes a sustainable enterprise. 3. Well packaged and targeted information on biodiversity is critical to raising public awareness and hence participation in programmes which protect and conserve biological diversity.

306 Section 67 of the EA.

307 Section 68 of the EA.

308 This inclusion shows likeness to the CBD. See paragraph 4.2.1 above.

309 Section 94(1) of the EA provides:

Where Lesotho is a party to an international or regional convention or agreement, concerning the management of the environment or natural resources, the Authority shall, in consultation with the relevant Line Ministry-(a) initiate and prepare legislative proposals for consideration by the relevant Ministry for purposes of implementing those international or regional conventions or agreements; and (b) identify appropriate measures necessary for the implementation of conventions or agreements.

310 Section 6 of the NCB.

311 Section 6(2) of the NCB.

protected areas is also covered in the NCB.³¹² In terms of section 42, the minister may fragment or consolidate protected areas.³¹³ Akin to section 42 of NEMPA, co-management of protected areas is covered in the NCB.³¹⁴

Part VI of the NCB provides for the protection of biodiversity. Section 58 of the NCB establishes a national biodiversity framework which must:³¹⁵

...provide for an integrated, co-ordinated and uniform approach to biodiversity management by all spheres of government, non-governmental organisations, the private sector, local communities, other stakeholders and the public.

Even more significant, this national framework *must*³¹⁶ reflect regional co-operation on issues concerning biodiversity management with South Africa.³¹⁷ This is a welcome inclusion and places a duty on cooperation regionally, and specifically with South Africa.

Bioregions where concentrated biodiversity occur require special plans for the management of such regions.³¹⁸ Where bioregions may require cooperation with South Africa, the Minister may take steps for an agreement between the countries.³¹⁹ Protection of threatened or protected

312 Part IV of the NCB.

313 Section 42 of the NCB provides:

The Minister may, in consultation with the Division and after consultation with any local boards affected thereby (a) incorporate all or part of a protected area into the area of jurisdiction of another local board; (b) declare a part of an existing protected area to be a separate protected area and either appoint a local board in respect of such area or incorporate such area into the area of jurisdiction of another local board; (c) combine two or more local boards in respect of two or more protected areas; and (d) de-establish a local board.

314 Section 44 of the NCB. For a discussion on section 42 of NEMPA, see paragraph 6.1.2 above. Comparing the two sections, section 44 of the NCB seems to be almost a carbon copy of section 42 of NEMPA.

315 Section 58(2)(a) of the NCB.

316 Own emphasis.

317 Section 58(2)(d) of the NCB. It is worth noting that section 58 of the NCB is almost an exact copy of section 38 of NEMBA.

318 Section 59 of the NCB. Section 40 of NEMBA also provides for bioregions to be established and bioregional plans to be implemented within them. See paragraph 6.1.2 above.

319 Section 59(2) of the NCB. Section 59 of the NCB is almost a carbon copy of section 40 of NEMBA. As far as the author could establish, apart from the bilateral MoU, no such agreement to date exist between South Africa and Lesotho. See paragraph 6.1.2 above.

ecosystems³²⁰ and species³²¹ is provided as well as trade in such species.³²² Management of alien and invasive species is also covered by the Bill.³²³ Like NEMBA, the NCB fails to provide specifically for transboundary biodiversity conservation but it does contain provisions for regional cooperation that may lay a sound foundation for cross-border biodiversity conservation.

6.3.3 *National Heritage Bill*

The most recent environmental development in Lesotho comes in the form of the *National Heritage Bill, 2006* (NHB). The NHB aims to protect, preserve and conserve cultural, natural and living heritage within Lesotho.³²⁴ Part V of the NHB provides for the protection and management of heritage resources. To provide protection for such areas, the area surrounding heritage resources may be declared protected areas.³²⁵

Further protection in the form of impact assessment is provided. These impact assessments are obligatory where any development is likely to affect the heritage resource.³²⁶ The relevance of the NHB is reflected in the heritage found in the MDTP that forms part of the natural environment.³²⁷ Conservation and protection of this heritage forms an integral part of biodiversity conservation.³²⁸ When in force, the NHB will repeal the *Historical Monuments, Relics, Fauna and Flora Act*.³²⁹

320 Section 63 of the NCB. Section 52 of NEMBA also deals with threatened and protected ecosystems and species. See paragraph 6.1.2 above.

321 Section 64 of the NCB. Section 56 of NEMBA provides for the protection of threatened species. See paragraph 6.1.2 above.

322 Section 65 of the NCB. Section 59 of NEMBA also deals with trade in threatened or protected species. See paragraph 6.1.2 above.

323 Sections 66 and 67, respectively, of the NCB. Parallel provisions to sections 66 and 67 of the NCB are found in chapter 5 of NEMBA.

324 Preamble to the NHB.

325 Section 21 of the NHB.

326 Section 33(1) of the NHB. It is interesting to note that the use of 'affect' and not 'negatively affect' arguably places a higher form of protection to heritage resources. The same wording (affect) is found in section 38(2)(a) of the South African NHRA.

327 See paragraphs 3, 4.2.3 and 6.1.4 above.

328 See paragraphs 3, 4.2.3 and 6.1.4 above.

329 Act 41 of 1967. Repealed by Section 46(1)(a) of the NHB. See paragraph 6.3.4 below. The NCB also provides for the *Historical Monuments, Relics, Fauna and Flora Act* to be repealed. See paragraph 6.3.4 below.

6.3.4 Other relevant legislation

Although the legislation discussed above forms the main framework for the cross-border conservation of biodiversity, other legislation may also apply to the MDTP.³³⁰ The *National Parks Act*,³³¹ *Forestry Act*,³³² *Water Resources Act*³³³ and the *Historical Monuments, Relics, Fauna and Flora Act*³³⁴ may all contribute to the framework regulating biodiversity.³³⁵

6.4 South Africa and Lesotho compared

It may be derived from the foregoing that South Africa has been more vigilant in establishing a comprehensive albeit fragmented and cumbersome, legal framework to regulate biodiversity in relation to cross-

330 Due to length restrictions on this dissertation these will only be discussed very briefly in footnotes hereafter.

331 Act 11 of 1975. This Act contributes to the biodiversity conservation in the MDTP as it regulates the National Parks of Lesotho and the biodiversity contained within them. A Board of Trustees is established in terms of section 5 of the Act to provide for the establishment and maintenance of national parks and the conservation of *fauna* and *flora*. Hunting and collection of plants is restricted in national parks by section 11.

332 Act 17 of 1998. The Forestry Act contributes to the conservation of natural forest and protected flora. Part IV of the Act provides for forest management. The goal of forest management being 'to obtain the maximum benefits in the form of forest production, environmental conservation and other economic uses that can be sustained over time.' Section 8(1) of the Act. Part V deals with forest reserves and private forests. Amongst others, provision relating to their declaration and management is made. See sections 12 and 16 of the Act. Protection of forests is covered in part VII of the Act. Protection against fire, sections 26 and 27 as well as protection against disease, section 28, is also provided for in the Act.

333 Act 22 of 1978. The importance of water for biodiversity conservation has been stressed in paragraph 3.1 above. The Act, in its preamble, states (as overriding goal): '[The act is established] for the use and control, the protection and conservation of water resources'. Provision for water use licences is made in section 4 of the Act. Pollution of water, is covered by sections 10 and 11 of the Act.

334 The relevance of natural and cultural heritage has been explained in paragraphs 3.1 and 4.2.3 above. This Act regulates the aforesaid aspects together with *fauna* and *flora*, although to a lesser extent than the legislation discussed in paragraphs 6.3.1-6.3.2 above. In terms of section 3(1) of the Act, the Preservation and Protection Commission is established. Section 10(1) provides that no *fauna* can be destroyed, damaged or removed from their habitat. Such actions will require written consent of the aforesaid Preservation and Protection Commission.

335 Legislation contributing indirectly includes, but is not limited to, the *Disaster Management Act* 2 of 1997 and the *Stock Theft Act* 4 of 2000. When the NCB enters into force, the *National Parks Act* as well as the *Historical Monuments, Relics, Fauna and Flora Act* will be repealed. For a list of legislation to be repealed when the NCB enters into force see schedule 1 of the act.

border conservation.³³⁶ Nationally, South Africa possesses a plethora of environmental acts which leads to a fragmented, insufficient and overall cumbersome governance effort. Being divided into provinces adds to this toll. NEMA as framework legislation is an important step towards integration and cohesiveness amongst the myriad of legislation.³³⁷ Lesotho, on the other hand, does not have as much environmental legislation as South Africa. The EA, also acting as framework legislation, provides Lesotho with a contemporary instrument for environmental protection.³³⁸ A major deficiency in both pieces of framework legislation is the absence of specific provisions relating to cross-border conservation. Accordingly, with no norm set as to cross-border conservation, it is unlikely for integrated provisions relating to cross-border conservation to emerge from the respective regimes of legislation under the framework acts. It seems that little has been done to promulgate legislation within the EA framework and that the NCB will be the first act to be the direct result thereof. The NCB contains many similarities and in some instances contains almost exactly the same provisions as NEMA and NEMBA.³³⁹ If the NCB does indeed come into force it may contribute greatly to the cause of harmonisation of legislation relating to biodiversity. This in turn may improve like-mindedness and cooperation between the relevant parties responsible for the cross-border conservation on grassroots level.

The following benefits as well as shortcomings have been identified in the national environmental regimes:

- No single integrated act exists for the cross-border conservation of biodiversity;
- Various provisions for the 'exclusive' conservation of biodiversity exist but does not apply across borders;
- Various provisions throughout both national systems may contribute to cross-border biodiversity conservation;

336 Many factors may have contributed to this, but the level of development in infrastructure and economy compared to that of Lesotho, may be the greatest reason.

337 See paragraph 6.1.1 above.

338 See paragraph 6.3.1 above.

339 See paragraph 6.3.1, 6.3.2 and 6.1.2 above.

- Provisions are scattered and fragmented amongst a plethora of acts; and
- Little legal certainty as to cross-border biodiversity conservation can be established because of this haphazard, fragmented and discontinuous legal regime.

Although provisions relating to biodiversity are found in the respective national frameworks discussed above, cross-border conservation thereof is not sufficiently covered. The lack of integrated substantive provisions and the existence of vague notions of regional cooperation leave a *lacunae* that need to be addressed. The bilateral MoU is the only document remaining to extract provisions for integrated cross-border conservation of biodiversity. This enquiry now turns to investigate its content.

7 The Bilateral MoU

The MoU between South Africa and Lesotho (the Parties) can arguably be described as the most important document for the MDTP as far as facilitation of integrated cross-border conservation of biodiversity is concerned.³⁴⁰ This argument is based on the lack of cross-border conservation provisions extracted from the national regimes. The MoU can serve as the perfect instrument to fill the gaps from the deficient legal frameworks discussed above. The MoU seems to be a normal bi-lateral contract and no evidence can be found that the MoU has been established in terms of any of the acts discussed above.

As may be expected, the MoU provides generously for cooperation and mechanisms to accommodate such cooperation between the parties. A Steering Committee is established to carry out the provisions set forth in the MoU.³⁴¹ The Steering Committee further facilitates as a forum for

³⁴⁰ Possible drawbacks of the MoU may be that it is a bilateral contract and it is based on consensus. Consensus on cross-border level may be difficult to accomplish and may lead to provisions being vague because of compromises and political influence because of differential state interests and differing national policies.

³⁴¹ Section 4 of the MoU.

discussion and coordination of conservation and sustainable use of resources in the MDTP.³⁴² The parties will respectively establish Project Coordination Committees which are the South African Project Coordination Committee (SAPCC) and the Lesotho Project Coordination Committee (LPCC).³⁴³ The main functions of both the SAPCC and LPCC are: the overall coordination of the Project, financial management and procurement, allocation of resources among the various agencies and activities, annual work plans and budgets for project activities, monitoring and evaluation, reporting requirements,³⁴⁴ as well as responsibilities and liaison with the Steering Committee.³⁴⁵ To assist both the LPCC and the SAPCC, a Project Coordinating Unit is established for each.³⁴⁶ The abovementioned Committees set the basis for the enforcement and implementation of the MoU in the MDTP. It seems that sufficient provision is made for cooperation between the two parties to effect proper transboundary governance of the MDTP's assets.

As to specific provisions regarding transboundary conservation of biodiversity, the MoU disappoints especially considering that such

342 Section 4(5) of the MoU. Further specific functions of the Steering Committee is set out by section IV(5), these are:

(a) providing strategic direction on matters arising in connection with this MoU, in particular regarding Article 8;(b) facilitating further cooperation and integration of activities as may be delegated to it from time to time by the Parties;(c) serving as a forum for discussing and facilitating the resolution of transboundary disputes in the Area; (d) providing advice and recommendation on proposed conservation and development programs, projects and initiatives in the Area; (e) proposing areas to be designated as protected or subject to other landuse controls; (f) monitoring conservation and development activities in the Area; (g) coordinating and exchanging relevant information; (h) promoting scientific, environmental, economic, cultural, recreational and social activities related to the Area; (i) developing a strategic management plan for the conservation and development of the Area within three years of the date of this MoU, and recommending its adoption and implementation by the relevant authorities; (j) actively searching for funding alternatives for conservation and sustainable development activities in the Area; (k) in respect of the proposed Project (i) providing advice and recommendations concerning key implementation aspects; (ii) considering and approving annual work plans proposed by the LPCC and the SAPCC; (iii) reviewing progress reports; and (l) establishing and supervising Working Groups in accordance with the provisions of Article 5 of this MoU.

343 Section 6 of the MoU.

344 For example: quarterly reports, quarterly financial management reports and annual reports. See section 6 of the MoU.

345 Section 6 of the MoU.

346 Section 7 of the MoU. They are the South African Project Coordination Unit (SAPCU) and the Lesotho Project Coordination Unit (LPCU).

conservation is regarded as the main objective of the MDTP.³⁴⁷ Considering the discussion above, the MoU seems to be more of a means to foster cooperation between the parties. The lack of substantive provision for transboundary conservation of biodiversity disappoints as the MoU could possibly have made a significant 'grassroots' impact by establishing substantive provisions for the cross-border conservation of biodiversity. This failure leaves the substantive provisions to be drawn from the fragmented and disjointed legal frameworks discussed above. This framework is not the ideal setting from which substantive provisions can be drawn, and leaves uncertainty regarding the applicable provisions regarding cross-border conservation of biodiversity in the MDTP.

8 Recommendations

In the foregoing paragraphs, norms, principles and substantive provisions all relating directly or indirectly to cross-border conservation of biodiversity in the MDTP have been extracted. This was done through the investigation of international, regional, sub-regional and national legal frameworks.³⁴⁸ As would be expected from the nature of international, regional and sub-regional instruments, they provide generously, albeit very generally, for cooperation between states. The consequence is a comprehensive legal framework mandating and providing for cooperation across sovereign borders.³⁴⁹ Although cooperation sets the basis for cross-border conservation, the lack of specific provisions providing for cross-border conservation of biodiversity resources leave *lacunae* at the international, regional and sub-regional levels.³⁵⁰ These *lacunae* are left to be filled by the respective national frameworks of South Africa and Lesotho.

When investigating the national frameworks of both South Africa and Lesotho, the principle of state sovereignty again takes its toll. This is

347 Section 1(1) of the MoU states: 'The objective of this MoU is to establish a framework for cooperation between the Parties for the purpose of conserving biological diversity and promoting sustainable development of the Area.'

348 See paragraphs 4, 5 and 6 above.

349 See also paragraph 2 above.

350 See paragraphs 4.4 and 5.3 above.

indicated by ample provision for the conservation of biodiversity within their respective territories but no specific provision for cross-border conservation thereof.³⁵¹ This deficiency is amplified by the fact that neither the EA of Lesotho nor NEMA of South Africa (both serving as framework acts) provide for cross-border conservation of biodiversity. Perhaps this could partly explain the absence of cross-border conservation in the rest of their respective regimes.

The MoU between South Africa and Lesotho further disappoints and contributes to the legal uncertainty relating to cross-border conservation of biodiversity.³⁵² Although stating the conservation of biodiversity as one of the main objectives of the MDTP, the MoU does not provide any substantive provisions therefore.³⁵³ It does, however, provide for cooperation.

Central to the accomplishment of cross-border conservation of biodiversity is sound environmental governance.³⁵⁴ Two aspects for successful environmental governance and cross-border conservation of biodiversity are proposed to be integrated and structured processes of decision-making, and, implementation of decisions taken.³⁵⁵ These processes and instruments for implementation are provided by the legal frameworks discussed above. Unfortunately, the existing legal frameworks are deficient and may lead to legal uncertainty. Accordingly, integrated and structured processes of decision making as well as their implementation can not be achieved successfully. Some proposals that may contribute to successful cross-border conservation are listed below.

351 See paragraphs 6.1, 6.2 and 6.4 above.

352 See paragraph 7 above.

353 See paragraph 7 above.

354 According to Borrini-Feyerabend *et al* good governance depends on the legitimacy of the political system and on the respect of local people for its institutions. Capacity of institutions to respond to problems also plays a role. Accordingly, Borrini-Feyerabend *et al* defines governance as 'the complex of ways by which individuals and institutions, public and private, manage their common concerns'. Borrini-Feyerabend *et al* *Co-management* 7. It is proposed that this definition can be applied, *mutatis mutandis* to environmental governance. See also Ogendo 'Governance and Sustainable Development' in Ginther *et al* *Good Governance* 105-110 and Bray 2005 *THRHR* 211-212.

355 IUCN ROSA *Legal Framework* 17.

- Amendment of NEMA and the EA: It is proposed that the most important step towards a successful solution is to amend the current framework acts. When cross-border conservation of biodiversity resources forms explicit part of the framework acts, there will be a mandate to adopt policies and/or legislation to accommodate cross-border conservation of biodiversity.
- Dedicated cross-border conservation legislation: This option could bring legal certainty to the fragmented and uncertain state of cross-border conservation. The problem with this proposed legislation would be that the working and jurisdiction thereof would be confined to sovereign borders again. Moreover, in South Africa this option would also add another piece of legislation to the myriad of existing legislation and may contribute to fragmentation.³⁵⁶ Accordingly, it would seem that a dedicated act will not solve the problem and a bilateral approach would better suit the nature of the problem. Notwithstanding, legal certainty, at least would be obtained in the respective countries and this would already further the cause of cross-border biodiversity conservation.
- Amendment of the MoU. Since the MoU contains no substantive provisions for cross-border conservation of biodiversity, including such provisions, may add to legal certainty and significantly contribute to solving the dilemma. On the negative side, the MoU is a consensus based instrument and to include substantive provisions might be very difficult if not impossible to enforce.³⁵⁷ An additional MoU focusing only on cross-border biodiversity conservation might be a viable solution.

³⁵⁶ See paragraph 2.3 above.

³⁵⁷ This is clear from the Bamako convention and the Revised African Convention. See paragraphs 5.1.2 and 5.3 above.

- Adoption of a SADC cross-border biodiversity conservation protocol resembling the Shared Watercourses Protocol discussed above.³⁵⁸ Given the holistic nature of biodiversity and transfrontier development in the SADC region,³⁵⁹ this proposal may serve as the more holistic and integrated approach. Such a protocol may serve as a unified and integrated approach throughout the whole SADC region and can better contribute to the conservation of the precious Southern-African biodiversity.

9 Conclusion

From the foregoing paragraphs, it can be derived that many complexities are intertwined when the term transboundary conservation is uttered. These challenges is made even more complex when biodiversity comes into play. Moreover, the African continent socially, ecologically and economically is in dire need of a vehicle to promote good relations between neighbouring countries.³⁶⁰ One of the mechanisms to achieve this is the establishment of transfrontier parks.³⁶¹ However, for these relations to be good and long-lasting, a holistic and integrated system for the governance of these areas is required. Accordingly, alignment of policies and a holistic approach in environmental laws governing the area may be required.

Although infested with many complexities, transboundary conservation is one of the few viable solutions to conserve rapidly declining biodiversity

³⁵⁸ See paragraph 5.2.2 above.

³⁵⁹ Apart from the MDTP, the following transfrontier parks are established in South Africa. These include: the Richtersveld Transfrontier Park (SA and Namibia), the Kgalagadi Transfrontier Park (SA and Botswana), the Limpopo/Shashe Transfrontier Park (SA, Botswana and Zimbabwe), the Great Limpopo Transfrontier Park (SA, Mozambique and Zimbabwe). See paragraph 1 above.

³⁶⁰ Sandwith *Transboundary Protected Areas* 7. See also IUCN Forging Linkages 23.

³⁶¹ Büscher 2005 *PLAAS Policy Brief* 1. According to Hamilton *et al* the benefits of transborder cooperation are plentiful. Benefits such as the promotion of ecosystem-based management, better control of pest species, larger protected areas reducing the risk of biodiversity loss, reintroduction of wildlife, better and joint control of wildfire and better control of poaching and illegal trade in *fauna* and *flora* are but a few benefits that could be derived from successful transborder cooperation. See further Hamilton *et al* *Transborder Protected Area Cooperation* 3-5 and Sandwith *Transboundary Protected Areas* 7, Mayoral-Phillips *Transboundary Areas in Southern Africa* 1 and IUCN *Forging Linkages* 23.

across national borders.³⁶² Zbicz³⁶³ describes transboundary conservation to be 'not an option, but a *necessity*'.³⁶⁴ Especially in light of the findings of the Living Planet Report,³⁶⁵ integrated and holistic approaches towards conservation of biodiversity are a necessity rather than an option.

Transfrontier parks like the MDTP may arguably be one of the most powerful instruments to combat rapidly declining biodiversity to ensure a protected environment for both present and future generations. For this to materialise we require a uniform and integrated approach which promotes legal certainty, clearly spells out rights and duties, roles, procedures and mechanisms in an endeavour to ensure sustainable conservation of biodiversity resources in the MDTP.

362 Zbicz 'Transboundary Conservation' in Goodale *et al* *Transboundary Protected Areas* 23.

363 Zbicz 'Transboundary Conservation' in Goodale *et al* *Transboundary Protected Areas* 23.

364 Own emphasis. See paragraph 3 above.

365 See paragraph 3 above.

Bibliography

Books

B

Bowman and Redgewell *International Law and Biodiversity*

Bowman M. and Redgewell C. *International Law and the Conservation of Biological Diversity* (Kluwer Law International The Hague Netherlands 1996)

Benvenisti *Sharing Resources*

Benvenisti E. *Sharing transboundary resources* (Cambridge University Press United Kingdom 2002)

Birnie and Boyle *International Law*

Birnie P. and Boyle E. *International Law and the Environment* (Oxford University Press New York 2001)

D

Dugard *International Law*

Dugard J. *International Law: A South African Perspective* 3rd ed (Juta Law Cape Town 2006)

F

Fourie and Fakir *Development Effectiveness* 5

Fourie M. and Fakir S. *Development Effectiveness Toolkit for Transboundary Conservation Areas in Southern Africa* (IUCN ROSA 2005)

G

Glazewski *Environmental Law*

Glazewski J. *Environmental Law in South Africa* 2nd ed (LexisNexis Butterworths Durban 2005)

H

Hamilton *et al Transborder Protected Area Cooperation*

Hamilton L. *et al Transborder Protected Area Cooperation* (IUCN Canberra Australia 1996)

Harris *International Law*

Harris D.J. *International Law* 6th ed (Sweet and Maxwell London 2004)

Hunter *et al International Environmental Law*

Hunter D., Salzman J. and Durwood Z. *International Environmental Law and Policy* 2nd ed (New York 2002)

I

IUCN *Forging Linkages*

Forging Linkages An assessment of progress 2004 (IUCN Gland Switzerland and Cambridge United Kingdom 2005)

IUCN ROSA *Legal Framework*

Mohamed-Katerere J. *Review of the Legal and Policy Framework for Transboundary Natural Resource Management in Southern Africa* (IUCN-ROSA 2001)

K

Kiss and Shelton *International Environmental Law*

Kiss A. and Shelton D. *International Environmental Law* 3rd ed (Transnational Publishers New York 2004)

N

Nanda and Pring *International Environmental law*

Nanda P. and Pring G. *International Environmental Law & Policy for the 21st Century* (Transnational Publishers New York 2003)

R

Rao *International Environmental Law*

Rao P. *International Environmental Law and Economics* (Blackwell Publishing 2001)

S

Sands *International Environmental Law*

Sands P. *Principles of International Environmental Law* (Cambridge 2003)

Sandwith *et al Transboundary Protected Areas*

Sandwith T. *et al Transboundary Protected areas for Peace and Co-operation* (IUCN Gland Switzerland 2001)

V

Van der Linde *Compendium*

Van der Linde M. (ed) *Compendium of South African Environmental Legislation* (PULP Pretoria 2006)

W

Wackernagel and Rees *Ecological Footprint*

Wackernagel M. and Rees W. *Our Ecological Footprint Reducing Human Impact on Earth* (New Society Publishers 1996)

Contribution from a collected work

B

Barry 'Ecological Modernisation' in Page E. and Proops J. (eds)

Environmental Thought (Edward Elgar Publishing 2003) 197

D

Dombrowsky and Grey 'The Status of River Management in Africa' in Al

Baz I., Hartje V. and Scheuman W. (eds) *Co-operation on Transboundary Rivers* (Baden Baden 2002) 85-86

F

Feris L.A. and Tladi D. 'Environmental rights' in Brand D. and Heyns C.

(eds) *Socio Economic Rights in South Africa* (PULP Pretoria 2005) 249-264

H

Hanks J. 'Transfrontier Conservation Areas' in Goodale U.M *et al* (eds)
*Transboundary Protected Areas The Viability of Regional
Conservation Strategies* (Food Product Press 2003) 127-148

N

Nkiwane 'Environmental law in Lesotho' UNEP *Teaching Environmental
law in African Universities* Volume 1 (UNEP 2005) 368-392

O

Okoth-Ogendo 'Governance and Sustainable Development' in Ginther K.,
Denters E. and J.I.M. de Waart (eds) *Sustainable Development and
Good Governance* (Kluwer Academic 1995) 105-110

S

Sandwith T. 'Overcoming barriers' in Goodale U.M. *et al* (eds)
*Transboundary Protected Areas The Viability of Regional
Conservation Strategies* (Food Product Press 2003) 149-169

V

Van der Linde M. and Basson E. 'Environment' in Chaskalson M. (ed)
Constitutional law in South Africa (Juta Cape Town 2006) 50-1-50-
29

Z

Zbicz D.C. 'Transboundary Conservation' in Goodale U.M. *et al* (eds)
*Transboundary Protected Areas The Viability of Regional
Conservation Strategies* (Food Product Press 2003) 22-37

Electronic Journals

K

Kotze L.J. 2006 *PER* 1-36 available at
[http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/iss
ues/2006x1x_Kotze_art.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/iss
ues/2006x1x_Kotze_art.pdf) 1 March 2007

F

Feris L. 2006 *PER* 1-18 available at
[http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/iss
ues/2006_3_Feris_art.pdf](http://www.puk.ac.za/opencms/export/PUK/html/fakulteite/regte/per/iss
ues/2006_3_Feris_art.pdf) 1 March 2007

Internet

A

African Union [Found on Internet] www.african-union.org [Date of use 30
March 2006]

B

Brundtland Report [Found on Internet]
http://www.are.admin.ch/are/en/nachhaltig/international_uno/unterseite02330/
[Date of use 27 June 2006]

C

CITES [Found on Internet] www.cites.org [Date of use 23 July 2006]

L

Living Planet Report 2004 [Found on
Internet]<http://assets.panda.org/downloads/lpr2004.pdf> [Date of use 28 April
2006]

M

MDTP [Found on Internet] www.maloti.org [Date of use 2 March 2006]

P

Pan African Perspective [Found on Internet]
<http://www.panafricanperspective.com/aec.htm> [Date of use 2 May 2006]

Peace Parks Foundation [Found on Internet] www.peaceparks.org [Date of

use 2 March 2006]

R

Ramsar [Found on Internet] <http://www.wetlands.org/rsis/> [Date of use 27 July 2006]

U

UNCCD [Found on Internet] www.unccd.int [Date of use 23 July 2006]

UNEP [Found on Internet] www.unep-wcmc.org/cms/ [Date of use 3 July 2006]

W

World Heritage Committee [Found on Internet] http://whc.unesco.org/pg.cfm?cid=31&id_site=985 [Date of use 27 July 2006]

Journals

B

Bray 1995 *SAPL*

Bray E. "Focus on the National Environmental Management Act: Co-operative Governance in the Context of the National Environmental Management Act 107 of 1998" 1999 (6)1 *SAJELP* 1-12

Bray 2005 *THRHR* 357-373

Bray E. "Legal Perspectives on Global Environmental Governance: South Africa's Partnership Role (Part2)" 2005 (3) *THRHR* 357-373

Bruch and Coker 1999 *Innovation*

Bruch C. and Coker W. "Breathing Life into Fundamental Principles: Constitutional Environmental Law in Africa" 1999 (6) *Innovation* 1-51

Büscher 2005 *PLAAS Policy Brief*

Büscher B. "Land Resources in a transfrontier setting: The case of the Maloti-Drakensberg Transfrontier Conservation and Development Project: 2005(19) *PLAAS Policy Brief* 1-4

D

De Lone 1998 *NYU ELJ*

De Lone "Improving the management of the Atlantic Tuna: The duty to strengthen the ICCAT in the light of the 1995 Straddling Stocks Agreement" 1998 *NYU ELJ* 1-9

Du Plessis 2001 *THRHR*

Du Plessis W. "The Potential for EIA Partnerships in SADC- A Comparison of Legislative Arrangements in Lesotho and South Africa" 2001 *THRHR* 458-470

E

Ebeku 2003 *AHRLJ* 149-166.

Ebeku K.S.A. "The right to a satisfactory environment and the African Commission" 2003 (1) *AHRLJ* 149-166

K

Kotze L.J. and Du Plessis W. "Absolving historical polluters from liability through restrictive judicial interpretation: Some thoughts on Bareki NO v Gencor Ltd" (To appear in *Stell LR* 2007).

Kotze L.J. and Du Plessis A.A. "The Inception and Role of International Environmental Law in Domestic Biodiversity Conservation Efforts: The South African Experience" (To appear in *QUTLJJ* 2007)

N

Nel and Du Plessis 2001 *SAJELP*

Nel J. and Du Plessis W. "An Evaluation of NEMA Based on a Generic Framework for Environmental Framework Legislation" 2001 *SAJELP* 1-37

Nel and Du Plessis 2004 *SAPL* 181-190

Nel J. and Du Plessis W. "Unpacking Integrated Environmental Management – A Step Closer to Effective Co-operative Governance?" 2004 *SAPL* 181-190

R

Roic 2006 *AG* 38-43.

Roic K. "Law and Disorder" 2006 (14) *AG* 38-43

S

Scholtz 2005 *MqJICEL*

Scholtz W. "Animal Culling: A Sustainable Approach or Anthropocentric Atrocity?: Issues of Biodiversity and Custodial Sovereignty" 2005(2) *MqJICEL* 1-30

T

Thomashausen 2002 *CILSA*

Thomashausen A. "The enforcement and recognition of judgements and other forms of legal co-operation in the SACD" 2002 *CILSA* 26-37

V

Van Amerom and Büscher 2005 *JMAS*

Van Amerom M. and Büscher B. "Peace Parks in Southern Africa" 2005(43) *JMAS* 159-182

Van der Linde 2002 *CILSA*

Van der Linde M. "African responses to environmental protection"
2002 *CILSA* 99-113

Van der Linde and Louw 2003 *AHRLJ* 167-187

Van der Linde M. and Louw L. "Considering the interpretation and
implementation of article 24 of the African Charter on Human and
Peoples' Rights in light of the SERAC communication" 2003(2)
AHRLJ 167-187

Van der Linde 2002 *AHRLJ* 42

Van der Linde M. "A review of the African Convention on Nature
and Natural Resources" 2002(2) *AHRLJ* 33-59

Register of legislation

C

Ciskei Nature Conservation Act 10 of 1987

Constitution of Lesotho 1993

Constitution of the Republic of South Africa 1996

E

Environment Act 2001

Environment Conservation Act 100 of 1982

Environment Conservation Act 73 of 1989

F

Forestry Act 17 of 1998

Free State Environmental Conservation Bill 1998

G

Game Theft Act 105 of 1991

Genetically Modified Organisms Act 15 of 1997

H

Historical Monuments, Relics, Fauna and Flora Act 41 of 1967

K

Kwazulu-Natal Nature Conservation Management Act 9 of 1997

Kwazulu-Natal Nature Conservation Management Amendment Act 5 of 1999

M

Marine Living Resources Act 18 of 1998

Mountain Catchment Areas Act 63 of 1970

N

National Environmental Management Act 107 of 1998

National Environmental Management: Air Quality Act 39 of 2004

National Environmental Management: 2nd Amendment Act 2004

National Environmental Management: Biodiversity Act 10 of 2004

National Environmental Management: Protected Areas Act 57 of 2003

National Forests Act 84 of 1998

National Heritage Bill 2006

National Heritage Resources Act 25 of 1999

National Parks Act 11 of 1975

National Parks Act 57 of 1976

National Veld and Forest Fire Act 101 of 1998

National Water Act 36 of 1998

Nature and Environmental Conservation Ordinance 19 of 1974.

Nature Conservation Bill 2005

Nature Conservation Ordinance 15 of 1974.

Nature Conservation Ordinance 8 of 1969

P

Protected Areas Bill 2002

Provincial Parks Board Act 12 of 2003

Q

Qwaqwa Nature Conservation Act 5 of 1976

W

Water Resources Act 22 of 1978

Water Services Act 108 of 1997

World Heritage Convention Act 49 of 1999

Register of Cases

Trail Smelter Arbitration US v Canada in Rob C. (ed) *International Environmental Law Reports Early Decisions* 231 Volume 1
(Cambridge University Press UK 1999)

Theses and dissertations

K

Kotze Integrated Environmental Governance

Kotze LJ *A Legal Framework for Integrated Environmental Governance in South Africa and the North-West Province*
(Unpublished LLD Thesis NWU 2005)

M

Mayoral-Phillips Transboundary Areas in Southern Africa

Mayoral-Phillips A.J. *Transboundary Areas in Southern Africa: Meeting the Needs of Conservation or Development? (LLM thesis 2002)*