

**International Free Trade and Biodiversity
Conservation:
Towards ‘Sustainable Trade’**

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by

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ABSTRACT

This dissertation examines the current state of South African legislation addressing biodiversity and international trade therein. Some international and domestic legal instruments promote free trade (including free trade of biodiversity resources), while environmental legal instruments promote the conservation of biodiversity and strictly controlled bioprospecting, including trade in biodiversity resources. This international conflict may influence the global and national strive for sustainable development.

Currently there is no uniform national policy that regulates or control international trade expansion in South Africa's biodiversity resources. The new *National Environment Management Biodiversity Bill* (hereafter the Biodiversity Bill), addresses several components of biodiversity conservation on national level, but no protection of biodiversity resources within a framework of sustainable trade is provided for. This dissertation discusses the state of biodiversity in South Africa, the national expansion of trade in these resources and several national and international legal obligations, in order to prove why the above lacuna may be inhibiting sustainable trade of biodiversity resources in South Africa.

The international obligations of South Africa with regard to international trade and biodiversity conservation, correspond with those of Australia. This dissertation accordingly recommends that, with regard to the legislative developments in Australia and with the existing South African framework policies such as the *National Environmental Management Act 107 of 1998*, the *Environment Conservation Act 73 of 1989* and the Biodiversity Bill as basis, the national legislature should strongly consider the enactment of a comprehensive national policy that will render sustainable trade in biodiversity resources in South Africa.

AFRIKAANS SUMMARY

Suid-Afrika as ontwikkelende en biodiversiteit-ryke land is nie uitgesluit van die internasionale konflik wat bestaan tussen toenemende internasionale vrye handel en die noodsaaklike bewaring van biodiversiteitsbronne nie.

Ten spyte daarvan dat Suid-Afrika se beskikbare biodiversiteitsbronne afneem, terwyl die vraag na hierdie bronne in die internasionale kommersiële handel toeneem, en die feit dat Suid-Afrika teenstrydige internasionale verpligtinge het, is daar huidiglik geen uniforme nasionale beleid wat internasionale handel in die biodiversiteitsbronne van Suid-Afrika reguleer of beheer nie. Die onlangs voorgestelde biodiversiteitswetgewing spreek verskeie komponente van biodiversiteit in Suid-Afrika aan, maar geen spesifieke of andersins voldoende voorsiening word gemaak vir internasionale kommersiële handel in nasionale biodiversiteitsbronne nie.

Volhoubare ontwikkeling word beklemtoon in talle internasionale omgewingsreg-instrumente asook in artikel 24 van die 1996 Grondwet. Die Suid-Afrikaanse wetgewer is daarom onder 'n internasionale en konstitusionele verpligting om ook vir die volhoubare internasionale handel in biodiversiteitsbronne voorsiening te maak. Die huidige raamwerke soos daargestel deur die *Omgewingsbewaringswet 73* van 1989 en die *Wet op Nasionale Omgewingsbestuur 107* van 1998, dien as basis en grondslag vir die voorgestelde wetgewing.

Die internasionale verpligtinge van Suid-Afrika, ten opsigte van onderskeidelik internasionale handel en biodiversiteitsbeskerming, stem ooreen met dié van Australië. Daar word aanbeveel dat die Suid-Afrikaanse wetgewer, met inagneming van die wetgewende ontwikkeling in Australië, 'n nasionale beleid vir spesifiek internasionale handel in biodiversiteitsbronne daarstel. So 'n beleid kan vervat word in òf 'n totaal nuwe wet òf as regulasies in terme van die finale nasionale biodiversiteitswet.

1. Introduction

South Africa, as a developing country, is in direct need of economic expansion, both on international and domestic level. International trade, as one of the fastest evolving activities within the modern commercial world, is one method in which this may be achieved.¹ Growing free trade may, however, potentially be in conflict with environmental law instruments with regard to biodiversity resources, since key objectives tend to differ.² Some international and domestic legal instruments promote free trade (including free trade of biodiversity resources), while environmental legal instruments promote the conservation of biodiversity and strictly controlled bioprospecting,³ including trade in biodiversity resources.⁴ The result is that environmental policies may result in barriers to trade, while some international trade agreements lead to less constrictive trade barriers. Biodiversity rich countries such as South Africa, end up in a turmoil of conflicting obligations with the potential to hinder the national and international movement towards comprehensive protection of

¹ International trade relates to the exportation of goods or services from one country to another country. Schmitthoff *Schmitthoff's Export Trade* 3. International trade in goods arguably also includes international trade in bio-diversity resources. For the purpose of this study, international trade in biodiversity resources means the cross-border exchange, buying or selling or other commercial dealings that allude to exportation, in genetic diversity (including, *inter alia*: bioactive compounds and chemical resources), species diversity (including, *inter alia*., agricultural products, plants, crops, wildlife and marine life) and ecological processes that constitute ecosystem diversity (including, *inter alia*: traditional agricultural methods and the patenting there-of). See Wynberg 2003 HYPERLINK www.grain.org/publications/issue5-en-p.htm 30 April.

² As of yet no uniform and universally applicable definition of biodiversity exists. Section 1 of the *National Environmental Management: Biodiversity Bill* Bill 30 of 2003 (hereafter the Biodiversity Bill), defines biodiversity as the diversity of animals, plants and other organisms, including the diversity of animals, plants and other organisms found within and between ecosystems, habitats and the ecological complexes of which they are part and species. However, the well-structured and complete definition of biodiversity resources of the *Convention on Biological Diversity* (hereafter the CBD), 1992 applies throughout this text. Article 2 defines biodiversity as the variability among living organisms from all sources including, *inter alia*: terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part. This includes diversity within species, between species and of ecosystems. See also the definition of biodiversity as contained in the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* GN 749 of 1998. It should be noted that through this policy the South African government originally intended to adopt a more holistic and coordinated approach towards the conservation of biodiversity shortly after South Africa became party to the CBD.

³ Bioprospecting is defined as the search for wild species, genes and their products with actual or potential use to humans with a view to their exploitation. Glazewski *Environmental Law* 305.

⁴ Pragmatically seen (and not simply as a matter of sentiment or aesthetics), conservation of biodiversity resources reflects the protection of the system on which the survival of humanity depends and the responsible management of biodiversity resources to ensure the long-term sustainability of biotic wealth. See the discussion in Damm *The Conservation Game* 206.

biodiversity resources, sustainable trade⁵ of biodiversity resources and sustainable development in general.⁶

The *General Agreement on Tariffs and Trade*, 1994⁷ (hereafter the GATT), the *Agreement on Trade Related Aspects of Intellectual Property Rights*, 1994⁸ (hereafter the TRIPS agreement) and the *Lomé Convention on Trade Relations between Africa and the European Union*, 1990,⁹ are in potential conflict with international and national environmental law instruments, with regard to biodiversity resources, since the latter instruments promote free trade. The instruments that focus on the conservation of biodiversity resources, include *inter alia*: the *Convention on Biodiversity*, 1992¹⁰ (hereafter the CBD), the *Convention on International Trade in Endangered Species*, 1973¹¹ (hereafter CITES), *South Africa's National Environmental Management Act 107 of 1998*¹² (hereafter NEMA) and the proposed *National Environment Management: Biodiversity Bill*, 2003.¹³

This conflict evidently becomes a national concern when South Africa (as member to all of the above international instruments) is left with the obligation of prosperous reconstructive economic development on the one hand, and biodiversity conservation

⁵ The suggested definition for sustainable trade is the trade in goods or services between countries in a way that meets the commercial and environmental needs of the present generation without compromising the ability of future generations to meet their own commercial and environmental needs. Sustainable trade in biodiversity resources is therefore the controlled exportation of biodiversity resources from South Africa to other countries of the world, in a way that meets the commercial and conservational needs of the present generation without compromising the ability of future generations to meet their own commercial and conservational needs.

⁶ For the purpose of this study the definition of sustainable development as it was published in the , *Our Common Future (Brundtland Report)* United Nations General Assembly Res 422118611, Dec 1987 applies. The Report describes sustainable development as '...development that meets the needs of the present generation without compromising the ability of future generations to meet their own needs.' See Bray 1998 *South African Journal of Environmental Law and Policy* 2 for a further discussion on sustainable development.

⁷ World Trade Organisation's *General Agreement on Tariffs and Trade*, Uruguay Round 1994.

⁸ The *TRIPS Agreement* is Annex 1C of the *Marrakesh Agreement* establishing the World Trade Organisation (hereafter the WTO) (Morocco, 15 April 1994).

⁹ *Lomé Convention on Trade Relations between Africa and the European Union* is an international aid and trade agreement between the African, Caribbean and Pacific countries and the European Union aimed at supporting the ACP states' efforts to achieve *inter alia* comprehensive development. The current Lomé IV Convention was signed in 1990. ECSIEP 2003 HYPERLINK <http://www.antenna.nl/eccsiep/lome/indexlom.html> 9 August.

¹⁰ *United Nations Convention on Biodiversity*, Rio de Janeiro 5 June 1992.

¹¹ *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, 1973. as amended 1979, and provisionally at Gaborone, 30 April 1983.

¹² *National Environmental Management Act 107 of 1998*.

¹³ *National Environment Management Biodiversity Bill* GN 49 of 2003.

and protection as a constitutional,¹⁴ legislative¹⁵ and international obligation,¹⁶ on the other. The issue of how environmental protection and the liberalisation of trade could be reconciled, came dramatically to the fore in the early 1990s.¹⁷ Since then, the trade and environment debate has assumed a prominent role in the international legal and political agenda, because of a close link between growth, liberalisation of trade and environmental protection based on the notion of sustainable development.¹⁸

As a leader among the developing countries of Africa and as a country known for its rich biodiversity, South Africa has a responsibility to position itself with regard to the above-mentioned discrepancies.¹⁹ The question is whether the current and newly proposed national legal regime of South Africa, measured against international standards and section 24 of the 1996 Constitution,²⁰ provide for adequate protection of South Africa's biodiversity, its resources, proprietors and products during the trade there-of. It is also questioned whether South Africa could benefit by following the example of Australia, as a prominent legal pioneer in this field.²¹

¹⁴ Section 24(b)(ii) of the *Constitution of the Republic of South Africa, 1996* (hereafter the 1996 Constitution) places the South African government under an obligation to enact legislation and to incorporate other measures in order to give substance to the constitutional right to have the environment protected, for the benefit of present and future generations, through reasonable legislative and other measures that promote conservation. Section 24 is a socio-economic, individual right and as it is partially formulated in the negative, at least a minimum standard is provided for environmental protection. See Kidd *Environmental Law* 36.

¹⁵ In the Preamble to the NEMA an obligatory statement is made, as it is stated that sustainable development requires the integration of social, economic and environmental factors in the planning, implementation and evaluation of decisions to ensure that development serves present and future generations. Reference is also made to the need to secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development. The *Development Facilitation Act* 65 of 1995 determines in section 3 that environmentally sustainable land development practices and processes should be encouraged together with the optimisation of the use of existing resources including resources relating to *inter alia* agriculture. See the obligations stemming from the Biodiversity Bill in paragraph 3.1 below.

¹⁶ See the obligations stemming from the CBD and CITES in paragraphs 4.2.1.1 and 4.2.1.2 below.

¹⁷ Francioni *Environment, Human Rights and International Trade* 105.

¹⁸ Francioni *Environment, Human Rights and International Trade* 105.

¹⁹ Wynberg 2002 *South African Journal of Science* 233. See also Damm *The Conservation Game* 211 and CIA 2002 *World Factbook: South Africa* HYPERLINK <http://www.cia.gov/cia/publications/factbook/geos/sf.html> Intro 9 August.

²⁰ Section 24 of the 1996 Constitution reflects the notion of sustainable development. See footnote 14 above.

²¹ Australia's *Environment Protection and Biodiversity Conservation Act, 1999* (hereafter the EPBCA), established a modern, streamlined process for environmental assessment and approvals and provides a substantially improved and integrated framework for the conservation and sustainable use of Australia's rich and unique biodiversity. Australian Government 2002 HYPERLINK EPBC Act <http://www.ea.gov.au> 15 April.

In this study, a literature study is conducted in order to determine the current state of South African legislation addressing biodiversity and international trade therein. Current South Africa legislation is compared to international legal trends with regard to trade in biodiversity resources and obligations stemming from international law. This dissertation further ascertains, by way of a comparative study, whether South African legislation on biodiversity resources and the trade therein, is in accordance with international standards and accordingly highlights the lessons to be learned from the legal framework of Australia.

This study proposes that, in order to successfully address the discrepancy between trade in biodiversity resources and the conservation of these resources, a pragmatic interdisciplinary approach is required.²² Such an approach should manifest in national legislation²³ complying with international standards, while accommodating the link between *inter alia* biodiversity conservation, sustainable development, intellectual property rights (hereafter IPR's) protection²⁴ and rapid international trade development. Legislative regulation with regard to environmental concerns is nothing new within the international legal framework.²⁵ Prolonged partnerships, reliable funding, strong leadership and comprehensive awareness raising with regard to trade in biodiversity and the risks related thereto, are not sufficient to safeguard against

²² The discrepancy between trade and biodiversity conservation arguably influences the scientific, commercial, social and political sectors of a country to a large extent.

²³ An obligation in this regard stems from the argument that all governmental sectors which depend on biological resources, should be encouraged to develop policies to encourage the sustainable use of these resources. In addition, other sectors that may have major impacts on biological resources, such as agriculture, commerce and transport, should ensure that their policies are consistent with conserving biological diversity. See in this regard Bilderbeek *Biodiversity and International Law* 53.

²⁴ Bioprospecting is a fast growing industry within the international environmental framework. International trade in patents or other forms of IPR's connected with agriculture, food production and healthcare products (as a category of bioprospective action), may therefore show rapid expansion in future. Agriculture, food production and the resources needed for the production of healthcare products, form part of the wider biodiversity resource base of a country. See paragraph 4.2.2.2 below. In addition to this, the protection of IPR's as with regard to biodiversity resources and specifically indigenous knowledge, is part of the international conflict between international trade expansion and the conservation of biodiversity resources. There is a trend in world trade to increasingly open access to markets, to abuse legalised piracy of indigenous knowledge and biodiversity through *inter alia* IPR's. The TRIPS Agreement for example obligates member countries to introduce IPR's over plant varieties and this intensifies a threat to farm saved seed. Wynberg 2003 [HYPERLINK www.grain.org/publications/issue5-en-p.htm](http://www.grain.org/publications/issue5-en-p.htm) 30 April.

²⁵ See Bilderbeek *Biodiversity and International Law* 53. See also the obligations stemming from the CBD in that parties must as far as possible regulate or manage biological resources important for the conservation of biological resources whether within or outside protected areas. See in this regard Farrier and Tucker 2001 *Ocean Development and International Law* 214.

adversarial effects to South Africa's biodiversity.²⁶ By suggesting adjustments and ways in which to allow, in its national legislative framework, for sustainable trade in biodiversity resources, it is proposed that the Biodiversity Bill and current environmental legislation do not sufficiently provide for sustainable trade in biodiversity resources in South Africa.²⁷

In this dissertation South Africa's position within the competitive global trade market is analysed. It is determined whether South Africa's current and newly proposed national biodiversity legislation provide for an adequate legal framework for what will be referred to hereafter as 'sustainable trade' of biodiversity resources.²⁸ The research focuses firstly on sustainable trade in biodiversity resources as part of a strengthened trading sector on the one hand, and biodiversity conservation on the other. In order to address South Africa's movement towards sustainable trade in biodiversity as the topic of this study, emphasis is then placed on the sustainable conservation of South Africa's biodiversity resources and expanding international trade;²⁹ the existing and proposed legal regime in South Africa with regard to biodiversity;³⁰ the relevance and importance of international legal instruments³¹ and ways in which to work towards sustainable trade as part of bioprospecting in South Africa.

2. The conflict between sustainable conservation of biodiversity resources and expanding international trade

The conflict between sustainable conservation of biodiversity resources and expanding international trade, is rooted in the fact that some international and

²⁶ Stoll-Kleeman and O'Riardon 2002 *Society and Natural Resources* 172. The authors state that a process beyond participation is required for biodiversity protection in the modern age. It is, however, suggested that when it comes to the conflict between expanding trade and biodiversity conservation, the need for regulation by means of a national legislative framework should be admitted and consequently addressed.

²⁷ Specific shortcomings are discussed in paragraph 3.3 below.

²⁸ See footnote 5 above for an exposition on the concept of sustainable trade.

²⁹ The legislative conflict between growing free trade and the aim of conservation of biodiversity resources is discussed within national and international legal frameworks. Mention is made of provincial legislation with regard to trade in biodiversity resources but, for the purpose of this paper, will not be discussed in detail.

³⁰ This includes *inter alia* the NEMA; the *Environmental Conservation Act 73* of 1989 (hereafter ECA) and the Biodiversity Bill.

domestic legal instruments promote free trade while environmental instruments promote the conservation of biodiversity and strictly controlled bioprospecting, including trade in biodiversity resources.³² Traditionally there has been no legal or any other prominent linkage between international trade and the environment, and more specifically biodiversity resources. Conflicting perceptions with regard to biodiversity conservation and expanding trade have also been present in South Africa.³³ In recent years, however, it has become increasingly apparent that the world economy and the global environment, including biodiversity resources, are connected and should be regarded as mutually supportive.³⁴

The previously prevailing conflicting perceptions have made room for a new theoretical perception, where environment protection and trading practices are inextricably linked.³⁵ Unfortunately though, such a theoretical linkage does not provide for practical steps to unite the conflicting objectives of commercial trade development and pro-active conservation of biodiversity resources within national environmental law. The conservation of biodiversity still remains a common concern of mankind that is not negotiable.³⁶ With regard to its conservation of biodiversity resources and the expansion of international trade, South Africa's current position is accordingly ascertained.

2.1 The state of biodiversity in South Africa

There is no single, exclusive method for measuring biodiversity, but it is generally accepted that only Brazil and Indonesia host a greater diversity of species than South Africa, which is hence ranked third in terms of global conservation significance.³⁷

³¹ International instruments to be studied include the CBD, CITES, GATT, TRIPS, the *Lomé Convention* and the *African Growth and Opportunity Act*, 2000 (hereafter AGOA).

³² See paragraph 1 above.

³³ Wynberg 2000 HYPERLINK www.grain.org/publications/issue5-en-p.htm 30 March.

³⁴ Nanda *International Environmental Law* 28.

³⁵ Schoenbaum 1992 *American Journal of International Law* 734. See also the *Bergen Ministerial Declaration on Sustainable Development*, 1990 and the *Rio Declaration on Environment and Development*, 1992 that respectively imply that biodiversity protection should constitute an integral part of processes of development and that there is a symbiotic relationship between the components of economics and the environment.

³⁶ Nagore *Biological Diversity* 53.

³⁷ Yeld 2002 *Wildlife Society of Southern Africa* 28. Also note that there are eight southern African hotspots of biodiversity. These are areas of high species richness and species diversity as well as high levels of endemism. Seven of these eight hotspots are wholly or partly located in South

South Africa is strongly positioned on the international map of biodiversity resources, as it is home to a substantial part of the world's biodiversity resources.³⁸ The biological resources of South Africa provide an alluring assortment of goods and services that vary from the direct use of species³⁹ to the direct use of ecosystems and habitats.⁴⁰ Millions of rural South Africans depend on biological resources for their day-to-day survival,⁴¹ and the country's biodiversity can be called a mini-economy in itself as it generates substantial income.⁴² It however holds true that the biodiversity resources of South Africa are of the most threatened in the world.⁴³ It is therefore projected that the current state of biodiversity in South Africa, necessitates a legislative awareness and national participation in the international endeavors to address the conflict between expanding international trade in biodiversity resources and the conservation thereof. South Africa can and should intervene in the current conflict between biodiversity conservation and trade in biodiversity resources. It is recommended that such intervention should find expression in sound and practical adjustments to the country's existing national legal policy with regard to biodiversity.

Africa. The Cape Floral Kingdom and succulent Karoo are amongst these internationally recognised hotspots. See also Yeld 2002 *Wildlife Society of Southern Africa* 29.

³⁸ Wynberg states that South Africa has a rich and spectacular array of ecosystems and landscapes, ranging from desert to subtropical forest, as well as a great diversity of marine and coastal systems. Wynberg 2002 *South African Journal of Science* 233. See also paragraph 1.2 of the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* GN 749 of 1998.

³⁹ For example food, medicine, shelters and fuel. See Goal 2 of the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* GN 749 of 1998.

⁴⁰ For example grazing, croplands, mining, recreation and tourism. See also Goal 2 of the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* GN 749 of 1998.

⁴¹ Wynberg states that biodiversity can be regarded as an easily accessible goldfield that makes a crucial contribution to livelihoods and it becomes a defense mechanism against poverty and an opportunity for self-employment. Wynberg 2002 *South African Journal of Science* 238.

⁴² Wynberg 2002 *South African Journal of Science* 238. The informal medicinal plant trade is estimated to total R 21 million per annum in the Witwatersrand alone and R 60 million in Kwazulu-Natal. About 19 500 tons of medicinal plants is traded each year in the country as a whole, with a trade value of R 270 million.

⁴³ Wynberg 2002 *South African Journal of Science* 233. The practices of agriculture and forestry, tourism and recreation, degradation of vegetation and soils, genetic modification, water impoundments as well as trade negatively affect biodiversity conservation. See also Yeld 2002 *Wildlife Society of Southern Africa* 29.

2.2 Expanding trade in biodiversity resources

2.2.1 Expanding trade in biodiversity resources on international level

The world trade regime and accompanying business, the establishment of strong international commercial relationships and the pursuit for global economic power, are growing at an ever-increasing rate.⁴⁴ International trade and its infrastructure are currently in a flourishing condition, influencing almost every other kind of global and national undertaking in this regard.⁴⁵ International trade in biodiversity resources is not excluded from this. Biodiversity resources and services are attributed significant value within the global trade market and it has been stated that ‘...biodiversity resources have become valued directly for their consumptive use and their productive use as *inter alia* raw materials...’.⁴⁶ The current problem with regard to the expansion of international trade in biodiversity resources is, however, that as economic appreciation for biodiversity and its utility is growing, such is the ‘...earth’s warehouse of biodiversity resources shrinking.’⁴⁷

The WTO and its policy considerations are significant for a discussion on expanding international trade in biodiversity resources.⁴⁸ The WTO *inter alia* propagates trade liberalisation, that will lead to a progressively more open world-trading environment. The global environment, that includes biodiversity resources, is acknowledged by the WTO Agreement as part of its global aim of trade expansion.⁴⁹ Acknowledgement alone is however not sufficient to establish sustainable trade in a natural commodity such as biodiversity. The international vision of free trade from a commercial

⁴⁴ The previous round of trade negotiations of the WTO is expected to increase the value of world trade by US \$ 200 billion by the year 2005. See also Wray Q 2003 HYPERLINK <http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=209313> 18 August.

⁴⁵ See further Wray Q 2003 HYPERLINK <http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=209313> 18 August.

⁴⁶ Hunter *Boston College Environmental Affairs Law Review* 134.

⁴⁷ Hunter 1997 *Boston College Environmental Affairs Law Review* 134.

⁴⁸ The WTO Agreement and its attached agreements were reached at the conclusion of the Uruguay Round in December 1993. The WTO has a strong and influential impact on global trade development today. World Trade Organisation 2001 HYPERLINK http://www.wto.org/english/res_e/download_e/tif.pdf 18 August.

⁴⁹ Environmental issues as part of global trade development, are explicitly addressed in the WTO’s *Agreement on Technical Barriers to Trade* (TBT Agreement, 1994), the *Agreement on Trade Related Aspects of Intellectual Property Rights* (TRIPS Agreement, 1994) and the general exception clause of the *General Agreement on Tariffs and Trade* (GATT, 1994). See World

perspective, is therefore often, and understandably so, counter-balanced by serious concerns and questions of anthropologists and environmentalists around the world.⁵⁰ On the international level thus, trade is escalating rapidly. This development raises concern among those concerned with the international trade in biodiversity resources. A direct correlation can be drawn between the growth of international trade and the growing international demand for access to biodiversity resources. It is therefore projected that the global movement towards sustainable development in countries known for their biodiversity richness, may be hindered by uncontrolled trade liberalisation efforts as promoted by *inter alia* the WTO Agreements.⁵¹

2.2.2 *Expanding trade in biodiversity resources: A South African and African perspective*

Most African countries are exceptionally wealthy in terms of biodiversity resources.⁵² The growth in international trade in biodiversity resources, implies that the focus of such countries will have to shift from a strong and sustainable local biodiversity market, to competitiveness in a free and open international trade market. These countries are further bound by the preconditions and legal provisions deduced from trade-related agreements,⁵³ that either directly or indirectly, influence the biodiversity resources of Africa.⁵⁴

Trade Organisation 2003 HYPERLINK <http://www.wto.org> for full text versions of these agreements.

⁵⁰ Moran 2001 *Annual Reviews Anthropol* 517. The question has been posed whether bioprospecting can produce new drugs, preserve traditional medical systems and deliver capacity-building technologies to the developing commercial world while conserving biodiversity. Tisdell states that:

There is considerable concern and evidence that agricultural (as a biodiversity-related industry) and environmental problems are becoming worse at the world level at a time when industrial production and national GNP's have burgeoned in the face of globalisation.

Tisdell *Sustainable Agriculture and Environment* 1. Take note of the author's reference to the fact that in addition hereto, the World Bank has noted that many environmental problems continue to intensify and in many countries there are few grounds for optimism.

⁵¹ Such as the objectives of *inter alia* the GATT. See paragraph 4.2.2.1 below.

⁵² Wynberg 2000 HYPERLINK www.grain.org/publications/issue5-en-p.htm 30 March.

⁵³ The *Lomé Convention* on Trade between Africa and the European Union was renegotiated in 2000 and its priorities are liberalisation, enforcement of intellectual property right regimes and integration into the world economy. AGOA is a framework for competition in Africa favorable to business with the United States of America. AGOA was signed into law on May, 18 in 2000 as Title 1 of the *Trade and Development Act* of 2000. It offers tangible incentives for African countries to continue their efforts to open their economies and build free markets. Export.gov

With regard to Africa's position in trade in biodiversity products and services, it is inferred that trade in biodiversity forms an important part of the vision of a globalised Africa. Over the last few centuries, Africa has provided a vast amount of natural resources to the world and both the range of resources and the ways in which they are used, have escalated.⁵⁵ From this fact, it is derived that Africa is in a position to offer the parcel sought by many countries and continents of the world, namely: resources, skills and the infrastructure for exploitation expenditure. It is evident that Africa stands strong as a promising international trader and that it has the ability to become an even more prominent role player within global trade politics. The result of this seemingly advantageous situation is, however, growing pressure on individual African countries to open up their markets and to allow freer access to *inter alia* biodiversity capital. South Africa, as a fast developing country and prominent economic representative of Africa, can not be excluded from this growing pressure in the bigger African context.⁵⁶

The conflict between sustainable conservation of biodiversity resources and expanding trade is a reality in both Africa and South Africa. Over the past few years, the biodiversity related industries of South Africa have made a significant and remarkable contribution to the national income of the country.⁵⁷ Although South

2000 HYPERLINK <http://www.agoa.gov/> 18 August. See paragraph 4.2.2.3 below for a further discussion.

⁵⁴ IPR's are strongly connected with trade in biodiversity resources in specifically the pharmaceutical and biochemical industries. IPR's create rights over intangible information. See further Moran 2001 *Annual Reviews Anthropol* 513. All over the world these rights constitute commercial property rights for a limited time period that provide incentives for further investment in developing future innovations. IPR's in Africa are usually protected in the form of patents, plant breeder's rights, trade secrets and copyrights. Moran 2001 *Annual Reviews Anthropol* 513. Together with this, the mining, pharmaceutical, biochemical and food industries of Africa are extremely attractive for foreign investing companies. There is no doubt about the fact that Africa needs to open up its market to be internationally competitive. The ironic concern is that almost every single service or commodity Africa has to offer, somehow finds linkage with its biodiversity capital.

⁵⁵ Wynberg 2000 HYPERLINK www.grain.org/publications/issue5-en-p.htm 30 March.

⁵⁶ Wray Q 2003 HYPERLINK <http://www.busrep.co.za/index.php?fSectionId=561&fArticleId=209313> 18 August.

⁵⁷ Significant earnings were accrued by the South African fishing industry (the wholesale value of which had been R1.10 billion in 1993). See also Laird and Wynberg 1996 *Biodiversity Prospecting in South Africa* 5. The wildflower industry provided a national income of R70 million in export earnings in 1993 and provided jobs for 20 000 to 30 000 people. Laird and Wynberg 1996 *Biodiversity Prospecting in South Africa* 7. Exports of horticulture products to the European Community from South Africa were estimated at some R52 million in 1990. Laird and Wynberg 1996 *Biodiversity Prospecting in South Africa* 7. See also ⁵⁷ South African Government 2003 HYPERLINK <http://www.environment.gov.za/ProjProg/Cites/SACites.htm> 18 August.

Africa's trade position and general economy is experiencing an advantageous revival, the fact remains that the national economy is fundamentally dependant upon the variety of goods and services from South Africa's biological resource base. In the cadre of the international conflict and in the light of the expanding international trade in biodiversity resources of the country, South Africa may have a problem at hand.⁵⁸

The world economy's linkage with biodiversity resources, as well as the fact that South Africa should regard its international trade industry and biodiversity resource base as mutually supportive, has been established.⁵⁹ The international conflict between sustainable conservation of biodiversity resources and expanding international trade should not be seen as a remote and strictly international concern with little, if any, relevance for South African environmental law development. Since South Africa is biodiversity rich and a promising participant in international trade, it should in all seriousness address this conflict.⁶⁰ It is suggested that a transparent and practically concise national biodiversity policy, should furnish South Africa with safeguards against the adversarial consequences that may stem from an international conflict that is evidently also Africa and South Africa's own.⁶¹

3. The South African *status quo* with regard to legislative regulation of trade in biodiversity resources

The South African legislature has an obligation to address and manage international and national environmental concerns that can potentially inhibit sustainable development.⁶² The general obligation alludes however, to the more specific

⁵⁸ The problem is contained in the fact that South Africa is experiencing blooming economic development to which participation in international trade, contributes to a large extent. But as South Africa is home to a biodiversity kingdom, the same blooming economy can in future irreversibly affect biodiversity resources.

⁵⁹ See Nanda *International Environmental Law* 28 for an international perspective on the symbiotic relationship between the world economy and the global environment.

⁶⁰ See paragraph 2.1 above for a discussion on the state of biodiversity in South Africa and paragraph 2.2 for a discussion on expanding trade in biodiversity resources on international level and in South Africa as part of the bigger African region.

⁶¹ See paragraph 3.3 below for a discussion on the proposed shortcomings of the Biodiversity Bill with regard to trade in biodiversity resources.

⁶² This obligation manifests in section 24 of the 1996 Constitution (see footnote 14 above) as well as in the NEMA (see paragraph 3.2.1 below). It was also explicitly addressed in Goal 6 of the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* GN 749 of 1998. Hunter suggests that the constructing of a legal framework in which accountability for sustainable development of biodiversity may take place is a collaborative task. Therefore both the

obligation to address and manage the conflict between sustainable conservation of biodiversity resources and expanding international trade. This paragraph ascertains whether South African environmental legislation, measured against international standards and section 24 of the 1996 Constitution,⁶³ provides for adequate protection of South Africa's biodiversity resources, its proprietors and products during the trade thereof.⁶⁴

One of the areas Glazewski⁶⁵ perceives as encompassed by environmental law, is resource conservation and utilisation. It is suggested that the conflict between biodiversity conservation and international trade therein, falls within the ambit of this area of national environmental law. The nature and scope of the conflict at hand, is of a nature that requires it to be addressed either directly in a national environmental law instrument with general application,⁶⁶ or as the single subject of a specialised and specific piece of environmental legislation.⁶⁷ The crux of this contention is that it is not desirable to attempt the establishment of sustainable trade in biodiversity (as a

international and national communities must undertake it. He states that sustainable development can be a unifying policy of conservation and use, satisfying the objectives of these two components. The notion of sustainable development has however, been described as 'idealistic pie in the sky'. Hunter is of the opinion that were it not for specific actions taken by both the international and individual countries, such criticism of the policy of sustainable development might have merit. Hunter 1997 *Boston College Environmental Affairs Law Review* 144. See also Reid *Nature Conservation Law* 261 where it is stated that a government's international obligations should have a significant impact on the policy and legislation that are adopted by individual countries. Also note that the Department of Environmental Affairs and Tourism (hereafter DEAT) is the lead South African governmental institution charged with the formulation of national norms and standards for biodiversity management. The implementation thereof is however, undertaken by different government institutions at central, provincial and governmental levels, which may, due to this fragmented approach, have negative impacts on the conservation of biodiversity resources. See in this regard, Wynberg 2002 *South African Journal of Science* 234.

⁶³ See footnote 14 above.

⁶⁴ See paragraph 1 above.

⁶⁵ This specific category embraces legal problems associated with the conservation and exploitation of natural resources, including water, flora and fauna and birds, marine mammals as well as fisheries. See further Glazewski *Environmental Law* 10. See also Cowan 1989 *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* 3 where it is stated that environmental law is in the process of developing its own distinctive principles, thus justifying its treatment as a legal subject in its own right.

⁶⁶ For example a chapter or lengthy section on international trade regulation in an act dealing with national biodiversity issues in general. It is suggested that the enactment of regulations to an existing act, for specifically this purpose can be just as sufficient.

⁶⁷ For example a national act specifically regulating international trade in the biodiversity resources of South Africa.

specialised industry) through the implicative interpretation⁶⁸ of general environmental law alone.⁶⁹

In ascertaining the *status quo* of national environmental legislation with direct and indirect application to international trade in biodiversity, a critical analysis of the provisions of the Biodiversity Bill and existing environmental legislation instruments is conveyed.⁷⁰

3.1 The National Environmental Biodiversity Bill of 2003

The *National Environment Management: Biodiversity Bill* (hereafter the Draft Biodiversity Bill) was published on 24 January 2003.⁷¹ The final Bill (hereafter the Biodiversity Bill) was published on 30 May 2003.⁷² The Biodiversity Bill sets out an enabling regulatory framework for the integrated management of South Africa's biodiversity as it provides for the management and conservation of South Africa's

⁶⁸ Protection of biodiversity resources inferred or derived from environmental legislation with general application may not be sufficient as to the specific nature of the conflict between international trade expansion and the conservation of biodiversity resources.

⁶⁹ See Glazewski *Environmental Law* 9 for resource conservation and utilisation as one of the areas of general concern in the encompassing environmental law of South Africa. Glazewski suggests that the conservation of biodiversity will be a further branch of this area and the regulation of international trade in biodiversity resources even a further branch thereof. Glazewski further indicates that as South Africa's environmental law is still in a phase of development and as the issue at hand is highly specialised, room exists to address the conflict between international trade and biodiversity conservation in a direct way. Also take note of the contention by Fuggle and Rabie *Environmental Management* 120 that the mere existence of a body of environmental law, although essential to establish a basis for action, does not in itself provide a solution to environmental problems. It is the satisfactory application of environmental law that is decisive for ultimate success.

⁷⁰ Shortcomings are identified and possible adjustments are proposed in paragraphs 3.1 to 3.3 below. Note that this study focuses on the *status quo* of national legislation regulating biodiversity and for this reason no provincial legislative instruments are discussed.

⁷¹ The Biodiversity Bill is deemed to be essential legislation since biodiversity in South Africa is currently regulated by means of a plethora of fragmented and incomplete legislation at provincial and national level. See paragraph 3.2 below. Absence of national legislation leads to difficulties in controlling the sustainable use of biological resources in a uniform and comprehensive manner. In order to comply with section 24 of the Constitution, national legislation is required to regulate the sustainable use of biological resources. NEMA provides for the consolidation of different pieces of biodiversity legislation. See also the *Memorandum on the objects of the National Environment Management: Biodiversity Bill 2003*.

⁷² As some of the critique to and comments on the Draft Biodiversity Bill had been considered, the final Biodiversity Bill poses quite a few amendments there-to. The final Biodiversity Bill reveals for example a different definition of biodiversity and provides for the export of listed indigenous biological resources while the Draft Biodiversity Bill made no mention thereof.

biodiversity.⁷³ The enactment of the Biodiversity Bill is in general a commendable and important step in the direction of sustainable development of biodiversity resources in South Africa.⁷⁴ The impact and implementation of the Biodiversity Bill are promising, as the provisions of the Biodiversity Bill have theoretically met many of South Africa's international obligations with regard to biological diversity.⁷⁵ An additional reason for optimism, is the fact that the Biodiversity Bill has been drafted in such a way as to allow for future amendments and extending arrangements as the state of biodiversity and required protection may change.⁷⁶ The Biodiversity Bill therefore exhibits an important and flexible disposition that allows for change in law as the state of biodiversity resources in South Africa will most likely change in future.⁷⁷ On close inspection the Biodiversity Bill also seems to be a user-friendly guide with the provisions thereof organised in an orderly and logical fashion.⁷⁸

The provisions of the Biodiversity Bill cover many activities, industries and administrative arrangements connected with biodiversity in South Africa.⁷⁹ Arguably

⁷³ See Article 2 of the Biodiversity Bill. Also note that the objectives of the Biodiversity Bill are set within the framework of the NEMA.

⁷⁴ It is commendable in the sense that it adds to the required expansion and development of environmental law in South Africa. Glazewski *Environmental Law* 3. It can further be regarded as laudable because South Africa is one of only a few countries that has already addressed its international obligation to regulate biodiversity by means of national legislation. The CBD requires of member states to commit themselves to adopting national legislation to secure the conservation of biodiversity resources and the sustainable use there-of. See also Hunter 1997 *Boston College Environmental Affairs Law Review* 145.

⁷⁵ Although it is not incorporated by name, the international obligations stemming from the provisions of CITES are neatly incorporated in Part 3 of the Biodiversity Bill. Chapter 3 of the Biodiversity Bill also provides for a National Biodiversity Strategy and Action Plan (NBSAP) that should give effect to the objectives of the CBD. The planning of the NBSAP started in May 2003 and the process to develop the NBSAP will continue up to October 2004. According to the Directorate: Biodiversity Conservation of DEAT, it is hoped that a Draft NBSAP will be available for widespread comment in September 2004. See the Directorate: Biodiversity Conservation' informing document, *About the National Biodiversity Strategy and Action Plan*.

⁷⁶ Section 52 for example provides that the Minister may identify any process or activity in a listed ecosystem as a 'threatening process'. It serves to indicate that as the scope and nature of a process such as trade in biodiversity resources may change in future, it can become a declared threatening process in terms of the Biodiversity Bill, although this may not currently be the situation.

⁷⁷ This is based on the supposition that the environment is an ever-changing component of life on earth. See for a full discussion Committee on Global Change Research 2003 HYPERLINK <http://books.nap.edu/books/0309064201/html> 12 September.

⁷⁸ See the summary of contents as part of the *Memorandum on the objects of the National Environment Management: Biodiversity Bill*, 2003.

⁷⁹ The Biodiversity Bill *inter alia* provides for a framework of application thereof and it sets out a framework for planning the conservation and sustainable use of biological diversity within a broader framework of planning for sustainable development. It also makes provision for the regulation of bioprospecting of genetic material derived from indigenous biological resources and

though, they do not sufficiently provide for protection of biodiversity resources against expanding international trade and the destructive effects thereof.⁸⁰ The reason for this is that the Biodiversity Bill makes provision for partial or complete regulation of trade in specifically listed biodiversity resources, but (and perhaps fatally so), not for commercial trade in biodiversity resources in general, that takes center stage in the conflict between international trade expansion and the conservation of biodiversity resources.⁸¹ The current state of the regulation of trade in biodiversity resources in the Biodiversity Bill (as the sole national legal instrument addressing biodiversity), is disappointing. In this context, the provisions of the Biodiversity Bill that indisputably regulate trade in biodiversity are ascertained.

Section 50 confirms two of the purposes of the Biodiversity Bill.⁸² The first is to give effect to South Africa's obligations under international agreements regulating international trade in specimens of endangered species, and the second is to ensure that the utilisation of biodiversity is managed in an ecologically sustainable manner. Section 58 obliges the Minister to consult a scientific authority (to be implemented under the Act) on issues relating to trade in specimens of endangered species regulated by such an international agreement. The specific international agreement referred to in these sections, is the CITES. It seems to be clear that although international trade is mentioned, it applies only to specimens of endangered species, which to a large extent narrows down the protection afforded by sections 50 and 58. Section 78(2) indicates that Chapter 6 of the Biodiversity Bill (that deals with bioprospecting, access and benefit sharing), will also apply to export from South Africa for the purpose of research or bioprospecting, of any indigenous biological resources listed by the Minister.⁸³ It is evident that the protection afforded by the regulation of bioprospecting, access and benefit sharing in Section 78(2), is also narrowed down to cover only an exclusive section of trade in biodiversity which

it provides for regulation of activities relating to components of biodiversity, achieved by means of a permitting system.

⁸⁰ The Biodiversity Bill specifically provides for trade for the purpose of conducting research under the name of bioprospecting but not for commercial trade in biodiversity resources in general.

⁸¹ The notion of trade in biodiversity resources and the regulation of such trade are either mentioned or discussed in sections 50, 58, 78, 81, 82 and 94 of the Biodiversity Bill.

⁸² The purposes of specifically Chapter 4 of the Biodiversity Bill are confirmed.

⁸³ The protection afforded by the regulation of bioprospecting, access and benefit sharing is again narrowed down to an exclusive section of trade in biodiversity namely biodiversity resources exported for the purpose of *inter alia* research.

consists of biodiversity resources exported for the purpose of *inter alia* research. Section 81 provides for the export of listed indigenous biological resources and states *inter alia* that a person may not export from South Africa any listed indigenous biological resources for the purpose of research or bioprospecting without the necessary permit.⁸⁴ The use of the words 'listed indigenous biological resources' inevitably excludes general protective measures relating to the exportation of biological resources under a practice of uncontrolled commercial trade. Section 94 reflects on regulations by the Minister. It states that among other powers, the Minister may make regulations with regard to the facilitation of the implementation and enforcement of an international agreement regulating international trade in specimens of listed threatened or protected species. It has been established that, without exception, reference to trade in biodiversity in the Biodiversity Bill, relates to trade in specimens of species of listed threatened species. Arguably such reference is not made because of the legislature's credible policy convictions, but merely because of an international obligation under CITES to do so.⁸⁵

The provisions of the Biodiversity Bill from which the regulation of trade in biodiversity can be derived, also include section 9(1). Section 9(1) determines that the Minister may issue norms and standards for the achievement of any of the objectives of the Act, including the conservation of South Africa's biodiversity and its components, as well as restriction of activities which have an impact on biodiversity and its components. The Minister may set indicators to measure compliance with those norms and standards. It is suggested that international trade be interpreted and proved to constitute one of these activities.⁸⁶ Section 38(1) obliges the Minister to prepare and adopt a national biodiversity framework within three years of the date on which the final Act takes effect. Such a framework must provide for an integrated and co-ordinated approach to biodiversity management by *inter alia* organs of state in all spheres of government, the private sector and other stakeholders.⁸⁷ Such a biodiversity framework has the potential to successfully provide for the regulation of

⁸⁴ See Chapter 7 of the Biodiversity Bill. In addition to section 81, section 82 provides for material transfer agreements that should be in a prescribed format and approved by the Minister in the exportation of indigenous biological resources.

⁸⁵ See paragraph 4 below.

⁸⁶ It is however, still not sufficient to deduct proper protection of South Africa's biodiversity resources under a single provision as vague as section 9(1).

⁸⁷ Section 39.

commercial international trade in biodiversity resources. But, since time is of the essence, and because the Biodiversity Bill has not been enacted with binding effect, it is uncertain if and when such a biodiversity framework will be in place to afford the required protection in the commercial trade in biodiversity resources.

Sections 84 to 90 make provision for a permit system. International trade in biodiversity resources can possibly be regulated by this system as it provides for the authorisation of certain restricted activities under the Biodiversity Bill.⁸⁸ The regulation of biodiversity by means of this permit system, under the Biodiversity Bill, incorporates an application procedure, risk assessments and export evidence, the permits themselves, additional requirements, integrated permits and the cancellation of permits.⁸⁹ However, the permit system under the Biodiversity Bill, lacks an all-encompassing protective and regulative nature as it relates exclusively to listed protected or threatened species.⁹⁰

It is evident from the above that the Biodiversity Bill does not sufficiently provide for sustainable trade in biodiversity resources in South Africa. Although the Biodiversity Bill addresses a plethora of issues, directly or indirectly related to biodiversity and the conservation thereof, it remains in abeyance as to the regulation of international commercial trade in a clear and sufficient manner. South Africa may have a problem at hand with regard to this omission. It should be considered as alarming and disquieting that no workable solution thereto is provided by the long expected national Biodiversity Bill.⁹¹

⁸⁸ Section 84.

⁸⁹ Section 85 to 90.

⁹⁰ Section 84.

⁹¹ See also Preston, Siegfried and Wynberg 1995 *South African Journal of Wildlife Research* 77. See paragraph 3.1 above. It should however be noted that already in 1997, the South African government committed itself to strive to conserve South Africa's biodiversity through legislative

3.2 Other relevant South African environmental legislation pertaining to international trade in biodiversity resources

The Biodiversity Bill is the only existing South African legal instrument on national level, with the regulation of biodiversity as its center topic.⁹² The provisions of the Biodiversity Bill will, however, only be enforceable once the final Act has been approved and enacted by Government. This means that there is currently no binding legal instrument for the regulation of trade in biodiversity in South Africa. It is however possible, to infer inherent national and private sector obligations with regard to the country's biodiversity from other existing national environmental legislation.

3.2.1 National Environmental Management Act 107 of 1998

The NEMA was designed to serve as overarching framework legislation⁹³ that provides for co-operative environmental governance through the establishment of principles for decision-making on matters affecting the environment, institutions that will promote co-operative governance and procedures for co-ordinating environmental functions exercised by organs of state.⁹⁴ In addition to this, it provides for the prohibition, restriction, or control of activities, which are likely to have a detrimental effect on the environment, and to provide for related matters.⁹⁵ In determining what sustainable development is, the NEMA specifically refers to biodiversity in providing that the disturbance of ecosystems and loss of biological diversity should be avoided, or where they cannot be altogether avoided, minimised and remedied.⁹⁶

According to Nel and Du Plessis,⁹⁷ framework legislation defines overarching and generic principles in terms of which sectoral-specific legislation (such as biodiversity

measures. See the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* GN 749 of 1998.

⁹³ Nel and Du Plessis 2001 *South African Journal of Environmental Law and Policy* 19.

⁹⁴ As deduced from the long title of the Act. See also Nel and Du Plessis 2001 *South African Journal of Environmental Law and Policy* 22.

⁹⁵ As deduced from the long title of the NEMA. See the contention of Glazewski *Environmental Law* 314 that the NEMA is based on a set of environmental management principles based on the concept of sustainable development.

⁹⁶ Section 2(4)(a)I. Also see Glazewski *Environmental Law* 315.

⁹⁷ Nel and Du Plessis 2001 *South African Journal of Environmental Law and Policy* 1.

legislation) is embedded. Environmental framework legislation like the NEMA, is characterised by generic legal elements, a flexible approach to address changing circumstances, dedicated sectoral-specific legislation and the inclusion of broad based environmental policy and principles.⁹⁸ It is therefore proposed that it is not the place of the NEMA to address a sectoral-specific issue such as the regulation of biodiversity resources in general or specifically the regulation of international trade in biodiversity, in a direct way. The NEMA should instead be appreciated for what it is: environmental framework law, of which the principles and values should be recognised and applied in the development of a legal instrument that will primarily regulate international commercial trade in biodiversity resources.⁹⁹

The importance of the NEMA in addressing the international conflict between biodiversity conservation and trade in biodiversity resources, should however not be under-estimated. The first sentence of the Biodiversity Bill states that its purpose is to provide for the management and conservation of South Africa's biodiversity within the framework of the NEMA.¹⁰⁰ Section 2 of the NEMA provides national environmental management principles that may directly apply to the conservation of biodiversity in the international trade there-of. Development (that arguably includes economic development), must *inter alia* be socially, environmentally and economically sustainable.¹⁰¹ Three additional principles include that sensitive, vulnerable, highly dynamic or stressed ecosystems require specific attention in management and planning procedures, especially where they are subject to significant human resource usage and development pressure,¹⁰² the avoidance or minimisation of disturbance of ecosystems and loss of biological diversity,¹⁰³ and that social, economic and environmental impacts of activities (such as international trade

⁹⁸ See further Nel and Du Plessis 2001 *South African Journal of Environmental Law and Policy* 3. It should be noted that the *National Environment Management Act Second Amendment Bill, 2003* contains amendments to section 5 of the NEMA on integrated environmental management. This Bill seeks to amend the NEMA to enable the system of environmental impact assessment and related management tools to be regulated in terms of NEMA rather than under the ECA. The amendment to the NEMA seeks to *inter alia* provide for the listing of activities that require an environmental authorisation and provide for offences when listed activities are undertaken without or in contradiction with an environmental authorisation.

⁹⁹ Other sectoral parts of trade in biodiversity resources may also be included.

¹⁰⁰ See the Long Title of the Biodiversity Bill.

¹⁰¹ Section 2(3).

¹⁰² Section 2(r).

¹⁰³ Section 4(a)(1).

activities), must be considered, assessed and evaluated.¹⁰⁴ The duty of care and remediation of environmental damage as addressed in section 28, is another relevant and important principle.¹⁰⁵ It is therefore recommended that whether trade in biodiversity resources will finally be regulated by the Biodiversity Bill itself or by regulations in terms of the final Biodiversity Act, the supporting and contextual framework principles of the NEMA must serve as basis for legislative arrangements to be implemented.

3.2.2 *Environment Conservation Act 73 of 1989*

The ECA provides for the effective protection and controlled utilisation of the environment.¹⁰⁶ It is suggested that sustainable trade in biodiversity resources falls within the cadre of controlled utilisation of the environment. For this reason the provisions of the ECA may play an important role.

Part V of the ECA deals with the control of activities that may have a detrimental effect on the environment.¹⁰⁷ Section 21 deals with the identification of activities that will probably have detrimental effects on the environment. In the list of activities provided in section 21(2), no mention is made of trade as an activity that will probably have a detrimental effect on the environment. It is suggested that trade may be categorised in this section under the head of 'resource removal, including natural living resources', that is provided for in section 21(2)(c), or as a new non-listed activity in the light of the fact that the list provided is unlimited.¹⁰⁸ Section 22 addresses the prohibition on the undertaking of identified activities and sets out the procedure to be followed where a person wants to undertake an activity identified in terms of section 21(1).¹⁰⁹

¹⁰⁴ Section 4(i).

¹⁰⁵ Section 28 is of importance and relevance as it *inter alia* states that every person who may cause degradation of the environment, must take reasonable measures to prevent such degradation from occurring, continuing or recurring. This principle of section 28 is also referred to as the precautionary principle. Note that only some of the NEMA principles that may apply to the conservation of biodiversity for the purpose of this study, have been mentioned.

¹⁰⁶ Fuggle and Rabie *Environmental Management* 99. See Kidd's general evaluation of ECA in Kidd *Environmental Law* 62.

¹⁰⁷ Part V consists of sections 21-23. See Kidd *Environmental Law* 56 in this regard.

¹⁰⁸ See also Fuggle and Rabie *Environmental Management* 108.

¹⁰⁹ In addition section 23 provides for limited development areas.

Part V therefore essentially provides for environmental impact assessment and is, in the words of Glazewski,¹¹⁰ arguably the most important aspect of the ECA that has not been repealed by the NEMA.¹¹¹ The ECA empowers the Minister to declare either activities, or areas, to be identified activities or limited development areas, respectively.¹¹² Although no specific biotic area is applicable, international trade in biodiversity resources may be categorised as an activity that may become a listed activity. The ECA makes specific reference to biodiversity, as it provides that the policy is to be applied with a view to facilitate the preservation of biodiversity in the natural environment.¹¹³ However, neither national nor international trade in biodiversity resources are listed in Regulation 1182 that contains the list of identified activities.¹¹⁴ It also seems improbable to categorise trade in biodiversity resources under one of the activities provided for in Regulation 1182, as was done under section 21 of ECA above. It is therefore strongly recommended that the Minister declares international trade in biodiversity to be a listed activity under the ECA.

Once done, the Minister can in future request a report concerning the impact of international trade on the environment, which includes biodiversity resources. This will arguably ensure the national regulation of trade in biodiversity resources in South Africa for the purpose of establishing sustainable trade in biodiversity resources. Once international trade in biodiversity is declared an identified activity, it will allude to the practical application of all of the relevant EIA provisions of the ECA in the execution of international trade in biodiversity resources. The EIA provisions entail that, when the Minister has declared international trade in biodiversity resources as an effected activity, no such trade may be undertaken without the required written authorisation from the Minister or relevant Premier.¹¹⁵

¹¹⁰ Glazewski *Environmental Law* 188.

¹¹¹ An EIA entails reports concerning the impact of the proposed activity after the systematic identification and evaluation of the potential effects of proposed projects, plans, programmes or legislative actions relative to *inter alia* the biological component of the total environment. See the EIA definitions of respectively Canter and Sadler in Glazewski *Environmental Law* 272.

¹¹² Glazewski *Environmental Law* 188.

¹¹³ Section 2(1)(a). See further Glazewski *Environmental Law* 315. Note that although NEMA repealed this section of the ECA, it saved certain matters under it. *The Identification under section 21 of Activities which may have a Substantial Detrimental Effect on the Environment* Reg 1182 GG 18261 5 September 1997.

In the light of the above, the conclusion is drawn that the ECA may potentially play an important role in establishing the required statutory regulation of international trade in biodiversity resources through the EIA procedure. International trade in biodiversity resources is currently not an activity provided for in Regulation 1182.¹¹⁶ The ECA therefore does not provide for the required national protection of South Africa's biodiversity resources in the industry of expanding international trade.

3.2.3 Provincial ordinances

Formerly South Africa had four provinces each with its own nature conservation ordinance.¹¹⁷ These were the Cape, Transvaal, Orange Free State and Natal provinces. The political transition in 1994 brought about nine new provinces in South Africa, but a number of the previous provincial laws, albeit in amended and supplemented form, is still in place and applicable.¹¹⁸

Although up to now, trade in biodiversity resources has not comprehensively been addressed in a national legislative instrument, the issue has been dealt with to some extent under existing provincial ordinances. It should be noted in this regard that, although South Africa has not enacted specific legislation to give effect to CITES, the provisions of the latter convention are meant to be enforced by way of the above provincial ordinances.¹¹⁹ The ordinances mainly follow the same approach and format, which deal with *inter alia*: reserves, the establishment and regulation of administrative conservation bodies as well as authorisation systems (including permits, certificates and licences) pertaining to *inter alia* trade, exploitation and

¹¹⁵ Section 22(1). See also Glazewski *Environmental Law* 281.

¹¹⁶ See footnote 113 above.

¹¹⁷ Due to the scope of this dissertation, the provincial ordinances are not discussed in detail. For further reading in this regard see Glazewski *Environmental Law* 429-457. The provincial ordinances include: the *Nature and Environmental Conservation Ordinance* 19 of 1974, as amended by the *Western Cape Nature Conservation Law Amendment Act* 3 of 2000, which applies to the Western Cape Province, Eastern Cape Province, Northern Cape Province and some areas of the North West Province; the *Nature Conservation Ordinance* 12 of 1983, which applies to Gauteng Province, Northern Province and North West Province; the *Nature Conservation Ordinance* 8 of 1969 which applies to the Free State Province and the *Nature Conservation Ordinance* 15 of 1974, as supplemented by the *KwaZulu-Natal Nature Conservation Management Act* 9 of 1997, which applies to the KwaZulu-Natal Province. It should be noted in this regard that the Mpumalanga Province has passed new legislation in the form of the *Eastern Transvaal Parks Board Act* 6 of 1995.

¹¹⁸ Glazewski *Environmental Law* 429.

¹¹⁹ Glazewski *Environmental Law* 60.

utilisation of certain amphibians, invertebrates, reptiles, birds, problem animals, indigenous plants and cave formations. As far as could be established, none of the ordinances explicitly provide for the regulation of international trade in biodiversity resources. The regulative policies under these ordinances are furthermore fragmented and not representative of all of South Africa's trade and environmental law obligations that exist on international level.¹²⁰ This fragmentation may in addition give rise to legal uncertainty, jurisdictional problems and possible co-ordination problems with regard to effective and uniform administration required by it. It is proposed in this regard that the various ordinances be reconciled in a national policy in order to provide for uniform definitions, protection standards as well as requirements pertaining to the international trade in biodiversity resources.

3.2.4 Sectoral legislation

As far as could be established, seven other legal instruments (apart from the NEMA and ECA) are applicable to biodiversity conservation in South Africa. The latter legislation includes: the *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972¹²¹ (hereafter the FCDA), the *Plant Breeder's Rights Act* 15 of 1976¹²² (hereafter the PBRA), the *Plant Improvement Act* 53 of 1976¹²³ (hereafter the PIA), the *Agricultural Pests Act* 36 of 1983¹²⁴ (hereafter the APA), the *Genetically Modified Organisms Act* 15 of 1997¹²⁵ (hereafter the GMOA), the *Animal Improvement Act* 62 of 1997¹²⁶ (hereafter the AIA) and the *National Forests Act* 84 of 1998¹²⁷ (hereafter the NFA). The above acts are highly specialised instruments, arguably sufficient for the protection of biodiversity within the cadre of their application, but not sufficient to establish a sustainable trade framework for South Africa.

¹²⁰ See paragraph 4.2 below.

¹²¹ *Foodstuffs, Cosmetics and Disinfectants Act* 54 of 1972.

¹²² *Plant Breeder's Rights Act* 15 of 1976.

¹²³ *Plant Improvement Act* 53 of 1976.

¹²⁴ *Agricultural Pests Act* 36 of 1983.

¹²⁵ *Genetically Modified Organisms Act* 15 of 1997.

¹²⁶ *Animal Improvement Act* 62 of 1998.

¹²⁷ *National Forests Act* 84 of 1998.

3.2.4.1 Foodstuffs, Cosmetics and Disinfectants Act 54 of 1972

The FCDA contains provisions aimed at the provision of the sale, manufacture or importation of any foodstuffs, that *inter alia* contain or have been treated with a prohibited substance.¹²⁸ The purpose and main aim of the FCDA as sectoral legislation,¹²⁹ are to add to specifically pollution control law in South Africa. The FCDA is topic specific and does not adequately provide for the national regulation of international commercial trade in biodiversity resources but only for a certain sector namely foodstuffs, cosmetics and disinfectants with regard to distribution in South Africa.¹³⁰

3.2.4.2 Plant Breeder's Rights Act 15 of 1976

The PBRA *inter alia* sets out the rights of holders of the plant breeder's right.¹³¹ The essence of the right is that prior authority needs to be obtained by way of a license by persons wishing to use or exploit the relevant plant material.¹³² The supposition is that trade in plants on which a breeder has a right protected by the PBRA, belongs within the bigger scope of trade in biodiversity resources. The PBRA as sectoral legislation can therefore be said to regulate to some extent a small proportion of trade in biodiversity resources (specifically plants under the protected right of a plant breeder). However, the regulation afforded by the PBRA is topic-specific, and not sufficient to comprise the generally required protection of South Africa's biodiversity resources in the international trade therein.

3.2.4.3 Plant Improvement Act 53 of 1976

The PIA provides *inter alia* for the control of the import and export of certain plants and propagating material and for incidental matters.¹³³ Section 2 deals with the application of the PIA. The flexible nature of the PIA is evident from the fact that its

¹²⁸ Sections 1 and 2. See Fuggle and Rabie *Environmental Management* 540-541.

¹²⁹ See Nel and Du Plessis 2001 *South African Journal of Environmental Law and Policy* 1-37 for a discussion on the difference between sectoral and framework legislation.

¹³⁰ See also Glazewski *Environmental Law* 324.

¹³¹ Section 23.

¹³² Section 23(1)(a) to (f).

¹³³ See the Long Title of the Act.

provisions apply to any kind of plant which the Minister declares to be included for the purpose of the Act.¹³⁴ Sections 26 and 27 respectively address the importation and export of plants and propagating material.¹³⁵ Provision is made for consignments, certificates and other regulative procedures pertaining to trade in plants. The exclusivity of the PIA is however evident from sections 26(6)(a) and 27(6) where it is stated that the Act shall not apply with reference to the importation of plants and propagating material intended for purposes other than cultivation or for immediate export.¹³⁶ The PIA does not address uncontrolled trade in plants for commercial purposes and therefore no adequate provision is made for the regulation of international commercial trade in this component of biodiversity resources of South Africa.

3.2.4.4 Agricultural Pests Act 36 of 1983

The APA provides for control over plants and plant diseases with a view to protect plants important for agricultural reasons.¹³⁷ Fuggle and Rabie¹³⁸ state that, as such, the APA is of some significance to nature conservation, particularly in respect of indigenous plants, as it may indirectly or incidentally benefit such plants. The APA provides for control over the importation (which is a component of international trade in biodiversity resources) of *inter alia* any plant, insect, growth medium and exotic animal. Contravention of any provision of the APA amounts to an offence.¹³⁹ The APA focuses on imports in specifically the agricultural sector. It does therefore not provide a comprehensive legislative framework for addressing international trade of South Africa's biodiversity resources.

3.2.4.5 Genetically Modified Organisms Act 15 of 1997

The provisions of the GMOA contain detailed regulations for the exportation, development, production, use and application of genetically modified organisms

¹³⁴ Section 2.

¹³⁵ Sections 26 and 27.

¹³⁶ Sections 26(6)(a) and 27(6).

¹³⁷ Section 3. See also Fuggle and Rabie *Environmental Management* 237.

¹³⁸ Fuggle and Rabie *Environmental Management* 237.

¹³⁹ Section 13.

(hereafter GMO's).¹⁴⁰ The GMOA *inter alia* provides for a required permit to participate in any of the mentioned GMO activities without prior authorisation. The definition of biodiversity resources includes GMO's and it is therefore deduced that the GMOA as sectoral legislation, provides for commercial trade in specifically GMO's that constitute a specific component of the broader biodiversity framework. There is accordingly some form of statutory protection provided when it comes to international trade of South Africa's GMO's. The protection afforded is however not all-encompassing nor of general application in order to address international commercial trade in all components of South Africa's biodiversity resources.

3.2.4.6 Animal Improvement Act 62 of 1997

The AIA is a highly specialised agricultural Act that provides for the breeding, identification and utilisation of genetically superior animals, in order to improve their production and performance.¹⁴¹ Trade in genetically superior animals, may arguably be categorised under the provisions for the utilisation thereof under the AIA. As the AIA is applicable to a small portion of the biodiversity resources of South Africa, the AIA, as sectoral-specific legislation, does not contribute to a sufficient policy framework for the protection of biodiversity resources in the international trade arena.

3.2.4.7 National Forests Act 84 of 1998

The NFA deals with protected trees in South Africa and provides in section 3(3), that forests must be developed and managed to conserve biological diversity, ecosystems and habitats. The NFA does not specifically provide for the utilisation of, or trade in, trees as a component of South Africa's biodiversity resources. Accordingly this sectoral-specific legislation will be of little, if any, use in the required policy framework for international trade in biodiversity resources.

¹⁴⁰ See Glazewski *Environmental Law* 316-320 for an elaborative discussion of the GMOA.

¹⁴¹ As deduced from *inter alia* the Long Title of the Act.

3.3 Identified shortcomings and suggestions

The provisions that relate to international trade in the biodiversity resources of South Africa, in respectively the Biodiversity Bill, NEMA, ECA and other sectoral-specific legislative instruments have been highlighted. A number of distinctive shortcomings allude to the contention that there is no existing and effective national environmental law instrument that adequately and comprehensively provides for sustainable trade in biodiversity resources.

The Biodiversity Bill, without exception, explicitly provides for the regulation of trade in specimens of endangered or listed protected species.¹⁴² The Biodiversity Bill, apart from the fact that it is not yet in force, is therefore viewed to be too exclusive in its sphere of application to provide for the required protection of biodiversity resources. In addition hereto, the international conflict between international trade and the conservation of biodiversity resources, is entrenched in the tension between international legal instruments to which South Africa belongs.¹⁴³ The Biodiversity Bill however, makes no provision for the regulation of the material problems that may rise from such a conflict. It is suggested that the Biodiversity Bill should recognise and ultimately show respect for the NEMA's precautionary principle¹⁴⁴ with regard to the harmful effects which commercial trade in biodiversity resources may reveal in future.¹⁴⁵

It is argued that it is primarily the place of the Biodiversity Bill to regulate international trade in the biodiversity resources of South Africa, either in the final Act itself or in regulations enacted in terms of the final Act.¹⁴⁶ In this regard Fuggle and Rabie¹⁴⁷ indicate that administrative legislation, of which regulations are a manifestation, is normally viewed as a technique through which the practical and

¹⁴² See paragraph 3.1 above.

¹⁴³ See paragraph 4 below.

¹⁴⁴ This principle is established by section 28 of the NEMA. See paragraph 3.2.1 above.

¹⁴⁵ As the NEMA functions as framework legislation for other environmental legislation such as the Biodiversity Bill, regard should *inter alia* be given to a precautionary requirement such as the avoidance of the disturbance of ecosystems and loss of biological diversity and where they can not be altogether avoided, for minimised effects and remedies. See paragraph 3.2.1 above on framework legislation. See also section 2(4) of the NEMA.

¹⁴⁶ Such a demeanor would make the final Act a type of framework policy in itself which is an action that should strongly be considered.

¹⁴⁷ Fuggle and Rabie *Environmental Management* 112.

technical detail of principal legislation is supplied. As the situation currently stands, the Biodiversity Bill does not provide secured or practical protection of biodiversity resources with regard to the conflict between the conservation of biodiversity resources and international trade therein. It is suggested that the South African legislature should strongly consider regulating international trade in biodiversity resources in the form of regulations to the final Biodiversity Act. Regulations provide a flexible tool since they can readily be promulgated and amended to adapt to new situations such as change in the state of biodiversity of South Africa.¹⁴⁸ South Africa can arguably be proud of its newly developed biodiversity legislation once the regulation of sustainable trade in biodiversity resources figures there under.

The relevance of the NEMA and ECA with regard to the statutory regulation of trade in biodiversity resources has been highlighted. The importance of these two legislative frameworks should not be underestimated. The basic and elemental framework for a biodiversity policy is provided for by the NEMA and it is suggested that the framework and development of the Biodiversity Bill should at all times be compared to the model framework provided for by the NEMA. In addition hereto, it is suggested that a policy for the regulation of trade in biodiversity resources will be watertight by providing the ultimate protection of South Africa's biodiversity resources if (as a supporting safety mechanism), international trade in biodiversity resources is to be declared an identified activity under ECA and more specifically under Regulation 1182.¹⁴⁹

The sectoral-specific acts discussed above appear to be fragmented, inconsistent and incomprehensive. This may cause legal uncertainty in the national regulation of commercial trade in biodiversity resources.¹⁵⁰ These acts are specified pieces of legislation that do not sufficiently provide for a policy framework to protect the biodiversity resource base of South Africa against the demands of an expanding international trade industry. It is argued that these sectoral-specific provisions should rather be used as supportive reference for the provisions of an all-encompassing regulatory policy on national level.

¹⁴⁸ See further Fuggle and Rabie *Environmental Management* 113.

¹⁴⁹ See footnote 113 above.

¹⁵⁰ See paragraphs 3.2.3.1 to 3.2.3.7 above.

The need for a national policy to regulate international trade in biodiversity resources has been emphasised and possible changes to existing frameworks have been suggested. It is argued that not one of the current instruments in the framework of national environmental law provides for adequate protection of South Africa's biodiversity resources, its proprietors and products during the trade thereof. This leaves a *lacuna* in national environmental legislation, with the potential to pose irreversible consequences in the national and international endeavors to provide for sustainable trade in biodiversity resources and sustainable development in general. The importance and application of the relevant main international legal instruments are accordingly discussed to ascertain a comparable framework and possibilities for application in South Africa.

4. International and foreign law as a guiding framework

As has been highlighted thus far, the South African legislature cannot stand indifferent towards the conflict between the conservation of and international trade in biodiversity resources.¹⁵¹ In endeavors to establish sustainable trade in biodiversity resources on national level, it is accordingly important to determine the scope and to ascertain the importance of applicable legal instruments operating in respectively the environmental and trade areas on international level. In addition hereto, South Africa's international obligations stemming from applicable conventions are identified, together with an analysis of operating foreign law systems and lessons to be learned from foreign biodiversity-related legislative frameworks.

¹⁵¹ See paragraphs 2 and 3 above. This obligation stems from *inter alia* the elative and encouraging article 74 of the *Charter of the United Nations*, 1945 as it shows a need for national policies based on the general principle of good neighbourliness. These policies must also take account of the interests and well being of the rest of the world, in social, economic and commercial matters. The duty of the South African legislature to position itself with regard to international concerns (such as environmental concerns), is also reflected in the maxim *sic utero tuo, et alienum non leadas*. See Kidd *Environmental Law* 76.

4.1 Importance of international law

4.1.1 International environmental law in general

Glazewski¹⁵² indicates that the domestic environmental laws of the countries of the world, including South Africa, have been profoundly influenced by international law.¹⁵³ The reason for this is the fact that many environmental problems do not know political or logistical boundaries.¹⁵⁴ A problem such as international trade in biodiversity resources can least of all, due to its nature, be confined by political or other legal boundaries in the regulation thereof. International environmental law is that part of international law, which deals with, *inter alia* the conservation of the environment.¹⁵⁵ Accordingly, the conservation of biodiversity resources and the problems arising from cross-border trade therein, falls within the scope of international environmental law.

International environmental law is a relatively young branch of international law which deals with a vast subject (including biodiversity-related affairs) which should provide important and rather precise standards.¹⁵⁶ Sustainable development is the founding principle around which most international environmental norms evolve and develop,¹⁵⁷ as it is an international object in itself.¹⁵⁸ The discrepancy between

¹⁵² Glazewski *Environmental Law* 31.

¹⁵³ International law is defined as '...a body of rules and principles which are binding upon states in their relations with one another'. Dugard *International Law* 1. Also see the broader description of international law of Kotzé and Jansen van Rensburg 2003 *Queensland University of Technology Law and Justice Journal* 125. For a discussion on the status of international law in South Africa, see Kidd *Environmental Law* 68.

¹⁵⁴ Glazewski *Environmental Law* 31.

¹⁵⁵ Fuggle and Rabie *Environmental Management* 158. Dugard defines international environmental law as a co-operative enterprise that embraces 'hard law' (customary rules and treaties) as well as 'soft law' (conference resolutions, guidelines and programmes of action). Dugard *International Law* 315-316.

¹⁵⁶ Fuggle and Rabie *Environmental Management* 163. These standards are to be found in *inter alia* treaty law. See paragraph 4.2 below.

¹⁵⁷ Glazewski *Environmental Law* 80.

¹⁵⁸ Tinker states that:

Generally accepted international obligations and rules of conduct related to environmental law now require, *inter alia*, the conservation and sustainable use of biological diversity and non-renewable natural resources. At the same time, pressures for resource development and short-term economic gain encourage a broad range of public and private activities that adversely affect the environment, either now or in the future.

Tinker 1995 *Vanderbilt Journal of Transnational Law* 783.

biodiversity conservation and the expansion of international trade, is a current and well-supported international concern.¹⁵⁹ It is argued that values, norms and structure deduced from international environmental law instruments, may enable a country such as South Africa to facilitate and regulate an environmental concern pertaining to the conflict between trade expansion and biodiversity conservation in its national environmental legislation.

4.1.2 International environmental law and the development of national environmental law

Global trends and pressures drive the development of national environmental laws.¹⁶⁰ It is accordingly suggested that no national legislative instrument (despite the principles of sovereignty),¹⁶¹ addressing a globally collective issue such as the conflict at hand, can effectively be developed and applied without reference and adherence to a pragmatic and standardised international legal framework. Kotzé and Jansen van Rensburg¹⁶² argue that in order to introduce a comprehensive environmental legal protection regime in domestic law, the ratification and implementation of international conventions as well as the consideration of the legal principles of international customary law and soft law, are regarded as high priorities by the South African government in environmental framework legislation. A fundamental element of environmental framework legislation at the national level, should *inter alia* be to make legislative proposals with regard to international conventions and to ensure the establishment of mechanisms and competencies to regulate international treaties and conventions.¹⁶³

It is therefore suggested that in the development and streamlining of national legislation for the regulation of international trade in biodiversity resources,

¹⁵⁹ See paragraph 2 above.

¹⁶⁰ Glazewski *Environmental Law* 31.

¹⁶¹ The extent of a state's sovereignty or jurisdiction is in most instances limited to the extent of its territory. Dugard *International Law* 112. See also Fuggle and Rabie *Environmental Management* 160 on the principle of sovereignty as it figures as a fundamental principle under customary international law.

¹⁶² Kotzé and Jansen van Rensburg 2003 *Queensland University of Technology Law and Justice Journal* 125.

¹⁶³ Nel and Du Plessis 2001 *South African Journal of Environmental Law and Policy* 9.

international environmental law should serve as framework law.¹⁶⁴ The NEMA facilitates this process through Chapter 6, which provides a framework for incorporating international environmental instruments.¹⁶⁵ Support is, in addition, provided by the 1996 Constitution. Sections 231 and 232 thereof respectively regulate international agreements and declare customary international law as law in South Africa.¹⁶⁶ Section 233 of the 1996 Constitution states that when interpreting legislation, courts must prefer any reasonable interpretation of the legislation that is consistent with international law.¹⁶⁷ Accordingly, the scope and importance of international agreements in the development of South African environmental legislation, for specifically the regulation of international trade in biodiversity resources, are determined.

4.2 *Relevant conventions and international obligations*

One of the principles of the NEMA provides that global and international responsibilities relating to the environment must be discharged in the national interest, thus acknowledging that the environmental obligations of South Africa form part of its broader international obligations.¹⁶⁸ South Africa's international environmental law obligations are to be found in the sources of international environmental law. These sources include *inter alia* international conventions or treaties, customary law, general principles of law recognised by civilised nations and judicial precedent.¹⁶⁹

The conflict between international trade in biodiversity resources and the conservation of biodiversity resources, stems directly from opposing obligations under the CBD

¹⁶⁴ This is in addition to the NEMA as national framework law that was discussed in paragraph 3.2.1 above.

¹⁶⁵ Sections 25, 26 and 27 of the NEMA deal with the incorporation of international environmental instruments, reports on the matter and the process of application.

¹⁶⁶ Section 232 states that customary international law becomes part of South African law unless it is inconsistent with the 1996 Constitution itself, or any other national act.

¹⁶⁷ Section 233 of the *Constitution of South Africa* Act 108 of 1996. See also Glazewski *Environmental Law* 32.

¹⁶⁸ Section 2(4)(n). Chapter 6 of the NEMA deals with South Africa's international obligations and agreements. In giving effect to the principle of section 2(4)(n), section 25(1) provides for the accession to and ratification of international environmental instruments. See also Glazewski *Environmental Law* 32 and paragraph 3.2.1 above.

¹⁶⁹ Glazewski *Environmental Law* 36. Conventions and customary law are generally recognised as the primary sources of international law providing the substantive content of international environmental law. See Glazewski *Environmental Law* 36 in this regard.

and the GATT, both to which South Africa is a party.¹⁷⁰ Accordingly, the incorporation of international obligations and norms are strongly recommended in the development of a national environmental policy to regulate sustainable trade in biodiversity resources. In ascertaining South Africa's general and explicit international obligations with regard to biodiversity conservation and international trade, regard is given to the applicable international law instruments.

4.2.1 Biodiversity-related instruments

4.2.1.1 Convention on Biological Diversity, 1992

The CBD¹⁷¹ is described as the first global, comprehensive agreement to address all aspects of biological diversity¹⁷² and the international legal regime for the conservation and sustainable use of biodiversity is based thereon.¹⁷³ The three primary objectives of the CBD are the conservation of biological diversity, the sustainable use of its components and the fair and equitable sharing of the benefits arising out of the utilisation of genetic resources.¹⁷⁴ The CBD is an important international framework policy, as it introduced a novel approach aimed at reconciling the need for conservation with the need for development.¹⁷⁵ It is for this reason that the South African legislature needs to identify and incorporate the country's international

¹⁷⁰ See footnotes 171 and 197 below. It is interesting to note that well over 130 countries adhere to both the WTO and the CBD. See Green Parties Worldwide 2003 [HYPERLINK http://www.greens.org/5_5/19/19_10.html](http://www.greens.org/5_5/19/19_10.html) 16 September.

¹⁷¹ The CBD was adopted at Nairobi and signed by over 150 countries at the Rio Summit. It came into force in 1993 and South Africa ratified it in November, 1995. See paragraph 1.1.2 of the *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* GN 749 of 1998. See also Glazewski *Environmental Law* 62. Note that besides the CBD and CITES discussed below, there are four additional international law instruments directly applicable to biodiversity resources, namely: the *Ramsar Convention on Wetlands of International Importance*, 1971; the *UNESCO World Heritage Convention on the Protection of the World Cultural and Natural Heritage*, 1972 and the *Bonn Convention on the Conservation of Migratory Species of Wild Animals*, 1979 and the *International Convention for the Protection of New Varieties of Plants* of December 2, 1961, as revised at Geneva on November, 10, 1972, on October 23, 1978, and on March 19, 1991. Due to the scope of this study, these instruments are not discussed in this dissertation.

¹⁷² These aspects include genetic resources, species and ecosystems. See Damm *The Conservation Game* 207. Koester compliments the CBD by describing it as a landmark, not only because of the fact that for the first time a global agreement exists to conserve biodiversity, but also because it reconciles the need for conservation with the concern for development. Koester 2001 *Environmental Policy and Law* 155.

¹⁷³ Glazewski *Environmental Law* 299.

¹⁷⁴ Article 1.

¹⁷⁵ See Damm *The Conservation Game* 206.

obligations under the CBD in a national policy dealing with the regulation of international trade in biodiversity resources. This contention is substantiated and simplified by the fact that the CBD is a soft law framework treaty since its provisions are generally expressed as overall goals and policies.¹⁷⁶ It adopts a holistic approach by not setting targets or including restrictive lists of species or areas to be protected.¹⁷⁷ South Africa can accordingly develop and incorporate specific biodiversity-related provisions to suit its unique environmental law framework within the broader CBD international framework.

It has been emphasised that none of the current national legislative instruments adequately provides for sustainable trade in the biodiversity resources of South Africa.¹⁷⁸ It is therefore suggested that in the enactment of a new national policy or in the amendment of applicable and existing environmental law policies to provide for sustainable trade in biodiversity resources, regard should be given to specific international obligations evident from the CBD. These obligations include *inter alia* the development and integration of national strategies for the conservation and sustainable use of biodiversity resources;¹⁷⁹ the integration of such strategies in sectoral and cross-sectoral plans, as well as in programs and policies;¹⁸⁰ the adoption of economically and socially sound measures to serve as incentives for the conservation and sustainable use of biological resources;¹⁸¹ the employment of *inter alia* EIA's where proposed projects (such as trade development projects) are likely to have significant adverse effects on biological diversity;¹⁸² the adoption of measures relating to the minimisation of adverse effects on biodiversity,¹⁸³ the taking of precautionary action in drafting biodiversity-related legislation and to stop and reverse the current biodiversity loss at the global, regional, sub-regional and national levels by the year 2010.¹⁸⁴

¹⁷⁶ In international law, soft law refers to provisions or legislative instruments that take the form of provisions that are very general in their phrasing and exhortatory in their tone, setting out broad aims and intentions rather than creating precise rules and obligations. Reid *Nature Conservation Law* 261.

¹⁷⁷ Glazewski *Environmental Law* 302.

¹⁷⁸ See paragraph 3 above.

¹⁷⁹ Article 6(a).

¹⁸⁰ Article 6(b).

¹⁸¹ Article 11.

¹⁸² Articles 7(c) and 14.

¹⁸³ Article 10(b).

¹⁸⁴ Koester 2001 *Environment Policy and Law* 187.

Glazewski¹⁸⁵ states that South Africa has a comprehensive body of legislation in place which more or less gives effect to its various obligations under the CBD. He suggests, however, that particular legislative steps are needed, in order to put in place a more extensive statutory regime to regulate certain controversial questions.¹⁸⁶ One such controversial question is arguably the regulation of sustainable international trade in the biodiversity resources of South Africa. It is evident that the CBD does not in itself and explicitly address the problem of expanding international trade at the cost of biodiversity conservation.¹⁸⁷ It is however recommended, that the South African legislature identify and incorporate the provisions and inherent obligations of the CBD in national sectoral-specific instruments such as the Biodiversity Bill or regulations thereto. Such a process is simplified by the fact that the conflict can be categorised under the scope of application of two of the three main objectives of the CBD, namely: the conservation of biological diversity and the sustainable use of and trade in its components.¹⁸⁸

4.2.1.2 The Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1973

CITES is an international conservation treaty which controls trade in wildlife (live animals and plants) and wildlife-products.¹⁸⁹ The most important objective of CITES is the protection of endangered wild animals and plants through the strict regulation of trade therein.¹⁹⁰

South Africa has not enacted specific national legislation to give effect to CITES, but rather relies on enforcement through the respective provincial Nature Conservation Ordinances.¹⁹¹ This situation has however, changed with the recent promulgation of the Biodiversity Bill which refers (although not by name), to some of the principles

¹⁸⁵ Glazewski *Environmental Law* 299.

¹⁸⁶ Glazewski *Environmental Law* 299.

¹⁸⁷ As an international framework policy, none of the articles of the CBD explicitly address the mentioned conflict nor do they suggest national solutions there-to.

¹⁸⁸ Article 1.

¹⁸⁹ See footnote 11 above. South Africa ratified the CBD in July 1975. See Glazewski *Environmental Law* 60.

¹⁹⁰ The basic approach of CITES is to regulate trade in wild animals and plants by listing them in three appendices to the Treaty by providing for different degrees of protection in each category. See Glazewski *Environmental Law* 60.

¹⁹¹ Glazewski *Environmental Law* 60. See also paragraph 3.2.3 above.

regarding trade in endangered species, of CITES.¹⁹² It is anticipated that if CITES regulated international trade in not only endangered species but in biodiversity resources in general, this Convention would have been the ideal international framework law for a national policy on sustainable international trade in biodiversity resources. The exclusivity in the application of CITES, is however, evident from the Preamble thereto which states that:

International co-operation is essential for the protection of *certain species of wild fauna and flora* against the over-exploitation of international trade (emphasis added).¹⁹³

CITES recognises the danger of over-exploitation innate in the practice of international trade. It does however expect international co-operation only in respect of specifically listed species of wild fauna and flora, which afford protection to this area of biodiversity alone, and not for biodiversity resources in general.

The main obligation that CITES imposes on member states, is that trade in species threatened with extinction, and trade in species that may become endangered unless trade is strictly regulated, be authorised by export and import permits approved by scientific authorities of the parties concerned.¹⁹⁴ This means that CITES requires export and import permits, certificates and reports authorised by a scientific authority in the international trade in specifically listed endangered species of wild fauna and flora.¹⁹⁵ South African authorities accordingly have an obligation to regulate trade in certain endangered species of wild fauna and flora by means of a permit system.¹⁹⁶ It is proposed that in the enactment of a policy to regulate international trade in biodiversity resources, reference to the regulatory provisions of CITES can be made to ensure protection of endangered species of wild fauna and flora (as components of biodiversity), within a national environmental policy with more extensive scope.

¹⁹² See sections 58 to 61 of the Biodiversity Bill.

¹⁹³ See the Preamble to CITES.

¹⁹⁴ Nissen 1996 *Law and Policy in International Business* 913.

¹⁹⁵ Fuggle and Rabie *Environmental Management* 174.

¹⁹⁶ Nissen contends that CITES tries to eliminate the economic incentive to exploit particular biodiversity species by destroying the international market demand for specific wildlife products through national policy arrangements. Nissen 1996 *Law and Policy in International Business* 913.

4.2.2 Trade-related instruments

4.2.2.1 The General Agreement on Tariffs and Trade, 1947

In the centre of the international trading system stands the GATT¹⁹⁷ which is an agreement under the control of the WTO.¹⁹⁸ The main purpose of the GATT is to provide a common institutional framework for trade relations among the parties thereto. The GATT aims to commit governments not to take certain actions (such as the enactment of legislative restrictions on trade in biodiversity resources) and to provide *inter alia* for rules against trade discrimination and for the elimination of all restrictions on trade.¹⁹⁹

As far as international trade in biodiversity resources is concerned, an important norm can be deduced from the Preamble to the Marrakesh Agreement that established the WTO and which is strongly connected to the GATT itself. The Preamble calls for the optimal use (that arguably includes cross-border trade), of the world's resources (which include biodiversity resources) in accordance with the objective of sustainable development, seeking to both protect and preserve the environment and to enhance the means of doing so.²⁰⁰ In addition hereto, the GATT contains provisions that relate directly to environmental protection.²⁰¹

The main objective of the WTO and the GATT is, however, the promotion of economic development through trade and they are essentially focused on a liberalisation of access to international markets on a non-discriminatory basis.²⁰² Whereas one of the main objectives of the CBD is the conservation of biodiversity, such is the main objective of the WTO growing free trade in sought commodities such as biodiversity resources. It is accordingly clear that the South African legislature (in

¹⁹⁷ South Africa became party to the GATT on 1 January 1995.

¹⁹⁸ See footnote 7 above. See further Glazewski *Environmental Law* 68.

¹⁹⁹ Nissen 1996 *Law and Policy in International Business* 904.

²⁰⁰ Schoenbaum 1997 *American Journal of International Law* 268. See also Glazewski *Environmental Law* 69 and footnote 7 above.

²⁰¹ Article XX (b) states that, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in the Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures necessary to protect *inter alia* animal or plant life.

the enactment of national policy for the establishment of sustainable trade in biodiversity resources), will have to carefully consider means to facilitate the opposing objectives and obligations under the CBD on the one hand, and the GATT on the other.²⁰³ A national environmental law instrument for the regulation of sustainable trade in biodiversity resources, will clearly have to relegate to environmentally protective trade restrictions. Failure to do so may allude to South Africa disobeying its general international obligation under the GATT and indirectly the WTO, not to develop disguised barriers to international trade in biodiversity resources.

4.2.2.2 The Trade-Related Aspects of Intellectual Property Rights Agreement, 1994

The objective of TRIPS is to reduce distortions and impediments to international trade, to take into account the need to promote effective and adequate protection of IPR's and to ensure that measures and procedures to enforce intellectual property rights do not themselves become barriers to legitimate trade.²⁰⁴ The TRIPS Agreement creates an international legal regime for IPR's and the international trade in *inter alia* the rights on patents of life forms as components of biodiversity.

Bioprospecting is a fast growing industry within the international environmental framework.²⁰⁵ International trade in patents or other forms of IPR's connected with agriculture, food production and healthcare products (as a category of bioprospective action), may show rapid expansion in future. Agriculture, food production and the resources needed for the production of healthcare products, form part of the wider biodiversity resource base of a country.²⁰⁶ Accordingly, expansion in the industry of

²⁰² Francioni *Environment, Human Rights and International Trade* 117.

²⁰³ South Africa is party to both the CBD and GATT.

²⁰⁴ As inferred from the Preamble to the TRIPS Agreement.

²⁰⁵ Section 1 of the Biodiversity Bill defines bioprospecting as the systematic search, collection, gathering, extraction, development or application of, or research on, genetic resources for commercial or industrial exploitation. Farrier and Tucker state that the end-focus of bioprospecting is for example the design and development of pharmaceuticals, industrial chemicals, construction materials and cosmetics. Farrier and Tucker 2001 *Ocean Development and International Law* 213.

²⁰⁶ Plant and animal products are needed for production in these fields.

patents or other IPR's under the name of bioprospecting may cause an increase in international trade in biodiversity resources itself.

Provision should therefore also be made for future developments in international trade in *inter alia* IPR's connected with biodiversity resources.²⁰⁷ The principles of TRIPS allude to the broad obligations of members there under. Article 8(1) sets out the principle that members may, in formulating and amending their laws and regulations, adopt measures necessary to *inter alia* promote public interest in sectors of vital importance to their socio-economic development.²⁰⁸ One of these vitally important sectors is arguably the environment and the state thereof. Article 8(2) sets out the principle that appropriate measures may be needed to prevent the abuse of IPR's (such as the establishment of patent rights on biotic life forms) by right holders or the resort to practices which unreasonably restrain trade or adversely affect the international transfer of technology.²⁰⁹ It is accordingly suggested that a national environmental policy for the establishment of sustainable trade in biodiversity resources should recognise and practically provide for the international obligations stemming from the article 8 principles of the TRIPS Agreement.

4.2.2.3 The Lomé Convention and the African Growth and Opportunity Act

The Lomé Convention is a preferential trade agreement between the European Union and the African, Caribbean and Pacific Countries (hereafter the ACP states).²¹⁰ One of the main obligations under this convention is for the European Union to support the ACP states' (including South Africa's) efforts to *inter alia* achieve comprehensive

²⁰⁷ Wynberg states that a concern for South Africa is the fact that intellectual property rights form a just part of more wide-sweeping trade initiatives that threaten biodiversity and natural resource-based livelihoods in Africa. Wynberg 2000 HYPERLINK www.grain.org/publications/issue5-en-p.htm 18 April.

²⁰⁸ Article 8(1).

²⁰⁹ Article 8(2).

²¹⁰ ECSIEP 2002 HYPERLINK <http://www.antenna.nl/ecsiep/lome/indexlom.html> 9 Augustus. The Lomé Convention is an international agreement that embodies provisions which include trade relations, commodity stabilisation measures, financial and technical co-operation. 15 European countries and 71 ACP countries belong thereto. South Africa has qualified membership of the Lomé Convention but there are however, certain advantages that the country will derive from this qualified membership. See also 2003 HYPERLINK <http://www.polity.org.za/hml/govdocs/pr/1997/pr1103a.html> 16 September.

development by means of a shift towards a market-oriented development pattern.²¹¹ Such a market-oriented development pattern includes trade liberalisation, the enforcement of intellectual property rights regimes and the priority of smooth integration into the world economy.

The African Growth and Opportunity Act²¹² is an international agreement in the same style as the Lomé Convention, as it was designed to increase United States exports to, and United States private investments in Africa (including South Africa).²¹³ It promotes international trade bank lending, ultimately creates free trade areas with the strongest countries and regions and ensures in essence that African markets are open to business with the United States of America. The conditions placed on participation by African countries, are amongst others, the progressive attention to the establishment of market-based economies, elimination of barriers to United States trade and investment and protection of intellectual property.²¹⁴

There is no direct and obvious link between the Lomé Convention and AGOA and the need to enact a national environmental instrument for sustainable international trade in biodiversity resources. It is, however, important for the South African legislature, to keep in mind and incorporate in its national legislation, its international trade related obligations under these and similar other instruments.²¹⁵ A failure to facilitate opposing international obligations stemming from environmental, trade-related and politically inspired instruments in a national policy for sustainable trade in biodiversity resources, can potentially leave such a policy with unnecessary and unwanted *lacunae*. It is proposed that such *lacunae* can lead to legal uncertainty and as a consequence thereof, to hindrances in the process of establishing sustainable trade in biodiversity resources.

²¹¹ South African Communication Service 2003 HYPERLINK <http://www.polity.org.za/html/govdocs/pr/1997/pr1103a.html> 16 September.

²¹² *African Growth and Opportunity Act*, 2000 as included in the *Trade Development Act* of 2000. This is a framework agreement for competition in Africa favourable to business with the United States of America.

²¹³ The effective date of South Africa's eligibility for AGOA apparel benefits is 7 March See Export.Gov 2003 HYPERLINK http://www.agoa.gov/eligibility/country_eligibility.html 15 September.

²¹⁴ Export.Gov 2003 HYPERLINK <http://www.agoa.gov/faq/faqy.html> 15 September.

²¹⁵ The Lomé Convention and AGOA are but two of the existing international trade agreements to which South Africa belongs. Specific reference is however made to the Lomé Convention and

4.3 Foreign law features and lessons learned

It has been highlighted that the conflict between international trade and the conservation of biodiversity resources is an international concern.²¹⁶ Accordingly, the obligation and need for national environmental law instruments to ensure sustainable trade in biodiversity resources, is an obligation and need, shared by many countries of the world. It is however true that South Africa is home to a unique composition of biodiversity resources.²¹⁷ For this reason, the required national environmental regulations for sustainable trade in biodiversity resources in South Africa, cannot necessarily be exactly parallel to the congruent policies of other countries.

The regulation of international trade in biodiversity resources is rooted in the cadre of international environmental law instruments and international trade-related instruments.²¹⁸ Accordingly it is possible to deduce, irrespective of South Africa's unique biodiversity composition, best practices from foreign law features of other countries, with more or less the same international trade-related and environmental conservation obligations as South Africa.²¹⁹ Australia, as a biodiversity rich country,²²⁰ and with progressive environmental law provisions,²²¹ is accordingly employed to compare legislative developments of a foreign country with that of South Africa.

AGOA as the European Union and the United States of America are perhaps two of the strongest participants in international trade.

²¹⁶ See paragraph 2.2 above.

²¹⁷ See paragraph 2.1 above.

²¹⁸ See paragraph 4.2 above.

²¹⁹ Miller and Lanou conducted a study on developing guidelines for biodiversity planning. They reflected on the worth of comparison by stating that biodiversity planning (of which international trade in biodiversity resources is arguably a part), is an open-ended process that develops continuously as further information and experience is gained. The process is cyclical, with the same steps repeated round after round. It is also adaptive because participants learn from past experiences about *inter alia* shifts in society, and it also involves multiple stakeholders and sectors. In their study, the preliminary lessons learned from the countries that co-operated, provided considerable guidance to those countries that still wanted to undertake a similar process. Miller and Lanou 2003 http://biodiv.wri.org/pubs_content_text.cfm 15 September.

²²⁰ Sant G (Press Gallery) 2001 HYPERLINK http://www.wwf.org.au/content/release_wildlife_trade2405.htm 15 April.

²²¹ Australian Government HYPERLINK http://www.ea.gov.au/about/publications/corporate_brouchure/approvals.html 15 April.

4.3.1. The Environment Protection and Biodiversity Act

Australia has a unique and fragile biodiversity.²²² The integrity of its biodiversity resource base is potentially threatened by several unsustainable practices. Some of these practices are associated with export and import activities.²²³ For this reason, Australia (which is, similarly to South Africa, party to the CBD, CITES and the WTO), enacted the *Environment Protection and Biodiversity Act*, 1999 (hereafter the EPBCA) as well as the *Wildlife Trade Bill*, 2001 (hereafter the WTB), which is integrated into the former Act.²²⁴

The EPBCA establishes a modern, streamlined process for environmental assessment and approvals. It also makes provision for a substantially improved and integrated framework for the conservation and sustainable use of Australia's rich and unique biodiversity.²²⁵ It is an act with a far-reaching scope as it consists of 528 separate sections.²²⁶ One of the objectives of the EPBCA, as it is set out in section 3, is the enhancement of Australia's capacity to ensure the conservation of its biodiversity by including provisions to identify processes that threaten *all levels of biodiversity* (emphasis added) and the implementation of plans to address these processes.²²⁷ This is a strong and therefore creditable provision, as it shows that all levels of Australia's biodiversity resources deserve protection under the EPBCA. The scope and objectives of the EPBCA were therefore developed not to be exclusively confined to include only threatened, listed or extinct species of biodiversity, as is the case with the Biodiversity Bill.²²⁸

The principles of ecologically sustainable development under the EPBCA, which also provides the framework principles for sustainable trade in biodiversity resources, state

²²² Sant G (Press Gallery) 2001 HYPERSLINK
http://www.wwf.org.au/content/release_wildlife_trade2405.htm 15 April.

²²³ Sant G (Press Gallery) 2001 HYPERSLINK
http://www.wwf.org.au/content/release_wildlife_trade2405.htm 15 April.

²²⁴ The EPBCA is the Commonwealth Government's prime environment legislation. See Environment Australia HYPERSLINK http://www.ea.gov.au/about/publications/corporate_-_brouchure/approvals.html 15 April.

²²⁵ Environment Australia HYPERSLINK http://www.ea.gov.au/about/publications/corporate_-_brouchure/approvals.html 15 April.

²²⁶ Australian Government 2003 HYPERSLINK
<http://scaleplus.law.gov.au/html/pasteact/3/3295/O/PA000150.htm> 17 September.

²²⁷ Section 3(2)(e)(iv).

inter alia that if there are any threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation.²²⁹ This may mean that if only a suspicion exists that international trade practices in Australia constitute a threat of serious or irreversible environmental damage, it is still reason enough to develop measures to prevent environmental degradation. This principle may arguably serve as basic point of reference for the regulation of sustainable trade in the biodiversity resources of South Africa. This contention is supported by the fact that this principle in the EPBCA is strongly reminiscent of the precautionary principle of the NEMA.²³⁰

The Biodiversity Bill lacks a provision that corresponds with section 9 of the EPBCA. Section 9 reflects on the relationship of the EPBCA provisions with other Australian environmental legislation. It is in other words clear from the EPBCA itself, how it should be applied in relation to other and existing national environmental law instruments. This is a commendable provision which the South African legislature may consider to incorporate in regulations addressing international trade in biodiversity resources, or alternatively in the Biodiversity Bill itself. For the sake of legal certainty in the cadre of environmental law in South Africa, it is recommended that it should be evident from sectoral-specific legislation, such as legislation addressing biodiversity-related issues, how it should be applied in relation to other sectoral-specific acts and national environmental framework legislation.²³¹

Sections 56(a) and (b) of the EPBCA address agreements relating to prescribed actions under section 25 of the Act.²³² Section 56 states that the Minister must not enter into a bilateral agreement containing a provision that relates to an action which is *inter alia* taken for the purpose of trade or commerce and which has the effect of giving preference to one state or part of a state, in relation to the taking of action by a person for the purposes of trade or commerce between Australia and another country or between two states.²³³ The significance of this provision lies therein that even

²²⁸ See paragraph 3.1 above.

²²⁹ Section 3A(b).

²³⁰ See paragraph 3.2.1 above.

²³¹ See paragraph 3.2 above.

²³² Section 25 deals with the actions covered by that specific division of the Act.

²³³ Note that the Minister does not have a discretion. The Act clearly states that the Minister must not enter into a bilateral agreement under the mentioned circumstances.

trade related actions on national governmental level, are regulated by the EPBCA. If a corresponding provision is to be incorporated in the Biodiversity Bill itself, or in regulations in terms of the final Biodiversity Act, the South African government will by implication have to consider its obligations with regard to biodiversity conservation before entering into bilateral trade agreements with other countries.

The EPBCA furthermore shows an interesting peculiarity, and the suggestion is that the South African legislature should elaborate thereon. Sections 303FA to 303FI deal with non-commercial purpose exports and imports of specimens and sections 303FJ to 303FU address commercial purpose exports and imports of specimens. Although these provisions do not apply to biodiversity resources in general, but only to specimens of species, the attempt to distinguish between commercial and non-commercial purpose trade, is a creditable action. It is suggested that in addressing international trade in the biodiversity resources of South Africa, a distinction must be made between international trade for respectively non-commercial and commercial purposes, since stricter control is needed for international trade in biodiversity resources for commercial purposes.²³⁴

4.3.2 *The WTB as an example of regulative possibilities under the Biodiversity Bill*

The WTB was enacted to replace the *Wildlife Protection (Regulation of exports and imports) Act, 1982*.²³⁵ It enhanced all previous wildlife trade regulation in Australia by allowing several key additions such as the assessment of the potential invasive threat posed by an imported species, tougher enforcement provisions, which require that a person caught in possession of a CITES specimen must produce evidence that it was legally imported, and the impact of harvesting a species is assessed on the ecosystem as a whole.²³⁶ It allows for the prosecution levels already incorporated in the EPBCA to be used.²³⁷

²³⁴ The reason for this is the characteristics of profits, power and competition in international trade for commercial purposes.

²³⁵ *Wildlife Protection (Regulation of Import and Exports) Act, 1982*.

²³⁶ Sant G (Press Gallery) 2001 HYPERSLINK
http://www.wwf.org.au/content/release_wildlife_trade2405.htm 15 April.

²³⁷ Sant G (Press Gallery) 2001 HYPERSLINK
http://www.wwf.org.au/content/release_wildlife_trade2405.htm 15 April.

The WTB was developed as sectoral-specific legislation under the EPBCA. The new wildlife trade provisions retain strict control on the export of Australia's native wildlife, the import of live exotic species and the movement of endangered species and trade which is regulated by CITES.²³⁸ The provisions under the WTB provide better conservation outcomes and benefits for industry by *inter alia* ensuring that any commercial use of Australian native wildlife for export, is managed in an ecologically sustainable way, providing a more streamlined and transparent system for commercial operators, maintaining a prohibition on the export for commercial purposes of certain live native species and requiring that the assessment of any permit applications for wildlife trade includes proper consideration of broader ecosystems impacts.²³⁹

Australia's enactment of the WTB shows that although a country may have a thorough national policy for biodiversity conservation in place, it is useful and practical to develop an additional policy to regulate trade in biodiversity resources. It is suggested that the South African legislature should provide for maximum protection of its biodiversity resources against expanding international trade and other activities that may be detrimental to the environment in its Biodiversity Bill. In addition to this, and as a form of sectoral-specific legislation, international trade in biodiversity resources should be provided for in a separate part of the Biodiversity Bill or in regulations in terms of the final Biodiversity Act.

Environmental problems, due to the common nature of the environment, cannot be limited within political or logistical boundaries.²⁴⁰ Accordingly the international environmental law framework functions as framework law for the national policies of the countries of the world. The values, norms and structures deduced from international environmental law instruments, may enable South Africa to facilitate and regulate an environmental concern such as the conflict between trade expansion and biodiversity conservation in its national environmental legislation. In its development of a suggested national sectoral-specific policy for international trade in

²³⁸ Australian Government Department of the Environment and Heritage 2003 HYPERLINK <http://ea.gov.au/about/annual-report/01-02/report-epbo-2.html> 17 September.

²³⁹ Australian Government Department of the Environment and Heritage 2003 HYPERLINK <http://ea.gov.au/about/annual-report/01-02/report-epbo-2.html> 17 September.

²⁴⁰ See Glazewski *Environmental Law* 31.

biodiversity resources,²⁴¹ the South African legislature should advance and combine its international treaty obligations under the CBD and the WTO. It is proposed that Australia's EPBCA, the WTB, and the way in which these two instruments provide joined protection of Australia's fragile biodiversity, serve as a useful example of an endeavour to facilitate sustainable trade of biodiversity resources.

5. Conclusion and recommendations

In this dissertation, sustainable trade in biodiversity resources was portrayed as the controlled exportation of biodiversity resources from South Africa to other countries of the world, in a way that meets the commercial and conservational needs of the present generation without compromising the ability of future generations to meet their own commercial and conservational needs.²⁴²

Provincial legislation in this regard seems to be fragmented and does not represent all of South Africa's trade and environmental law obligations that exist on international level.²⁴³ The NEMA and ECA provide a protective legal framework on national level, and consequently lay a firm contextual foundation for comprehensive legislative protection of South Africa's biodiversity resources that should be heeded.²⁴⁴ Sectoral-specific instruments like the Biodiversity Bill, are however fragmented and not all-encompassing, as they exclusively provide for partial regulation of trade in specifically listed biodiversity resources.²⁴⁵ Although commercial trade in biodiversity resources in general stands at the centre of the conflict between international trade expansion and the conservation of biodiversity resources, national legislative protection accordingly lacks in this regard.

It is proposed that South Africa should develop an all-encompassing national policy for the comprehensive regulation of commercial trade in all biodiversity resources. Such a policy may arguably function best as a national sectoral-specific policy that

²⁴¹ With sectoral-specific legislation is meant an additional provision or policy to the existing Biodiversity Bill.

²⁴² See paragraph 1 above.

²⁴³ See paragraphs 3.2.3 and 4.2 above.

²⁴⁴ As was established in paragraph 3.2 above, it is not the object or function of the NEMA or ECA to provide for the specific regulation of international trade in biodiversity resources.

integrates South Africa's trade and environmental law obligations in a way that corresponds with international standards.²⁴⁶ The minimum international standard may be deduced from the CBD, CITES, GATT and the TRIPS agreement when interpreted and applied in a collaborative way.²⁴⁷ In order to ensure sustainable trade in biodiversity resources in South Africa, a national policy that facilitates the opposing objectives from specifically the CBD and CITES on the one hand, and the GATT and TRIPS agreements on the other, is required.

In a practical way, the suggested policy should resemble the basic requirements of section 24 of the 1996 Constitution²⁴⁸ and the precautionary principle to be found in section 28 of the NEMA.²⁴⁹ Such a policy may, in order to fortify its comprehensive character, incorporate existing provincial laws and the provisions of other national sectoral-specific instruments in a way that enables symbiotic legislative co-ordination and cohesion.²⁵⁰

The suggested policy should preferably be integrated into the Biodiversity Bill as was successfully done with the WTB and EPBCA in Australia.²⁵¹ Regulations with a focus on international trade in biodiversity resources in South Africa, may supply practical and technical detail in this regard, in addition to the Biodiversity Bill as principal legislation on biodiversity. Such regulations may readily be promulgated and amended to adapt to new situations, such as changes in the state of biodiversity in South Africa.²⁵² The incorporation of a clear, precise and practical permit system, as part of the suggested policy, may be a successful venture under the suggested regulations. CITES for example requires export and import permits, certificates and reports authorised by a scientific authority for international trade in endangered species.²⁵³ Such a system may be extended in the national regulations to include not only endangered species, but all biodiversity resources.

²⁴⁵ See paragraph 3 above. Sectoral-specific instruments may, however, serve to support a new policy dealing with exclusively international trade in biodiversity resources.

²⁴⁶ See paragraph 3.3 above.

²⁴⁷ See paragraph 4 above.

²⁴⁸ See footnote 14 above.

²⁴⁹ See paragraph 3.2.1 above.

²⁵⁰ See paragraphs 3.2.3 and 3.2.4 above.

²⁵¹ See paragraph 4.3 above.

²⁵² See paragraph 3.3 above.

²⁵³ See paragraph 4.2.1.2 above.

Australia has successfully achieved the above with the establishment of WTB, that was integrated into the EPBCA. These two instruments do not fully function independently but rather function in a mutually supportive way, in order to provide comprehensive regulation of trade in Australia's biodiversity resources.²⁵⁴ Apart from the structural example of legislative protection of biodiversity resources, the WTB and EPBCA incorporate a principle of ecologically sustainable development, a continuous reference to all levels of biodiversity and a reference to the relationship of the WTB with other legislation of Australia.²⁵⁵ South Africa may consider similar contextual provisions in its own policy for the regulation of international trade in biodiversity.

It is, however, also possible to declare international trade in biodiversity resources, an identified activity under ECA by amending Regulation 1182 thereto.²⁵⁶ The possibility of amending the final Biodiversity Bill, or of developing a new national act for the regulation of international trade in biodiversity resources, also exists but is not preferred to the solutions suggested above, as it will require lengthly and consequently more expensive procedures.

South Africa's biodiversity is wondrously rich. Because of its immense complexity, these resources are however also fragile. As a result of its fragile nature, South Africa's biodiversity may not stand the test of time if the national legislature stands cold towards its duty to place South Africa on a path of sustainable trade in biodiversity.

²⁵⁴ See paragraph 4.3 above.

²⁵⁵ See paragraph 4.3 above.

²⁵⁶ See paragraph 3.2.2 above.

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Australia

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