

# Distilling legal principles for STBG in SADC

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## Outline of the presentation



- **Introduction**
  - PAs, TFCAs and biodiversity



- **Relevant legal frameworks**
  - International
  - AU
  - SADC



- **Gaps and weaknesses**
- **Tackling the challenges**
  - Back to the basics



- **Principles for STBG**
- **The way forward**

## Background



- **Management of PAs (and therefore TFCAs) not successful**
- **WHY? – one of the indicators - Biodiversity**
  - Extinction rate 1000 times the background rate (GBO 3, LPR and GEO)
  - PAs are the cornerstone of biodiversity conservation
    - UNDP/GEF *Protected Areas for the 21<sup>st</sup> Century* (2010)

## Background



- **PAs global coverage**
  - 1970 – 2 mil sq km
  - 2010 – 18 mil sq km
  - +- 130 000 PAs globally
  - +- 225 TFCAs
- **Reasons for lack of success?**
  - Decision making and policy constraints (GBO 3)
  - Lack of management plans (UNDP/GEF)
    - 90 000 PAs MP yet to be developed

## Background



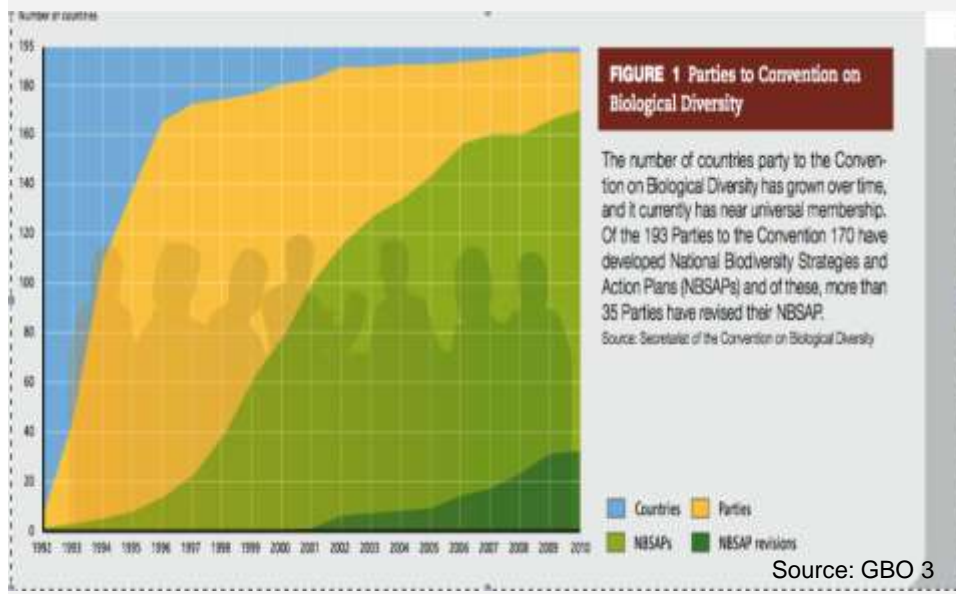
- **Decision making relies on law**
- **More specifically in a TFCA, relies regional and sub-regional law**
- **Article 5(3) of the GLTP Treaty:**  
 “The Parties undertake to follow relevant **regional and international treaties and protocols** in the **development and management** of the Transfrontier Park”

## International law - CBD



- **Main provisions**
  - Conservation
  - Sustainable use
  - Access and benefit sharing
    - Draft Nagoya Protocol (article 8)
  - Sovereignty
- **Provisions for TFC?**
  - Article 4 – provisions may apply beyond national jurisdiction
  - Article 5 – cooperation in matters of transfrontier importance
  - National Action Plans may coordinate and harmonise law and policy

## International law – CBD (2)



## International law



- **Ramsar Convention**
  - Convention only applies to designated RAMSAR sites
    - (49 in SADC)
  - Article 5 – parties must consult where wetlands traverse borders
  - Transboundary Ramsar Sites (TRS)
    - Provision for joint management plans
    - None designated in SADC
- **CMS Convention**
  - Calls for international agreements
  - Only 6 ratifications in SADC (only SA and Mozambique share borders)
- **World Heritage Convention**
  - Relies on national legislation
  - 7 SADC states have adopted national legislation
  - No transfrontier provisions
- **CITES**
  - Regulates trade in *fauna* and *flora*
  - No explicit provisions for transfrontier conservation may have indirect effect
    - Controversial ban of ivory trade

## AU law



- **African Charter**
  - Article 24 - right to a satisfactory environment
  - No transfrontier provisions
- **Treaty of the AEC**
  - General environmental provision for harmonisation
  - No transfrontier provisions
  - Establishes RECs (SADC)
- **African Convention of Nature and Natural Resources (1968)**
  - Sustainable development
  - Article 2 – higher responsibility on states with high levels of endemism
    - SADC – biodiversity hotspots
  - No provisions for transfrontier conservation
  - Convention has no COP nor secretariat

## SADC law



- **Protocol on Forestry**
  - Harmonisation and cooperation
  - No transfrontier provisions
- **Protocol on Shared Watercourses**
  - Article 4 – states **shall jointly protect watercourses**
    - Pollution control
    - Invasive species
    - Conservation of the aquatic environment
- **Protocol on Wildlife**
  - Main provisions geared towards institutional mechanisms
  - Article 4 – recognises and urges states to establish TFCAs and cooperate and integrate law and policy to manage shared resources
- **Protocol on Fisheries**
  - Harmonisation and cooperation
  - No transfrontier provisions

## Gaps and Weaknesses



- **Provides for harmonisation and cooperation**
  - No substantive arrangements
- **No provisions for PAs**
- **'Silo' approach to biodiversity conservation**
- **No substantive provisions contributing directly to transfrontier biodiversity conservation**
- **RESULT?**
  - Fragmentation and legal uncertainty
  
- **Ironically the efficacy of TFCAs relies heavily on treaty-based measures**

## Tackling the challenges



- **TFCAs new development in SADC**
- **New challenges needs to revert back to the basics and not rely on *ad hoc* solutions (Verschuuren and Oudenaarden 2004)**
- **What are the basics?**
  - Legal principles (Dworkin, Alexy, Taekema) Potential principles (Lang)
- **Why legal principles?**
  - Flexible and open-ended
  - TBG needs this approach:
    - Biodiversity
    - Geographical
    - climatological
    - demographic
    - social
    - economic
    - institutional
    - Legal
  - Principles have wider acceptance than rules (De Sadeleer 2004) **Very important in AU and SADC context**

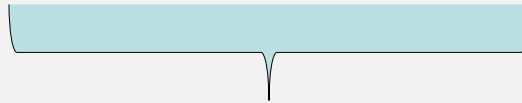
## Sustainable Transfrontier Biodiversity Governance (STBG)



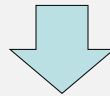
- Sustainable Development
- Biodiversity
- Governance



Transfrontier context



**Principles**



**STBG**

## Core Principles for TFCAs



- **Core Principles (New Delhi Declaration 2002)**
  - Sustainable use
  - Equity and poverty alleviation
  - Common but differentiated responsibilities
  - Precautionary approach
    - Human health
    - Natural resources
    - Ecosystems
  - Public participation; access to information and justice
  - Good governance
  - Integration and interrelationship
    - Human rights
    - Social circumstances
    - Economic circumstances
    - Environmental factors

## Complimenting principles



- ***UNEP Principles of Conduct in the Field of Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States 1978***
  - Principle 1 – Cooperation
  - Principle 2 – Conclude binding agreements
  - Principle 3 – Sovereignty
    - Capabilities of States
  - Principles 4 – 15
    - Procedural matters – access to information, access to justice etc

## Framework Principles for STBG



- **Cooperation based on differential equality (CBDR)**
- **Codification and enforceability**
- **Custodial sovereignty (Scholtz 2008)**
- **Procedural fairness**
- **Good governance**
  - Participation
  - Correct model of governance (IUCN)
- **Sustainable use**
- **Precautionary principle**
- **The principle of Best Practice**
- **Integration and interrelationship**
  - Principles themselves
  - Human rights
  - Social circumstances
  - Economic circumstances
  - Environmental factors



## Best Practice (1)



- **Ecosystem services approach**
  - Integration or designation of law pertaining to
    - Invasive species
    - Land use planning
    - Natural resources
    - Infrastructure, transport and energy
- **Sustain livelihoods**
  - Sustainable use
  - Tourism
  - Safeguards and thresholds
  - Equitable benefit sharing
  - Procedural rights
- **Compulsory management plans**
  - Conservation goals
  - Identifies resources and threats (eg diseases)
  - Ecosystem services
  - Sustainable livelihoods
  - Climate change

## Best Practice (2)



- **Effectiveness assessments**
  - Research
  - Monitoring
  - Adaptation
  - Update management plans
  - Capacity building
- **Stakeholder engagement**
  - Not only local communities but all IAPs
- **Threat assessments**
  - Diseases
  - Climate change
- **Valuation studies**
  - Ecosystem services
  - Sustainable livelihoods

## The way forward



- **Principles must be adopted in the form of a SADC Protocol**
- **Serve as a guiding document or framework for Establishing Agreements**
  - create a normative framework for making decisions
  - Will give stakeholders procedural rights and remedies
  - Legal certainty
  - Legitimacy of decision making

