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Political and Institutional Arrangements for the Development of TBCA
International Environmental Law as Support and Assistance for the Creation of TBCA's

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Introduction

The decision to adopt a “transboundary” mechanism for to promote the achievement of particular objectives, or to attempt to solve particular problems of conservation and sustainable use of valuable or important ecosystems and habitats is a very difficult one. The cost, in both time and money, of the process of establishing such areas can be significantly larger than the cost of full implementation of an existing or new single-jurisdiction protected area.

Once that decision is made and the commitment of human and financial resources begins, it is important that the legal elements of the process be handled effectively. The legal tools must assist in the development of Transboundary Protected Areas (TBPAs).¹ Even more than domestic protected areas, TBPAs can only be created once. It is rare that the international agreement by which a TBPA can ever be revised or rewritten. Hence, the Parties usually have only one chance to create a legal and political framework that will support and foster effective implementation and management of a new TBPA.

While law has many “faces” for many different situations, this paper discusses it in terms of the legal “tools” available to countries or sub-national units seeking to develop a mechanism for transboundary co-operation in conservation and sustainable use of protected habitats or ecosystems.

Kinds of Law

The law is not a single “flavour” there are numerous types of law, all of which should play an important role in the TBPA process.

- **International Law:** Multilateral (Global) Environmental Agreements, other treaties, and “international customary law” (practices that are generally accepted by so many countries that the international tribunals consider them to be requirements imposed on all countries) constitute international “hard law” (binding on the governments to whom it applies.) There are also many kinds of “soft law” (non-binding or voluntary documents, such as guidelines, voluntary codes of conduct, memoranda of understanding, recommendations, etc.);

¹ The phrase “Transboundary Protected Area” is only one of several options (including “peace park,” “Transboundary Conservation Area,” and “Transfrontier Protected (or Conservation) Area.”) There is no legally preferred choice of term, given that each such area will vary greatly from all others in the mix of factors that affect the manner of its naming on designation. The author does not believe that there is any value in developing a standard set of terminology, apart from making the writing of papers like this easier. This paper uses the “Transboundary Protected Area” – the option which, in the author’s opinion, offers the least chance of misunderstanding.

- **Negotiated Law:** Bilateral and multilateral agreements (such as Agreements establishing TBPAs) are generally like contracts. Contracts can be thought of as “negotiated law” – the parties agree to their provisions, and those provisions become as enforceable as any other law that is binding on the parties. Sometimes, after the agreement is in force, the parties have disputes concerning what certain provisions mean in particular situations. These dispute can be settled by law (either by interpretation of the language of the agreement, or by applying rules from other sources of international hard law)
- **National Policy, Law and Regulations:** International law and the negotiated agreement cannot possibly cover all aspects of protected area management that will be relevant to the TBPA. Hence, national legislation and institutions will play an important role in all stages of creating and implementing a TBPA. One of the greatest challenges of this process will be finding ways to integrate, co-ordinate, or operate within the different national legal, administrative and judicial structures of the countries involved.
- **Subnational Law and Regulations:** Increasingly, conservation responsibilities are being devolved (decentralised.) In many recent situations, most of the work in the development, and even the negotiation of TBPA has been undertaken by subnational units (provinces, states, etc.), particularly in federated systems.
- **Local law and custom (traditional law):** In many cases, with regard to protected areas, devolution of authority and involvement has extended to the most local level (municipalities, villages, traditional communities, etc.) Integrating this level of legal provisions, as they apply surrounding and within the proposed TBPA will often be a particular and difficult challenge.

How can International Law be Useful in the Creation of TBPA?

Many misperceptions exist regarding international law and its application to TBPAs –

- Often it is expected that international law provides answers or a template for resolving questions or confusions among the parties (this is rarely the case);
- by contrast, international law may sometimes be seen as a barrier (or at least an obstacle) to the creation of TBPA (also untrue).

On the other hand, it is essential to have a clear understanding of what international law is and does. At base, one should understand that international law is entirely different from national and sub-national law in virtually every respect. In its most summarised form, that difference can be described as follows:

- International agreements are intended to provides an input into basic decisions of sovereign governments that are parties to the international agreement. They set internationally agreed *objectives and mandates*, but they are generally not intended or written in a way that they can automatically be binding law of the country.
- Where a country has become a party to a Global (or bilateral) Environmental Agreement, it has made a policy decision at the highest level to adopt and seek to fulfil the objectives of that agreement. All levels of government should be able to rely on this decision, in developing and implementing proposals.

- The countries that become parties to an international agreement then have the obligation of implementing those commitments, by passing national law. It is only through this mechanism that the country decides how it will achieve the agreed mandates. This is the only step in which the particular duties of private citizens, corporate entities, and even government agencies, and others are stated.

International law, therefore, does not provide a roadmap for implementation. It can, however, provide a basis for cross-border communication, including describing key concepts, standards, principles and approaches.

In addition, international law provides at least some of the benefits of an enforcement mechanism. Although this mechanism is not always effective in making countries comply, it is very useful in giving key information regarding the manner in which key concepts are interpreted.

▪ **International Agreements that are Most Relevant to TBPA**s

A number of global agreements contains provisions that are relevant to TBPA and their objectives. These include the Convention Concerning the Protection of the World Cultural and Natural Heritage (the “World Heritage Convention”), Convention on Wetlands of International Importance (Ramsar), Convention on Biological Diversity (CBD), UN Convention on Law of the Sea (UNCLOS); Convention on Trade in Endangered Species of Fauna and Flora (CITES); Convention on Migratory Species (CMS); UN Framework Convention on Climate Change (FCCC); UN Convention to Combat Desertification (CCD); and the World Trade Organisation (WTO) agreements and processes.²

▪ **World Heritage Convention and Ramsar Convention**

Of these, the most directly relevant are the World Heritage Convention and the Ramsar Convention. These offer a variety of potential tools and assistance for the creation of TBPA. There are many parallels in the operation under both of these agreements. Both are primarily designed around special designation of particular protected areas (as “World Heritage Sites” and “Wetlands of International Importance,” respectively.) Party Countries propose sites within their countries for these designations. If the designation is granted, the proposing Party thereafter is obligated to protect the site, and to meet certain other requirements with regard to it.

Under both Conventions, the Parties make a further commitment to protection of critical areas within their boundaries which are nationally important, even though not of international importance or possessing outstanding universal value.

As to all of their important heritage and wetland areas, the Parties have access to assistance in various forms, particularly guidance documents and technical assistance.

² Some of the most relevant WTO Agreements and institutions include the Trade-related Intellectual Property system (TRIPs), the Agreement on Sanitary and Phytosanitary standards (SPS), and the Agreement on Technical Barriers to Trade (TBT).

- **Convention on Biological Diversity and Law of the Sea**

A more general type of support for the creation and implementation of TBPAs is found in the CBD and the UNCLOS. The CBD's scope and coverage are extremely broad, including, in essence, all biological diversity on the planet. In this context, ecosystems are considered elements of biodiversity, as well as combinations of biodiversity and/or homes to biodiversity.

With regard to biodiversity, the CBD's three objectives may be briefly described as conservation, sustainable use, and equitable sharing of the benefits of genetic resources. To achieve these objectives, the CBD necessarily must focus on protection of critical areas and habitats as a primary component of biodiversity conservation. One part of this key activity is "*in situ* conservation" – a concept that includes as one of its primary tools the creation and effective management of protected areas. Included within this mandate is a call to enter into collaborative arrangements with other countries to promote the protection *in situ* of ecosystems and habitat areas. The CBD is currently in the midst of a process of developing its Workplan on Protected Areas.

In a similar way, the UNCLOS places a general mandate and requirement on all parties to promote natural resource management as to all ocean areas, including those that are outside of or that extend across national jurisdictional boundaries. It, too, includes a strongly worded requirement that countries collaborate to achieve environmental conservation within the oceans. The manner in which this mandate is being used to support the development of Marine Protected Areas in transboundary situations and in the high-seas may constitute an important legal precedent that may apply in terrestrial transboundary protected area and NRM situations.

- **Other Key Conventions**

Many other conventions offer important legal elements for consideration in transboundary NRM and transboundary PAs, including:

- CITES, which generally controls "trade"³ in particular species. It is unusual in imposing very strict mandatory requirements regarding what member countries must legislate relating to species trade.⁴ It has been adhered to by a very high percentage of the governments on the planet. In light of these two factors, CITES can be an important tool for negotiation and implementation of HSMPAs, by utilising the fact that the determination of which species are "endangered" or otherwise controlled under CITES is based in significant part on the status of the ecosystem on which the species depends, and the effect that harvesting has on that ecosystem. In recent years, CITES has taken major steps towards becoming the first true "sustainable development convention."
- CMS, although generally aimed at protecting particular listed species, directs its primary activities towards habitat protection – as the primary method of protection. Most interesting is the fact that habitat protection measures need not relate to areas within national jurisdiction.

³ In CITES, "trade" includes nearly all types of human induced transboundary movement of species and their parts.

⁴ Even as to these requirements, the Convention specifies the objective that must be met through binding legislative or pseudo-legislative processes and their implementation. It does not specify the legal mechanism to be used, nor the content of legislation, etc.

Countries take action to protect these areas in the ways that are available to them (controlling their own nationals endorsing voluntary guidelines, etc.), even if they cannot control all activities there. CMS has had a groundbreaking impact, through its use and promotion of a variety of new kinds of international mechanisms (Memoranda of Understanding and jointly agreed “action plans.”)

- UNFCCC offers certain incentives for the restoration of forested and grassy areas.
- UNCCD focuses on sustainable land uses.
- The agreements of the WTO agreements and processes (WIPO, TRIPs, SPS and TBT Agreements) may also have impacts on conservation activities. Efforts are currently underway to ensure a more active role for international conservation conventions in these processes.

- **International Institutions**

Institutions and programmes, including the UNESCO Man and the Biosphere Programme, the UN Environmental Programme (Regional Seas, Protected Areas, etc.), the UN Food and Agriculture Organisation, offer very useful vehicles for assisting in the creation of protected areas, including TBPA. In addition, IUCN’s World Commission of Protected Areas, through its Guidelines for Protected Area Management and various publications forming a TBPA toolkit, offers a great basis of assistance in this process.

Regional Agreements Addressing TBPA

A number of regional agreements already have addressed the creation of TBPA and regional PAs. These include the South Pacific Regional Environmental Programme, the Protocol on Specially Protected Areas and Wildlife in the Wider Caribbean Region, the African Convention on the Conservation of Nature and Natural Resources (Revisions in process), and the Barcelona and Bern Conventions (Europe). In examining regional examples, it may be particularly valuable to examine the affirmative frameworks created in two regions – the Mesoamerican Biodiversity Corridor, and the Danube Basin

Legal components of TBPA creation

The full description of the relevant legal issues in the creation of TBPA would require several volumes. In the current context, the most important question to be addressed may be – what steps must be taken by legal experts to assist in the process of achieving transboundary conservation and sustainable use objectives. These activities can generally be described in terms of (i) a “needs assessment”; (ii) presentation of the available options for legal “arrangement” memorialising the outcome of negotiations; (iii) development of a strategy for the process of TBPA negotiation/creation; (iv) advising in the negotiation and drafting of the arrangement; and (v) assisting the party countries in developing legislation, institutions and programmes towards meeting their obligations under the arrangement.

▪ **Needs Analysis:**

The needs analysis should be undertaken at the earliest possible moment that officials or others begin to seriously consider the creation of a TBPA or other transboundary natural resource management. Through an in depth examination of (among other things) relevant laws, policies, regulatory documents, institutions, and enforcement experiences in all sectors affecting or affected by the proposal or the area in question, the analyst may be able to provide the following basic background information:

- Identification of relevant problems or issues;
- Determination of the manner in which these problems break down among the national jurisdictions;
- Analysis of the objectives and results that are expected from the proposed arrangement;
- Initial analysis concerning whether and how a TBPA can help in achieving these results; and
- “Caveats” or uncertainties in these results.

In general, a more detailed needs analysis may be a “shortcut” that will lighten the burdens throughout the TBPA creation process (and thereafter in the process of establishment of implementing institutions and mechanisms.) Where information concerning the issues, problems and objectives of both sides is known early, the process and objectives can be better conformed at the beginning, to more easily meet with approval on both sides of the negotiating table.

▪ **Options for the Form of Arrangement**

One of the most neglected components of TBPA negotiations currently in development is the failure to consider all of the options for addressing the objectives of the parties. Among the options that should be considered are

- formal “Agreement” (TBPA)
- “joint arrangement” (including MoU and other informal arrangements) for management
- “joint arrangement” for enforcement
- EIA agreement or protocol
- bilateral/intra-regional network of PAs
- something else (private contract, public/private Joint Venture)

The immediate assumption that a formal agreement must be developed can be a serious mistake, and one which increases the cost (in time, money and delays) of the process, and ultimately curtail the practical value and implementability of the TBPA.

In addition, the importance of coming to some agreement quickly is often overlooked. In many cases, it is preferable to develop a lower level of agreement or a document covering a narrower scope of activities, in order to ensure that conservation matters of urgency are addressed quickly. This approach also enables the party countries to gain some experience in the particular type of co-ordination proposed, and may increase the efficiency of the broader agreement when it is finally agreed.

- **Strategy development**

While the strategy of the negotiation is primarily a political matter, the legal expert may be able to provide critical information, and ensure that the negotiating team has reasonable expectations of the possible results and time necessary to obtain them.

It can address the possibilities of a variety of “levels of agreement” – many of the options described above may be entered into between the two countries ministers responsible for the relevant types of conservation, rather than engaging in the much lengthier process of obtaining agreement at the national (plenipotentiary) level. In some cases, various issues to be addressed in the negotiations may be decided at different levels. An initial strategic agreement regarding the level at which particular issues will be agreed, and the manner of that agreement may go far in expediting the negotiations.

- **Advice in negotiations**

While legal advice is usually requested in the negotiations, its role is often not understood. It is most effective where it addresses matters of (i) procedure (how the process should work); and (ii) “comparative” law (differences in national governance, mandate, and legal terminology which might be unintentional confounding factors in the negotiations).

- **Legislation and compliance at the national and other levels**

One of the least recognised problems in the creation of TBPA is the difficulty that parties have in developing national legislation and institutions to meet their international commitments. In this, they face many pitfalls, including the need to ensure that provisions get through Parliament without changes that alter its ability to satisfy the requirements of the international commitment. Moreover, it is often necessary to reconfigure other laws, to endow relevant agencies with authority to take cross-border action, or even, in some cases, to enter into official communication with officials from the other party country(ies).

Conclusion

In a number of cases, TBPA or similar negotiation processes may be critical to the success of the parties in meeting key conservation objectives, and mandates under international agreements. In this process, the sharing of experience and process development will be crucial factors, enabling the development of clearly stated needs and mandates of the proposed area. If the lessons from the law can be helpful, it will primarily be in addressing the difficult balance between the need for flexibility and the need for clear, binding provisions.

Although the foregoing discussion addresses only the rudimentary outline of issues for the creation of TBPA and other transboundary conservation arrangements, it should be noted that their implementation will open a new “Pandora’s box” of legal issues as well as opportunities for the law to be a positive tool in solving problems and producing the desired results.