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Despite the Convention on Biological Diversity's recognition of state sovereignty over genetic resources and its creation of prior informed consent and benefit-sharing obligations relating to the use of such resources, the biological wealth of developing countries (including South Africa) continues to be misappropriated. As a result, developing countries have long fought for a binding international framework to govern access to genetic resources and the sharing of benefits from their utilisation. In October 2010, after almost a decade of discussions and negotiations, this goal was achieved through the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. Given that South Africa has signed but not yet ratified this instrument (which has still to come into force), this article evaluates South Africa's existing access and benefit-sharing regime against the Protocol's provisions, and comments on the extent to which South African law will need to be developed should the country become a Party to the Protocol. It further considers the benefits that South Africa could potentially secure by ratifying the Protocol as well as those factors that may dilute the Protocol's effectiveness in combating biopiracy.

The past two decades have witnessed South Africa's policy-makers seeking to give domestic effect to the country's international obligations under the 1992 Convention on Biological Diversity and grappling with implementing the country's land reform programme. What is somewhat disconcerting is that these two legal domains, conservation and land reform, have for the bulk of the past two decades operated in virtual isolation of each other. It is only in the past few years that the conservation and land reform authorities have come to recognise the integral link between the two, a link which is often fraught with conflict and which frequently plays out in the context of protected areas. This article critically explores this often-troubled nexus and the array of recent domestic developments through which the authorities have sought to traverse it. These developments most importantly include the Memorandum of Agreement concluded between the erstwhile Minister of Land Affairs and Minister of Environmental Affairs and Tourism in 2007, and the National Co-Management Framework launched in late 2010. As is

highlighted in this critical review of these initiatives, their focus is exceedingly narrow and they are beset by several theoretical and practical problems. They consequently operate in a manner that shrouds an array of protected area governance options present in South Africa's domestic legal framework. The second part of the article focuses on these apparently misunderstood governance options which theoretically provide domestic stakeholders with a far more diverse and nuanced array of tools for balancing the country's conservation and land reform agendas.

Recent Cases

ACCESS AND BENEFIT-SHARING IN THE WAKE OF CBD COP10: THE NAGOYA PROTOCOL AND ITS POTENTIAL IMPLICATIONS FOR SOUTH AFRICA

Melissa Lewis*

Abstract

Despite the Convention on Biological Diversity's recognition of state sovereignty over genetic resources and its creation of prior informed consent and benefit-sharing obligations relating to the use of such resources, the biological wealth of developing countries (including South Africa) continues to be misappropriated. As a result, developing countries have long fought for a binding international framework to govern access to genetic resources and the sharing of benefits from their utilisation. In October 2010, after almost a decade of discussions and negotiations, this goal was achieved through the adoption of the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization. Given that South Africa has signed but not yet ratified this instrument (which has still to come into force), this article evaluates South Africa's existing access and benefit-sharing regime against the Protocol's provisions, and comments on the extent to which South African law will need to be developed should the country become a Party to the Protocol. It further considers the benefits that South Africa could potentially secure by ratifying the Protocol as well as those factors that may dilute the Protocol's effectiveness in combating biopiracy.

1 Introduction

Modern advances in technology (particularly in the field of biotechnology) have dramatically increased the potential for genetic resources to be used in developing new commercial products.[1] However, neither genetic resources themselves, nor the technologies required for their research and development, are evenly distributed across the globe. While the highest concentrations of genetic resources tend to be found in developing countries, the industries that make use of such resources are predominantly based in developed nations.[2] Because of this inverse relationship between the distributions of genetic resources and their users, it is frequently the case that resources that have been harvested in one country are researched and developed in another. The control over access to genetic resources and the distribution of any benefits resulting from the utilisation of such resources are issues that affect countries on both sides of the user-provider relationship.

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[1] C Richerzhagen *Protecting Biodiversity: The Effectiveness of Access and Benefit-sharing Regimes* (2010) at 1.

[2] Richerzhagen (n1) at 14; R Wynberg *Bioprospecting, Access and Benefit-sharing in South Africa: Towards a Strategic Assessment*, paper prepared for the National Botanical Institute as a contribution towards the Southern African Biodiversity Support Programme and National Biodiversity Strategy and Action Plan (May 2004) (available at http://www.fni.no/abs/publication-34html).

Biologically wealthy developing countries have long fought for access and benefit-sharing ('ABS') issues relating to genetic resources to be regulated at the international level.[3] The first step towards such regulation was achieved with the adoption of the Convention on Biological Diversity[4] ('CBD'), which includes the fair and equitable sharing of benefits from the utilisation of genetic resources as one of its three core objectives,[5] and introduces a number of broadly-worded ABS obligations. However, in the two decades that have passed since the CBD's adoption, the Convention has been largely ineffective in curbing the misappropriation (or 'biopiracy'[6]) of genetic resources and the traditional knowledge that is often associated with such resources.[7] In October 2010, after a lengthy negotiating process, the Parties to the CBD thus adopted the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization (the 'Nagoya Protocol').[8] It is hoped that the Protocol will assist in combating biopiracy—in particular, through the compliance and monitoring obligations that it will impose upon Parties with jurisdiction over users of genetic resources (so-called 'user countries'[9]).

This article begins by describing the need for and adoption of the Nagoya Protocol, with a particular focus on South Africa's position in this regard. As a megadiverse country,[10] South Africa could potentially benefit quite significantly by becoming a Party to the Protocol. Such benefits must, however, be weighed against the obligations that ratification would impose upon South Africa and the extent to which our existing ABS regime would need to be developed in order to satisfy such obligations. Given that South Africa has already signed the Nagoya Protocol,[11] the article assesses the country's current ABS laws against the Protocol's provisions and comments on the extent to which these laws may require development if South Africa ratifies the Protocol. It then considers the benefits that South Africa could potentially gain by becoming a Party to the Protocol and highlights some of the problems that may arise in this regard.

[3] See sections 2.2 and 2.5 below.

[4] Convention on Biological Diversity, 1992 (available at http://www.cbd.int/convention/text/).

[5] CBD, Article 1.

[6] 'Biopiracy' is a term used to refer to the 'illegitimate appropriation or commercialization of genetic resources and associated knowledge'. MN Alexaides and SA Laird 'Laying the foundation: equitable biodiversity research relationships' in SA Laird (ed) *Biodiversity and Traditional Knowledge: Equitable Partnerships in Practice* (2002) at 7.

[7] See section 2.4 and accompanying footnotes.

[8] The Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization to the Convention on Biological Diversity, 2010 (available at http://www.cbd.int/abs/text/). The Protocol was adopted by the CBD's Conference of the Parties ('COP') in Decision X/1.

[9] See MW Tvedt and T Young *Beyond Access: Exploring Implementation of the Fair and Equitable Sharing Commitment in the CBD*, IUCN Environmental Policy and Law Paper No. 67/2 (2007) at 5 and 13.

[10] See generally RA Mittermeier, PR Gil and CG Mittermeier *Megadiversity: Earth's Biologically Wealthiest Nations* (1997).

[11] Signatories to the Nagoya Protocol, http://www.cbd.int/abs/nagoya-protocol/signatories/ (last accessed on 27 December 2011).

2 Background to the adoption of the Nagoya Protocol

2.1 The distribution and uses of genetic resources

Biodiversity is not evenly distributed between countries. Instead, it is concentrated in the southern hemisphere, largely within developing nations.[12] South Africa, for example, is home to between 250,000 and 1,000,000 species (many of which cannot be found elsewhere)[13] as well as an entire plant kingdom[14] and three global 'biodiversity hotspots'.[15] Biodiversity offers human beings a wide range of benefits,[16] including the scientific knowledge and profits that can be generated by researching and developing genetic resources. As defined by the CBD, genetic resources include any material of plant, animal, microbial or other origin that contains 'functional units of heredity'[17] and is of actual or potential value.[18] Seeds, plant cuttings, sperm and extracted DNA (such as a chromosome or gene) can all, for example, be described as genetic resources.[19] Through the application of modern technologies, these resources are used to develop a wide range of commercial products, such as pharmaceuticals, botanical medicines, crop protection products, cosmetics, and fragrances.[20] *Hoodia* plants from southern Africa have, for example, been used to develop internationally marketed appetite suppressants.[21] A more recent example involves the production of an anti-anxiety extract from *Sceletium*

[12] Richerzhagen (n1) at 1 and 17; L Glowka, F Burhenne-Guilmin and H Synge *A Guide to the Convention on Biological Diversity*, IUCN Environmental Policy and Law Paper No. 30 (1998) at 1.

[13] The country is particularly rich in plant life, with over 18,000 (or 7.5% of the world's total) vascular plant species being found within its borders. Department of Environmental Affairs and Tourism *White Paper on the Conservation and Sustainable Use of South Africa's Biological Diversity* (1997), Chapter 1 (available at http://www.environment.gov.za/PolLeg/WhitePapers/Biodiversity/Contents.htm).

[14] The Cape Floral Kingdom is the only one of the world's plant kingdoms to be found within the borders of one country. Ibid.

[15] Biodiversity hotspots are areas characterised by the presence of at least 1,500 endemic species of vascular plants and a loss of at least 70% of their original habitat. The hotspots found in South Africa are the Cape Floristic Region, Succulent Karoo and Maputaland-Pondoland-Albany. See generally Conservation International *Biodiversity Hotspots*, http://www.biodiversityhotspots.org/Pages/default.aspx (last accessed on 27 September 2011).

[16] The preamble to the CBD recognises biodiversity as having ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values to human beings, in addition to its own inherent value.

[17] I.e. Units that function to convey hereditary information. Glowka et al (n12 at 21) describe 'functional units of heredity' as including 'all genetic elements containing DNA (deoxyribonucleic acid) and, in some cases, RNA (ribonucleic acid)', while ten Kate and Laird explain that, depending on the circumstances, intact living cells, whole chromosomes, genes, and DNA fragments smaller than genes can all be considered to be functional units of heredity (K ten Kate and SA Laird *The Commercial Use of Biodiversity: Access to Genetic Resources and Benefit-sharing* (1999) at 18). For a detailed discussion of this term see PJ Schei and MW Tvedt *'Genetic Resources' in the CBD: The Wording, the Past, the Present and the Future*, report by the Fridjof Nansen Institute (2010) (available at http://www.fni.no/doc&pdf/FNI-R0410.pdf); and Tvedt and Young (n9) at 54-58.

[18] CBD, Article 2: definition of 'genetic resources', read with definition of 'genetic material'.

[19] Glowka et al (n12) at 21-22.

[20] Ten Kate and Laird (n17) at 1. See generally ten Kate and Laird's discussion of the use of genetic resources in pharmaceuticals, botanical medicines, major crops, horticulture, crop protection products, applications of biotechnology in fields other than healthcare and agriculture, and cosmetics and personal care products. A more concise discussion of these sectors is provided by Richerzhagen (n1) at 26-36. South Africa's ABS legislation provides the following as examples of products that can be developed from indigenous biological resources: 'drugs, industrial enzymes, food flavours, cosmetics, emulsifiers, oleoresins, colours and extracts'. National Environmental Management: Biodiversity Act 10 of 2004, s1: definition of 'commercialisation'.

[21] R Wynberg 'Institutional Responses to Benefit-sharing in South Africa' in Laird (n6) at 62-67.

tortuosum (a South African plant species, commonly referred to as 'Kanna' or 'Kougoed'). Upon completion of development, the extract will be marketed in both South Africa and the United States under the name 'Zembrin'.[22] As is often the case with the development of products by the botanical medicines, pharmaceuticals, cosmetics and personal care sectors,[23] initial research into both *Hoodia* and *Sceletium tortuosum* was guided by traditional knowledge concerning the uses of these species.[24]

2.2 The old regime: 'Free access' to the genetic resources of provider countries

Given the profits that can arise from the utilisation of genetic resources,[25] it is not surprising that biologically wealthy countries such as South Africa are of significant interest to 'bioprospectors' (persons in search of commercially valuable genetic resources[26]).[27] Historically, South Africa's genetic resources have been harvested and exported in a virtually unlimited fashion. While foreign companies have profited from the development of some of these resources, South Africa has not generally shared in these profits.[28] Nor have South Africa's indigenous communities commonly benefited when their traditional knowledge has assisted bioprospectors.[29] Similar difficulties have been experienced by many other provider countries.[30] While these problems can, in part, be attributed to a lack of domestic regulation,[31] a more controversial contributor has been the fact that, at the international level, genetic resources have historically been considered

[22] See generally http://www.zembrin.com.

[23] As Laird and ten Kate observe, '[t]he botanical medicine, cosmetic and personal care, pharmaceutical and, to a lesser extent, crop protection sectors seek traditional knowledge to help guide product research and development activities'. The authors do, however, proceed to highlight that contemporary horticulture, seed and biotechnology industries make little direct use of traditional knowledge. It thus should not be assumed that traditional knowledge contributes to all research and development involving genetic resources. SA Laird and K ten Kate 'Biodiversity prospecting: the commercial use of genetic resources and best practice in benefit-sharing' in Laird (n6) at 270. Nor should it be assumed that the majority of genetic resources that *are* associated with traditional knowledge are appropriate for commercialisation. Indeed, only a small minority of those resources that are researched are ever developed into commercial or industrial products. NR Crouch, E Douwes, MM Wolfson, GF Smith and TJ Edwards 'South Africa's bioprospecting, access and benefit-sharing legislation: current realities, future complications, and a proposed alternative' (2008) 104 *South African Journal of Science* 355 at 356.

[24] Both species have long been used by the San for their medicinal qualities. Research into *Sceletium tortuosum* was also assisted by the Paulshoek and Nourivier communities of Namaqualand. Wynberg (n21) at 62; South African San Council, press release at !Khwattu, Western Cape, (20 October 2010) (available at http://zembrin.com/documents/SASC%20PRESS%20RELEASE%201%20OCTOBER%202010%20%20final.pdf).

[25] At the time of ten Kate and Laird's research (over a decade ago) it was estimated that the combined annual global markets for products derived from genetic resources in the industry sectors that they had surveyed sat between USD 500 billion and USD 800 billion. Ten Kate and Laird (n17) at 1.

[26] Wynberg (n2) at 8.

[27] Crouch et al (n23) at 355.

[28] Annual revenues from *Pelargonium* cultivars in the Netherlands, Germany and Belgium, for example, amount to approximately USD 6 billion. Ibid. Note, however, that South Africa's genetic resources are not only of interest to *foreign* bioprospectors. In 1996, a review of bioprospecting in South Africa revealed that virtually all of the country's research institutions were engaged in bioprospecting activities. M Taylor and R Wynberg 'Regulating Access to South Africa's Biodiversity and Ensuring the Fair and Equitable Sharing of Benefits from its Use' (2008) 15:2 *SAJELP* 217 at 218.

[29] Crouch et al (n23) at 355; Wynberg (n2) at 40; K Garforth and JM Cabrera *Sustainable Biodiversity Law: Global Access, Local Benefits*, A CISDL Legal Research Paper (2003) at 7.

[30] See, for example, P Kameri-Mbote 'Access to Genetic Resources and Benefit-sharing in Kenya' in CO Okidi, P Kameri-Mbote and M Akech (eds) *Environmental Governance in Kenya: Implementing the Framework Law* (2008) at 393.

[31] Crouch et al (n23) at 355.

to be part of the 'common heritage of human kind' and thus freely available to all countries for all purposes.[32] When, in the 1980s, discussions began on a framework convention on biodiversity[33] (the CBD), developing countries saw an opportunity to change this position. They thus refused to undertake the conservation obligations sought by developed nations unless the Convention also recognised state sovereignty over genetic resources and required that benefits derived from the use of such resources be shared with the countries that had provided them.[34]

2.3 The CBD's provisions on access and benefit-sharing

While provisions on ABS proved to be one of the most difficult aspects of the CBD to negotiate,[35] countries were eventually able to produce an instrument that balanced the interests of developed and developing nations and introduced new principles to govern access to genetic resources.[36] The adopted text recognises, for the first time in international law, that states have sovereign rights over their genetic resources.[37] It proceeds to require that access to such resources occur on mutually agreed terms[38] and be subject to the prior informed consent of the Party providing the resources (unless otherwise determined by that Party).[39] The Convention additionally establishes 'the fair and equitable sharing of the benefits arising out of the utilization of genetic resources' as

[32] Glowka et al (n12) at 5 and 76-8; W Lesser *Sustainable Use of Genetic Resources under the Convention on Biological Diversity: Exploring Access and Benefit Sharing Issues* (1998) at 19; Richerzhagen (n1) at 2. The 1983 United Nations Food and Agriculture Organization's International Undertaking on Plant Genetic Resources, for example, was based on the principle that 'plant genetic resources are a heritage of mankind and consequently should be available without restriction'. Glowka et al (n12) at 78.

[33] The IUCN began exploring the possibility of a treaty on biodiversity in 1984. Glowka et al (n12) at 2. In 1987, UNEP established a working group to investigate the desirability and possible form of an umbrella convention to rationalise the existing treaties on biodiversity and to address other areas that may be encompassed by such a convention. UNEP Governing Council Decision 14/26 (available in Report of the UNEP Governing Council on the work of its fourteenth session (8-19 June 1987) at 78-79, http://www.unep.org/resources/gov/prev_docs/87_06_GC14__report__N8723250.pdf). Two years later, UNEP arranged the establishment of 'an ad hoc working group of legal and technical experts with a mandate to negotiate an international instrument for the conservation of the biological diversity of the planet' and called for work on this issue to be expedited 'as a matter of urgency with the aim of having the proposed new international legal instrument ready for adoption as soon as possible'. UNEP Governing Council Decision 15/34 (available in Report of the UNEP Governing Council on the work of its fifteenth session (15-16 May 1989) at 161-163, http://www.unep.org/resources/gov/prev_docs/89_05_GC15_report__N8922724.pdf). Formal negotiations began in 1991 and were completed in May 1992, resulting in the adoption of the Convention on Biological Diversity. Glowka et al (n12) at 2-3; I Rummel-Bulska 'The Negotiating Process Leading to the Convention on Biological Diversity' in E Couzens and T Kolari (eds) *International Environmental Law-making and Diplomacy Review 2006*, University of Joensuu-UNEP Course Series 4 (2007) at 63 and 70-71. For a comprehensive discussion of the Convention's negotiation, see Rummel-Bulska. Ibid.

[34] Ten Kate and Laird (n17) at 4; Glowka et al (n12) at 5.

[35] See generally Rummel-Bulska (n33).

[36] M Bowman, P Davies and C Redgwell *Lyster's International Wildlife Law*, 2ed, (2010) at 593-4. See also 598. While not a focus of this article, the International Treaty on Plant Genetic Resources for Food and Agriculture, 2001 (available at http://www.planttreaty.org) is also relevant insofar as it regulates ABS concerning plant genetic resources used for food and agriculture.

[37] CBD, Article 15.1: 'Recognising the sovereign rights of states over their natural resources, the authority to determine access to genetic resources rests with the national government and is subject to national legislation.'

[38] CBD, Article 15.4.

[39] CBD, Article 15.5.

one of its three core objectives[40] and, to this end, requires Parties to take measures with the aim of sharing benefits from the use of genetic resources with the Party that has provided them.[41] Parties are further required to encourage benefit-sharing with indigenous and local communities whose traditional knowledge has been utilised.[42] These provisions are, however, balanced against an obligation on the part of provider countries to 'endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties and not to impose restrictions that run counter to the objectives of [the CBD]'.[43]

Although the CBD 'ushers in a new era concerning access to genetic resources',[44] the Convention's ABS commitments are (like most of its provisions) broadly-phrased, providing little indication as to how Parties should meet these obligations.[45] While some level of guidance has been provided by the Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization[46] and (at a regional level) the African Model Legislation for the Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources,[47] neither of these instruments is legally binding. The result is that Parties have taken varied approaches in implementing the CBD's ABS provisions.

[40] CBD, Article 1. The Convention's other objectives are 'the conservation of biological diversity' and 'the sustainable use of its components'.

[41] CBD, Article 15.7. While Article 1 indicates that benefit-sharing may take the form of appropriate technology transfer and funding, it is silent on the other kinds of benefits that may be shared. Article 15.7 expands upon this by calling for sharing of the results of research and development involving the genetic resources that have been provided. Further guidance is provided by Articles 15.6 (possible participation in scientific research on the genetic resources that have been provided), 16.3 (access to and transfer of technology which makes use of the genetic resources that have been provided), 19.1 (participation in biotechnological research activities involving the genetic resources that have been provided), and 19.2 (access to the results and benefits arising from biotechnologies based on the genetic resources that have been provided).

[42] CBD, Article 8(j).

[43] CBD, Article 15.2. Hodges and Daniel have described these provisions as ' "the grand bargain", where, in simple terms, developing countries would provide access to their genetic resources in return for resulting economic benefits derived from developing countries' use of the resources.' TJ Hodges and A Daniel 'Promises and Pitfalls: First Steps on the Road to the International ABS Regime' (2004) 14:2 *Review of European Community and International Environmental Law* 148 at 148; see also Tvedt and Young (n9) at xv.

[44] Statement from the CBD's COP to the Commission on Sustainable Development at its Third Session, Annex to Decision I/8, para 10.

[45] Tvedt and Young (n9) at 5; Glowka et al (n12) at 1-2.

[46] In 2000, the CBD's COP tasked the drafting of guidelines on ABS to an Open-Ended Ad Hoc Working Group on Access and Benefit-sharing. Decision V/26. The draft Bonn Guidelines were developed at the Working Group's first meeting and were adopted by the COP in 2002. Decision VI/24. They are intended to provide guidance to governments when developing national regimes and contractual arrangements for ABS. Decision VI/24, para 1.

[47] A draft of this model law was originally developed by the Ethiopian Environmental Protection Authority, the Third World Network and the Institute for Sustainable Development in Ethiopia. JA Ekpere *The OAU's Model Law: The Protection of the Rights of Local Communities, Farmers and Breeders, and for the Regulation of Access to Biological Resources—An Explanatory Booklet* (available at http://www.blauen-institut.ch/tx_blu/tp/tpt/t_oau_model_law.pdf). In 1998, the Organisation of African Unity's ('OAU') Council of Ministers called upon governments of Member States to 'give due attention as a matter of priority to the need for regulating access to biological resources, community knowledge and technologies' and to adopt the draft model legislation. Decisions Adopted by 68th Ordinary Session of the Council of Ministers of the OAU, 1-6 June 1998, CM/Dec.428 (LXVIII) (available at http://www.au.int/en/content/ouagadougou-1-6-june-1998-council-ministers-organization-african-unity-meeting-its-sixty-eig). The final version of the African Model Legislation was approved in 2001. It is meant to assist Member States in formulating their own ABS laws. Decisions Adopted by the 74th Ordinary Session of the Council of Ministers to the OAU, 5-8 July 2001, CM/Dec.44 (LXXIV) (available at

2.4 The continued misappropriation of genetic resources in South Africa and other provider countries

South Africa is one of relatively few Parties to the CBD to have developed ABS-specific laws at national level.[48] Between them, the 2004 National Environmental Management: Biodiversity Act[49] ('NEMBA') and 2008 Bio-Prospecting, Access and Benefit-Sharing ('BABS') Regulations[50] establish a permitting system to govern the use of South Africa's indigenous biological resources and the traditional knowledge associated with such resources. The system incorporates both prior informed consent and benefit-sharing requirements. However, both before and after the commencement of these laws, South Africa has struggled with the misappropriation of its genetic resources and related traditional knowledge. In 2007-2008, for example, the European Patents Office granted patents to Schwabe Pharmaceuticals (a German pharmaceutical company) for certain treatments containing South African *Pelargonium* species. This was despite the fact that the company had failed to obtain prior informed consent for the use of the plants or to make benefit-sharing arrangements concerning such use.[51] More recently, in 2009,

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http://www.au.int/en/content/lusaka-5-8-july-2001-council-ministers-seventy-fourth-ordinary-session-ninth-ordinary-sessio).

[48] Out of the 193 Parties to the CBD, the ABS Measures Database for the Convention currently shows only 55 countries as having taken ABS measures. ABS Measures Search Page, http://www.cbd.int/abs/measures (last accessed on 27 September 2011). Many of these measures do not take the form of comprehensive ABS legislation, but rather non-binding policy documents or guidelines, some of which barely even mention ABS. Indeed, it has been estimated that ten years after the adoption of the CBD, less than 10% of Parties had adopted ABS legislation. Tvedt and Young (n9) at 1.

[49] Act 10 of 2004. Though NEMBA makes no express reference to the CBD, the Act's objectives largely mirror those of the Convention and many of its substantive provisions clearly seek to implement the CBD at national level. Chapter 6 (which commenced in 2006 and was subsequently amended by the National Environmental Laws Amendment Act 14 of 2009) deals exclusively with bioprospecting, access and benefit-sharing.

[50] GN R138 in *Government Gazette* 30739 of 8 February 2008.

[51] Four of the patents (Patents EP 1 429 795, EP 1 651 244, EP 1 684 775, and EP 1 763 520, all of which involved the use of *Pelargonium sidoides* and *Pelargonium reniforme*) were challenged by the African Centre for Biosafety and Swiss NGO, the Berne Declaration, on behalf of a community in the Eastern Cape. One of the grounds of objection was that, in contravention of the CBD, Schwabe had failed to obtain prior informed consent from, or to make benefit-sharing arrangements with, either the South African government or the community that provided the resources and associated traditional knowledge. It was thus argued that the patents were *contra bonos mores* and contravened Article 53 of the European Patent Convention, which prohibits the granting of European patents in respect of 'inventions the commercial exploitation of which would be contrary to "ordre public" or morality'. African Centre for Biosafety, the Berne Declaration and Evangelischer Entwicklungsdienst, *Factsheet: The Pelargonium Patent Challenges* (January, 2010) (available at http://www.biosafetyafrica.org.za/images/stories/dmdocuments/10.01.Update_Factsheet_Pelargonium_Patents_en.pdf). The Opposition Division of the European Patent Office did ultimately revoke one of the patents. This was not, however, on the basis that the patent was *contra bonos mores*, but rather on the basis that the procedure that had been patented lacked an inventive step. European Patent Office *European Patent Office revokes 'pelargonium extract' patent* (26 January 2010), http://www.epo.org/news-issues/press/releases/archive/2010/20100126.pdf.

Insofar as South African law is concerned, it should be noted that three out of the four patents were granted before the commencement of the BABS Regulations (which came into effect on 1 April 2008). In September 2008, permit applications were made under these Regulations. DEA presentation at KwaZulu-Natal's NRF/DEA NEMBA Legislation and Research Integrity Workshop (7 December 2010); see also Mariam Mayet *Biopiracy Under Fire: The Pelargonium Patent Hearing*, A Briefing Paper by the African Centre for Biosafety (January, 2010), at 18 (available at http://www.biosafetyafrica.org.za/images/stories/dmdocuments/ACB_briefing%2pelargonium%

Nestec SA (a subsidiary of Nestlé) made five 'international' patent applications[52] to use South African rooibos and honeybush in the treatment of hair and skin conditions and inflammatory disorders.[53] Nestec failed to negotiate benefit-sharing agreements or attempt to obtain bioprospecting permits prior to making these applications.[54]

The misappropriation of genetic resources and traditional knowledge continues to occur not only in South Africa, but in provider countries worldwide.[55] This is despite the fact that the CBD has been in force for almost two decades. The problem has, in part, been attributed to the fact that, while a number of provider countries have adopted ABS laws which identify the procedures and requirements for access to their genetic resources (in particular, prior informed consent and mutually agreed terms),[56] user countries have done little to ensure that the foreign genetic resources that are utilised within their jurisdictions have been accessed in accordance with provider country legislation, or that

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20patent%20patent%20challenge%20update_Jan%202010.pdf). A benefit-sharing agreement has since been concluded with the Imingcangathelo Development Trust (GN 677 in *Government Gazette* 33348 of 2 July 2010), though no bioprospecting permit has yet been issued (author's correspondence with DEA, 22 August 2011). In September 2009, however, collection permits for *Pelargonium* were issued under the Ciskei Nature Conservation Act 10 of 1987 and in July 2011 the Department of Environmental Affairs published a draft biodiversity management plan for *Pelargonium sidoides*. GN 501 in *Government Gazette* 34487 of 29 July 2011.

[52] I.e. the applications were made under the 1970 Patent Cooperation Treaty, which is administered by the World Intellectual Property Organization ('WIPO') and allows nationals or residents in Contracting States to seek patents simultaneously in a number of countries. See generally http://www.wipo.int/pct/en/treaty/about.html.

[53] Patent WO/2010/000564 (rooibos and inflammation); WO/2010/000580 (rooibos or rooibos extracts with prebiotics for skin and hair); WO/2010/000578 (honeybush or honeybush extracts with prebiotics for skin and hair); WO/2010/000579 (rooibos or rooibos extracts for skin and hair); WO/2010/000577 (honeybush or honeybush extracts for skin and hair).

[54] See generally Berne Declaration and Natural Justice *Dirty Business for Clean Skin: Nestlé's Rooibos Robery in South Africa*, Briefing Paper (26 May 2010) (available at http://naturaljustice.org.za/images/naturaljustice/briefing%20paper-rooibos%20robbery.pdf). In December 2010, WIPO's international preliminary reports on patentability deemed Nestec's applications to be insufficiently inventive (and, for the most part, insufficiently novel) to deserve patents. These reports are available via: http://www.wipo.int/patentscope/search/en/WO2010000564, http://www.wipo.int/patents_cope/search/en/WO2010000580, http://www.wipo.int/patentscope/search/en/WO2010000578, http://www.wipo.int/patentscope/search/en/WO2010000579, and http://www.wipo.int/patent_scope/search/en/WO2010000577 respectively. Nestec consequently decided to drop the applications. Author's correspondence with Johanna von Braun, Natural Justice (22 August 2011.) In 2010, South Africa's Department of Environmental Affairs also engaged Nestec on this issue. There is ongoing dialogue between the Department and Nestec to ensure compliance with South Africa's ABS laws. Author's correspondence with DEA (22 August 2011).

[55] See examples of claims of biopiracy in TR Young 'Analysis of Claims of "Unauthorized Access and Misappropriation of Genetic Resources and Associated Traditional Knowledge"' in T Young (ed) *Covering ABS: Addressing the Need for Sectoral, Geographical, Legal and International Integration in the ABS Regime*, IUCN Environmental Policy and Law Paper No. 67/5 (2009) at 131-135.

[56] Detailed provider-side legislation has, for example, been adopted by Kenya (Environmental Management and Coordination Act, 1999; Environmental Management and Coordination (Conservation of Biological Diversity and Resources, Access to Genetic Resources and Benefit Sharing) Regulations, 2006), Ethiopia (Proclamation No. 482/2006 – Access to Genetic Resources and Community Knowledge and Community Rights Proclamation; Council of Ministers Regulation No. 169/2009), India (Biological Diversity Act, 2002; Biological Diversity Rules, 2004) and Costa Rica (Law on Biodiversity, No. 7788, 1998; Rules on Access to Biodiversity, 2003, Presidential Decree No. 31-514). As highlighted by Tvedt and Young, the vast majority of existing ABS legislation is found in developing countries, and '[e]ven when developed countries have adopted some ABS law … the overwhelming bulk of such measures are focused on the provider side (access to and use of the country's own genetic resources)'. Tvedt and Young (n9) at 11.

benefit-sharing actually occurs following the development and commercialisation of genetic resources.[57]

2.5 The development of an international regime on access and benefit-sharing

Dissatisfied with the inaction of user countries under the CBD's vague ABS provisions, developing countries began calling for the adoption of a comprehensive international regime on access and benefit-sharing. Such a step was, in particular, advocated by the group of Like-Minded Megadiverse Countries ('LMMCs'): a group of seventeen countries (including South Africa) that are rich in biodiversity and associated traditional knowledge. The group of LMMCs was created in Mexico in February 2002 as 'a mechanism for consultation and cooperation to promote [its members'] interests and priorities related to the preservation and sustainable use of biological diversity'.[58] From the outset, the group affirmed its commitment to meet the objectives of the CBD,[59] expressed its concern over the limited ability of existing international instruments to protect the interests of countries of origin of biodiversity, and adopted as one of its objectives 'the creation of an international regime to effectively promote and safeguard the fair and equitable sharing of benefits arising from the use of biodiversity and its components'.[60]

Merely six months after the creation of the group of LMMCs, the World Summit on Sustainable Development ('WSSD') was held in Johannesburg, South Africa.[61] One of the primary outcomes of the WSSD was the adoption of the Johannesburg Plan of Implementation,[62] in which countries committed to, *inter alia*, '[n]egotiate within the framework of the Convention on Biological Diversity, bearing in mind the Bonn Guidelines, an international regime to promote and safeguard the fair and equitable sharing of benefits arising out of the utilization of genetic resources'.[63] Eight years later,

[57] This problem was recognised by the COP over a decade ago when it urged those countries that are recipients of genetic resources to 'adopt, appropriate to national circumstances, legislative, administrative or policy measures consistent with the objectives of the Convention that are supportive of efforts made by provider countries to ensure that access to their genetic resources for scientific, commercial and other uses, and associated knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant to the conservation and sustainable use of biological diversity, as appropriate, is subject to Articles 15, 16 and 19 of the Convention, unless otherwise determined by that provider country.' Decision V/26, section A, para 4(c).

[58] Cancun Declaration of Like-Minded Megadiversity Countries (18 February 2002), available at http://chmguatemala.gob.gt/Members/esolorzano/documentos/paises-megadiversos-lmmc/Declaration%20Cancun%20del%20LMMC.pdf.

[59] Particularly those found in Articles 8(j), 15, 16 and 19. Ibid.

[60] Ibid; See also the Cusco Declaration on Access to Genetic Resources, Traditional Knowledge and Intellectual Property Rights of Like-Minded Megadiverse Countries (29 November 2002), available at http://pe.biosafetyclearinghouse.net/activ idades/2009/grouplmmc.pdf, and the New Delhi Ministerial Declaration of Like-Minded Megadiverse Countries on Access and Benefit Sharing (21 January 2005), available at http://chmguatemala.gob.gt/Members/esolorzano/documentos/paises-megadiversos-lmmc/New%20Delhi%20Ministerial%20Declarat ion%20on%20ABS.pdf. In addition to advocating the rights of provider countries, the group of LMMCs has stressed 'the need to guarantee the full protection of the rights of indigenous and local communities over their traditional knowledge so that their heritage is not accessed and used without their consent or without the due benefit sharing arrangements'. Cusco Declaration and Annex to New Delhi Declaration.

[61] See generally http://www.un.org/events/wssd/.

[62] Plan of Implementation of the World Summit on Sustainable Development (available at http://www.un.org/esa/sustdev/documents/WSSD_POI_PD/English/WSSD_PlanImpl.pdf).

[63] Johannesburg Plan of Implementation, para 44(o). While these negotiations would eventually lead to the adoption of the Nagoya Protocol, the Johannesburg Plan of Implementation does not itself call for the development of a legally binding instrument on ABS. Indeed, at the time of the WSSD, countries disagreed

after a difficult negotiating process,[64] this commitment led to the adoption of a legally binding protocol on ABS at the tenth COP to the CBD ('COP 10') in Nagoya, Japan.

The Nagoya Protocol opened for signature on 2 February 2011 and will remain open until 1 February 2012.[65] It will enter into force ninety days after being ratified by fifty Parties to the CBD.[66] The Protocol currently has sixty-nine signatories (including South Africa[67]), but has only been ratified by Gabon.[68]

3 Aligning South Africa's ABS laws with the Nagoya Protocol

The stated objective of the Nagoya Protocol is

> the fair and equitable sharing of the benefits arising from the utilization of genetic resources, including by appropriate access to genetic resources and by appropriate transfer of relevant technologies, taking into account all rights over those resources and to technologies, and by appropriate funding, thereby contributing to the conservation of biological diversity and the sustainable use of its components.[69]

The Protocol's substantive provisions attempt to achieve this objective by requiring Parties to take measures concerning three core issues: access, benefit-sharing and compliance. Since South Africa has already enacted detailed ABS laws at national level, it is necessary to consider the obligations that will be introduced by the Nagoya Protocol, and the extent to which South Africa may need to develop its existing legislation to comply with these obligations if it ratifies the Protocol.

3.1 Access

3.1.1 The Nagoya Protocol's provisions on access to genetic resources and the traditional knowledge associated therewith

The Nagoya Protocol requires that access to genetic resources for their utilisation shall be subject to the prior informed consent ('PIC') of the Party providing the resources unless that Party has determined otherwise.[70] Provider countries thus have discretion over whether to require PIC. Those Parties that do require PIC are obliged to take various

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on whether a binding ABS instrument was necessary. As a compromise between these views, the Plan thus referred only to an 'international regime' on ABS and left the question of whether this regime should be binding to future negotiations. Hodges and Daniel (n43) at149. (Note that ABS was also the focus of para 44(n) of the Plan, which committed countries to '[p]romote the wide implementation of and continued work on the Bonn Guidelines'.)

[64] In Decision VII/19, the CBD COP mandated the negotiation of the international ABS regime to the Ad Hoc Open-ended Working Group on Access and Benefit-sharing, which had already been established in 2000 (see Decision V/26). In 2006, Decision VIII/14 instructed the Working Group to complete work on this issue at the earliest possible time before the tenth COP to the CBD ('COP10'), which was to be held in 2010. Despite numerous meetings and inter-sessional proceedings, negotiations were not finalised by the start of COP10, and had to continue throughout the Conference, with the final text only being adopted in the early hours of Saturday 30 October through Decision X/I. Report on the Tenth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UNEP/CBD/COP/10/27, at paras 78-103 (available at http://www.cbd.int/doc/?meeting=cop-10).

[65] Nagoya Protocol, Article 32. The Protocol is to be signed at the UN Headquarters in New York.

[66] Nagoya Protocol, Article 33.

[67] South Africa signed the Protocol on 11 May 2011. Signatories to the Nagoya Protocol (n11).

[68] Ibid.

[69] Nagoya Protocol, Article 1.

[70] Nagoya Protocol, Article 6.1. As is the case with the Protocol's other provisions on provider countries, Article 6.1 applies only to a Party providing genetic resources 'that is the country of origin of such resources or a Party that has acquired the genetic resources in accordance with the [CBD]'.

measures, as appropriate, to provide for fairness, legal certainty,[71] clarity and transparency in their laws and procedures for accessing genetic resources and establishing mutually agreed terms for access.[72] These include measures to provide for written decisions on applications for access to be made in a cost effective manner and within a reasonable period of time, and for a permit (or its equivalent) to be issued at the time of access as evidence that PIC was indeed granted and mutually agreed terms established.[73] Each Party must designate a national focal point to provide information on obtaining prior informed consent and mutually agreed terms,[74] as well as competent national authorities that shall be responsible for, *inter alia*, granting access.[75]

Indigenous and local communities were represented during the negotiation of the Nagoya Protocol[76] and, although the Protocol's objective makes no reference to such communities, its subsequent provisions provide them with significantly stronger recognition than they are afforded by the CBD. Insofar as access is concerned, the Protocol calls upon Parties to take measures with the aim of ensuring that the PIC or approval and involvement of indigenous and local communities is obtained for access to both genetic resources themselves (in instances where the community has an established right to grant access to such resources)[77] and traditional knowledge associated with genetic resources.[78] It further requires Parties, in their implementation of the Protocol, to 'as far as possible, not restrict the customary use and exchange of genetic resources and associated traditional knowledge within and amongst indigenous and local communities in accordance with the objectives of the [CBD]'.[79]

In instances when the same genetic resources[80] or traditional knowledge are found in more than one Party, the Parties concerned must endeavour to cooperate with a view to implementing the Protocol.[81] The Protocol also anticipates the creation of a global

[71] For discussions on achieving legal certainty in the ABS context see TR Young 'Summary Analysis: Legal Certainty for Users of Genetic Resources under Existing Access and Benefit Sharing (ABS) Legislation and Policy' in Young (n55); JC Medaglia and CL Silva *Addressing the Problems of Access: Protecting Sources, While Giving Users Certainty*, IUCN Environmental Policy and Law Paper No. 67/1 (2007).

[72] Nagoya Protocol, Article 6.3. See also Article 18 on compliance with mutually agreed terms.

[73] Nagoya Protocol, Article 6.3(d)-(e).

[74] Nagoya Protocol, Article 13.1.

[75] Nagoya Protocol, Article 13.2. In terms of Article 13.3, a single entity may be designated to perform the functions of both national focal point and competent national authority. Information concerning national focal points and competent national authorities, as well as domestic ABS measures and the issuance of permits or their equivalents, is to be made available to the Access and Benefit-sharing Clearing House established by Article 14 of the Protocol.

[76] When mandating the ABS Working Group to negotiate an international regime on ABS, the COP expressly directed the Group to 'ensure the participation of indigenous and local communities'. Decision VII/19, section D, para 1. Indeed, the Working Group's meetings were attended by numerous observers, many of which represented groups or organisations with a concern for the rights of indigenous communities. The Interregional Negotiating Group that was established at ABS9 to produce a draft protocol also included two representatives from indigenous and local communities. See the reports of the various Working Group meetings (available at http://www.cbd.int/abs/reports/).

[77] Nagoya Protocol, Article 6.2.

[78] Nagoya Protocol, Article 7. Mutually agreed terms must also be established for such access. Note that the PIC of indigenous and local communities need only be required 'as appropriate' and '[i]n accordance with domestic law'. The discretion over whether or not to protect the knowledge and resources of these communities thus remains with the Member States in whose jurisdiction they reside.

[79] Nagoya Protocol, Article 12.4. See also Article 12.1-3, which requires Parties to endeavour to support the development of various community protocols and procedures on access to traditional knowledge and to take these, along with customary law, into consideration in implementing the Protocol.

[80] This applies only to *in situ* resources.

[81] Nagoya Protocol, Article 11.

multilateral benefit-sharing mechanism, which could potentially be used to facilitate benefit-sharing with regard to transboudary genetic resources or traditional knowledge.[82]

While the CBD requires Parties that are providers of genetic resources to 'endeavour to create conditions to facilitate access to genetic resources for environmentally sound uses by other Contracting Parties',[83] this provision is not expanded upon by the Nagoya Protocol. Interestingly enough, the draft protocol that the ABS Working Group forwarded to the COP at the start of COP10[84] contained bracketed provisions requiring that similar domestic and foreign applications for access be treated equally[85] and that all applications for access be accompanied by a full environmental impact assessment certifying that the access is for environmentally sound uses.[86] Neither of these provisions was included in the text that was eventually adopted in Nagoya. The adopted text does, however, call upon Parties to '[c]reate conditions to promote and encourage research which contributes to the conservation and sustainable use of biodiversity … including through simplified measures on access for non-commercial research purposes'.[87] Having noted in its preamble 'the importance of ensuring access to human pathogens for public health preparedness and response purposes', the Protocol further provides that Parties may take into consideration the need for expeditious access and benefit-sharing in cases of present or imminent emergencies that threaten or damage human, animal or plant health.[88]

3.1.2 *South Africa's regulation of access to genetic resources and traditional knowledge*

Unlike the CBD and the Nagoya Protocol, South Africa's ABS laws do not refer to the 'utilization of genetic resources', but rather to 'bioprospecting involving indigenous biological resources'. As defined by the Protocol, 'utilization of genetic resources' means 'to conduct research and development on the genetic and/or biochemical composition of genetic resources, including through the application of biotechnology'.[89] 'Bioprospecting', on the other hand, is defined by South African law so as only to include 'research on, or development or application of, indigenous biological resources for *commercial or industrial exploitation*'.[90] NEMBA, in other words, draws a distinction between research that has a commercial purpose and research that does not. The Act further distinguishes between the discovery and commercialisation phases of

[82] Nagoya Protocol, Article 10. Parties are directed to consider the need for and modalities of such a mechanism (which might also be used in those instances in which PIC cannot be obtained, such as when genetic resources have been harvested from areas falling beyond national jurisdictions). Benefits shared through the mechanism would be used to support the conservation and sustainable use of biodiversity globally.

[83] CBD, Article 15.2.

[84] Annex I to the Report of the third part of ABS9, UNEP/CBD/COP/10/5/Add.5 (available at http://www.cbd.int/abs/reports/).

[85] Ibid, Article 5.2 (a *bis*).

[86] Ibid, Article 5 (1 *ter*).

[87] Nagoya Protocol, Article 8(a).

[88] Nagoya Protocol, Article 8(b).

[89] Nagoya Protocol, Article 2(c).

[90] NEMBA, s1(emphasis added). This includes:

'(a) the systematic search, collection or gathering of such resources or making extractions from such resources for purposes of such research, development or application;

(b) the utilisation for purposes of such research or development of any information regarding any traditional uses of indigenous biological resources by indigenous communities; or

(c) research on, or the application, development or modification of, any such traditional uses, for commercial or industrial exploitation.'

bioprospecting,[91] with bioprospecting permits only being required for those activities that fall into the commercialisation phase.[92] The export of indigenous biological resources for the purpose of bioprospecting requires an integrated export and bioprospecting permit,[93] while the export of such resources for any other kind of research requires only an export permit.[94]

Issuing authorities are designated by the BABS Regulations,[95] which also clearly articulate the various steps of the permitting process. The Regulations contain detailed provisions on the application procedure (including the form of applications),[96] the powers and duties of issuing authorities,[97] the issuing and content of permits (including the requirements that must be met before a permit can be issued[98] and the form in which permits must be issued),[99] and appeals against decisions of issuing authorities.[100] NEMBA itself contains more limited provisions on permits, which describe, *inter alia*, the grounds on which a permit may be cancelled,[101] the procedure for renewing and amending permits,[102] and the consequences of breaching a permit's conditions or bioprospecting/exporting indigenous biological resources without the necessary authority.[103] As will be required by the Nagoya Protocol, South African law thus establishes a permitting process and provides potential bioprospectors with both clarity as to the procedure for obtaining access to the country's indigenous biological resources, and a degree of certainty regarding their legal position as applicants and permit holders. Also in line with the Nagoya Protocol, the BABS Regulations require issuing authorities to process permit applications within a reasonable time.[104] The Department of

[91] NEMBA, s1 defines the discovery phase of bioprospecting as that phase of bioprospecting when 'the nature and extent of actual or potential commercial or industrial exploitation in relation to the project is not sufficiently clear or known to begin the process of commercialisation'. During the commercialisation phase of bioprospecting, on the other hand, the nature and extent of actual or potential exploitation 'is sufficiently established to begin the process of commercialisation'. 'Commercialisation' itself is defined to include a number of specific activities, including the completion of intellectual property applications (whether in South Africa or a foreign country) and the obtaining of intellectual property rights. The examples discussed above, concerning the granting of patents for certain uses of *Pelargonium* and the application for patents involving honeybush and rooibos, would thus both fall under the commercialisation phase of bioprospecting.

[92] NEMBA, s81(1)(a). (See also BABS Regs, reg 4(1), which requires amendment so as to be brought into line with NEMA.) Those engaging in the discovery phase of bioprospecting need only notify the Minister of Water and Environmental Affairs of their activities and sign a commitment to comply with the requirements applicable to the commercialisation phase of bioprospecting upon entering this phase. NEMBA, s81A. Note, however, that this notification requirement has only been applicable since 1 April 2011.

[93] NEBMA, s81(1)(b), read with BABS Regs, reg 4(2).

[94] NEMBA, s81(1)(b), read with BABS Regs, reg 5(1).

[95] BABS Regs, reg 6. The Minister of Water and Environmental Affairs is the issuing authority for both bioprospecting permits and integrated export and bioprospecting permits, while the member of a province's Executive Council who is responsible for the conservation of biodiversity is the issuing authority when only an export permit is required and the resources to be exported are collected, gathered or curated in that province.

[96] BABS Regs, reg 10, read with Annexures 2 and 3. See also reg 9, which describes who may apply for a permit.

[97] BABS Regs, reg 7. See also NEMBA, s88-89.

[98] BABS Regs, reg 8.

[99] BABS Regs, regs 11-13, read with Annexures 4-6. See also NEMBA, s90.

[100] BABS Regs, regs 14-15. See also NEMBA, s94.

[101] NEMBA, s93.

[102] NEMBA, s93A.

[103] Such conduct constitutes an offence, conviction of which may result in a fine of up to R10 million and/or ten years imprisonment. NEMBA, s101 and s102(1). See also BABS Regs, reg 20-21.

[104] BABS Regs, reg 7(1).

Environmental Affairs ('DEA') has, however, struggled to satisfy this requirement. Part of the problem has been that, initially, NEMBA required permits for all phases of bioprospecting. As a result, the Department was flooded with a large volume of permit applications, which it lacked the capacity to process.[105] NEMBA's initial approach was also criticised as being 'unduly difficult, costly and onerous to the applicant' insofar as it required benefit-sharing arrangements to be made before the discovery phase of bioprospecting.[106] In 2009, the Act was consequently amended so as to only require permits at the commercialisation phase.[107] At the time when these amendments commenced,[108] the DEA had not issued any bioprospecting or integrated bioprospecting and export permits under NEMBA and the BABS Regulations. Three such permits have since been issued under these laws.[109]

Provisions on the PIC of indigenous and local communities form an important part of the Nagoya Protocol. It is thus significant that South Africa's current bioprospecting regime has been designed to protect not only the country's interests, but also the interests of those persons or communities who have provided either indigenous biological resources themselves or traditional knowledge associated with indigenous biological resources. The issuance of bioprospecting permits is made contingent upon PIC having been granted by such persons/communities.[110] Benefit-sharing agreements must also be concluded with these stakeholders[111] (an issue that will be discussed in more detail in section 3.2.2) and, when a person[112] has provided or given access to indigenous biological resources, the parties must additionally conclude a material transfer agreement regulating the provision of, or access to, such resources.[113] All benefit-sharing agreements and material transfer agreements must be approved by the Minister.[114] Between them, NEMBA and the BABS Regulations describe both the required content and form of these agreements.[115]

As called for by the Nagoya Protocol, South African law also protects the customary use and exchange of genetic resources and traditional knowledge. NEMBA empowers the Minister to declare certain exemptions from the Act's bioprospecting provisions through notice in the Government Gazette.[116] A list of exempted activities was published in 2008 and includes, *inter alia*, 'the collection, use, propagation, cultivation or trade of indigenous biological resources for domestic use or subsistence purposes'.[117] 'Domestic

[105] DEA presentation (n51).

[106] Crouch et al (n23) at 359. The problem with this approach was that it is not possible to determine the benefits that will arise from the development of a resource during the early stages of research. It is consequently very difficult to negotiate benefit-sharing agreements at this stage, and such a task should only be required once the commercial or industrial value of a resource has been determined. Ibid. See also Taylor and Wynberg (n28) at 231.

[107] Sections 29, 38 and 39 of the National Environmental Laws Amendment Act 14 of 2009.

[108] The majority of the National Environmental Laws Amendment Act commenced on 18 September 2009. GN 65 in *Government Gazette* 32580 of 18 September 2009.

[109] Permits have thus far been issued for the use of genetic material from *Sceletium tortuosum*, *Chlorocebus aethiops*, and *Aloe ferox*. DEA presentation (n51); author's correspondence with DEA (22 August 2011).

[110] NEMBA, s82(2)(a) and s82(3)(a) read with s82(1); BABS Regs, reg 8(1).

[111] NEMBA, s82(2)(b) and s83(b), read with s82(1); BABS Regs, reg 8(1)(c)-(d).

[112] 'Person' in this context may include a community or organ of state. NEMBA, s81(a).

[113] NEMBA, s82(2)(b)-(c), read with s82(1)(a); BABS Regs, reg 8(1)(c).

[114] NEMBA, s82(2)(3) and 82(3)(c); BABS Regs, reg 11(1)(a).

[115] NEMBA s83; BABS Regs, reg 17, read with Annexure 8 (benefit-sharing agreements). NEMBA s84(1); BABS Regs, reg 16, read with Annexure 7 (material transfer agreements).

[116] NEMBA, s86.

[117] GN R149 in *Government Gazette* 30739 of 8 February 2008.

use' is defined to mean use 'for direct consumption or other traditional practices'.[118] At present, indigenous biological resources can thus be harvested and sold for traditional use without a bioprospecting permit. With the majority of South Africans relying on traditional medicine as a form of healthcare,[119] this exemption is very significant. From a conservation perspective, however, traditional use poses a major problem due to the pressure that it places on medicinal flora.[120]

Although the Nagoya Protocol fails to elaborate upon the CBD's requirement that access to genetic resources be facilitated for *environmentally sound* uses, bioprospecting can pose a threat to conservation if not properly regulated.[121] The BABS Regulations recognise this by requiring issuing authorities, before issuing permits, to satisfy themselves that the proposed activity's impact on indigenous biological resources 'will be negligible or will be minimised and remedied'[122] and that the activity 'will not deplete an indigenous biological resource beyond a level where its integrity is jeopardised'.[123] Applicants may be required to undertake a risk assessment before a permit is issued, though this requirement falls completely within the discretion of issuing authorities.[124]

In an attempt to ensure compliance with the material transfer and benefit-sharing agreements concluded under South Africa's ABS laws, the BABS Regulations do not allow permits to be issued to foreigners unless they apply jointly with a South African natural or juristic person.[125] In this regard, a distinction is thus drawn between domestic and foreign applicants. However, since the adopted version of the Nagoya Protocol fails to require that domestic and foreign applicants be treated equally, there would be no need for South Africa to alter this approach were it to ratify the Protocol. Indeed, South Africa already draws far less of a distinction between foreign and domestic applicants than some other provider countries, which only require that permits be obtained by foreign bioprospectors.[126]

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[118] Ibid. Domestic use does not, however, include the 'development of new products for commercial or industrial exploitation either alone or in partnership with a third party'.

[119] In 2007, Mander et al estimated that 72% of South Africa's black population was making use of traditional medicine. M Mander, L Ntuli, N Diederichs and K Mavundle 'Economics of the Traditional Medicine Trade in South Africa' in *South African Health Review* (2007) at 190.

[120] It is estimated that 20,000 tonnes of plant material are consumed as traditional medicine every year. Mander et al (n119) at 190-191. The vast majority of these plants are harvested from the wild and many are harvested using unsustainable methods. Ezemvelo KZN Wildlife *The Medicinal Plant Trade in KwaZulu-Natal: Conservation Concerns and Actions*, http://www.kznwildlife.com/index.php?/The-Medicinal-Plant-Trade-in-KwaZulu-Natal-Conservation-Concerns-and-Actions.html. See also J Botha 'Developing an understanding of problems being experienced by traditional healers living on the western border of Kruger National Park: foundations for an integrated conservation and development programme' (1998) 15:4 *Development Southern Africa*, 621 at 629. The result has been rapidly declining medicinal plant populations and even localised extinctions. Mander et al (n119) at 191-192.

[121] Garforth and Cabrera (n29) at 7.

[122] BABS Regs, reg 7(2)(a). In terms of reg 11(2)(f)(iii), all bioprospecting permits are to be issued subject to the condition that the permit-holder will be liable for the costs of mitigating or remedying any impacts that bioprospecting has on the environment. See also s28 of the National Environmental Management Act 107 of 1998, which provides that, even when environmental harm has been authorised by law, a person who has caused significant degradation of the environment must minimise and rectify such degradation.

[123] BABS Regs, reg 7(2)(b).

[124] Reg 7(5)(c), read with NEMBA s89.

[125] I.e. either a natural person who is a South African citizen or permanent resident, or a juristic person that is registered in terms of South African law. BABS Regs, reg 9(1). In its application to engage in bioprospecting activities concerning *Pelargonium*, for example, Shwabe Pharmaceuticals has partnered with Parceval (Pty) Ltd, a South African manufacturer of herbal, homeopathic and natural medicines. GN 677 in *Government Gazette* 33348 of 2 July 2010, read with http://www.parceval.co.za/.

[126] In terms of s3(1)-(2) of India's Biological Diversity Act, 2002, for example, all natural persons who

As already noted above, South African law differentiates between commercial and non-commercial research. While the commercialisation phase of bioprospecting requires a bioprospecting permit, the export of indigenous biological resources for research purposes other than bioprospecting requires only an export permit.[127] PIC from the providers of indigenous resources and/or traditional knowledge and the conclusion of material transfer agreements and benefit-sharing agreements are not prerequisites for the issuance of export permits. Instead, the proposed export must simply be 'for a purpose that is in the public interest'.[128] If the resources to be exported are from *ex situ* collections, the exporter does not even require an export permit, but need only enter an export agreement and notify the issuing authority thereof.[129] Research other than bioprospecting that is conducted entirely within South Africa is completely exempt from NEMBA's bioprospecting provisions.[130] The kind of 'simplified measures on access for non-commercial research purposes' anticipated by the Nagoya Protocol are thus already provided by South Africa's ABS regime. While South African law fails to provide for expedited ABS measures in emergency situations, this is not a *requirement* of the Nagoya Protocol, but merely an issue that Parties 'may take into consideration'.

One issue that is covered by the Nagoya Protocol, but not by South Africa's ABS laws, is the cooperation with neighbouring countries concerning transboundary species or knowledge. The DEA is, however, working on this matter and aims to conclude bilateral agreements on a number of species by 2014, starting with *Hoodia* and *Pelargonium*.[131]

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are not citizens of India, or who are citizens but are non-resident, and all juristic persons that are not incorporated/registered in India, or that are so incorporated/registered but have non-Indian participation in their share capital or management, are prohibited from obtaining any biological resources occurring in India or any knowledge associated therewith for the purposes of research/commercial utilisation/bio-survey and bio-utilisation without previous approval from the National Biodiversity Authority. In terms of s7, Indian citizens and juristic persons registered in India that wish to obtain biological resources for similar purposes need only give prior intimation to the relevant State Biodiversity Board.

[127] BABS Regs, reg 5.

[128] BABS Regs, reg 13(1). The 'public interest' includes:

'(a) the conservation of biodiversity in South Africa;

(b) the economic development of South Africa; or

(c) enhancing the scientific knowledge and technical capacity of South African people and institutions.'

This regulation thus ensures that South Africa receives some benefit from the export of biological resources for research other than bioprospecting, even though such benefit may be indirect and/or non-monetary in nature. All export permits are to be issued subject to the conditions that the indigenous biological resources to which they relate 'may only be used for non-commercial research purposes as specified on the permit' and 'may not be used for bioprospecting purposes'. BABS Regs, reg 13(2)(f)(i)-(ii). Should there subsequently be a change of intent concerning the non-commercial purpose of the research, the user would thus need to apply for a bioprospecting permit. (Indeed, even the Nagoya Protocol recognises (in Article 8(a)) that, while there is a need for simplified measures on access for non-commercial research, Parties must '[take] into account the need to address a change of intent for such research'.) Note also that, even in the case of export permits, foreign applicants are required to apply jointly with a South African partner. BABS Regs, reg 5(3), read with reg 9(1).

[129] GN R149 in *Government Gazette* 30739 of 8 February 2008.

[130] Ibid. In terms of this notice, the Minister exempts the following activity from Chapter 6 of NEMBA: 'research other than bioprospecting, provided that the research is conducted within the borders of South Africa and the research is not conducted for the purposes of commercial or industrial exploitation'.

[131] Author's correspondence with DEA (22 August 2011).

3.2 Benefit-sharing

3.2.1 *The Nagoya Protocol's provisions on sharing of benefits arising from the utilisation of genetic resources and associated traditional knowledge*

The Nagoya Protocol requires that benefits arising from 'the utilization of genetic resources as well as subsequent applications and commercialization' be shared with the Party that has provided the resources in a fair and equitable manner and in accordance with mutually agreed terms.[132] It also calls for the sharing of benefits with indigenous and local communities where such benefits have resulted from either the utilisation of genetic resources that are held by communities in accordance with domestic legislation[133] or the use of traditional knowledge associated with genetic resources.[134] Each Party must take legislative, administrative or policy measures, as appropriate, to implement these requirements.[135]

The Protocol further requires Parties to encourage users and providers to direct benefits from the utilisation of genetic resources towards the conservation and sustainable use of biodiversity.[136] This requirement supports the Protocol's core objective, which (as articulated in Article 1) recognises that benefit-sharing is meant to contribute to the first and second objectives of the CBD (conservation and sustainable use). The preamble to the Nagoya Protocol also acknowledges the potential role of ABS in making such a contribution and recognises that 'public awareness of the economic value of ecosystems and biodiversity and the fair and equitable sharing of this economic value with the custodians of biodiversity are key incentives for the conservation of biological diversity and the sustainable use of its components'. Indeed, when the CBD's objectives were originally negotiated, it was believed that the sharing of benefits from the utilisation of genetic resources would incentivise biologically wealthy developing countries to engage in conservation. As observed by Young, however, this expectation is not necessarily reasonable and the task of linking benefit-sharing to conservation and sustainable use has turned out to be far more complex than was originally anticipated. [137] It is thus disappointing that the Nagoya Protocol does so little to establish such a link.[138]

[132] Nagoya Protocol, Article 5.1. 'Benefits' in this context may include both monetary and non-monetary benefits and a list of examples is annexed to the Protocol. Article 5.4. See also Article 23 on technology transfer, collaboration and cooperation.

[133] Nagoya Protocol, Article 5.2.

[134] Nagoya Protocol, Article 5.5.

[135] Nagoya Protocol, Articles 5.3, 5.2 and 5.5 respectively. Note, however, that the Protocol's provisions on benefit-sharing with communities are not as strictly worded as those on benefit-sharing with Parties. Article 5.2 provides that measures must be taken 'as appropriate, with the aim of ensuring' that benefits from the use of genetic resources are shared with indigenous and local communities, while Article 5.5 requires measures 'as appropriate, in order that' benefits from the use of traditional knowledge be shared with such communities.

[136] Nagoya Protocol, Article 9.

[137] Young (n55) at 1 and 197-8. See also Wynberg (n21) at 69 and Wynberg (n2) at 42.

[138] Indeed, in 2003, Garforth and Cabrera identified the 'lack of measures linking access to genetic resources with the sustainable use of biodiversity' as one of the primary lacunae in the international ABS framework, and suggested that it would be appropriate for an international regime on ABS to explore the kinds of measures that could be used to encourage conservation through ABS. Garforth and Cabrera (n29) at 8.

3.2.2 *Benefit-sharing requirements in South African law*

Insofar as South African law is concerned, 'the fair and equitable sharing among stakeholders of benefits arising from bioprospecting involving indigenous biological resources' is one of the objectives of NEMBA.[139] The Act seeks to achieve this objective by providing that permits for the commercialisation phase of bioprospecting can only be issued if the bioprospector has entered into benefit-sharing agreements with any persons providing or giving access to genetic resources, as well as communities whose traditional knowledge or uses are assisting the bioprospecting.[140] South African law thus already contains requirements concerning the sharing of benefits with the country's indigenous and local communities. As will be discussed below, however, NEMBA makes no provision for benefit-sharing when foreign genetic resources are researched and developed within South Africa. The country's role as a user of genetic resources is thus neglected by its current ABS laws.

Before approving a benefit-sharing agreement, the Minister must be satisfied that it is fair and equitable to all parties. The Minister is authorised to consult any person competent to provide technical advice on the agreement and may also invite public comment thereon, although confidential information may not be made public.[141] Thus far, two draft benefit-sharing agreements have been published for public comment through notices in the Government Gazette.[142] Unfortunately, the restriction on publishing confidential information has lead to these notices being so scant on detail that meaningful public participation has been largely precluded.

The Minister may refuse to approve a benefit-sharing agreement unless it makes some provision for activities that promote the 'conservation, sustainable use and development of the relevant indigenous biological resources'.[143] While this section of NEMBA could certainly be used to ensure that benefits from bioprospecting are directed towards the conservation and sustainable use of biodiversity (thereby implementing one of the requirements of the Nagoya Protocol), it does not appear to have yet been used for this purpose. Neither of the two draft benefit-sharing agreements that have been published appears to require benefits from bioprospecting to be directed towards conservation and sustainable use.[144] Both agreements do, however, require that the resources in question be cultivated rather than harvested from the wild,[145] and in this way attempt to ensure that use of the resources for bioprospecting occurs in a sustainable manner

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[139] NEMBA, s2(a)(iii).

[140] NEMBA, s82(2)(b) and 82(3)(b), read with s82(1); BABS Regs, reg 8(1)(c)-(d). As has already been noted, the content and form of benefit-sharing agreements are outlined by NEMBA and the BABS Regulations.

[141] BABS Regs, reg 17(3).

[142] The first draft benefit-sharing agreement to be published was between Schwabe Extracta GMBH & CO.KG, Parceval (Pty) Ltd, and the Imingcangathelo Development Trust and provides for the sharing of both monetary and non-monetary benefits generated from the use of *Pelargonium sidoides* and *reniforme*. GN 677 in *Government Gazette* 33348 of 2 July 2010. The second was between the Edakeni community in KwaZulu-Natal and the Edakeni Muthi Futhi Trust (see http://www.muthifuthi.co.za/about.html). The agreement concerns the use of twenty-eight species of indigenous plants in the development of formulas created by an inyanga who initiated the project. GN 133 in *Government Gazette* 34093 of 10 March 2011.

[143] BABS Regs, reg 17(4). This may include 'enhancing the scientific knowledge and technical capacity of persons, organs of state or indigenous communities to conserve, use and develop indigenous biological resources'.

[144] However, because so little detail about these benefit-sharing agreements has been published, it is difficult to ascertain with certainty whether either agreement provides for benefits to be directed to conservation and sustainable use.

[145] The agreement involving Schwabe provides that '[t]he Imingcangathelo Development Trust intends to cultivate the indigenous biological resource … to which the Bioprospecting permit relates', while the

Once a bioprospecting permit has been granted, all money arising from benefit-sharing agreements and material transfer agreements and due to stakeholders must be paid into a Bioprospecting Trust Fund, which is established by NEMBA[146] and administered by the Director-General of the Department of Environmental Affairs.[147] Payments to, or for the benefit of, stakeholders are to be made from this Trust Fund.[148] If there is surplus money in the Trust Fund, the BABS Regulations allow this to be used for a variety of purposes, including the conservation of indigenous biological resources.[149] While it is unlikely that the Bioprospecting Trust Fund will often contain such a surplus,[150] this provision does provide another means for benefits from bioprospecting to be directed towards conservation.

3.3 Compliance

3.3.1 *The Nagoya Protocol's compliance and monitoring provisions*

One of the biggest problems that provider countries have encountered in attempting to regulate ABS is that, even if they have ABS-specific legislation, these laws are difficult to enforce when resources are researched and developed in a foreign jurisdiction.[151] It was thus hoped that the Nagoya Protocol would require countries with jurisdiction over users of genetic resources to take effective measures to assist provider countries in ensuring compliance with their ABS laws.[152]

Although there were instances during COP10 when the ABS negotiations almost collapsed entirely over the question of compliance,[153] negotiators were eventually able to reach agreement on this issue. The adopted text requires all Parties to take 'appropriate, effective and proportionate legislative, administrative or policy measures' to provide that genetic resources, or traditional knowledge associated therewith, that are *utilised within their jurisdictions* have been accessed in accordance with PIC and that mutually agreed terms have been established, as required by the ABS laws or regulations of the Party that provided the resources or is home to the communities who hold the traditional knowledge.[154] Parties shall additionally take steps to address situations of non-compliance[155] and shall, as far as possible and appropriate, cooperate in cases where the laws of Parties that have provided genetic resources have allegedly been violated.[156]

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agreement involving the Edakeni Muthi Futhi Trust states that '[a]ll indigenous biological resource [*sic*] used by the Trust are sourced from registered nurseries and cultivated in Edakeni. No material will be collected from the wild to produce any products'.

[146] NEMBA, s85(1). See also BABS Regs, reg 18 (which deals with the duties of permit holders to notify the Director-General and stakeholders of transfers into the Bioprospecting Trust Fund).

[147] See NEMBA, s85(3); BABS Regs, reg 19.

[148] NEMBA, s85(1); BABS Regs, reg 19(4)(c)-(5).

[149] BABS Regs, reg 19(6)(a). See also reg 19(6)(d)-(e).

[150] Taylor and Wynberg (n28) at 234.

[151] N Chishakwe 'SADC: Access to Genetic Resources, and Sharing the Benefits of their Use – International and Sub-regional Issues' in Young (n55) at 32.

[152] The group of LMMCs, for example, has stressed the importance of measures that will ensure that users of genetic resources comply with the laws of countries in which genetic resources originate. See the recommendations attached to the New Delhi Declaration of LMMCs on ABS (n60).

[153] IISD Reporting Services 'CBD COP10 Highlights: Friday, 22 October 2010' (25 October 2010) 9:540 *Earth Negotiations Bulletin* at 3-4 (available at http://www.iisd.ca/biodiv/cop10/).

[154] Nagoya Protocol, Article 15.1 (genetic resources) and Article 16.1 (traditional knowledge). Insofar as traditional knowledge is concerned, such measures need only be taken 'as appropriate'.

[155] Nagoya Protocol, Articles 15.2 and 16.2.

[156] Nagoya Protocol, Articles 15.3 and 16.3.

The Protocol further attempts to ensure compliance by requiring all Parties to designate at least one 'checkpoint', which collects or receives information about the source of genetic resources and whether or not they have been appropriately accessed.[157] Parties must, as appropriate and depending on the characteristics of a particular checkpoint, require users of genetic resources to provide relevant information[158] at the checkpoint and must take measures to address situations of non-compliance.[159] The idea behind the creation of checkpoints is that they will assist in monitoring the utilisation of genetic resources so as to ensure that this occurs in accordance with the provisions of the Nagoya Protocol. The Protocol attempts to facilitate this monitoring function by providing for the creation of an internationally recognised certificate of compliance, which acts as evidence that the genetic resources concerned were accessed in accordance with the provider country's requirements concerning PIC and the establishment of mutually agreed terms.[160]

When mutually agreed terms have been established, Parties are required to ensure that their legal systems provide an opportunity to seek recourse for non-compliance with these terms[161] and to 'take effective measures, as appropriate, regarding: (a) Access to justice; and (b) The utilization of mechanisms regarding mutual recognition and enforcement of foreign judgments and arbitral awards'.[162]

3.3.2 *The need for South Africa's ABS laws to recognise South Africa's role as a user country*

While South Africa's ABS laws may already be largely aligned with the provisions of the Nagoya Protocol, a significant shortfall in South Africa's approach is that it focuses exclusively on South Africa's role as a provider of genetic resources, thus failing to recognise the country's responsibilities as a user of such resources. Indeed, the stated purpose of NEMBA's ABS provisions is to regulate bioprospecting, export and benefit-sharing in relation to South Africa's *indigenous biological resources*.[163] The ABS obligations created by NEMBA and the BABS Regulations thus only relate to resources that are indigenous to South Africa. This fails to take into account the fact that that *all* countries can be both providers and users of genetic resources[164] and that all Parties to the

[157] Nagoya Protocol, Article 17.1(a)(i).

[158] This may include information on the source of the genetic resources, prior informed consent, the establishment of mutually agreed terms, and/or the utilisation of the resources. Nagoya Protocol, Article 17.1(a)(ii).

[159] Ibid.

[160] As already explained, the Nagoya Protocol requires those Parties that require PIC to, *inter alia*, provide for the issuance of a permit or its equivalent at the time of access. Article 6.3(e). These documents are to be made available to the Access and Benefit-sharing Clearing House, which is established by the Protocol as a means for sharing information related to ABS. Article 14.2(c); Article 14.1. Article 17.2 provides that once a permit or its equivalent has been made available to the Access and Benefit-sharing Clearing House, it shall constitute an internationally recognised certificate of compliance. Article 17.3 proceeds to state that such a certificate 'shall serve as evidence that the genetic resource which it covers has been accessed in accordance with prior informed consent and that mutually agreed terms have been established, as required by the domestic access and benefit-sharing legislation or regulatory requirements of the Party providing prior informed consent'.

[161] Nagoya Protocol, Article 18.2.

[162] Nagoya Protocol, Article 18.3.

[163] NEMBA, s80(1). See also s2(a)(iii). The Act's definition of 'indigenous biological resources' expressly excludes all exotic animals, plants or other organisms, apart from those which 'through the use of biotechnology, have been altered with any genetic material or chemical compound found in any indigenous species'. NEMBA, s80(2)(b), read with s80(2)(a) and s1.

[164] Tvedt and Young (n9) at 3 and 10.

Nagoya Protocol will consequently be required to adopt user-side measures.[165] Indeed, South Africa has well-developed institutions and research capacity,[166] and the country's Medical Research Council is currently engaged in pharmaceuticals research in Europe, North Africa, Zimbabwe, Mexico and the United States. The Council for Scientific and Industrial Research is similarly conducting research in Europe, Asia and Zimbabwe.[167] Should South Africa ratify the Nagoya Protocol, it will thus be necessary for the DEA to develop policy or legislation to ensure that when genetic resources or traditional knowledge that have been accessed in another Party to the Protocol are utilised within South Africa, such resources/knowledge were accessed in accordance with the provider country's ABS laws. Measures to address non-compliance with both provider country requirements and established mutually agreed terms will also be necessary. Such developments could probably be best achieved through amendments to NEMBA and the BABS Regulations—especially since one of the very objectives of NEMBA is to 'give effect to ratified international agreements relating to biodiversity which are binding on the Republic'.[168]

Becoming a Party to the Nagoya Protocol would further require South Africa to designate at least one checkpoint to monitor compliance. Interestingly enough, South Africa's Patents Act[169] currently requires anyone launching a patent application to lodge a statement with the registrar of patents stating whether the invention for which protection is claimed is based on or derived from an indigenous biological resource, genetic resource, or traditional knowledge or use.[170] If it is, the applicant shall be called upon to prove that he or she has the authority to utilise the resource, knowledge or use.[171] Should the statement that the patentee lodges with the registrar contain false information, which is material and which the patentee knew or ought reasonably have known to be false, these will be grounds for any person to apply for the patent's revocation.[172] Should the applicant be aware that the information is false, he or she may additionally be found guilty of a criminal offence.[173] One way in which South Africa could establish the checkpoint required by the Nagoya Protocol would be to amend the Patents Act so as to extend these provisions to inventions based on or derived from foreign genetic resources.[174] There is no reason why it should be more difficult for applicants to comply with such amended provisions than it is for them to comply with the Act's current requirements. While a bioprospecting permit that has been issued under NEMBA can be presented as proof that an applicant is authorised to use an indigenous biological resource,

[165] Indeed, Tvedt and Young argue that this is already a requirement under the CBD. Tvedt and Young (n9) at 5.

[166] Wynberg (n21) at 61; Crouch et al (n23) at 365.

[167] Author's correspondence with DEA (14 February 2011). Both of these institutions are also heavily involved in bioprospecting within South Africa. See Wynberg (n2) at 29-33.

[168] NEMBA, s2(b).

[169] Act 57 of 1978.

[170] Patents Act, s30(3A).

[171] Patents Act, s30(3B).

[172] Patents Act, s61(1)(g). Sections 30(3A)-(3B) and 61(1)(g) were inserted into the Patents Act through s2 of the Patents Amendment Act 20 of 2005.

[173] Section 82 of the Patents Act provides that any person who, for the purpose of deceiving the registrar, commissioner, or any officer in the administration of the provisions of the Act, or for the purpose of procuring or influencing the doing or omission of anything in relation to the Act, knowingly makes a false statement or representation, shall be guilty of an offence and on conviction liable to a fine not exceeding R1000 and/or imprisonment not exceeding 12 months.

[174] For an example of a foreign statute that takes this approach, see s8b of Norway's Patents Act (Act 9 of 15 December 1967).

the internationally recognised certificates of compliance provided for by the Nagoya Protocol could serve the same purpose in relation to foreign genetic resources.

4 Benefits that South Africa stands to gain by ratifying the Nagoya Protocol and factors that may dilute the Protocol's effectiveness

Having considered the extent to which South Africa's ABS regime currently aligns with the Nagoya Protocol, the final section of this article examines the Protocol's potential to benefit this country should it be ratified and discusses some of the difficulties that may arise in this regard.

4.1 Benefits arising from the Nagoya Protocol's compliance and monitoring provisions

As demonstrated above, becoming a Party to the Nagoya Protocol would require South Africa to recognise its role as a user country by taking measures to: monitor the use of genetic resources from other Parties; ensure that foreign genetic resources and traditional knowledge utilised within South Africa have been accessed in accordance with the ABS requirements of provider Parties; and provide recourse for non-compliance with either these requirements or mutually agreed terms. While the Protocol's compliance and monitoring provisions would thus require the development of South African law, these provisions also provide South Africa with a significant incentive to ratify the Protocol.

Although foreign genetic resources are occasionally researched and developed within South Africa, the country's predominant role remains that of a *provider* of genetic resources. The fact also remains that, although South Africa's national ABS regime is more stringent than those of many other provider countries, it has failed to completely eliminate the misappropriation of genetic resources and traditional knowledge. The compliance and monitoring provisions of the Nagoya Protocol have the potential to improve this situation by harnessing the assistance of user countries in the enforcement of South Africa's ABS laws. Such assistance may be even more vital now that South Africa only requires benefit-sharing agreements and material transfer agreements to be entered at the commercialisation phase of bioprospecting, at which stage the relevant genetic resources will often already have been exported to a foreign jurisdiction. It is also noteworthy that, because South Africa already has its own comprehensive ABS legislation, it is in a far better position to benefit from the Nagoya Protocol than those provider countries that have yet to regulate ABS domestically.[175] This is because the compliance and monitoring obligations that will be created by the Protocol are directly linked to the existence of provider country legislation or regulatory requirements.[176]South Africa could, in particular, benefit from the establishment of checkpoints in user countries to monitor the use of genetic resources. The effectiveness of such monitoring will, however, largely depend on the kinds of checkpoints that Parties choose to designate.

[175] Zambia, for example, currently lacks a legal and administrative framework for the equitable sharing of benefits from the use of biological resources. This problem has been identified in the country's National Biodiversity Strategy and Action Plan, which highlights benefit-sharing as one of its six strategic goals and envisages the development of legislation concerning this issue. Government of the Republic of Zambia, Ministry of Environment and Natural Resources *National Biodiversity Strategy and Action Plan* (available at http://cbd.int/countries/profile.shtml?country=zm#thematic).

[176] See, for example, Articles 15.1 and 16.1, which require Parties to take measures to provide that genetic resources and traditional knowledge utilised within their jurisdictions have been accessed in accordance with prior informed consent and that mutually agreed terms have been established 'as required by the domestic access and benefit-sharing legislation or regulatory requirements of the other Party'.

During the Protocol's negotiation, developing countries (in particular, the group of LMMCs) argued that checkpoints should, at a minimum, include patent offices, at which applicants should be required to disclose information about the use of any genetic resources or traditional knowledge in their inventions (in much the same way as South Africa's Patents Act already requires for inventions developed from indigenous biological resources). In the absence of such disclosure, it was argued that applications should not be further processed.[177] Had the Nagoya Protocol included requirements of this nature, it would have assisted in preventing controversies such as those that have recently raged in South Africa concerning *Pelargonium*, rooibos and honeybush. To the disappointment of developing countries, however, such prescriptive monitoring requirements were strongly resisted my most developed nations,[178] with the result that the Protocol leaves Parties with significant discretion as to the kind of checkpoints that are designated,[179] the kind of information that must be disclosed at such checkpoints, and the manner of dealing with failures to comply with disclosure requirements.[180] It is consequently difficult to speculate about how the Protocol's monitoring provisions will be operationalised and whether they will make a significant contribution to the elimination of biopiracy.

4.2 Ambiguity concerning the Protocol's scope

Difficulties in anticipating the benefits of the Nagoya Protocol do not only arise in the context of checkpoints. The Protocol's negotiation was characterised by a number of intense disagreements that could only be resolved by completely deleting certain disputed provisions[181] and replacing others with extremely broad language.[182] As a result, there is currently a great deal of uncertainty about how the Protocol will be implemented, and disputes over the interpretation of ambiguous provisions are bound to arise between developed and developing nations.

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[177] Shortly after its creation, the group of LMMCs agreed on 'the need to present, prior to the issuance of a patent, a prior informed consent agreement with the country of origin of the genetic resources and/or traditional knowledge that are used in or are part of an invention'. Cancun Declaration of LMMCs (n60). The group subsequently agreed to ensure that the international regime on ABS would include requirements concerning the mandatory disclosure of the country of origin of biological material and associated traditional knowledge in applications for intellectual property rights, as well as mandatory consequences for failure to disclose. New Delhi Declaration of LMMCs on ABS (n60). Indeed, the LMMCs stressed this issue from the very start of formal negotiations. Report from the ABS Working Group's third meeting, UNEP/CBD/WG-ABS/3/7 (available at http://www.cbd.int/abs/reports/) at para 20. See also Tvedt and Young (n9) at 34-35.

[178] Japan, Australia, New Zealand, the European Union and Switzerland, for example, all strongly opposed a requirement concerning mandatory disclosure in patent applications and argued that such a requirement conflicts with international intellectual property law. IISD Reporting Services 'ABS-4 Highlights: Wednesday, 1 February 2006' (2 February 2006) 9:342 *Earth Negotiations Bulletin* at 2 (available at http://www.iisd.ca/biodiv/abs-wg4/).

[179] Although earlier versions of the negotiating text (including Article 13 of the draft Protocol that was forwarded to the COP at the start of COP10 (n84)) had included a list of potential/mandatory checkpoints (e.g. patent offices, research institutions subject to public funding, entities publishing research results, authorities providing regulatory or marketing approval), the adopted version of the Protocol makes no reference to any specific type of checkpoint, but instead simply requires that checkpoints be 'effective' and that they be 'relevant to the utilization of genetic resources, or to the collection of relevant information at, *inter alia*, any stage of research, development, innovation, pre-commercialization or commercialization'. Article 17.1(a)(iv).

[180] The Protocol provides only that such measures must be 'appropriate, effective and proportionate'. Article 17.1(a)(ii).

[181] E.g. a long-negotiated provision on publically-available traditional knowledge was not included in the final text.

[182] E.g. the compliance provisions discussed above.

One particular area of ambiguity that may prove problematic for South Africa involves the scope of the Nagoya Protocol. Article 3, which describes the Protocol's scope, was originally intended to contain a list of either exclusions or inclusions so as to provide clarity about which resources the Protocol would cover.[183] Reference to specific exclusions or inclusions was, however, omitted from the final version of Article 3, which simply provides that the Protocol shall apply to genetic resources, and traditional knowledge associated with genetic resources, that fall within the scope of the CBD, as well as to benefits arising from the utilisation of such resources or knowledge. The scope provision thus provides little guidance on which resources are covered by the Protocol.

Although the negotiators of the Nagoya Protocol encountered numerous disagreements over scope,[184] one of the most contentious scope-related issues was whether the Protocol should apply not only to genetic resources themselves, but also to derivatives of genetic resources (products derived from genetic resources, which might not themselves contain functional units of heredity[185]—e.g. snake venom, plant sap, extracted oils). Developing countries argued that a large percentage of biopiracy relates to derivatives and that is was thus essential that these be encompassed by the Nagoya Protocol.[186] As has already been noted, South Africa's ABS laws, unlike the CBD and the Nagoya Protocol, do not refer to the 'utilization of genetic resources', but rather 'bioprospecting involving indigenous biological resources'. NEMBA defines the term 'indigenous biological resources' to include 'any derivative' of an animal, plant or other organism belonging to an indigenous species.[187] The obligations created by NEMBA and the BABS Regulations thus apply to the use of not only genetic resources, but also derivatives. The Nagoya Protocol, on the other hand, while defining the term 'derivative',[188] does not make express use of the term in any of its operative provisions. While an implied inclusion of derivatives can

[183] See Article 3 of the draft Protocol that was forwarded to COP10 (n84).

[184] There were disagreements concerning the Protocol's geographic scope (whether it should apply to resources that are harvested beyond national jurisdictions), temporal scope (whether it should cover new and continuing uses of the genetic resources and traditional knowledge that were acquired before the Protocol comes into force), and substantive scope (whether certain types of genetic resources, such as pathogens, should be covered, and whether the Protocol should apply not only to genetic resources themselves, but also to the derivatives of such resources). The divergence of positions over these issues is illustrated by the conflicting bracketed provisions in Article 3 of the draft text as it stood at the start of COP10. Ibid.

[185] Medaglia and Silva (n71) at 39. See also n17 above.

[186] International Centre for Trade and Sustainable Development 'CBD Clinches ABS Protocol in Nagoya' (8 November 2010) 10:20 *Bridges Trade BioRes* 3 at 4 (available at http://ictsd.org/i/news/biores/94075/). Although the CBD's COP did direct the ABS Working Group to consider the issue of derivatives (Decision VII/19), developed and developing countries were divided on this issue from the beginning. IISD Reporting Services 'ABS-3 Highlights: Thursday, 17 February 2005' (18 February 2005) 9:310 *Earth Negotiations Bulletin* at 1 (available at http://www.iisd.ca/biodiv/abs-wg3/). The report from the second meeting of the Interregional Negotiating Group (UNEP/CBD/WG-ABS/9/ING/2, available at http://www.cbd.int/doc/?meeting=ABSWG-ING-02) demonstrates that, directly before the start of COP10, developed and developing countries were still at odds over derivatives, with developing countries stressing that this was a key issue, which needed to be better reflected in the draft text (see, for example, the statements of Namibia and Mexico at paras 42 and 44) and developed countries resisting the inclusion of derivatives within the scope of the Protocol (see, for example, the statements of Canada and Japan at paras 54 and 105).

[187] NEMBA, s1 and s80(2)(a). According to s1 of NEMBA 'derivative' means 'any part, tissue or extract, of an animal, plant or other organism, whether fresh, preserved or processed, and includes any chemical compound derived from such part, tissue or extract'.

[188] Article 2 of the Protocol defines 'derivative' to mean 'a naturally occurring biochemical compound resulting from the genetic expression or metabolism of biological or genetic resources, even if it does not contain functional units of heredity'.

potentially be read into certain provisions,[189] the relationship between the Protocol and derivatives is by no means clear-cut, and it is also possible to interpret the Protocol as not requiring user countries to assist in preventing biopiracy involving derivatives of genetic resources.

4.3 Involvement of prominent user countries

A final (and fairly obvious) point concerning the eventual effectiveness of the Nagoya Protocol is that, for the Protocol to play a meaningful role in combating biopiracy, it must be ratified by prominent user countries. The extent to which user countries will involve themselves with the Protocol is, however, at this stage uncertain. At the time of COP10, Parties to the CBD were under significant pressure to adopt a binding protocol on ABS. 2010 was the United Nations' International Year of Biodiversity[190] and it was anticipated that a number of important decisions would emanate from COP10—including the adoption of a new Strategic Plan for Biodiversity.[191] Certain developing countries, however, made it very clear that they would treat the Conference's success as a 'package' and would refuse to cooperate on other important issues unless a binding ABS protocol was adopted.[192] In the face of this pressure, most Parties accepted that the adoption of the Nagoya Protocol at COP10 was an absolute necessity. It does not, however, follow that all of the countries that participated in the Protocol's adoption will ultimately be prepared to sign and ratify it, thereby binding themselves to its provisions. One striking feature of the Nagoya Protocol is that, apart from its provisions on legal certainty concerning prior informed consent and mutually agreed terms, it offers virtually no advantages to countries that are primarily users of genetic resources. When this is weighed against the fairly heavy obligations that the Protocol will impose on user countries, it stands to reason that many such countries may think twice before expressing their consent to be bound. That said, the Protocol has already been signed by the European Union (which, as a regional economic integration organisation, is entitled to become a Party to the Protocol[193]), as well as a number of states that are home to significant user industries. These include the United Kingdom, Switzerland, Germany, France, Italy, Spain and Japan.[194] Hopefully, this is an indication that the Protocol will receive a fair measure of support from developed nations. However, even assuming that a high number of user countries sign

[189] It has been suggested that the 'utilization of genetic resources' under the Protocol can be interpreted to include the use of derivatives of genetic resources. International Centre for Trade and Sustainable Development (n186).

[190] In December 2006, the UN General Assembly declared 2010 to be the International Year of Biodiversity and designated the CBD secretariat as the year's focal point. UN General Assembly Resolution 61/203. See generally http://www.cbd.int/2010/welcome/.

[191] The first Strategic Plan for the CBD (adopted in Decision VI/26) was to expire in 2010 (see generally http://www.cbd.int/sp/2010/). A revised plan was thus required to cover the implementation of the Convention from 2011 to 2020.

[192] The package proposed by developing countries (including the LMMCs) included an ABS Protocol, a revised strategic plan and a resource mobilisation strategy. Report on COP10 (n64) at para 29.

[193] Nagoya Protocol, Article 32 (see also Article 33), read with CBD, Articles 33.1 and 34.1. Do note, however, that, for the purposes of entry into force, ratification by the European Union will not be counted as additional to ratifications by EU Member States. Article 33.3. The EU Member States that have thus far signed the Nagoya Protocol are: Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Italy, Luxembourg, the Netherlands, Poland, Portugal, Romania, Spain, Sweden and the United Kingdom. Signatories to the Nagoya Protocol (n11), read with http://europa.eu/about-eu/countries/index_en.htm (last accessed on 28 September 2011).

[194] Signatories to the Nagoya Protocol (n11). For discussions of the user industries in these countries see Richerzhagen (n1) at 27-34; Laird and ten Kate (n23) at 34-5 (pharmaceuticals), 79-80 (botanical medicines), 122-123 (seed), 160 (horticulture), 189 (crop protection) and 263 (personal care and cosmetics).

and ratify the Nagoya Protocol, it must be remembered that a country cannot become a Party to a protocol adopted under the CBD unless it is already, or becomes at the same time, a Party to the CBD itself.[195] Although the Convention does have the largest membership of any of the global biodiversity treaties,[196] there is one very significant non-member: the United States of America. The United States, however, dominates the world's pharmaceutical and biotechnology sectors. It is also home to a large number of companies dealing in botanical medicines, cosmetic and personal care products, seeds, agrochemicals and horticultural products.[197] Indeed, the United States has been described as having more users of genetic resources within its jurisdiction than any other country.[198] Despite this fact, the Nagoya Protocol will do nothing to compel the United States to ensure that foreign genetic resources utilised within its jurisdiction have been accessed in accordance with the ABS laws of provider countries.[199]

5 Conclusion

As a megadiverse country with a rich history of traditional knowledge, South Africa is a very promising location for bioprospecting activities. Such activities have the potential to generate significant benefits, including financial profits for providers of genetic resources and traditional knowledge, the sharing of information and technology with South African partners, and incentives for the conservation of the country's biodiversity. The need for legislative measures that secure such benefits has been recognised by the South African government, which has developed a national ABS regime that is far more comprehensive than those provided by most Parties to the CBD. Even with these measures in place, however, controversies continue to arise concerning the misappropriation of South Africa's indigenous biological resources and associated traditional knowledge. One of the major reasons for this is the absence of user-side ABS measures in other Parties to the CBD. While these countries are subject to the Convention's obligations concerning prior informed consent, mutually agreed terms and the fair and equitable sharing of benefits arising from the use of genetic resources, the CBD is a typical framework convention, which leaves individual Parties with significant discretion in determining how to implement its provisions. By elaborating upon the ABS obligations created by the CBD, the Nagoya Protocol has the potential to improve this situation. At the same time, however, the text of the Protocol is riddled with ambiguities that are bound to result in future debates and inconsistent applications. As was highlighted by the Ukraine during the final plenary session of COP10, 'different countries have different views and understandings regarding particular provisions of [the Nagoya Protocol]'.[200] Whether or

[195] CBD, Article 32.1.

[196] The CBD currently has 193 parties. List of Parties to the CBD, http://www.cbd.int/convention/parties/list/ (last accessed on 30 September 2011).

[197] Richerzhagen (n1) at 27-35. See also Laird and ten Kate (n23) at 34, 79-80, 122-123, 160, 189 and 263.

[198] Tvedt and Young (n9) at 24. It is perhaps noteworthy that the first permit to be granted under South Africa's BABS Regulations was for the development of a product intended for distribution in the United States. The permit was issued to South African-based HGH Pharmaceuticals (Pty) Ltd, for the use of *Sceletium tortousum* in the production of an anxiety relieving extract named 'Zembrin', which will be distributed in the United States by New Jersey-based company, PL Thomas. See generally http://zembrin.com/.

[199] See Tvedt and Young (n9) at 25 for a brief overview of the measures currently taken by the United States to regulate ABS. See also Young's examples of claims that genetic resources have been misappropriated by American companies, research institutions and government departments. Young (n55) at 131-135.

[200] Report on COP10 (n64) at para 102.

not the Protocol makes a meaningful contribution to the elimination of biopiracy (and thereby improves implementation of the CBD's third objective) will thus depend largely on the willingness of Parties to cooperate on ABS issues and to take effective domestic measures. The position has been well-described by Namibia which, at COP10's closing plenary, stated the following:

> For Africa, the issue of access and benefit-sharing is very crucial as our people who are custodians of biodiversity need a share from the benefits being generated by that biodiversity. We recognize that the document before us may not have included what we were expecting. However, it can be a workable starting point.[201]

Despite its weaknesses, the Nagoya Protocol does have the potential to benefit provider countries—in particular, through its compliance and monitoring provisions. Interestingly enough, these provisions, while providing South Africa with its strongest incentive to ratify the Protocol, would also require the development of South Africa's ABS regime. As has been demonstrated by this article, NEMBA and the BABS Regulations are, for the most part, already well aligned with the provider-side obligations that will be created by the Nagoya Protocol. However, should South Africa decide to ratify the Protocol, it will need to additionally recognise its role as a user of genetic resources and develop its ABS laws to incorporate the user-side measures that the Protocol requires.

[201] Report on COP10 (n64) at para 100. See also the statements of Cuba and Bolivia (at paras 99 and 101 respectively), which highlight that the Nagoya Protocol does not reflect the interests and concerns of all Parties to the CBD.

CO-MANAGING SOUTH AFRICA'S CONSERVATION AND LAND REFORM AGENDAS: EVALUATING RECENT INITIATIVES TO RESOLVE THE UNRULY INTERFACE THRUST UPON SOUTH AFRICA'S PROTECTED AREAS

Alexander Paterson*

Abstract

The past two decades have witnessed South Africa's policy-makers seeking to give domestic effect to the country's international obligations under the 1992 Convention on Biological Diversity and grappling with implementing the country's land reform programme. What is somewhat disconcerting is that these two legal domains, conservation and land reform, have for the bulk of the past two decades operated in virtual isolation of each other. It is only in the past few years that the conservation and land reform authorities have come to recognise the integral link between the two, a link which is often fraught with conflict and which frequently plays out in the context of protected areas. This article critically explores this often-troubled nexus and the array of recent domestic developments through which the authorities have sought to traverse it. These developments most importantly include the Memorandum of Agreement concluded between the erstwhile Minister of Land Affairs and Minister of Environmental Affairs and Tourism in 2007, and the National Co-Management Framework launched in late 2010. As is highlighted in this critical review of these initiatives, their focus is exceedingly narrow and they are beset by several theoretical and practical problems. They consequently operate in a manner that shrouds an array of protected area governance options present in South Africa's domestic legal framework. The second part of the article focuses on these apparently misunderstood governance options which theoretically provide domestic stakeholders with a far more diverse and nuanced array of tools for balancing the country's conservation and land reform agendas.

1 Introduction

As highlighted by Barry Commoner almost 40 years ago, the 'root cause' of many an environmental crisis is frequently found in the manner in which people 'interact with each other' – and that 'to solve the environmental crisis we must solve the problems of poverty, racial injustice and war'.[1] Nowhere are these sentiments more clearly depicted than in South Africa. Racial injustices underpinned by discriminatory land legislation, fractured communities, destroyed their relationship with their land, undermined traditional landownership and use patterns, deepened poverty and created yawning caverns between conservationists and disenfranchised local communities.

While having avoided the ravages of civil war, the country faces the ongoing challenge of simultaneously remedying the racial injustices of the past, alleviating

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[1] B Commoner 'Ecology and Social Action' in H Albright (ed) *The Horace M. Albright Conservation Lectureship* (1973) 13 University of California, School of Forestry and Conservation 62.

widespread poverty, conserving the nation's rich yet rapidly dwindling natural resources and grappling with the ravages of climate change. In an effort to overcome some of these challenges, domestic policy-makers have introduced broad legal reforms in the conservation and land reform sectors. A plethora of policies[2] and laws[3] have been introduced in the past two decades to curb the rapid demise of the nation's biological resources.[4] These laws seek to entrench a more inclusive, participatory and human-centred approach to conservation, which mimics similar developments in the international conservation discourse in the past two decades.[5] Simultaneously, several policies[6] and laws[7] have been introduced to remedy the skewed land ownership patterns and land tenure anomalies.[8]

[2] These policies include: Government of South Africa *National Protected Areas Expansion Strategy for South Africa 2008* (2009); *National Biodiversity Framework* (published in GN 813 in *GG* 32474 of 3 August 2009); A Driver *et al National Spatial Biodiversity Assessment 2004: Priorities for Biodiversity Conservation in South Africa* (2005) *Strelitzia* 17, South African National Biodiversity Institute; Department of Environmental Affairs and Tourism *South Africa's National Biodiversity Strategy and Action Plan* (2005); Department of Environmental Affairs and Tourism *Guidelines for the Implementation of Community-Based Natural Resource Management (CBNRM) in South Africa* (2003); and *White Paper on the Conservation and Use of South Africa's Biodiversity* (1997) (published in GN 1095 in *GG* 18163 of 28 July 1997).

[3] National laws of relevance to conservation promulgated in the past two decades include: National Environmental Management: Biodiversity Act 10 of 2004; National Environmental Management: Protected Areas Act 57 of 2003; World Heritage Convention Act 49 of 1999; National Heritage Resources Act 25 of 1999; National Environmental Management Act 107 of 1998; National Forests Act 84 of 1998; Animal Improvement Act 62 of 1998; National Water Act 36 of 1998; and Marine Living Resources Act 18 of 1998. Provincial laws of relevance to conservation promulgated in the past two decades include: Eastern Cape Parks and Tourism Act 2 of 2010; Northern Cape Nature Conservation Act 9 of 2009; Mpumalanga Tourism and Parks Agency Act 5 of 2005; Provincial Parks Board Act (Eastern Cape) 12 of 2003; Limpopo Environmental Management Act 7 of 2003; Limpopo Tourism and Parks Board Act 8 of 2001; Mpumalanga Nature Conservation Act 10 of 1998; Kwazulu-Natal Nature Conservation Management Act 9 of 1997; and Kwazulu-Natal Nature Conservation Act 29 of 1992.

[4] For a comprehensive assessment of the perilous state of South Africa's biological resources, see generally: Department of Environmental Affairs and Tourism *South African Environmental Outlook: A Report on the State of the Environment* (2006) 108-137; *National Biodiversity Strategy and Action Plan* (2005) 13-17; and *White Paper on Biodiversity* (1997) 13-14.

[5] See further: A Paterson 'Protected Areas: South Africa' in B Lausche *Guidelines for Protected Areas Legislation* (2011) IUCN Environmental Policy and Law Paper No.81 IUCN Environmental Law Centre Bonn; A Paterson 'Contractual Tools for Implementing the CBD in South Africa' in J Benidickson *et al Environmental Law and Sustainability After Rio* (2011) Edward Elgar Publishers 341-366; and A Paterson 'Wandering About South Africa's New Protected Areas Regime' (2007) (1) *SA Public Law* 1-33.

[6] These policies include: *Green Paper on Land Reform* (2011) (published in GN 639 in *GG* 34607 of 19 September 2011); Ministry of Rural Development and Land Reform *The Comprehensive Rural Development Programme Framework* (2009); Sustainable Development Consortium *Settlement and Implementation Support Strategy for Land and Agrarian Reform in South Africa: A Synthesis Report* (2007) Commission on Restitution of Land Rights Pretoria; Government of the Republic of South Africa *The Land and Agrarian Reform Project: The Concept Document* (2008) (Version 5(2)) dated February 2008; Department of Land Affairs *Implementation Plan for the Proactive Land Acquisition Strategy* (2006) (Version 1) dated May 2006; and Department of Land Affairs *White Paper on South African Land Policy* (1997).

[7] National laws of relevance to land reform promulgated in the past two decades include: Communal Land Rights Act 1 of 2004; Transformation of Certain Rural Areas Act 94 of 1998; Extension of Security of Tenure Act 62 of 1997; Interim Protection of Informal Land Rights Act 31 of 1996; Communal Property Association Act 28 of 1996; Land Reform (Labour Tenants) Act 3 of 1996; Land Administration Act 2 of 1995; Restitution of Land Rights Act 22 of 1994; Provision of Land and Assistance Act 126 of 1993; and Upgrading of Land Tenure Rights Act 112 of 1991.

[8] For an overview of the skewed land ownership patterns and land tenure anomalies which greeted South Africa's transition to a constitutional democracy in the mid-1990s, see generally: *White Paper on South African Land Policy* (1997).

The resultant legal and institutional framework of relevance to conservation and land reform is not surprisingly very complex. The two sectors have historically developed and operated in virtual isolation from one another, a challenge that is compounded by the fact that these domains are themselves each beset by legal and institutional fragmentation. The origins of this fragmentation clearly lie in the negotiated political compromise that shaped the constitutional allocation of legislative and executive competences between the national, provincial and local spheres of government. Complicating the interface further, is the fact that the agendas perpetuated by these legal reforms while theoretically reconcilable, frequently counteract one another in practice.

This particularly plays out where land restitution claims have been lodged in terms of the Restitution of Land Rights Act[9] over land situated in a diverse array of South Africa's protected areas, including national parks, nature reserves, wilderness areas and world heritage sites. A total of 79 696 land restitution claims were lodged under the Act, of which 75 884 had been settled at last count.[10] Of these, only 121 relate to land situated within protected areas[11] with 43 having been settled to date.[12] While the overall number of claims appears trivial, the area of land subject to such claims is extensive.[13] The total extent of the remaining 78 restitution claims in protected areas amounts to approximately 2.5 million hectares.[14] This is a vast extent if one juxtaposes it against 2.6 million hectares, the cumulative extent of the 75 884 claims settled to date.[15] From a budgetary perspective, it is also interesting to note that an estimated R20 billion, almost equal to the entire budget spent on settling all restitutions claims to date, is required to settle just the six outstanding claims in the Kruger National Park.[16]

It would appear that the proponents of South Africa's *Land Reform Programme* did not anticipate restitution claims within protected areas as no reference is made of the potential conflict between conservation and land reform imperatives in its guiding policy, the *White Paper on South African Land Policy.* Similarly, the Restitution of Land Rights Act,[17] which provides the statutory framework for implementing the restitution component of the *Land Reform Programme*, contains no distinct mechanisms for dealing with such claims. This Act is nonetheless of key relevance to the current enquiry. Prior to

[9] 22 of 1994. The Act generally enables persons and communities dispossessed of rights in land after 13 June 1913 as a result of past racially discriminatory laws or practices, to restitution of a right in land, provided that no just and equitable compensation was received in respect of such dispossession (section 2).

[10] Commission on Restitution of Land Rights *Presentation of Annual Report (2009-2010)* (2010).

[11] Commission on Restitution of Land Rights Presentation by Chief Land Claims Commissioner (Mr Mphela) at People and Parks Congress, dated August 2008. See further: Department of Environmental Affairs *Conservation for the People with the People: A Review of the People and Parks Programme* (2010) 37; Department of Environmental Affairs *Status of Land Claims in Protected Areas* (2010) Unpublished document, dated February 2010; M De Koning 'Co-management and its Options in Protected Areas of South Africa' (2009) 39(2) *Africanus* 6; M De Koning & M Marais 'Land Restitution and Settlement Options in Protected Areas in South Africa' (2009) 39(1) *Africanus* 67; and T Kepe 'Land Claims and Co-management of Protected Areas: Exploring the Challenges' (2008) 41 *Environmental Management* 311.

[12] *Conservation for the People with the People* (2010) 37; and *Status of Land Claims in Protected* Areas (2010).

[13] The extent of outstanding claims in the Kruger National Park alone, amount to 1 429 575 hectares (*Status of Land Claims in Protected* Areas (2010)). This is equal to almost three-quarters of the Park's total territory of 2 000 000 hectares.

[14] This figure is compiled from the statistics contained in *Status of Land Claims in Protected* Areas (2010).

[15] *Presentation of Annual Report (2009-2010)* (2010).

[16] Commission on Restitution of Land Rights *Presentation of Annual Report (2008-2009)* (11 August 2009).

[17] Act 22 of 1994.

reform of South Africa's national conservation regime in 2005,[18] the Act provided the main regime through which 43 communal land restitution claims within existing protected areas were settled.[19] Following such reform, the Restitution of Land Rights Act remains of key relevance in resolving the estimated 78 outstanding claims,[20] but its provisions should be read and applied in conjunction with South Africa's contemporary conservation regime.

Calls have emanated from particularly the environmental quarter for authorities to adhere to the dictates of cooperative governance enshrined in Chapter 3 of the Constitution of the Republic of South Africa.[21] These calls continue to resound within the conservation sector.[22] However, notwithstanding the introduction of an array of statutory mechanisms and non-statutory initiatives in the past decade to promote cooperative governance, it is only in the past four years that the Government has taken tangible steps to traverse the conservation and land reform interface. The first is the conclusion of a *Memorandum of Agreement*[23] between the conservation and land reform authorities in 2007 to clarify their roles regarding the settlement of land restitution claims in protected areas. The second is the publication of a *National Co-Management Framework*[24] in 2010, aimed at guiding the settlement of such claims.

It is these initiatives that form the focus of this article. As will be highlighted in the critical overview of these initiatives, undertaken in the first part of this article, their focus is exceedingly narrow and they are beset by several theoretical and practical problems. They consequently operate in a manner that shrouds an array of protected area governance options present in South Africa's domestic legal framework. The second part of the article focuses on these apparently misunderstood governance options which theoretically provide domestic stakeholders with a far more diverse and nuanced array of tools for balancing the country's conservation and land reform agendas. In order to highlight these governance options, I briefly canvas the nature of protected areas governance and its rise in international prominence in the past decade. I do so with a view to objectively clarifying the potential role land claimant communities can play in protected areas and extracting an array of potential governance options to enable them to do so. I then turn to consider South Africa's current legal landscape to illustrate the extent to which it caters for the implementation of these governance options.

[18] This reform was largely precipitated by the commencement of the National Environmental Management: Biodiversity Act 10 of 2004 and National Environmental Management: Protected Areas Act 57 of 2003 in 2005.

[19] *Status of Land Claims in Protected Areas* (2010); and *Conservation for the People with the People* (2010) 37.

[20] The Department of Environmental Affairs estimate the number of outstanding land claims in protected areas to be 78 (*Conservation for the People with the People* (2010) 37).

[21] Constitution of the Republic of South Africa, 1996. See most recently: A Paterson 'Seeking to Undermine Cooperative Governance and Land-Use Planning' (2010) 25(2) *SA Public Law* 692-697; K Muller 'Environmental Governance in South Africa' in H Strydom & N King (eds) *Environmental Management in South Africa* (2nd Ed) (2009) Juta & Co Ltd Cape Town 68-96; L Kotze 'Environmental Governance Perspective on Compliance and Enforcement in South Africa' in A Paterson & L Kotze (eds) *Environmental Compliance and Enforcement in South Africa: Legal Perspectives* (2009) Juta & Co Ltd Cape Town103-125; and W Du Plessis 'Legal Mechanisms for Cooperative Governance in South Africa: Successes and Failures' (2008) 23 *SA Public Law* 87-110.

[22] Paterson (2007) *SA Public Law* 6-7.

[23] Minister of Agriculture and Land Affairs & Minister of Environmental Affairs and Tourism *Memorandum of Agreement* (2007) dated 2 May 2007.

[24] Department of Environmental Affairs *National Co-Management Framework* (2010).

2 Recent Government Initiatives to Link Conservation and Land Reform

2.1 Memorandum of Agreement

The first tangible step to bridge the conservation and land reform interface was the conclusion of a *Memorandum of Agreement* between the former Minister of Agriculture and Land Affairs and the Minister of Environmental Affairs and Tourism in 2007.[25] Its preamble expressly recognises the legitimate right of several claimant communities to land situated in protected areas and the need for the Department of Land Affairs (now the Department of Rural Development and Land Reform (DRD&LR)) and the Department of Environmental Affairs and Tourism (now the Department of Environmental Affairs (DEA)) to cooperate in their resolution.[26] The parties agreed on a series of fundamental principles to guide the settlement of these claims.[27] The remainder of the agreement simply repeats these principles in various forms with the only real additions being that: title in land shall be granted to communities where feasible and applicable; co-management is the chosen form of governance for resolving the land reform and conservation interface; and management responsibility is left to existing management authorities unless the environmental authorities choose to review it. A phased *Operational Protocol*[28] for settling such land claims is annexed to the agreement.

The *Memorandum of Agreement*, together with its *Operational Protocol*, must be commended for its distillation of a clear procedural framework for ensuring improved cooperation between the DRD&LR and DEA in resolving land restitution claims situated in protected areas. There are however a far broader range of national, provincial and local government authorities and institutions that have a role to play or stake in the process.[29]

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[25] For a full discussion of the *Memorandum of Agreement* and its attached *Operational Protocol*, see: De Koning et al (2009) *Africanus* 66-79.

[26] *Memorandum of Agreement* (2007) 4.

[27] The principles crucially include: the roles and responsibilities of the DRD&LR and the DEA in resolving such claims must be clearly defined; close cooperation between these two departments must be fostered; protected areas are assets of national and international importance and their perpetual conservation is a non-negotiable imperative; ownership of land by claimants without physical occupation does not necessarily compromise conservation; co-management must take place in a manner that is sustainable, effective and compatible with relevant conservation and development mandates; restitution settlements must uphold the principles of economic viability, financial sustainability and holistic management; restitution settlements should further uphold the principles of economic viability and result in tangible and realistic direct and indirect benefits for land claimants; restoration should be equitable and should not place land claimants in a less advantageous position; the award of access rights must be clearly defined; post-settlement land-use must be compatible with biodiversity conservation; claimants must be prohibited from alienating land restored to them other than to the Government; communities with land claims in protected areas should be given preference in respect of any land tenure upgrading and development projects undertaken on land situated adjacent to the protected area; and a clear communication strategy is essential for implementing the framework (*Memorandum of Agreement* (2007) 8-10).

[28] The *Operational Protocol* envisages the following six stages and identifies which institution/s is responsible for each: lodgement and registration of the land claim (DRD&LR); screening and categorisation of the land claim (DRD&LR); determination of the validity of the claim and establishment of communal legal body (DRD&LR, Commission on the Restitution of Land Rights (CRLR) and DEA); negotiation of the settlement of the claim (CRLR, DRD&LR and DEA); signing of the settlement agreement (Minister of Rural Development and Land Reform); implementation of the settlement agreement (DRD&LR and DEA).

[29] In the conservation context these include: national statutory authorities (such as South African National Parks and the South African National Biodiversity Institute); provincial environmental departments; provincial conservation agencies (such as CapeNature; Ezemvelo KZN Wildlife; Eastern Cape Parks and Tourism Agency;and Mpumalanga Parks and Tourism Authority); and individual protected area management authorities, park forums and advisory committees. For a comprehensive overview of these institutions, see: Department of Environmental Affairs *Review of Institutional Arrangements for*

The most notable of these would be the traditional leadership institutions (which continue to play a significant role in rural land administration) and the district and local municipalities (whose mandate it is to promote regional and local planning and development). The failure of the *Memorandum of Agreement* to acknowledge these other government authorities and institutions may well undermine its utility.

Furthermore, certain substantive aspects regarding the approach to settling the land claims are potentially problematic. The first is the apparent aversion to the option of physical occupation, which in certain contexts may be a viable and desirable alternative. The second is the default allocation of management to existing authorities, which while desirable from a continuity perspective, may preclude the potential valuable role local claimant communities can play in managing the area. The third is the apparent adoption of an all or nothing approach to the issue of tenure (the grant of full title or no title) notwithstanding the land restitution regime recognising a diverse array of land tenure options.[30] The fourth is the reliance placed on one model of governance, namely co-management, to the exclusion of other viable governance models such as joint management, private management or management by local communities or indigenous peoples.[31] The fifth is the lack of clarity regarding what exactly constitutes co-management. The final problem is the continued ambiguity as to the role played by the many additional ministries, departments and institutions, other than DRD&LR and DEA, in the land restitution process.

2.2 National Co-Management Framework

In an effort to provide further clarity on the chosen form of governance for resolving the conservation and land reform interface, the Government recently published a *National Co-Management Framework*.[32] Prepared by a task team comprising of members from relevant national and provincial land and conservation authorities[33] and officially

Management of Protected Areas (2010). In the land reform context these include: the provincial and district offices of the DRD&LR; the national and regional branches of the Commission on the Restitution of Land Rights; communal property institutions (such as communal property associations and land trusts) to which the land is ordinarily restored; and institutions of traditional authority (such as tribal authorities and traditional councils) who often exercise historic authority over land administration in rural areas. Additional relevant institutions in both contexts include: the National Treasury (where a land restitution claim triggers financial implications for the Government, such as the conclusion of a lease between a successful claimant community and the conservation authority); the Department of Agriculture, Fisheries and Forestry, Department of Mineral Resources and Department of Water Affairs (where the land subject to restitution is also of relevance for agriculture, fishing, forestry, mining and fresh-water conservation); the Department of Public Works (where the land subject to restitution is owned by the Government); the Department of Cooperative Governance and Traditional Affairs (where issues of cooperative governance of traditional affairs are triggered); and district and local municipalities (which play a key role in the provision of services and infrastructure and the administration of post-settlement grants).

[30] The Restitution of Land Rights Act provides for the 'restitution of a right in land' which is defined to include: '(a) the restoration of a right in land; or (b) equitable redress' (section 1). 'Restoration of a right in land' is in turn defined as the 'return of a right in land or a portion of land'; and 'equitable redress' as 'any equitable redress, other than the restoration of a right in land ... including (a) the granting of an appropriate right in alternative state-owned land; (b) the payment of compensation' (section 1). This would accordingly include the grant of full tenure rights or potentially some alternate limited rights in land.

[31] The alternate forms of protected areas governance are discussed more fully in Part 3.1 below.

[32] For a comprehensive discussion of the background to and content of the *National Co-management Framework* see: De Koning (2009) *Africanus* 5-17.

[33] The task team comprised of representatives from: DEA; DRD&LR; Chief Land Claims Commissioner; Isimangaliso Wetland Park Authority; South African National Parks; Ezemvelo KZN Wildlife; Mpumalanga Tourism and Parks Authority; and the erstwhile Eastern Cape Parks Board.

launched at the 4th People and Parks Conference convened in August 2010, the stated purpose of the document is to provide 'a broad framework of the principles to be implemented for the establishment of co-management arrangements on protected areas'.[34]

2.2.1 *The 'Co-Management Models'*

Not surprisingly based on the fundamental principles highlighted in the above *Memorandum of Agreement*, the *National Co-management Framework* identifies three models of co-management, namely: full co-management; full lease; and part lease and part co-management. It furthermore identifies the forms of 'beneficiation'[35] associated with each model. These include: revenue sharing; rental income; capacity building; development rights; mandatory partner status in management and development opportunities; equity partnerships in private sector tourism concession enterprises; access rights; natural resource use; and participation in management through representation on the management authority, employment and contractual delegation of certain management functions to community enterprises.[36]

Under the '*full co-management model*', claimant communities are allowed to participate actively in the management and tourism development of the protected area.[37] Whilst final decision-making power would appear to remain vested in the existing management authority, this model anticipates claimant community representation on this authority and consultation with it on the management of, and tourism development within, the area. Beneficiation options under this model include: ensuring communal access to the protected area for cultural reasons and the use of natural resources situated within its borders; identifying specific tourism development sites within the protected areas and affording the claimant community development rights in respect of these sites; allocating a share of revenue derived from the protected area to the claimant community; and employing community members in tourism and conservation activities within the protected area.[38] Notwithstanding the extensive forms of beneficiation associated with this model, the *National Co-Management Framework* highlights several potential disadvantages with its implementation. These include: the often protracted negotiation process preceding the finalisation of the co-management agreements; the slow transfer of visible benefits to the claimant communities; the management complexities associated with including community members in the management structures; and the imposition of management responsibilities and costs on communities lacking the necessary capacity and resources to service them.[39] Its applicability is furthermore only really feasible in the minority of protected areas that generate a profit and/or in those where future tourism development opportunities are viable.[40]

As its name suggests, the '*full lease model'* envisages the conclusion of a lease between the claimant community and the Government. Various types of leases are proposed, the selection of which is dependent on the nature of the protected area, the extent and variability of any income derived by it, and the level of associated financial

[34] *National Co-Management Framework* (2010) 2.

[35] 'Beneficiation' is defined to mean 'the acquisition of direct and indirect benefits derived by the claimants from activities to be conducted and operated from the protected area' (*National Co-Management Framework* (2010) 2).

[36] *National Co-Management Framework* (2010) 10-13.

[37] *National Co-Management Framework* (2010) 7-8.

[38] *National Co-Management Framework* (2010) 7.

[39] *National Co-Management Framework* (2010) 8.

[40] M De Koning 'Returning Manyaleti Game Reserve to its Rightful Owners: Land Restitution in Protected Areas in Mpumalanga, South Africa' (2010) 236 (61) *Unasylva* 41-42.

administration that the management authority wishes to undertake.[41] Owing to the financial implications of this model for Government expenditure, National Treasury approval is a necessary prerequisite.[42] This model is promoted for those protected areas where no viable socio-economic opportunities exist for providing viable beneficiation to the claimant community.[43] The existing management authority retains sole responsibility for managing the protected area, and the claimant community has no access rights, equity rights or development rights.[44] Anticipated benefits associated with this model include: the immediate allocation of guaranteed income to claimant communities; the retention of the management authority as the sole management agency; and the shorter process for concluding the settlement agreement as no co-management agreement need be concluded. Anticipated disadvantages include that the model's feasibility is dependent on National Treasury funding; it excludes the claimant community from participating in the management of the protected area; and it precludes any form of community access, use and development rights over the natural resources situated within it.[45] These latter two traits raise significant questions about the suitability of including this model under the rubric of a *National Co-Management Framework*.

The *National Co-management Framework* expressly acknowledges that these models should be viewed as situated on a continuum rather than as discreet options.[46] Sitting between the above two models on the co-management continuum is the '*part lease and part co-management model*' which effectively comprises of a blend of aspects of the above two models.[47] The precise nature of this model is not clearly defined in the *National Co-Management Framework*. It would appear that the actual nature of the blend will depend on the socio-economic opportunities provided by the protected area, with existing management authority dictating the level of community participation in its management, and the degree of community access, use and development rights within it.[48]

It is anticipated that the choice of the most appropriate co-management model must be informed by the protected area's existing management plan and a feasibility study undertaken by the management authority to determine the 'sustainable and compatible economic utilization' of the restored land situated in the protected area.[49] Regarding institutional arrangements, the *National Co-management Framework* envisages that the relevant management authority and community property institution to which the land has been restored, establish a co-management committee to act as the forum for consulting over, preparing and implementing the relevant co-management option.[50] The co-management committee is required to meet at least twice a year and only decisions that

[41] The forms of lease agreements include: a fixed cash lease (based on the market value and not production value of the land); a flexible cash lease (the quantum of which is based on the income generated by the protected area); a share of income lease (where the income generated by the protected area is divided between the claimant community and the management authority in proportion to their contribution to the costs of managing the protected area); and a percentage share lease (where the claimant community does not contribute to the costs of managing the area but nonetheless receives a percentage of the income). See further: *National Co-Management Framework* (2010) 7-10.

[42] *National Co-Management Framework* (2010) 8.

[43] *National Co-Management Framework* (2010) 7.

[44] *National Co-Management Framework* (2010) 8.

[45] Ibid.

[46] *National Co-Management Framework* (2010) 7.

[47] Ibid.

[48] *National Co-Management Framework* (2010) 7-8.

[49] *National Co-Management Framework* (2010) 6 & 10.

[50] *National Co-Management Framework* (2010) 14.

are duly minuted and agreed to in writing are binding on the parties.[51] The existing management authority is required to provide secretarial support to the co-management committee while each party is required to fund the costs of their representatives participating in it.[52]

2.2.2 *Assessment of the National Co-Management Framework*

The theoretical merits of the co-management model of governance have been well noted by several international and domestic scholars.[53] The *National Co-Management Framework* provides much needed clarity on what the Government views as 'co-management' in the context of protected areas. It clearly spells out the anticipated forms of beneficiation associated with it, the procedures for implementing it and the institutions tasked with such implementation. Furthermore, it provides evidence of improved cooperative governance between the country's conservation and land reform authorities. However, the *National Co-Management Framework* also raises several theoretical and practical concerns.

Theoretical Concerns

From a theoretical perspective, it is uncertain why the Government has chosen exclusively to focus on one component of the protected areas governance continuum, namely that of co-management. The Government appears to have chosen co-management as its model 'irrespective of the history, rationale, and type of land reform', a model which 'may be too weak or inadequate a tool for the challenging land reform process in South Africa'.[54] Why other feasible protected areas governance options attracting increasing international support, such as joint management and management by indigenous peoples and local communities, are ignored is unclear.[55] This is particularly problematic if one considers that the co-management governance model arose to deal with an entirely distinct context[56] and that several of the conditions which have been

[51] Ibid

[52] Ibid.

[53] De Koning (2009) *Africanus* 6-7; G Borrini-Feyerabend *et al Co-Management of Natural Resources: Organising, Negotiating and Learning-by-Doing* (2007) GTZ & IUCN, Kasparek Verlag Heidelberg 3-4; M Hauck & M Sowman *Guidelines for Implementing Coastal and Fisheries Co-Management in South Africa* (2005) Subsistence Fishing Co-Management and Capacity Building Programme, University of Cape Town, Cape Town, 2 & 7; M Isaacs & N Mohammed *Co-Managing the Commons in the 'New' South Africa: Room to Manoeuvre* (2000) Commons Southern Africa: Occasional Paper No.5, CASS/PLAAS Harare/Bellville 2; and F Berkes & T Henley 'Co-Management and Traditional Knowledge: Threat or Opportunity?' (1997) 18 *Policy Options* 31.

[54] Kepe (2008) *Environmental Management* 311-312.

[55] These forms of governance are discussed more fully in Part 3.1 below.

[56] As concisely summarised by Kepe, the co-management model arose: to conserve scarce resources and not to deal with land reform issues; as a method for governments to co-opt support and improve their legitimacy rather than seeking to provide for meaningful public participation; and as a government-led initiative in respect of government-owned land - not as a community-led initiative in respect of communally-owned land (Kepe (2008) *Environmental Management* 314-315). See further: G Tipa & R Welch 'Co-Management of Natural Resources: Issues of Definition from an Indigenous Community Perspective' (2006) 42(3) *Journal of Applied Behavioural Research* 373-391; S Jentoft 'The Way Forward' in D Wilson *et al* (eds) *The Fisheries Co-Management Experience: Accomplishments, Challenges and Prospects* (2003) Kluwer Academic Dordrecht 2; M Hara & J Nielsen 'Experiences with Fisheries Co-Management in Africa' in Wilson *et al* (eds) *The Fisheries Co-Management Experience: Accomplishments, Challenges and Prospects* (2003) 81-95; M Hauck & M Sowman 'Coastal and Fisheries Co-Management in South Africa: An Overview and Analysis' (2001) 25 *Marine Policy* 171-185; and R Pomeroy & F Berkes

identified by commentators as necessary prerequisites for its successful implementation[57] are currently absent in South Africa.[58] Furthermore, having opted for co-management, it is surprising that the *National Co-Management Framework* fails to consider the full spectrum of co-management options as identified by the likes of Berkes,[59] Sen and Raajear-Nielson,[60] Tipa and Welch,[61] Dudley[62] and most recently by De Koning.[63] It furthermore has a very strong orientation towards the lease model,[64] a model whose form effectively precludes co-management and whose feasibility is dependent on yet to be secured funding from the National Treasury. As recently highlighted by one member of the Task Team appointed to develop the *National Co-Management Framework*, the underlying reason for this was disagreement amongst Task Team members on the meaning of co-management and the misconception of government authorities that the enabling legislative framework does not provide for shared decision-making.[65]

Practical Concerns

From a practical perspective, various additional concerns to those raised in the context of the *Memorandum of Agreement* above, are of relevance. Firstly, it is uncertain why the ambit of the *National Co-Management Framework* is limited to agreements concluded

'Two Can Tango: The Role of Government in Fisheries Co-Management' (1997) 21 (5) *Marine Policy* 465-480.

[57] Berkes identified the following as necessary preconditions for the successful implementation of co-management: the presence of appropriate institutions; trust between partners; legal protection of local rights; and economic incentives for local people (F Berkes 'New and Not-So-New Directions in the Use of the Commons: Co-Management' (1997) 42 *The Common Property Resource Digest* 6).

[58] Kepe (2008) *Environmental Management* 314-318. See further: H Magome & J Murombedzi 'Sharing South African National Parks: Community Land and Conservation in a Democratic South Africa' in W Adams & M Mulligan (eds) *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (2003) Earthscan London 108-134; and T Kepe *et al* 'Land Reform and Biodiversity Conservation in South Africa: Complementary or in Conflict?' (2005) 1 *International Journal of Biodiversity Science and Management* 13.

[59] Berkes draws a distinction between the following levels of co-management: informing; consultation; cooperation; communication; advisory committees; management boards; and partnerships/community control. See further: F Berkes 'Co-Managing: Bridging the Two Solitudes' (1994) 22 (2-3) *Northern Perspectives* 19.

[60] Sen and Raajear-Nielsen draw a distinction between the following five types of co-management: instructive, consultative; cooperative; advisory and informative. See further: S Sen & J Raakjaer-Nielson 'Fisheries Co-Management: A Comparative Analysis' (1996) 20 *Marine Policy* 406-407.

[61] Tipa and Welch draw a distinction between three types of 'real co-management', namely: cooperative management; community-based management; and collaborative management. See further: Tipa et al (2006) *Journal of Applied Behavioral Science* 381-387.

[62] Dudley refers to co-management under the rubric of shared governance and draws a distinction between: transboundary management; collaborative management; and joint management. See further: N Dudley (ed) *Guidelines for Applying Protected Area Management Categories* (2008) IUCN Gland 26-27.

[63] De Koning draws a distinction between eight different types of co-management: ad hoc benefit-sharing; consultation benefit-sharing; lease; part lease/part co-management; co-operative co-management; part co-management/part delegated management; delegated management; and privately managed. See further: De Koning (2009) *Africanus* 8-12; and M De Koning 'Co-Management in Protected Areas - Presentation & Document prepared for the People & Parks Steering Committee' (dated 12 December 2012) 15-26.

[64] This is reflected, for example, in the skewed attention afforded to the lease option and the unduly positive outlook afforded to it in contrast to the co-management option in both the draft and final *National Co-Management Framework*. See in this regard: *National Co-Management Framework* (2010) 7-10; and Department of Environmental Affairs and Tourism, Department of Land Affairs, SANParks, Ezemvelo Wildlife & Eastern Cape Parks *Draft National Co-Management Framework* (2009) 3-7.

[65] De Koning (2009) *Africanus* 7-8.

under section 42 of the National Environmental Management: Protected Areas Act[66] (Protected Areas Act) when there are several other governance options available in South Africa's statutory framework for promoting a balance between the Government's conservation and land reform agendas.[67] Secondly, the proposed establishment of co-management committees to act as the institutions through which claimant communities and conservation authorities' interests are discussed and negotiated is a welcome addition although their powers, functions and membership will require careful consideration given the challenges plaguing several existing co-management committees.

There is currently evidence of conservation authorities with superior experience, resources and capacity wielding significant power within the co-management institutions, often to the exclusion of community representatives.[68] Decision-making within several existing co-management institutions has been recorded as running along 'highly authoritarian and hierarchical lines'[69] with the role of the co-management institution remaining largely theoretical.[70] Furthermore, there is evidence of conservation authorities using protected area management plans to effectively veto the communities' rights of access, use and development.[71] Some commentators argue that this constitutes an unjustified encroachment on the communities' proprietary rights[72] and others that the conditionality imposed on their rights places them in a situation of dependence as opposed to authority.[73] The above state of affairs has led to growing tensions between the conservation authorities and claimant community representatives on many of the co-management institutions.[74] These problems are even evident where the community has majority representation on the co-management institution.[75]

Several factors exacerbating the above problematic state of affairs have been identified by various domestic commentators. The first is the apparent fundamental misconception among many conservation authorities that co-management amounts to mere consultation and not joint decision-making.[76] The second is the failure of the parties to clarify the exact nature of the co-management arrangement in the founding agreements

[66] Act 57 of 2003.

[67] These are discussed in Part 3.3 below.

[68] J Friedman 'Winning Isn't Everything: What the Makuleke Lost in the Process of Land Restitution' (2005) BA Thesis (Environmental Studies) University of Chicago 48.

[69] R Palmer et al *The Dwesa-Cwebe Restitution Claim: A Case Study as Preparation for a Field Based Learning Programme* (2006) Phuhlisani Solutions CC Cape Town, 11.

[70] S Robins & K Van der Waal ''Model tribes' and Iconic Conservationists? The Makuleke Restitution Case in the Kruger National Park' (2008) 39(1) *Development & Change* 67; Palmer et al *The Dwesa-Cwebe Restitution Claim* (2006) 44 & 49-50; Kepe et al (2005) *International Journal of Biodiversity Science & Management* 13; Friedman 'Winning Isn't Everything: What the Makuleke Lost in the Process of Land Restitution' (2005) 36 & 47; S Turner *et al Community-Based Natural Resource Management: Experiences and Lessons in Linking Communities to Sustainable Resource Use in Different Social, Economic and Ecological Conditions in South Africa* (2002) Research Report No.11, PLAAS Bellville 45; and C Steenkamp & B Grossman *People and Parks: Cracks in the Paradigm* (2001) Policy Think Tank Series No.10, IUCN-ROSA Harare 7.

[71] Steenkamp et al *People and Parks: Cracks in the Paradigm* (2001) 4-5.

[72] B De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) HSRC Press Pretoria 67.

[73] M Spierenburg *et al* 'Enclosing the Local for the Global Commons: Community Land Rights in the Great Limpopo Transfrontier Conservation Area' (2008) 6(1) *Conservation & Society* 92-95.

[74] De Koning (2009) *Africanus* 16; Kepe (2008) *Environmental Management* 317; and Robins et al (2008) *Development & Change* 67.

[75] D Grossman & P Holden 'Towards Transformation: Contract Parks in South Africa' in H Suich *et al* (eds) *Evolution and Innovation in Wildlife Conservation* (2009) Earthscan London 360; and Isaacs *et al Co-Managing the Commons in the 'New' South Africa* (2000) 11.

[76] De Koning (2009) *Africanus* 16.

governing their relationship.[77] The third is the hesitancy of particularly lower-ranked conservation officials to relinquish management authority to the co-management institutions owing to perceived doubts about the management capabilities of community members.[78] The fourth is the failure of relevant government authorities to clearly delineate their mandates causing confusion as to who is the competent authority for managing the protected area and who should accordingly represent the conservation authorities on the co-management institution.[79] The fifth is the lack of post-settlement support for building and sustaining the capacity of communal property institutions, which undermines both their internal functioning and their ability to play a meaningful role in the co-management institutions.[80] The sixth is the failure to properly take into account and adequately compensate community members for the opportunity costs associated with their participation in these institutions. This has in certain areas led to their passive participation or absence in order to reduce such costs.[81] In others, it has led to the claimant community overtly frustrating the management of the protected area, through for instance delaying the preparation and approval of the protected area's management plan.[82]

Problems have also been recorded regarding the process for selecting which community representatives sit on the co-management institutions; and once selected, the lack of transparency and accountability in the exercise of their duties.[83] Their failure to communicate and provide feedback to their constituent communities, predominantly as a result of resource and capacity constraints, has fuelled distrust between not only the community and its representatives on the co-management institution, but on occasion the entire co-management institution itself.[84] These problems again raise questions regarding the 'simplistic assumptions of 'community' as harmonious, representative, democratic and equitable institutions'.[85] Care therefore clearly has to be exercised in selecting appropriate community representatives to sit on these co-management institutions, and to

[77] De Satgé *Issues for the Development of Post-Settlement Support Strategy* (2006) 47.

[78] Grossman *et al* 'Towards Transformation' in Suich et al *Evolution and Innovation* (2009) 364; H Reid 'Contractual National Parks and the Makuleke Community' (2002) 29(2) *Human Ecology* 144; and Steenkamp *et al People and Parks: Cracks in the Paradigm* (2001) 5.

[79] R De Satgé *Learning Programme Review: Issues for the Development of Post-Settlement Support Strategy* (2006) 55-57 & 64.

[80] R Palmer *From Title to Entitlement: The Struggle Continues at Dwesa-Cwebe* (2003) Fort Hare Institute of Social and Economic Research Working Paper No.46, University of Fort Hare Alice 10; and C Fabricius 'Conservation and Communities - Learning from Experience' in R Palmer *et al* (eds) *From Conflict to Negotiation: Nature-Based Development on South Africa's Wild Coast* (2002) HSRC Press Pretoria 262.

[81] Fabricius 'Conservation and Communities' in Palmer *et al From Conflict to Negotiation* (2002) 271.

[82] Grossman *et al* 'Towards Transformation' in Suich et al *Evolution and Innovation* (2009) 361; H Magome & J Murombedzi 'Sharing South African National Parks: Community Land and Conservation in a Democratic South Africa' in W Adams & M Mulligan (eds) *Decolonizing Nature: Strategies for Conservation in a Post-Colonial Era* (2003) Earthscan London 120; and Isaacs *et al Co-Managing the Commons in the 'New' South Africa* (2000) 14.

[83] Grossman *et al* 'Towards Transformation' in Suich et al *Evolution and Innovation* (2009) 360-361; Kepe (2008) *Environmental Management* 317; C Walker *Land-Marked* (2008) Jacana Media Auckland Park 139; Magome *et al* 'Sharing South African National Parks' in W Adams *et al* (eds) *Decolonizing Nature* (2003) 120; Turner *et al Community-Based Natural Resource Management* (2002) 45; Isaacs *et al Co-Managing the Commons in the 'New' South Africa* (2000) 11 & 14; and E Boonzaier 'Negotiating the Development of Tourism in the Richtersveld, South Africa' in M Price (ed) *People and Tourism in Fragile Environments* (1996) John Wiley & Sons Limited Chichester 130.

[84] Ibid.

[85] Boonzaier 'Negotiating the Development of Tourism in the Richtersveld' in Price *People and Tourism in Fragile Environments* (1996) 136.

ensure that mechanisms are put in place to facilitate communication between them and their constituencies.

The above discussion predominantly relates to decision-making within the borders of domestic protected areas. It must be recognised, however, that the management of these areas increasingly involves 'a clash of local, regional, national and even international interests'.[86] This is particularly the case where the domestic protected area is linked to a neighbouring protected area or incorporated with a transboundary conservation initiative. This latter trait currently characterises several of South Africa's protected areas, where the areas supposedly co-managed by the claimant community, have been incorporated in transfrontier parks.[87] What is concerning in this regard, is the failure of the conservation authorities to engage the communities on the establishment of these transfrontier parks and to include community representation on the management institutions responsible for their administration, notwithstanding the fact that the communities 'own' significant portions of land incorporated within them.[88] Concerns have also been raised about the failure of conservation authorities to consult communal property institutions which hold land tenure over parts of these areas, over the sourcing and allocation of financial grants for these transfrontier parks.[89] This selective engagement of communities on key issues impacting on the protected area has led some commentators to view these transfrontier park initiatives as deliberate attempts to circumvent local community participation in conservation.[90]

There are clearly significant challenges facing the realisation of the objects of South Africa's contemporary conservation regime that seeks to promote greater community participation in the decision-making structures and processes governing protected areas. Whilst there is recognition by conservation authorities of the need to transform their outdated approach to conservation and improve their communication with communities,[91] the practical realisation of this transformation appears to remain superficial.[92] If one considers the cumulative experience reflected in many protected areas subject to co-management schemes, it appears to mimic Murphree's identified frailties inherent in many 'people and parks' type programmes where the government authorities refuse to 'surrender the power and control of access to resources essential for robust devolution'.[93]

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[86] Walker *Land-Marked* (2008) 110.

[87] Take for instance the following examples: the inclusion of the Pafuri Region of the Kruger National Park into the Greater Limpopo Transfrontier Park; the inclusion of the Richterveld National Park into the /Ai-!Ais-Richtersveld Transfrontier Park.

[88] Grossman *et al* 'Towards Transformation' in Suich *Evolution and Innovation* (2009) 364; Robins *et al* (2008) *Development & Change* 67; Spierenburg *et al* (2008) *Conservation & Society* 89-90; W Whande *Trans-boundary Natural Resource Management in Southern Africa: Local Historical and Livelihood Realities within the Great Limpopo Trans-frontier Conservation Area* (2007) Research Report No.25, PLAAS Bellville 30 & 47; Magome *et al* 'Sharing South African National Parks' in Adams *et al Decolonizing* (2003) 123-125 & 126-127; and Y Katerere *et al A Critique of Transboundary Natural Resource Management in Southern Africa* (2001) *Series on Transboundary Natural Resource Management Paper No.1*, IUCN-ROSA Harare.

[89] Grossman *et al* 'Towards Transformation' in Suich et al *Evolution and Innovation* (2009) 364.

[90] Spierenburg *et al* (2008) *Conservation & Society* 89-90; M Ramutsindela *Transfrontier Conservation in Africa: At the Confluence of Capital, Politics and Nature* (2007) CAB International Wallingford 105-113; M Chapin 'A Challenge to Conservationists' (2004) 17(6) *World Watch* 17-31; and V Dzingirai *Disenfranchisement at Large: Transfrontier Zones, Conservation and Local Livelihoods* (2004) IUCN-ROSA Harare 8.

[91] C Fabricius *et al* 'Towards Strengthening Collaborative Ecosystem Management: Lessons from Environmental Conflict and Political Change in Southern Africa' (2001) 31(4) *Journal of the Royal Society of New Zealand* 840-841.

[92] Turner *et al Community-Based Natural Resource Management* (2002) 11.

[93] R Martin 'Murphree's Laws and Principles, Rule and Definitions' in B Mukamuri *et al* (eds) *Beyond*

It has been recognised that the implementation of a collaborative and participatory form of management is a 'long and continuously evolving process'.[94] Its implementation in South Africa is in its relative infancy, but conservation authorities would do well to regularly heed the warning of one domestic commentator, that the 'persistence of a patronistic, hegemonic approach is ultimately self-defeating'.[95]

It is therefore unclear why the Government continues to advocate co-management as the central model for resolving the conservation and land reform interface, unless in the words of De Koning, it represents 'a camouflage for the continuation of state hegemony' over protected areas.[96] Three additional aspects heighten this concern. First, the continued lack of clarity on the exact nature of the domestic co-management model and whether it amounts to joint management or mere consultation.[97] Secondly, the unresolved issue of whether the initial co-management arrangements are the first step towards self-management by the claimant community, or the perpetually entrenched management model.[98] Thirdly, the desirability of replicating the co-management model throughout South Africa, when the example on which it is founded, namely the Makuleke's land claim to the Pafuri Region of the Kruger National Park, is failing to deliver its anticipated benefits to the community[99] and has been labelled as financially unsustainable.[100] Steps clearly need to be taken to move away from the blind reliance on the co-management model to traverse the conservation and land reform interface and to afford greater recognition to the broad array of governance options prescribed in the relevant domestic legal framework.

3 Legal Options for Linking the Conservation and Land Reform Regimes

Recent government initiatives to link South Africa's conservation and land reform regimes are to be welcomed. However, as highlighted above, their focus is very narrow and they are fraught with several theoretical and practical problems. As a result, they appear to operate in a manner that shrouds an array of governance options present in South Africa's legal framework for traversing the interface between the country's conservation and land reform regimes. To extract these governance options 'hidden' within South Africa's legal framework, it is necessary to briefly reflect on the issue of protected areas governance for three reasons. First, to acknowledge the emerging international discourse around protected areas governance. Secondly, to clarify objectively the potential theoretical role claimant communities can play in protected areas. Thirdly, to distil an array of governance options to enable them to do so. Having

Proprietorship - Murphree's Laws on Community-Based Natural Resource Management in Southern Africa (2009) Weaver Press Harare 17.

[94] Fabricius *et al* (2001) *Journal of the Royal Society of New Zealand* 841.

[95] Steenkamp *et al People and Parks: Cracks in the Paradigm* (2001) 7.

[96] De Koning (2009) *Africanus* 8.

[97] B De Villiers 'People and Parks: Challenges and Opportunities' in *Land Reform in South Africa: Constructive Aims and Positive Outcomes - Reflecting on Experiences on the Way to 2014* (2009) Seminar Report No.20, KAS Johannesburg 87-88.

[98] S Collins 'The Makuleke Conservation and Land Reform Project - A Conservation Rather than Community Development Success So Far' (2010) (Unpublished paper) 6; and De Villiers *Land Claims and National Parks: The Makuleke Experience* (1998) 66.

[99] Spierenburg *et al* (2008) *Conservation & Society* 87-97; Robins *et al* (2008) *Development & Change* 53-72; Friedman 'Winning Isn't Everything' (2005); Reid (2002) *Human Ecology* 135-155; Ramutsindela (2002) *GeoForum* 15-24; and Steenkamp *et al People and Parks: Cracks in the Paradigm* (2001).

[100] Y Groenewald & F Macleod 'Land Claims 'Could Kill Kruger'' (2005) *Mail and Guardian* (18 February). These doubts largely stem from what SANParks officials believe are skewed perceptions on the money to accrue from eco-tourism concessions in the Pafuri Region (Reid (2002) *Human Ecology* 144).

highlighted these options, I will be in a position to consider the domestic legal framework and assess the extent to which it provides for their implementation.

3.1 The Emerging International Discourse on Protected Areas Governance

Protected areas governance refers to 'who holds management authority and responsibility and can be held accountable according to legal, customary or otherwise legitimate rights'.[101] It is accordingly concerned with the interactions between the myriad of structures, processes, institutions and traditions that have a role to play in the formation and management of protected areas, how the power is allocated and exercised within the protected areas, and the manner in which those who exercise such power are held accountable.

If one surveys the scholarship on protected areas which has arisen during the course of particularly the past two decades,[102] one is immediately struck by the diversity of structures, processes, institutions and traditions at play and the variance in the quality and consistency of governance across and between them. Following a comprehensive review of trends in global protected area governance between 1992 and 2002, Dearden *et al* acknowledged this diversity and concluded that protected areas governance has no 'one best way'.[103] Borrini-Feyerabend *et al* have similarly concluded that protected areas governance is a 'complex and nuanced phenomenon that … [is] … not easy to circumscribe'.[104]

However, if one sifts through this diversity and complexity, there appear to be three broad issues which fundamentally shape protected areas governance and accordingly the rights/benefits and responsibilities/costs of those tasked with planning for, establishing, managing, regulating and financing protected areas.[105] The first relates to who holds tenure over the land situated within a protected area.[106] The second broad issue relates to management and specifically who is responsible for managing a protected area, and the form and nature of such management.[107] The third broad issue is what I would call

[101] G Borrini-Feyerabend 'Governance of Protected Areas, Participation and Equity' in *Biodiversity Issues for Consideration in the Planning, Establishment and Management of Protected Areas Sites and Networks* (2004) Convention on Biological Diversity Technical Series No.15, Secretariat of the Convention on Biological Diversity Montreal 100.

[102] For a comprehensive distillation and discussion of this literature, see M Lockwood *et al* (eds) *Managing Protected Areas: A Global Guide* (2006) Earthscan London.

[103] P Dearden *et al* 'Trends in Global Protected Area Governance, 1992-2002' (2005) 36(1) *Environmental Management* 99.

[104] G Borrini-Feyerabend *et al* 'Governance in Protected Areas' in Lockwood *et al Managing Protected Areas: A Global Guide* (2006) 117.

[105] These functions are distilled from the five powers identified by Graham *et al*, namely: planning powers; regulatory (including law enforcement) powers; spending powers; revenue generating powers; and the power to enter into agreements to share or delegate such powers (J Graham *et al Governance Principles for Protected Areas in the 21st Century* (2003) A Discussion Paper, Institute on Governance, Parks Canada & CIDA Ottawa 13).

[106] This issue is in turn shaped by the following specific issues: the range of actors holding tenure (which can include national, provincial and local government institutions; NGOs; community organisations; juristic and natural persons); the form of tenure (which can include legal or formal tenure, customary tenure, common tenure; de jure and de facto tenure); and the content of the tenure (full ownership rights or more limited rights relating to development, use, access and/or occupation). For a general discussion of the varying form and content of rights and tenure that exists within protected areas, see: A Paterson 'Clearing or Clouding the Discourse: A South African Perspective on the Utility of the IUCN Protected Areas Governance Typology' (2010) 10(3) *South African Law Journal* 494-495.

[107] The actors at play here are as diverse as those listed above in the context of tenure (note 106) and whilst they may be the same as those who hold tenure, this is not always the case. These actors may either undertake their role individually or in partnership with other actors through some form of co-management arrangement. The nature of the management rights and obligations is similarly varied and range from

'beneficiation', namely the range of rights/benefits and associated responsibilities/costs, which may flow from a protected area.[108]

Having expressly reaffirmed the vital current and future role protected areas play in conserving the globe's biological diversity, those attending the Vth World Parks Congress held in Durban (South Africa) in 2003 identified governance as 'central to the conservation of protected areas throughout the world' and that 'success in the coming decade will depend in part on strengthening the governance of protected areas'.[109] It was at this Congress that an initial attempt was made to formulate a common language for understanding and describing the different forms of protected areas governance.[110] Four governance typologies were proposed (government; co-managed; private; and community conserved areas)[111] and the World Commission on Protected Areas was specifically mandated to include a governance dimension in the IUCN's protected areas management category system to reflect the plurality of protected area governance types accurately.[112] The past four Conference of Parties (COP) to the *Convention on Biological Diversity*[113] have further reiterated the need to improve and where necessary diversify and strengthen protected areas governance types, and for parties specifically to recognise the contribution of co-managed protected areas, private protected areas, and indigenous and local community conserved areas within the national protected area system.[114]

This process culminated in the inclusion of four forms of governance in the *IUCN Management Guidelines (2008)*, the express purpose of which is to assist the international community and domestic policy-makers to understand, plan for and accurately record protected areas governance.[115] These forms are: governance by government; shared

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statutorily prescribed management schemes to those informed by customary laws and traditions. Finally, the actual nature of the management activities can include the preparation of management plans, the prescription of rules, norms and standards, permitting schemes, environmental assessment and reporting. For a general discussion of the management component of protected areas governance, see: Paterson (2010) *South African Law Journal* 495.

[108] As in the case of land tenure and management, two issues impact on the beneficiation component of protected areas governance: who has the rights/benefits and who bares the responsibilities/costs; and what is the basis or form of beneficiation. Regarding the former question, the rights/benefits and responsibilities/costs may fall on one or more person or institution, which could include: government authorities; community institutions; non-government organisations, companies; and ordinary people. Regarding the latter question, the rights/benefits and responsibilities/costs can be based in law, custom and agreement. The selection of the appropriate institution and form of beneficiation will largely depend on the capacity of key stakeholders.

[109] World Commission on Protected Areas *Durban Action Plan* (2003) IUCN Gland 257.

[110] Ibid.

[111] These four governance typologies were specifically based on the preparatory work of: Graham et al *Governance Principles for Protected Areas in the 21st Century* (2003); and Borrini-Feyerabend 'Governance of Protected Areas, Participation and Equity' in *Biodiversity Issues for Consideration* (2004) 100-105.

[112] World Commission on Protected Areas *Durban Action Plan* (2003) 258.

[113] 31 *ILM* 818 (1992).

[114] The importance of protected areas governance was affirmed in the *Programme of Work on Protected Areas* (adopted at COP 7 (Kuala Lumpur, 2004) and annexed to Decision VII/28) which emphasises the need to recognise and promote a broad set of protected area governance types, including areas conserved by indigenous and local communities and private nature reserves. See Programme Element 1 (Goal 1.1, para. 1.1.4) and Programme Element 2 (Goal 2.1: para. 2.1.2 and paras. 2.1.4-2.1.6; and Goal 2.2: paras. 2.2.1-2.2.2, paras. 2.2.4-2.2.5 and para. 2.2.7). See further: COP 10 (Nagoya, 2010) Decision X/31 (Protected Areas) para. 30-32; COP 9 (Bonn, 2008) Decision IX/18 (Protected Areas) para. 6a-6d; and COP 8 (Curitiba, 2006) Decision VIII/24 (Protected Areas) para. 18g.

[115] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 25. See further, G Borrini-Feyerabend *Implementing the CBD Programme of Work on Protected Areas - Governance as Key for Effective and Equitable Protected Area Systems* (2008) IUCN/CEESP Briefing Note 8, Cenesta Tehran 2-4.

governance; private governance; and governance by indigenous peoples and local communities. *Governance by government* is the traditional form of protected areas governance whereby a government body, usually a government agency or statutory authority, 'holds the authority, responsibility, and accountability for managing the area', determining its conservation objectives, developing and enforcing its management plan.[116] *Shared governance* involves governance by two or more actors.[117] Its practical manifestation is however far from simple, and involves the employment of far more diverse and 'complex institutional mechanisms and structures … to share management authority and responsibility among a plurality of (formally and informally) entitled governmental and non-governmental actors'.[118] This diversity includes 'collaborative management' (also referred to as 'co-management')[119] and 'joint management'.[120] *Private governance* encapsulates protected areas owned or controlled by private entities including individuals, NGOs, corporations acting individually or collectively.[121] Finally, governance by indigenous peoples and local communities covers protected areas where the 'management authority and responsibility rest with indigenous peoples and/or local communities through various forms of customary or legal, formal or informal, institutions and rules'.[122] The diversity of arrangements, institutions and areas that potentially fall under this exceedingly broad definition is vast and not necessarily static.[123] Some commentators have even labelled it as the 'most exciting conservation development of the 21st century'.[124] Having existed for hundreds or even thousands of years, its rise in

[116] See further Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.

[117] See generally: Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26; A Kothari 'Collaboratively Managed Protected Areas' in Lockwood *et al Managing Protected Areas: A Global Guide* (2006) 528-548; and Borrini-Feyerabend et al *Indigenous and Local Communities and Protected Areas* (2004) 32-50.

[118] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.

[119] Collaborative management covers the scenario where authority vests in one body (predominantly a government agency or statutory authority), but this body is required - by law or policy - to inform and consult other stakeholders.

[120] Joint management differs from 'collaborative management' in that decision-making authority vests in a range of bodies. The decision-making process is varied and may or may not require consensus. Once a decision is made, its implementation is assigned or delegated to various agreed bodies or individuals.

[121] Dudley *Guidelines for Applying Protected Area Management Categories* (2008) 26.

[122] Ibid.

[123] For a comprehensive discussion of the nuanced governance types underpinning community conserved areas across the globe, see: A Khotari *et al Territories and Areas Conserved by Indigenous Peoples and Local Communities (ICCAs): How Far Do National Laws and Policies Recognise Them?* (2010) Preliminary Report dated October 2010, prepared for IUCN/CEESP, TILCEPA, WCPA and Kalpavriksh; R Blomley *et al Community Conserved Areas: A Review of Status and Needs in Selected Countries of Central and Eastern Africa* (2007) Draft Report prepared for TILCEPA, TGER, IUCN/CEESP, SwedBio & WCPA; D Smyth 'Indigenous Protected Areas in Australia' (2006) 16(1) *Parks* 14-20; V Rivera *et al* V 'Community Conservation Areas in Central America: Recognising them for Equity and Good Governance' (2006) 16(1) *Parks* 21-27; M Bassi 'Community Conserved Areas in the Horn of Africa' (2006) 16(1) *Parks* 28-34; J Brown *et al* 'Community Conserved Areas: Experience from North America' (2006) 16(1) *Parks* 35-42; M Ferrari 'Rediscovering Community Conserved Areas in South-East Asia: Peoples; Initiative to Reverse Biodiversity Loss' (2006) 16(1) *Parks* 43-48; N Pathak 'Community Conserved Areas in South Asia' (2006) 16(1) *Parks* 56-62; P Holden *et al* 'Community Conserved Areas in Some Southern African Countries' (2006) 16(1) *Parks* 68-73; G Oviedo *Lessons Learned in the Establishment and Management of Protected Areas by Indigenous and Local Communities in South America* (2003) WCPA Ecosystems, Protected Areas and People Project, IUCN Gland; and J Beltran *Indigenous and Traditional Peoples and Protected Areas: Principles, Guidelines and Case Studies* (2000) Best Practice Protected Area Guidelines Series No.4, IUCN Gland.

[124] Kothari 'Community Conserved Areas' in Lockwood *et al Managing Protected Areas: A Global Guide* (2006) 549.

prominence can partly be allied to the recognition of the rights of indigenous peoples and of local and mobile communities in several international instruments.[125]

3.2 Understanding the Role of Claimant Communities in Protected Areas Governance

As highlighted above, the source of authority within a protected area (embodied in the notion of protected areas governance) is determined by three key components - land tenure, management and beneficiation. If one dissects these three components, it appears that a claimant community can theoretically play four main roles in a protected area - that of owner, manager, developer and beneficiary. Prior to describing each of these roles, it is important to note the following in respect of each of them. First, the nature of the protected area will influence the nature of the role. Secondly, the community can take on one or more of these roles in a protected area. Thirdly, the community can take on these roles independently or in partnership with others.[126] Finally, the role of the community in a protected area can shift over time as its interests, capacity and resources change.

3.2.1 *Owner*

A claimant community can own land situated in a protected area (full title) or hold certain rights over the land or natural resources located in it (rights holder). Where it holds full title, the community will probably be required to enter into an agreement with the Government which: regulates the incorporation of its land into the protected area; imposes certain restrictions on the use of the property; sets out who is responsible for managing the protected area; clarifies the forms of beneficiation in the protected area; and prescribes the duration of the agreement. Where the community is a rights holder, it will probably also be required to enter into an agreement with the government authority, institution or person responsible for managing the protected area. The agreement will probably: set out who is entitled to exercise these rights; define the nature of the rights; may impose conditions/restrictions on the exercise of these rights; clarify the rights/benefits accruing to each party; spell out the obligations/costs ascribed to each party; and prescribe the duration of the agreement.

3.2.2 *Manager*

The second main role a claimant community can play in a protected area is that of manager. This role envisages a community actively managing the land and natural resources located in a protected area. This management can be undertaken individually or in partnership with other persons or institutions. The responsibility for managing a protected area will probably be prescribed by statute providing for: the formal appointment of a management authority; the preparation and implementation of a management plan; and monitoring and reporting on such implementation. Where the

[125] These instruments include: *International Covenant on Economic, Social and Cultural Rights* (1976) 21 *ILM* 925; *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries* (1989) 28 *ILM* 1382; and most recently the *United Nations Declaration on the Rights of Indigenous Peoples* (2007) 46 *ILM* 1013. See further the following decisions of the CBD COP (COP 8 Decision VIII/24 (para. 18g) and COP 9 Decision IX/18 (para. 6)), which specifically recognised the value of this form of protected area governance.

[126] Such partnerships could be entered into with government authorities, other community institutions, companies, non-governmental organisations or other persons.

responsibility to manage the protected area is shared between two or more entities, provision will probably be made for the conclusion of a co-management agreement between these entities which sets out the parties' reciprocal rights/benefits and obligations/costs associated with managing the protected area; and the duration of the agreement.

3.2.3 *Developer*

A claimant community can also seek to undertake a commercial development or activity in a protected area. The community may seek to undertake such a development or activity individually or in partnership with others. The nature and form of the development and activity will generally be regulated strictly by statute providing for: the type of development and activity which may be undertaken in the protected area; the management planning framework which should inform its design; any studies and authorisation processes which should precede its implementation; the people and institutions which must be consulted prior to doing so; and potentially the conclusion of a commercial agreement between relevant stakeholders.[127] The latter commercial agreement will generally set out the nature of the development or activity; the parties' reciprocal rights, benefits, responsibilities and costs associated with it; and the duration of their relationship.

3.2.4 *Beneficiary*

A community may benefit from the establishment of a protected area. The community will generally accrue such benefits through its role as owner, manager and/or developer. A community who operates in none of these capacities may also potentially accrue benefits owing to its historic or current association with the land situated in or adjacent to a protected area.[128] The relationship of the community to a protected area will influence the form of beneficiation and whether it is regulated by statute, agreement, or by a mixture of the two. Where the community is the owner, the form of beneficiation will probably be regulated by the agreement in terms of which the land is contracted into the protected area. Where the community is the manager, the form of beneficiation will probably be regulated by the terms of its designation as the management authority and the terms of the approved management plan for the protected area. Where the community operates as a developer, the form of beneficiation will probably be regulated by a commercial agreement entered into with the protected area's management authority. Where the beneficiary is a third party (in other words does not operate in any of the above capacities), the form of beneficiation will probably either be regulated by: an agreement between the community and the management authority, developer, government authority and/or non-profit organisation; or by way of statute.

[127] These stakeholders could include: government authorities; the management authority; the owners of the protected area; people who hold rights in the protected area where the development or activity will take place; and neighbouring landowners and communities.

[128] A typical example of this would be a community who successfully asserts its rights to land situated in a protected area but by way of agreement forgoes these rights in favour of compensation or other forms of benefits. These forms of benefits could include: training; employment; access to facilities located in the protected area; the supply of basic goods, services and products to the protected areas and those visiting it; the allocation of government grants and/or a share of proceeds generated by the protected area to develop/uplift those areas adjacent to it.

3.3 Current Legal Options for Facilitating the Role of Claimant Communities in Protected Areas

Claimant communities can clearly play many different roles in protected areas. The nature of these roles will vary considerably in each case but can theoretically be grouped under the following six main governance options: owner/manager; owner/co-manager; owner/beneficiary; non-owner/manager; non-owner/co-manager; and non-owner/non-manager/beneficiary. As mentioned above, these governance options are not cast in stone and a community may shift between them over time. For instance, a community may wish to commence its relationship to the protected area under the owner/beneficiary option. As its management skills, capacity and resources increase the community may then wish to migrate to the owner/co-manager option, sharing the management authority with another person or institution. Finally, as the community's skills, capacity and resources increase further, it may wish to take over the management of the protected area single-handedly thereby entering the owner/manager option.

If one surveys South Africa's current legal landscape, it becomes apparent that it contains the requisite legal tools for implementing each of these six governance options to bridge the conservation and land reform interface. The general nature of these options and the legal process for implementing each of them is discussed below. It is discussed from a national perspective as it is predominantly under the national conservation and land reform regime that the options have been, and will continue to be, regulated.[129]

3.3.1 *Owner/Manager Option*

Under this option the claimant community owns, or will own, the land already located, or to be located, in the protected area. The community also currently manages, or wish to manage, the protected area. It would therefore take on the role of owner and manager. The general legal process to be followed in implementing this option, detailed in Figure 1 below, will depend on whether one is dealing with an existing protected area or the desire to create a new protected area.

Where one is dealing with an existing protected area, two separate yet related legal processes will need to be followed: those relating to ownership; and those relating to management. Regarding ownership, the community would need to establish an appropriate institution to hold ownership.[130] It would then have to comply with the land restitution process as prescribed in the Restitution of Land Rights Act.[131] Regarding management, the community would need to comply with the management regime set out in the Protected Areas Act.[132] Where one is dealing with a new protected area, the above

[129] The legal procedures may vary in the provincial context where provincial conservation laws are used to establish and regulate the management of the protected area. A discussion of the nuanced provincial procedures unfortunately falls outside the purview of this article.

[130] The array of possible institutions (and the laws regulating their formation and management) include: communal property association (Communal Property Association Act 28 of 1996); trust (Trust Property Control Act 57 of 1998); section 21 company (Companies Act 61 of 1973); private company (Companies Act 61 of 1973); and a closed corporation (Closed Corporations Act 69 of 1984).

[131] For a discussion of this process, see: Hall 'Reconciling the Past, Present, and Future' in C Walker *et al Land, Memory, Reconstruction and Justice - Perspectives on Land Claims in South Africa* (2010) Ohio University Press Ohio 21-40; C Van der Merwe 'Restitution of Land Rights Act 22 of 1994' (1994) 36(5) *Annual Survey of South African Law* 303-308; and V Jaichand *The Restitution of Land Rights: A Workbook* (1997) Lex Patria Johannesburg.

[132] The management regime is contained in Chapter 4 of the Protected Areas Act. For a discussion of this regime, see: Paterson (2007) *SA Public Law* 20-24.

two legal procedures would be intersected by a third, that relating to establishment. Here the community would also need to comply with the procedures set out in the Protected Areas Act for establishing the protected area.[133]

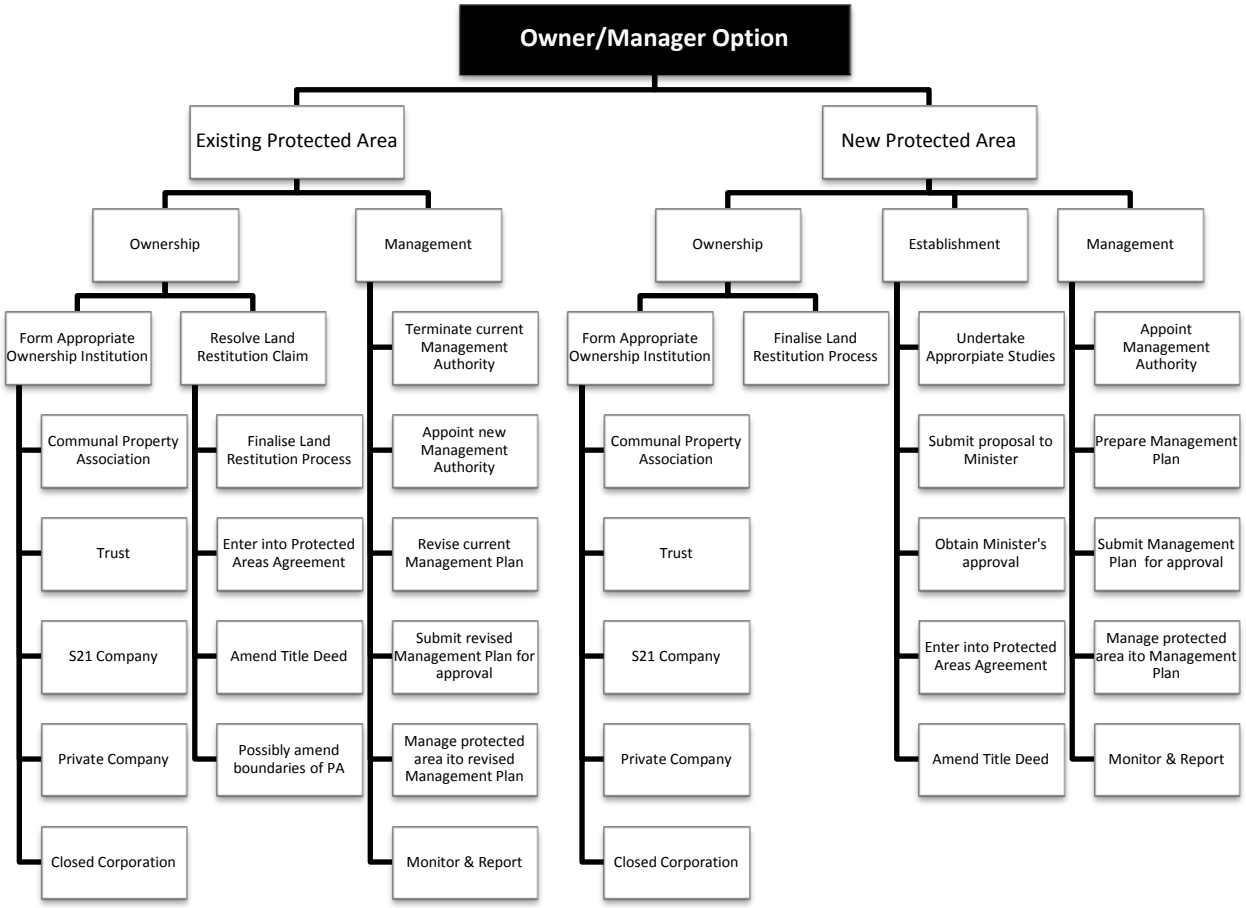

FIGURE 1: Owner/Manager Option

3.3.2 *Owner/Co-Manager Option*

Under this option the claimant community similarly owns, or will own, the land already located, or to be located, in the protected area. The community wishes to share the current or future responsibility to manage the protected area with another person or institution. It would therefore take on the role of owner and co-manager. This option is facilitated by the fact that the Protected Areas Act provides for the conclusion of co-management agreements between the management authority for the protected area and third parties.[134] It mimics the co-management option set out in the *National Co-Management Framework.* The general legal process that would need to be followed to implement this option is detailed in the Figure 2 below. It will similarly depend on whether one is dealing with an existing protected area or the desire to create a new protected area.

[133] The declaratory regime is contained in Chapter 3 of the Protected Areas Act. For a discussion of this regime, see: Paterson (2007) *SA Public Law* 17-20.

[134] Section 42. For a discussion of the nature of and process for concluding such co-management agreements, see: Paterson (2007) *SA Public Law* 20-24.

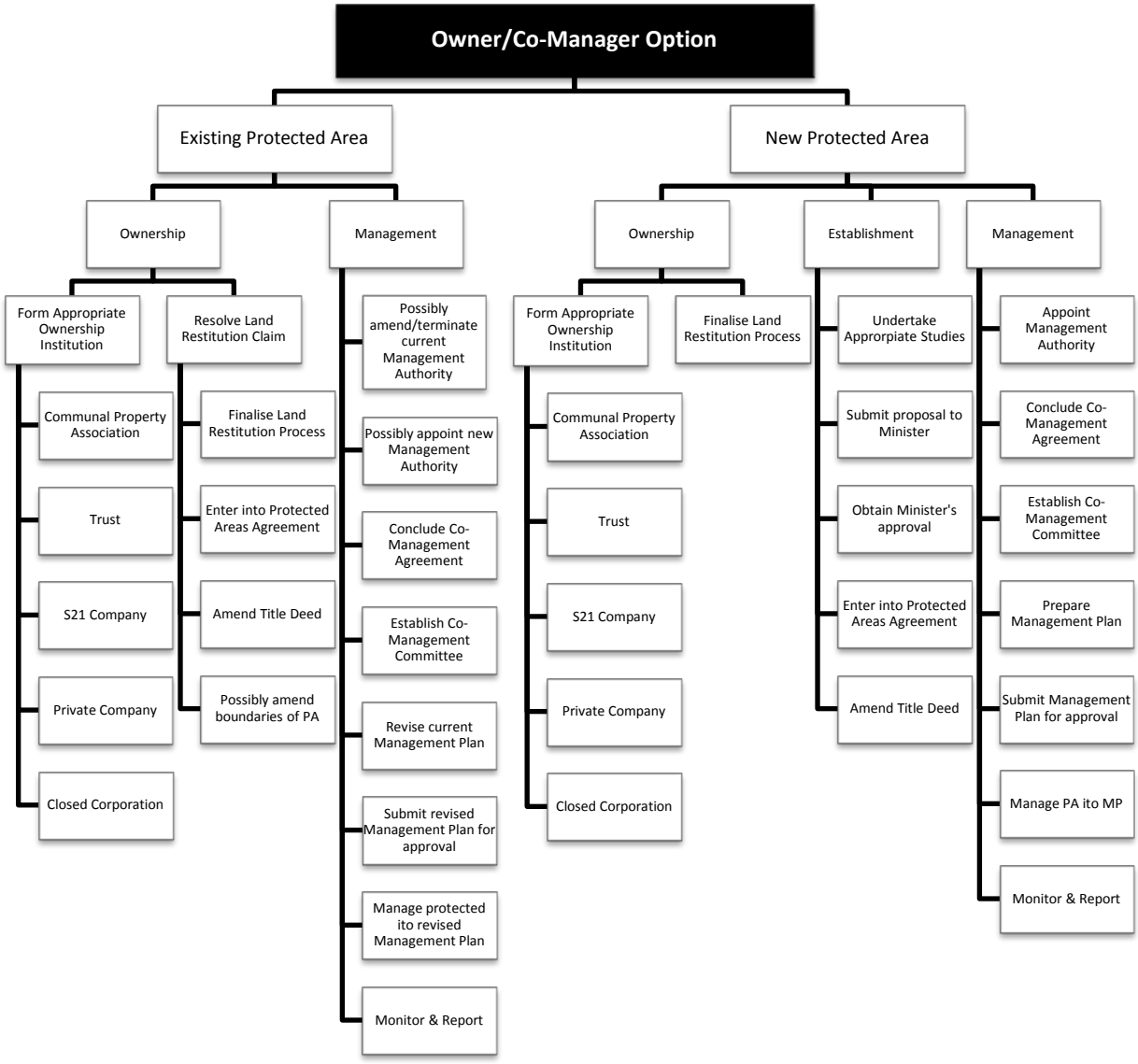

FIGURE 2: Owner/Co-Manager Option

Where one is dealing with an existing protected area, the same two separate yet related legal processes to that described above under the owner/manager option need to be followed. Regarding ownership, the community would need to establish an appropriate institution to hold ownership[135] and thereafter comply with the land restitution process under the Restitution of Land Rights Act. Regarding management, the community would need to comply with the management regime set out in the Protected Areas Act with the added requirement of concluding a co-management agreement to regulate the co-management relationship. Where one is dealing with a new protected area, the above two legal procedures would be intersected by a third, that relating to establishment. The community would in addition need to comply with the procedures set out in the Protected Areas Act for establishing the protected area.

[135] For a list of these potential institutions (and the laws that regulate them), see note 130 above.

3.3.3 *Owner/Beneficiary Option*

Under this option the claimant community owns, or will own, the land already located, or to be located in a protected area. It does not wish to take on the role of manager, which task is assigned to another person or institution. As a result of its ownership, the community accrues certain rights or benefits associated with the protected area. The community therefore takes on the role of owner and beneficiary.

The nature of the legal process regulating ownership of the protected area and the nature of the community's rights or benefits associated with it will differ significantly. A broad distinction needs generally to be drawn between the restitution context (where the issue of beneficiation is, or was, addressed in the agreements underpinning the settlement of the land restitution claim) and the general context (where the issue of beneficiation was not addressed). The general legal process that would need to be followed in implementing this option is detailed in Figure 3 below.

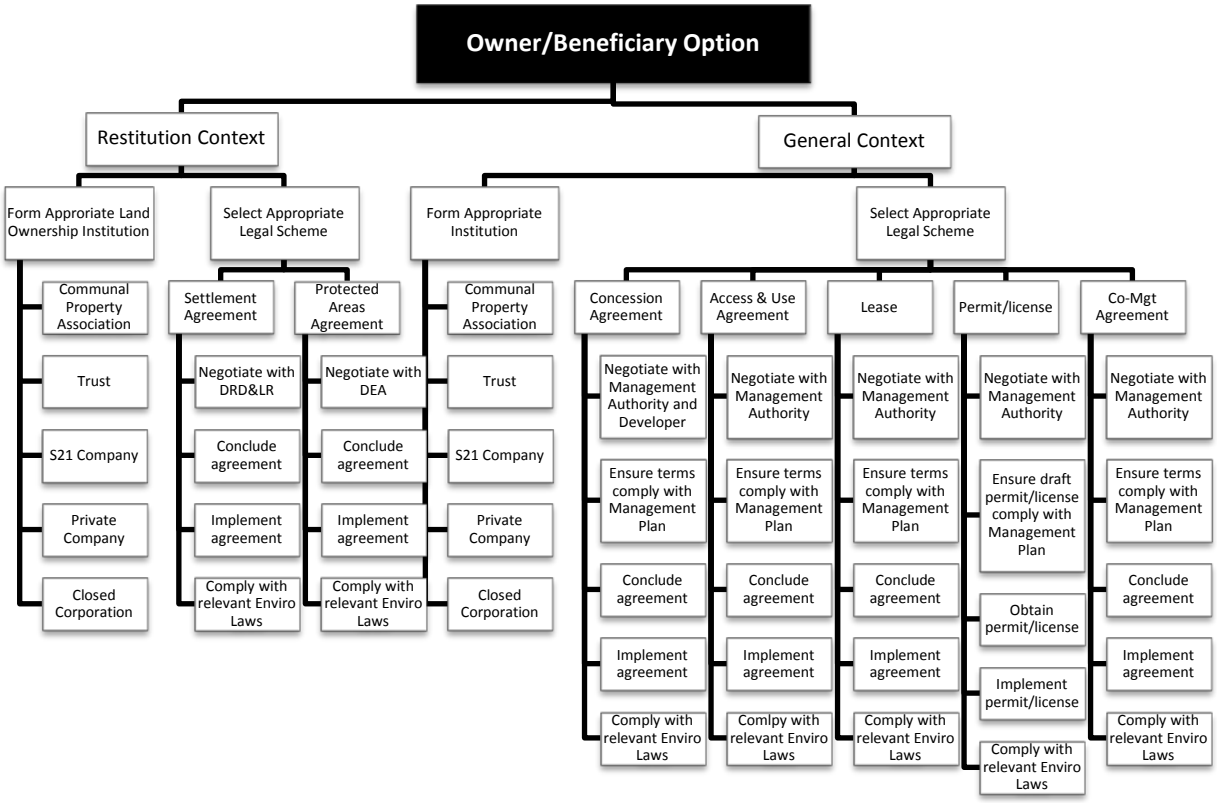

FIGURE 3: Owner/Beneficiary Option

In the restitution context, the community would firstly need to establish an appropriate institution to hold ownership[136] and thereafter select and implement the appropriate legal scheme to regulate the rights or benefits accruing to it. The two available legal schemes are the settlement agreement concluded under the Restitution of Land Rights Act, or an agreement concluded under the Protected Areas Act in terms of which the community agree to contract their land into the protected area.[137] In the general context the

[136] For a list of these potential institutions (and the laws that regulate them), see note 130 above.

[137] These two agreements will generally set out the rights and benefits of the successful land claimant community in respect of the protected area. These could include: decision-making rights; access rights;

community would similarly need to establish an appropriate institution to hold any rights/benefits accruing from the protected area.[138] Thereafter, it would similarly need to select and implement the appropriate legal scheme to regulate their rights or benefits. Here the available legal schemes are more diverse and include: concession agreements; access, use and lease agreements; permits and licenses; and co-management agreements.[139]

3.3.4 *Non-Owner/Manager Option*

Under this option a claimant community that does not own the land located in a protected area, wishes to take on the management of the protected area or some of the resources situated within it. The community would therefore take on the role of non-owner and manager. This option is based on the presumption that all issues regarding ownership and the establishment of the protected area have been resolved. One is therefore dealing here solely with the issue of management. The general legal process that would need to be followed in implementing this option is detailed in Figure 4 below.

This option is enabled by the country's conservation regime allowing a community to manage a protected area or the biological resources situated within it, even where it does not own the land or resources situated within it. This is provided for in two main ways: their designation as the management authority for the area;[140] or the conclusion of a biodiversity management agreement between them and the designated management authority.[141] Prior to entering into either of the above management arrangements, the community would need to establish the appropriate institution to enable them to do so.[142]

occupation rights; resource use rights; commercial rights; equity rights; lease benefits; employment benefits; and grant benefits.

[138] For a list of these potential institutions (and the laws that regulate them), see note 130 above.

[139] The Protected Areas Act allows management authorities of certain protected areas to: conclude commercial/concession agreements with communities to undertake commercial developments and activities in the protected area; enter into agreements and leases with communities to use in a sustainable manner of biological resources located in the protected area; and issue permits/licenses to communities to use in a sustainable manner of biological resources located in the protected area (section 50 read together *Regulations for the Proper Administration of Special Nature Reserves, National Parks and World Heritage Sites* (2005) (regulations 5, 20-22 and 31-33). The Act also allows management authorities to conclude co-management agreements with people to regulate human activities that affect the environment in the protected area (section 42). These agreements do not only relate to co-management of the protected area, but can also include: the apportionment of any income generated from the management of the protected area or any other form of benefit-sharing between the parties; the use of biological resources in the protected area; access to and occupation of the protected area; the development of economic opportunities within and adjacent to the protected area; the development of local management capacity and knowledge exchange; and the offering of financial and other support. For further discussion on the nature, form and process that must be precede the use of these statutory mechanisms, see: Paterson (2007) *SA Public Law* 26-29.

[140] The Protected Areas Act provides for the appointment of management authorities (section 38). For a discussion of this process, see: Paterson (2007) *SA Public Law* 20-24.

[141] The Biodiversity Act enables the Minister to conclude a biodiversity management agreement with a suitable person, organisation or organ of state, regarding the implementation of a biodiversity management plan (section 44). For a discussion of this process, see: Paterson 'Contractual Tools for Implementing the CBD in South Afric' in Benidickson et al *Environmental Law and Sustainability After Rio* (2011) 344-349.

[142] For a list of these potential institutions (and the laws that regulate them), see note 130 above.

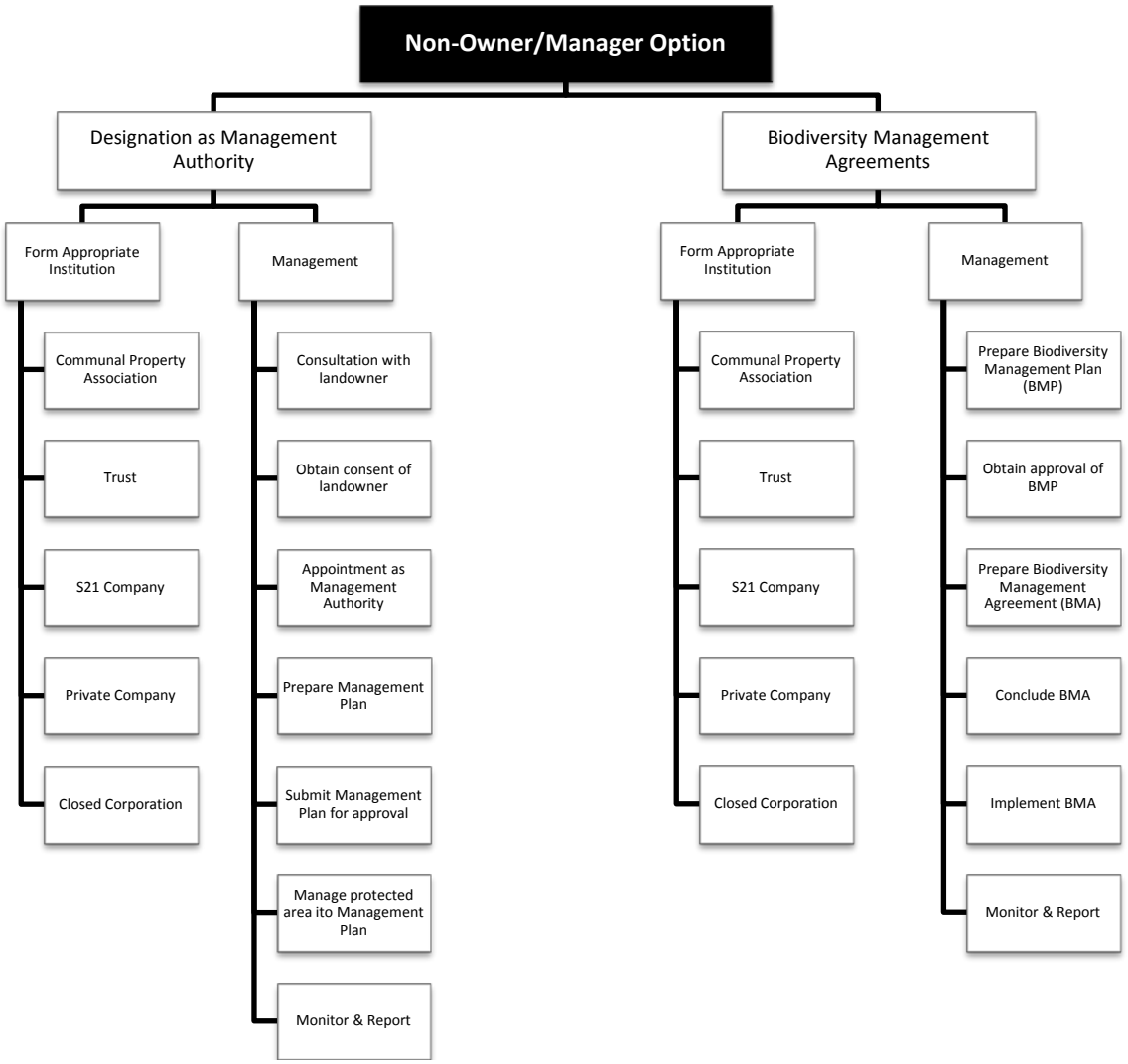

FIGURE 4: Non-Owner/Manager Option

3.3.5 *Non-Owner/Co-Manager Option*

Under this option a claimant community that does not own the land located in a protected area, wishes to participate in the management of the protected area, but wishes to do so in partnership with one or more persons or institutions. They would therefore take on the role of non-owner and co-manager. A distinction needs to be drawn between where the community has been appointed as the designated management authority for a protected area and wishes to share the management responsibility with another person or institution; and where the community is this latter institution within whom the designated management authority wishes to share such management. The general legal process that would need to be followed to implement this option is detailed in Figure 5 below.

This option is, as in the owner/co-manager model, enabled by the country's conservation regime allowing a management authority to enter a co-management agreement with another person or institution.[143] Where the community is the designated

[143] See note 134 above.

management authority it would need to identify a prospective co-manager and comply with the procedures set out in the Protected Areas Act for concluding a co-management agreement with this person or institution. Where the community is not the designated management authority, it would firstly need to form an appropriate institution and thereafter conclude a co-management agreement with the designated management authority.

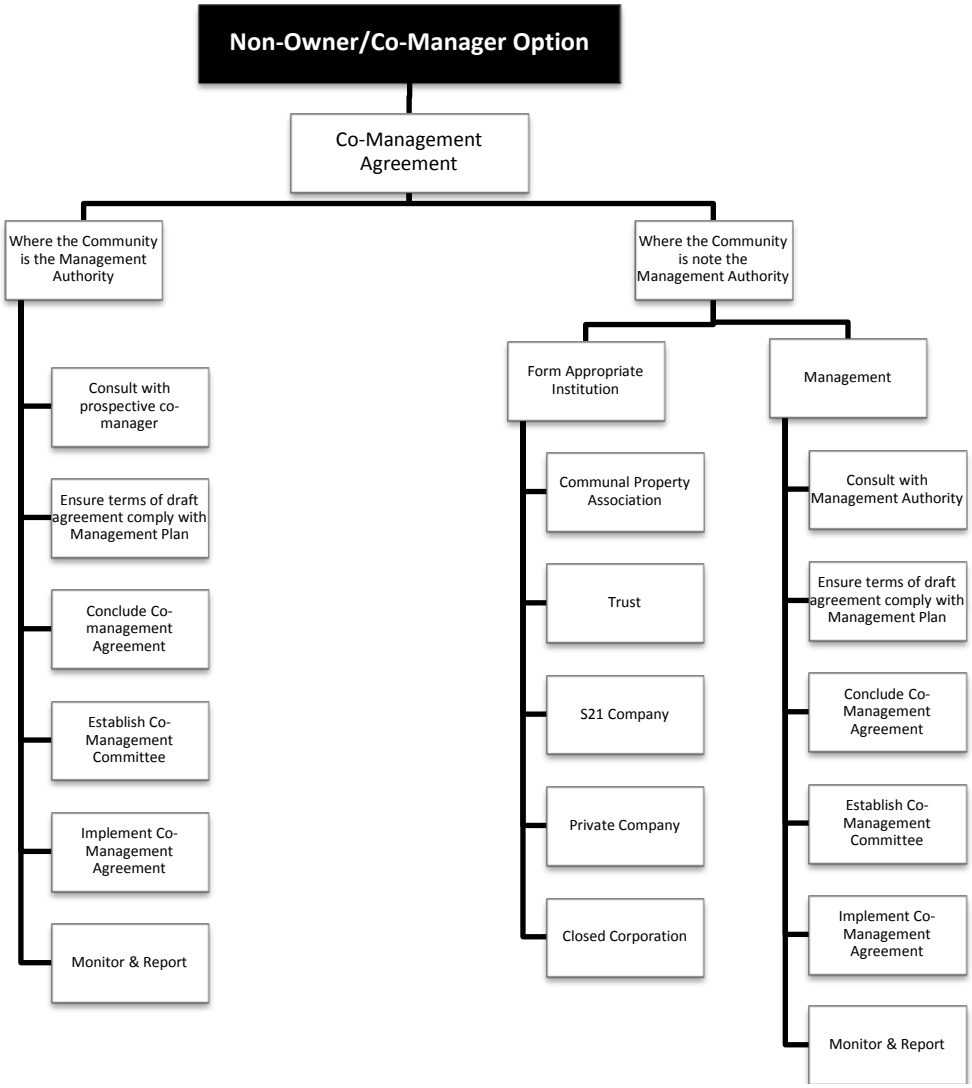

FIGURE 5: Non-Owner/Co-Manager Option

3.3.6 *Non-Owner/Non-Manager/Beneficiary Option*

Under this final option, the claimant community neither owns nor manages the land located in the protected area. They accordingly accrue no rights or benefits associated with these roles. Any rights or benefits accruing to the community from the protected area arise through an array of external legal transactions. One is therefore dealing here solely with the issue of beneficiation. The nature of the legal process regulating the forms of

beneficiation associated with the protected area will differ significantly. The legal process that would need to be followed to implement this option is detailed in Figure 6 below.

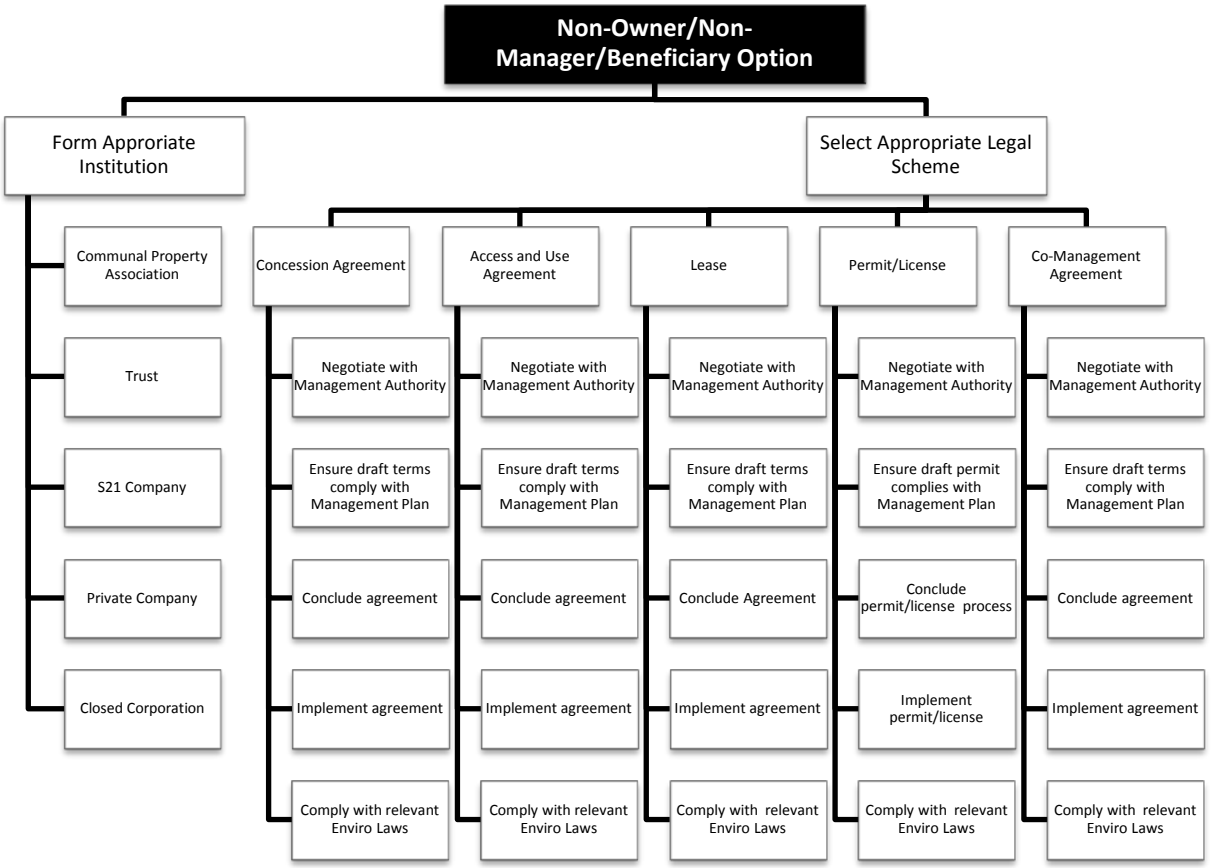

FIGURE 6: Non-Owner/Non-Manager/Beneficiary Option

A general distinction needs to be drawn between two main legal processes: the formation of the appropriate institution to accrue the rights or benefits where no such institution exists;[144] and the selection and implementation of an appropriate legal scheme to regulate the nature of these rights or benefits. Here the available legal schemes are diverse and include: concession agreements; access, use and lease agreements; permits and licenses; and co-management agreements.[145]

4 Conclusion

In this article I have sought to grapple with the interface between South Africa's conservation and land reform regimes. I began by highlighting the importance and problems facing the interface, and how these problems frequently play out in the context of protected areas. I then sought to critically consider two recent Government initiatives specifically aimed at traversing the interface, namely the *Memorandum of Understanding* and the *National Co-Management Framework.* While providing valuable guidance to administrators tasked with settling the outstanding land restitution claims in protected

[144] For a list of these potential institutions (and the laws that regulate them), see note 130 above.
[145] See note 139 above.

areas, I sought to illustrate through my critical appraisal of these initiatives, their inherent theoretical and practical frailties. Perhaps the most significant of these is the entrenchment of co-management, and an exceptionally narrow formulation of it, as the favoured governance option for seeking to bridge the conservation and land reform divide. I argued that the narrow vision espoused by these initiatives shrouds several other governance options provided for within South Africa's domestic legal framework for doing so.

I then shifted to focus on these apparently misunderstood governance options that I believe theoretically provide domestic stakeholders with a far more diverse and nuanced array of tools for traversing the divide. In order to unpack these governance options, I briefly considered the nature of protected areas governance and the recent priority ascribed to it in the international protected areas discourse. I then identified an array of potential governance options for traversing the conservation and land reform interface and illustrated how South Africa's current relevant legal framework caters for their implementation.

Given the inherent theoretical and practical frailties of the current co-management model, it seems somewhat surprising that the Government continues to exclusively rely on it as the primary model for resolving the interface. The geological, ecological, biological, cultural, social and economic settings permeating conservation and land reform interface vary significantly. So to do the interests and capacities of local claimant communities, conservation officials and other relevant stakeholders involved in its resolution. So why then seek to narrow the array available governance options? Surely we should rather seek to acknowledge the diverse array of protected areas governance options currently being promoted by the international community, and revel in our good fortune that we have the enabling domestic legal framework to provide for their implementation. It is only through this process that South Africa will successfully traverse the apparent growing divide between conservationists and disenfranchised local claimant communities and thereby simultaneously fulfil the country's conservation and land reform agendas where these collide in protected areas.

RECENT CASES

The Sacrificial Blesbok: Inching Toward Greater Understanding of Animal Welfare Law in South Africa: *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw; and Natal Zoological Gardens (Pty) Ltd and Others v Ezemvelo KZN Wildlife and Others*

Ed Couzens[*] and Adrian Bellengére[**]

1 Introduction

In May 2008 the Supreme Court of Appeal decided an appeal against a decision of Van der Merwe J in the Free State Provincial Division in which application had been made for an interim interdict, pending institution of an action, to restrain the respondent from feeding live animals to tigers – this practice being alleged to be in contravention of the Animals Protection Act.[1]

While the decision in *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw*[2] (hereafter *National Council*) rested ultimately (and incorrectly, it is argued) on the majority of the court's finding that the applicant had not satisfied the requirements for the grant of an interdict, the decision – and in particular the dissenting judgment of Cameron JA – raises interesting points relating to environmental litigation. In recent years South Africa's environmental jurisprudence has expanded primarily through statutory development, but there is arguably a noticeable infiltration of environmental awareness into judgments. This is a development which may eventually be of great significance.

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[1] Act 71 of 1962.

[2] 2008 (5) SA 339 (SCA).

2 The facts of the *National Council* case

The appellant in *National Council* was the National Council of Societies for the Prevention of Cruelty to Animals (the 'NCSPCA'), which is a statutory body established in terms of the Societies for the Prevention of Cruelty to Animals Act[3] and which includes in its objects the 'prevention of ill-treatment of animals by promoting their good treatment by man'.[4] The respondent, Openshaw, had at least at one time been the manager of a project which had attempted to train captive-born Chinese tigers to hunt – the eventual intention being to release the tigers back into the wild in China.[5] During Openshaw's tenure as manager of the project, a television documentary was screened which showed the capture, in a net, of a blesbok; which capture was followed by an assertion from Openshaw that the blesbok was to be released into an enclosure which contained tigers.[6] The implication was that the tigers would eventually capture and kill the blesbok. Openshaw did not, at any point during the litigation which ensued after the screening of the interview, ever reveal what actually happened to the blesbok.[7]

After, and based on, the screening of the television interview, the appellant apparently tried to persuade the police service to initiate prosecution.[8] When this effort failed, the appellant sought (in the Free State Provincial Division) a final interdict preventing the respondent from presenting live prey such as blesbok to the tigers.[9] After the answering affidavits, and before the hearing, in the court a quo the appellant abandoned its claim for final relief; and on appeal from the refusal of the final interdict sought, sought an interim interdict pending the determination of certain disputed factual issues by means of the hearing of oral evidence – on the basis that an action would be instituted within 30 days of the grant of the interim order.[10] The basis of the appellant's case, both *a quo* and on appeal, was that the respondent, in presenting the blesbok to the tigers, had committed an offence in terms of s 2(1)(g) of the Animals Protection Act.[11] The relevant section provided as follows:

> (1) Any person who - … (a) save for the purpose of training hounds maintained by a duly established and registered vermin club in the destruction of vermin, liberates any animal in such manner or place as to expose it to immediate attack or danger of attack by other animals or by wild animals, or baits or provokes any animal or incites any animal to attack another animal; or …. shall, subject to the provisions of this Act and any other law, be guilty of an offence and liable on conviction to a fine or to imprisonment for a period not exceeding twelve months or to such imprisonment without the option of a fine.

3 The majority judgment

The Court *a quo* considered that, particularly in the absence of any explanation from the respondent as to what had happened to the particular blesbok, the interview footage provided *prima facie* evidence that s 2(1)(g) had been contravened[12] – at least

[3] Act 169 of 1993.
[4] At 342, para [6].
[5] At 342, para [7].
[6] At 343, para [9].
[7] At 343, para [10].
[8] At 351, para [42].
[9] At 343, para [8].
[10] At 345, para [13].
[11] Act 71 of 1962; at 343, para [8].
[12] At 345, para [14].

that a single contravention had occurred.[13] However, the Court *a quo* dismissed the application on two grounds. Firstly, procedurally, on the basis that some 19 months had lapsed since the application had first been launched and, as this was considerably beyond the 30 days allowed for the institution of action, it considered that the delay was highly prejudicial to the respondent[14] and secondly, on the merits, as the appellant had not, in its view, satisfied its duty to show *prima facie* that there was a reasonable apprehension of a future contravention of the Act, unless the interdict were granted.[15]

The majority of the SCA, per Mhlantla AJA, found that there was no reason to deviate from the finding of the Court *a quo*. Per Mhlantla AJA, an interdict 'is not a remedy for past invasion of rights but is concerned with present or future infringements' and is 'appropriate only when future injury is feared'. Per Mhlantla AJA, further, '[w]here a wrongful act giving rise to the injury has already occurred, it must be of a continuing nature or there must be a reasonable apprehension that it will be repeated'.[16] On the evidence, and in the face of an 'expression' by the respondent 'of future intent not to release any live prey in the immediate proximity of the tigers',[17] Mhlantla AJA found that it could not be said that the 'more plausible inference to be drawn' was a likelihood that the respondent would contravene s 2(1)(g) in the future.[18]

Farlam JA, Heher JA and Hurt AJA concurred with Mhlantla AJA. The appeal was therefore dismissed with costs.

4 The dissenting judgment

Cameron JA dissented, advising that in his view the interdict ought to have been granted and the appellant's costs ought to have been paid by the respondent. The dissent stemmed from Cameron JA's difference of opinion on two issues: firstly, the status and role of the appellant, the NSPCA; and, secondly, the fact that the respondent, Openshaw, had expressly declined, in the face of evidence clearly indicating that he had violated the Act, to undertake not to commit further such violations.[19]

Cameron JA, considering[20] the status and role issue, found that the statute[21] in setting out its objects entrusted the NSPCA with 'preventing the ill-treatment of animals by promoting their good treatment by man',[22] but that this is not the only object. The NSPCA is mandated also 'to take cognizance of the application of laws affecting animals and societies and to make representations in connection therewith to the appropriate authority'.[23] Consideration of these dual objects, according to Cameron JA, requires recognising that the NSPCA's objects go beyond preventing ill-treatment' and 'include the wider responsibility of making representations about laws affecting animals' – this latter responsibility requiring lobbying and advocacy in

[13] At 348, para [23].
[14] At 346, para [18].
[15] At 345, para [14].
[16] At 346, para [19].
[17] At 348, para [25].
[18] At 348, para [26].
[19] At 349, para [32].
[20] At 350, para [34]. The majority judgment does not consider this issue.
[21] Prevention of Cruelty to Animals Act 169 of 1993.
[22] Section 3(c).
[23] Section 3(e).

respect of law revision and law reform.[24] The instant application, in Cameron JA's view, concerned 'not only the prevention of cruel treatment' but also the 'broader question of the adequacy (or inadequacy) of the laws preventing such treatment'.[25]

Both of the Animals Protection Act and the Prevention of Cruelty to Animals Act are, per Cameron JA, 'animal welfare legislation' which do not confer rights upon the animals to which they afford protection but which are designed to promote the welfare of such animals.[26] In so doing, the statutes 'recognise that animals are sentient beings that are capable of suffering and of experiencing pain' and recognize that 'humans are capable of inflicting suffering on animals and causing them pain'.[27] Although animals, per Cameron JA, are capable of such suffering, and though humans are capable of inflicting such suffering, 'animals have no voice of their own … Like slaves under Roman law, they are the objects of the law, without being its subjects' – this is the reason for the statutory creation of the NSPCA[28] as the 'guardian and [the] voice' of animals.[29] Arising from this status and role, according to Cameron JA, the NSPCA was 'rightly impelled to action' by Openshaw's conduct; which conduct 'foretold a criminal infraction'.[30]

Finding that the conduct was indeed criminal, Cameron JA pointed out that s 2(1)(g) of the Animals Protection Act does not 'attempt to inhibit naturally predatory behaviour by animals in the wild' but instead 'proscribes cruel human interventions that supplant natural conditions with unnatural confinement and expose live prey to the danger of immediate attack with no recourse'.[31] Cameron JA then considered the respondent's not disputing that 'feeding a live blesbok to a tiger in a confined space would constitute cruel maltreatment in violation of the section';[32] the respondent's answering affidavit which had detailed the training methods used on the tigers;[33] and the failure of the respondent to give 'any account of what actually happened to the blesbok' and 'any undertaking or assurance that what happened would not be repeated' – such account and undertaking being described as 'signally missing'.[34] The respondent, per Cameron JA, had to 'carry the consequences of his choice to remain silent, and to evade the plain implications of his conduct' and 'his reticence cast[] a shadow on his motives and conduct'.[35] Further, the respondent's 'failure to give any sort of undertaking against future violations' not only lacked 'any explanation' but also lacked 'any justification'.[36] Per Cameron JA, this 'express and deliberate omission' to give any future undertaking was what 'cried out for interdictory relief against' the respondent.[37]

Cameron JA accepted 'that an interdict is not a remedy for past wrongs' but stated that the 'matter is different … when the past wrong does not involve merely

[24] At 350, para [35].
[25] At 350, para [36].
[26] At 350, para [38].
[27] At 350-351, para [38].
[28] At 351, para [39].
[29] At 351, para [40].
[30] Ibid.
[31] At 351, para [41].
[32] Ibid.
[33] At 351-352, para [42].
[34] At 352, para [43].
[35] At 352, para [45].
[36] At 352, para [46].
[37] At 353, para [47].

commercial or financial interests, but unacknowledged criminal conduct, where the perpetrator is impenitent'.[38] In this case, the interdict application 'involved a criminal prohibition aimed at preventing ill-treatment of voiceless beings' with the NSPCA undertaking its 'wide and singular responsibilities in the field'.[39]

Cameron JA then suggested that, where the evidence showed that a criminal prohibition had been violated, it was wrong to accept 'a mere expression of future intention to abstain'; and that in the face of the 'perpetrator's deliberate refusal to impose any self-limiting undertaking' there was a 'need for judicial intervention'.[40]

Concluding, Cameron JA argued that the interdict sought ought to have been granted on the basis that if 'no offence had been committed, and Openshaw honoured his expressed intention not to feed live prey to predators in future, the interdict would do no harm'; whereas, 'given the glaring absence of any undertaking supplementing his professed intentions, the interests of the animals required the grant of an order'.[41] Finally, Cameron JA suggested that the 'analogy of interdict applications involving alleged personal assaults' was not 'far-fetched'; with the difference being that 'animals have less voice than most apprehensive assault victims'.[42]

5 Overview

This is a case in which the dissenting judgment is, in the view of the present writers, of far greater interest than that of the majority. The majority judgment is a narrow, legalistic judgment, arguably obiter in its import, in which the judges saw no reason to view the matter as having any features to distinguish it from other interdict applications in which there is proof that a violation has occurred, but insufficient proof that the violation will recur.

Arguably, this may have been, although it is unlikely, the correct decision on the evidence presented to the court. The case was not necessarily presented as well as it might have been. There was no clear evidence that future violations would recur through the actions of the particular plaintiff. There was a lengthy, and unexplained, delay of more than 19 months since the launch of the initial application and the action threatened by the appellant (to which action the application for an interdict, pending determination of 'disputed factual issues' by way of oral evidence,[43] was ancillary) had not yet been launched.[44] Finally, it is arguable that the appellant would have been better advised, on the refusal of the police to prosecute, to have launched its own private prosecution in terms of s 33 of the National Environmental Management Act.[45] Given the finding of Mhlantla AJA[46] that 'a fair inference can be drawn that the respondent would in August 2005 commit one offence in contravention of s 2(1)(g) of the Act', and the finding of Cameron JA (dissenting) that there was 'prima facie evidence of a contravention of the Act',[47] the chances of success would doubtless have been high had such a prosecution been pursued. Such a conviction might well have proved a far greater deterrent to others committing similar acts than

[38] Ibid.
[39] Ibid.
[40] At 353, para [48].
[41] At 353, para [49].
[42] Ibid.
[43] At 345, para [13].
[44] At 346, para [18].
[45] Act 107 of 1998.
[46] At 347, para [23].
[47] At 352, para [44].

would have been the interdict sought. In one sense this is a pity as s 33 has, since its introduction into law in 1999,[48] been apparently unused.

Given these inadequacies in the appellant's case, the majority judgment is not on the face of it particularly contentious. However, this reading of it as being not particularly contentious on the law is arguably superficial. It is not contentious only because it was 'merely' an animal that was concerned. Had the subject been a human – where, for instance, a protection order was concerned – the judgment might well be considered both careless and contentious.

6 Assessment of the majority judgment

The majority judgment, while superficially having the merit of disposing of the matter expediently, is logically, legally and factually flawed; and, if followed, has the potential to create an unsound precedent.

The logical inconsistencies are visible from the outset. The respondent raised, on appeal, for the first time, the argument that, as he would shortly be leaving the country, the appeal was moot. The court, because it concluded that the appeal must fail on the merits, did not consider the question of mootness.[49] If the appeal was indeed moot (which was undecided by the majority), the merits would be of no further interest. Deciding the latter issue first, and using this to justify avoiding the former issue is logically incoherent. Were it moot, commentary on the merits may be *obiter*.

The court exacerbated this inconsistency when it held that the appeal fell 'to be dismissed on account of the appellant's delay in instituting the principle action to which its claimed relief is ancillary'.[50] This overlooks two issues. Firstly, action was to be instituted 'within 30 days of the grant of the interim order'.[51] The interim order had, at the date of the hearing of the appeal, not been granted for the simple reason that it was itself the subject of the appeal. Arguably, had the court granted the interim order on appeal, then, and only then, would the appellant have had 30 days in which to institute action. Secondly, and more seriously, by dismissing the appeal on procedural grounds – on the basis of the delay, the court by going on to consider the merits of an already dismissed case rendered its own judgment on the merits *obiter*. What would the court have done if, on the merits, it had found the interim interdict to be warranted in the circumstances? It could not very well have granted it as it had already refused it.

The risk of retrospectively engineering a judgment to reflect a decision already reached is clearly demonstrated here. The reasoning on the merits is used to justify a decision on the procedural aspects, which decision actually should have precluded an assessment of the merits.

The legal flaws are less obvious, but are nonetheless relevant and important. In considering the merits the court examined the law relating to the granting of interim relief by way of an interdict, setting out the 'requisites for the right to claim an interim interdict'[52] (leaving aside the difficulty inherent in the use of the word 'right', which perhaps could have been better phrased as the 'requisites to satisfy to be awarded an interim interdict'). The court focused only on the second requirement, that of a 'well

[48] The National Environmental Management Act having commenced on 29 January 1999.
[49] At 342, para [5].
[50] At 346, para [18].
[51] At 345, para [13].
[52] At 347, para [20].

grounded apprehension of irreparable harm',[53] stating that the test is an objective one; and quoting, with approval, *Minister of Law and Order v Nordien and Another*[54] in which was stated 'this means that, on the basis of the facts presented to him the judge must decide whether there is any basis for the entertainment of a reasonable apprehension by the applicant'.[55] By a leap of legal logic, the court extrapolates from this the requirement that the 'applicant should allege facts justifying a reasonable apprehension that harm is likely to be repeated'.[56] The court, by stating that 'an interdict is not a remedy for a past invasion of rights',[57] confuses the nature of the application. The past invasion of rights, especially when it forms part of a pattern or policy, provides the well-grounded apprehension of irreparable harm. The court's role, by its own definition, is to determine whether the appellant's apprehension is reasonable in the circumstances. This is how the law regarding interim interdicts is applied day in and day out in South Africa's superior and inferior courts. It is impossible, or certainly grossly undesirable, to imagine a battered woman being denied a protection order (interim relief) because she has been unable to lead any evidence, other than that she has already been beaten often, that her assailant may beat her again. The objective test applied in such a case is that there is a reasonable belief, held by the victim, that she may be beaten. This belief is based on the fact that it has occurred already. No such applications are refused on the basis that such an interdict is not a remedy for a past invasion of rights.

To complicate the issue further the court, in testing to see if there was a reasonable apprehension of the harm continuing,[58] applied a test – this being whether 'a reasonable person would find an apprehension of harm that the respondent is likely in future to contravene s 2(1)(g) of the Act';[59] although it had earlier, as we have seen, quoted with approval the requirement that the test to be applied is whether there is a reasonable apprehension by the applicant. This confuses the notion of a *reasonable apprehension* by a specific party with the notion of an apprehension by a *reasonable person*, a subtle but significant point. What might not constitute an apprehension to a person in the street might well constitute a reasonable apprehension to someone in the position of the applicant.

The third legal flaw relates to the issue of evidence, which in application proceedings is traditionally contained in affidavit form. More accurately, it should be stated, it relates to the dichotomy between *facta probanda* and *facta probantia* – what constitutes the elements and what constitutes the evidence supporting the elements. The appellant argued that as further tiger cubs were to be introduced this supported the contention that there was a reasonable apprehension of harm. The court rejected this as an issue that had not been raised on the initial papers, stating that it is trite law that a proper case must be made on the founding papers[60] and thus, in its opinion, this was a 'new case'.[61] This is not a new case, it was merely evidence, or *facta probantia*, supporting the elements, or *facta probanda*, of the case before the court;

[53] Ibid.
[54] 1987 (2) SA 894 (A) at 896G-I.
[55] At 347, para [21].
[56] At 347, para [22].
[57] At 346, para [20].
[58] At 347, para [24].
[59] At 347, para [24].
[60] At 349, para [29].
[61] At 348, para [28].

and, in any event, had been raised by the respondent in its own answering affidavit – which affidavit formed part of the founding papers to which the court referred.

On the facts, arguably, the judgment is also deficient, and, although this is open to debate, at least one of the other judges of appeal is of the same view. The court effectively found that there was no evidence placed before it showing a reasonable apprehension of harm.[62] The entire case, however, is founded on an apprehension, by the appellant, of harm. The very nature of an interdict is that interim relief is sought in case something occurs. There is no onus on an applicant to show that without the interdict the apprehended harm will occur. It is impossible to prove a future event will occur and simultaneously seek an order preventing its occurrence. Interdicts are by their nature preventative, a fact recognized by the court, and, as in this case, are often sought to confirm an existing law. If the respondent does not intend to contravene the law further (which this respondent, incidentally, did not undertake not to do) no harm will occur by the granting of the relief.

7 Assessment of the dissenting judgment

The dissenting judgment of Cameron JA is preferable to the opinion of the majority, both in terms of its legal coherence, its application of the law to the facts, and in the facts it finds proved.

Cameron JA deals with the issue of whether the appeal is moot first, and in concluding that it is not,[63] he then can logically progress to the next stages – firstly the procedural delay, which, given the issues at stake, he does not believe constitutes a significant enough prejudice to overshadow the merits of the case,[64] and secondly the merits themselves. Cameron JA's judgment on the merits has the attraction of being coherent and logical. He starts by finding that the respondent's past conduct constitutes a contravention of the Act and thus a crime.[65] The first requirement for the granting of an interdict has thus been met. This has been established by the appellant on the papers, creating a reasonable apprehension that it might recur. The respondent's failure to respond thereto, notwithstanding the opportunity to do so supports this reasonable apprehension.[66] This does not constitute a reversal of the onus, expecting the respondent to prove that an interdict should not be granted; instead it is in line with the spirit of the High Court rules which establish that any fact that remains uncontraverted, notwithstanding an opportunity to do so, is deemed to be admitted.[67] The second requirement has also thus been met. Cameron JA is correct[68] in finding that the balance of convenience favours the appellant, the third requirement, and that the interdict should thus have been granted.

This judgment may well be criticized on the basis that Cameron JA is guilty of 'anthropomorphisizing' blesboks; after all, several phrases have the potential to be read as emotional language. While this may well be the tone of some of the language used in the judgment, this does not detract from its logical coherence and is, in fact, somewhat of a red herring. Parliament has already made the decision that certain animal interests, particularly their welfare, are worthy of protection, by passing

[62] At 348, para [26].
[63] At 352, para's [33 – 36].
[64] At 353, para [50].
[65] At 352, para [44].
[66] At 353, para [48].
[67] Rule 22(3) of the Uniform Rules of Court.
[68] At 353, para [49].

legislation criminalizing conduct that falls short of an accepted standard. Cameron JA's judgment does not imbue animals with any greater protection than that already anticipated by the legislation. Indeed, Cameron JA's judgment is less about blesboks and more about the law than the judgment of the majority. This judgment does not confer rights on blesboks, nor does it require one to apply a rights based constitutional discourse to an environmental issue, and nor does it open the floodgates to environmental litigation by interdict. What it does do is evenly apply the law to statutory provisions irrespective of the subjects, and thereby takes a step against the prevailing current. It is the dissenting judgment which has the potential, ultimately, to advance environmental jurisprudence.

8 Subsequent judicial consideration of the *National Council* judgment: the *Natal Zoo* case

Despite the cautions and misgivings expressed above, it is the opinion of the authors of this Note that the judgment remains possessed of huge potential significance. While the majority judgment is likely to be quickly sidelined in the areas of civil procedure and the law of evidence, as a judgment which is both poorly thought through and unlikely to come to major prominence (given the overall subject matter of the case), the dissenting judgment arguably has the potential for relevance beyond its immediate effects.

Both of the majority and dissenting judgments have already been cited with approval (albeit in a confusing manner) in a subsequent judgment – this being the unreported judgment in *Natal Zoological Gardens (Pty) Ltd and Others v Ezemvelo KZN Wildlife and Others*,[69] in the KwaZulu-Natal High Court, Pietermaritzburg, before Swain J (the '*Natal Zoo*' case).

The *Natal Zoo* case ultimately required simply a decision as to which party was to bear the costs of an application. An administrative decision[70] taken by the respondents[71] concerning the granting of licences and permits to the applicants had been taken on internal appeal.[72] Pending the outcome of this appeal decision, the applicants had sought an interim interdict preventing the enforcement of certain conditions attached to the licences and permits. An administrative appeal decision, taken after the application had been instituted, had rendered the application redundant. In the event, the internal appeal succeeded and the permits were set aside.[73] The court consequently pointed out that the application to court needed to be regarded as having been 'partially successful' as the enforcement of the conditions was predicated on their having been lawfully imposed in the first place.[74] The court then confirmed (as 'trite') the general rule that a successful party should be awarded costs, but cautioned that this was an issue in respect of which the court had a judicial discretion which it could exercise – importantly, the court added that 'moral and ethical considerations may enter into the exercise of the discretion of the court'.[75]

[69] Case 5945/09 [2009] ZAKZPHC 38 (13 August 2009).

[70] Acting in terms of the Natal Nature Conservation Ordinance 15 of 1974.

[71] Ezemvelo KZN Wildlife is the authority for biological diversity in the province of KwaZulu-Natal.

[72] At 1, para [1].

[73] At 2, para [2].

[74] At 2, para [3].

[75] At 2-3, para [4].

Counsel for the respondents had argued that the applicants ought to pay the respondents' costs, based on the contention that the applicants had been unable to establish any reasonable apprehension of injury.[76] They contended that the application had been misconceived, and was in fact unnecessary, as any of the steps which the first respondent could have taken to enforce the imposed conditions were themselves subject to the right of appeal held by the applicants.[77] Thus there was no apprehension of harm.

The test, said the court, of whether there is a well-grounded apprehension of irreparable harm is an objective one. The question that needs to be asked is whether 'the reasonable man, confronted by the facts, would apprehend the probability of harm'. For authority for this proposition, the court relied on no other case than *National Council of Societies for the Prevention of Cruelty to Animals v Openshaw* ('*National Council*').[78] Still relying on *National Council*, the court said that the applicants do not have to show that injury would have followed, but only that it was reasonable for them to have apprehended injury. It was, however, for the court to decide whether there was any basis for the entertainment of a reasonable apprehension by the applicants.[79]

In order to resolve the issue of whether it was reasonable for the applicants to apprehend injury, argument was focused on two main areas:[80] firstly, an examination of the pre-litigation correspondence between the parties, to determine how the first respondent responded to several requests by the applicant for an undertaking not to enforce, pending the outcome of the appeal, the conditions imposed on the licences and permits;[81] and, secondly, the legal remedies available to the applicants, in the relevant legislation, to resist any attempts by the first respondent to enforce the disputed conditions.[82]

It appears that the applicants had made several attempts to procure the requested undertaking but that the first respondent made it clear that they would enforce compliance with the conditions, even before finalization of the appeal. The respondents stated that its interactions with the applicants were governed at all times by its concern for the welfare of the animals which the applicants possessed and controlled; and that it was this concern which rendered the respondents unable to agree not to enforce any of the conditions attached to the permits and licence in question.[83]

The court then reasoned that this led to the second debated aspect: what remedies were available to the applicants to challenge any withdrawal of the zoo registration, licences and permits and the possible confiscation of animals themselves in terms of relevant legislation.

The court then pointed out that an appeal lies[84] to the MEC in respect of a refusal to grant a permit to keep captive an indigenous or an exotic animal – or against the attachment of conditions to such a permit.[85] However, not subject to an appeal in

[76] At 3, para [5].
[77] At 3-4, para [5].
[78] At 4, para [7]; with reference to 347C [para [24]] of *National Council*).
[79] At 4, para [8]; with reference to 347D-E of *National Council*.
[80] At 4, para [9].
[81] At 5, para [9.1].
[82] At 5, para [9.2].
[83] At 7, para [11].
[84] In terms of s 89 of the Ordinance.
[85] Section 80.

terms of the Ordinance is the refusal to grant a licence in respect of a zoo[86] or to register a zoo[87] or the attachment of conditions to any registration or licence.[88] Confiscation of indigenous or exotic mammals is subject[89] to an appeal to the MEC.[90] However, not subject to any appeal is the confiscation[91] of any indigenous amphibian, invertebrate or reptile.[92] The court concluded that there is no right of appeal in respect of a refusal to grant, or the attachment of conditions to, the grant of a licence or to register a zoo and that, regarding the confiscation of animals, it is only in respect of indigenous amphibians, invertebrates and reptiles that no appeal lies.

What was indicated, per the court, was that the lodging of an appeal by the applicants would not deter the respondents from seeking to enforce any conditions attached to the permits in question.[93] According to the court it was, therefore, 'clear' that the first respondent intended to enforce the conditions attached to the permits or licences issued regardless of the appeal, or any future appeals, lodged by the applicants. However, said the court, this attitude could only cause an appreciation of irreparable harm on the applicants' part if it had, as a reasonable consequence, confiscation of animals or a criminal prosecution. Either of these eventualities could be legally challenged (on an urgent interim basis) before this court, on the basis that the enforceability of the contravened condition was subject to appeal.[94]

In regard to the zoo licence and registration issue, and the confiscation of indigenous amphibians, invertebrates and reptiles where no right of appeal lies, any attempt to institute a criminal prosecution or to confiscate animals could likewise be legally challenged. Such legal challenge could be on an interim urgent basis before the court (by invoking the provisions of the Promotion of Administrative Justice Act[95] in respect of the zoo licence or registration) or by review proceedings (in respect of the conditions imposed in respect of specified amphibians, invertebrates and reptiles).[96]

Consequently, according to the court, 'in my view, the applicants have not established that they entertained a reasonable apprehension of irreparable injury if the interdict was not granted'.[97] On the other hand, 'weighed against this', the court acknowledged that the applicants were faced with a refusal (by the first respondent) to furnish any undertaking, as well as an insistence on enforcing the conditions in the interim – 'albeit', added the court, 'that the motivation was the welfare of the animals'.[98]

On the only issue actually before the court, the question of which side should pay costs, the court then stated that, considering all that it had already canvassed and in the exercise of its discretion, it was its view that this was not a case where either of the parties should be required to pay the other party's costs. Although the applicants

[86] Section 85.
[87] Section 83.
[88] At 8, para [14.2].
[89] In terms of s 89C of the Ordinance.
[90] At 9, para [16.1].
[91] In terms of s 110 of the Ordinance.
[92] At 9, para [16.2].
[93] At 10, para [18].
[94] At 10-11, para [19].
[95] Act 3 of 2007.
[96] At 11, para [20].
[97] At 11-12, para [21].
[98] At 12, para [22].

had not possessed a reasonable apprehension of irreparable injury, this was not a case where they should be ordered to pay the respondents' costs as due regard had to be had to the fact that the applicants were substantially successful. 'Likewise', said the court, this was not a case where the respondents should be ordered to pay the applicants' costs, 'particularly as it [was] clear that the refusal to furnish an undertaking was dictated by concern for the welfare of the animals housed in the Zoo and Lion Park'.[99]

The court then drew the judgment to its conclusion by suggesting that the issue of whether or not the conditions imposed by the first respondent for the welfare of the animals were reasonable or necessary was not for it, the court, to decide. According to the court, in this regard there were a number of 'hotly disputed issues' between the parties. The court saw fit to add, however, that 'I can say, however, that I am left with a deep and abiding concern for the welfare of these animals'. The court then described as 'aptly put' the following paragraph from Cameron JA's dissenting judgment in *National Council*:

> Though animals are capable of experiencing immense suffering and though humans are capable of inflicting immense cruelty on them, the animals have no voice of their own. Like slaves under Roman law, they are the objects of the law, without being its subjects.[100]

The court's final order was that each party should pay its own costs.[101]

9 Conclusion

Leaving aside the many inconsistencies in the *Natal Zoo* judgment, (*inter alia*, firstly, that there is no reasonable apprehension of harm if there is a legal remedy in the form of an urgent application to court and that this precludes bringing an ordinary application to court and, secondly, the glaringly obvious oversight that even in the face of an express refusal to desist from a course of action, apprehension of harm only occurs when the action has actually commenced), what Swain J does is draw from both the majority and the dissenting judgments in *National Council*. The judge[102] relies on the majority judgment in respect of the requirements for the reasonable apprehension of harm; although the present writers have argued that these were inadequately applied in *National Council* and, arguably, are incorrectly applied here.

Swain J then relies on the dissenting judgment[103] for authority for taking his 'deep and abiding concern for the welfare of [] animals' into account in his judgment. It is obvious that Swain J *did* take the welfare of the animals in question into account – his suggestion, made twice, that the respondents had been motivated by concern for animal welfare[104] was clearly a factor which he took into account in reaching the decision he reached.

Swain J's quoting, with approval, of Cameron JA's dissenting judgment in respect of animals having no voice of their own[105] might be viewed at first glance as an *obiter dictum*. Arguably, in fact, the *dictum* goes to the very heart of the judgment. Just as

[99] At 12, para [23].
[100] At 12-13, para [24]; with reference to 351B-C of *National Council*).
[101] At 13, para [25].
[102] At 4, paras [7] and [8].
[103] At 12-13, para [24].
[104] At 7, para [11]; and at 12, para [22].
[105] At 13, para [24].

Cameron JA found[106] that the NSPCA's role goes beyond merely preventing the ill-treatment of animals and extends to legal representation to the appropriate authorities, so Swain J impliedly finds that the respondents' roles require that they be pro-active, and as unhindered as possible, in addressing issues concerning animal welfare – the court by implication finding, in making the costs order it made, that the respondents ought to be as untrammelled as possible in fulfilling these roles.

As Swain J found, 'moral and ethical considerations may enter into the exercise of the discretion of the court' in determining costs awards.[107] These considerations appear to have been prominent in the judgments of both Cameron JA and Swain J.

As suggested earlier in this Note, in the *National Council* case it is the judgment in dissension which has the potential, ultimately, to advance environmental jurisprudence – in this case, in the form of advancing considerations of animal welfare. It was suggested also that *National Council* was a case in which the dissenting judgment is, strongly arguably, of far greater interest than that of the majority. These suggestions are, the present writers submit, strongly borne out by the *Natal Zoo* case – in which case the court focused significant attention on the dissenting judgment of Cameron JA.

If this is correct, and future decisions build on the *National Council* and *Natal Zoo* cases, then the sacrifice of the anonymous blesbok to advance animal welfare considerations in law may prove to have been of benefit far greater than merely to the tiger which probably ate it.

[106] At 350, para's [34]-[36].
[107] At 2-3, para [4].

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