



## TRANSBOUNDARY CONSERVATION SPECIALIST GROUP (TBC SG)

### RESULTS OF LEGAL CONCEPT PAPER SURVEY

The Transboundary Conservation Specialist Group (TBC SG) of the World Commission on Protected Areas (WCPA) aims to develop a legal concept paper which will present an agenda for legal scholarship for transboundary conservation. A survey containing open-ended questions was conducted to identify globally relevant legal and institutional issues and challenges and highlight regional nuances.

Members of the TBC SG and WCPA's Law and Protected Area Task Force were invited to participate in an online survey. Survey questions were accompanied by a summary of issues to provide a framework within which participants could respond. Survey participants were asked to evaluate the extent to which they agreed with the summary of issues presented and to respond to further more specific questions.

The results of the survey were presented to the TBC SG to allow survey respondents to comment on whether their responses have been interpreted correctly and to enable others highlight what else may be important. These initial results are presented here. The Legal Concept Paper is being developed from a further synthesis of the survey results and additional comments.

Many thanks to everyone who participated in the survey. Your time and ideas are much appreciated. Special thanks also to Maja Vasilijevic (TBC SG Chair) and Prof. Paul Martin (Director, Australian Centre for Agriculture and Law, University of New England) for their input.

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## GENERAL ISSUES

Four issues were presented to survey participants as the key issues for effective transboundary conservation:

- 1) The importance of political will and good governance;
- 2) The need for more effective legal instruments and further scholarship on the legal issues surrounding transboundary conservation;
- 3) The need to address institutional issues in tandem with legal ones; and
- 4) The need to address funding and capacity issues.

Participants were asked to indicate if any additional issue/s should be addressed.

Additional issues raised included the importance of effective dialogue and the need to consider the political realities of regional communities and the international community. Responses highlighted the need to address the legal, institutional, cultural and differences between the countries and the importance of linkages between transboundary conservation and socio-economic and cultural issues, sustainability, peace and conflict.

One response stressed the importance of ecological approaches and the need for transboundary approaches to the management of ecosystems as 'a natural scientific necessity'. Similarly, another response stated the need for neutral platforms to facilitate science-based cooperation as well as investment in infrastructure and research. The need for long-term monitoring was also raised as an issue.

Two responses highlighted the need to consider marine and coastal situations and Areas Beyond National Jurisdiction (ABNJ).

Some responses emphasised the importance of the issues presented or issues discussed under one of the four main issues of the survey. Responses referred to the importance of participation and also highlighted the need to harmonize legislation within and between participating countries. One response indicated the need for support of legal instruments and institutions not only by countries directly involved in transboundary initiatives but also neighbouring countries and international institutions (e.g. UN, regional governance structures (European Commission, African Union) and the IUCN). One response called for a legal framework to enable joint management between government institutions within and outside protected areas. Another highlighted the need for legal instruments which support payment for environmental services and establish compensation mechanisms. The need for equitable sharing of costs and benefits was also highlighted in the responses.

## Q1 POLITICAL WILL AND GOOD GOVERNANCE

Q 1 was accompanied by this summary of issues:

Transboundary conservation involves multiple institutions at various levels of political organization.<sup>1</sup> Endorsement of transboundary initiatives by authorities and stakeholders at each level of political organization is one of the most important components of the transboundary process. Initiatives should actively involve stakeholders at every level to enable the meaningful contribution of each level to the process.

The meaningful incorporation of local efforts is essential. However, local communities are often excluded from the negotiation of their rights in the broader transboundary conservation process. It is necessary to link the overarching goals of the transboundary initiative with sustainable use and to include place-specific information in the design of initiatives. Scientific knowledge should be considered in combination with traditional local knowledge and transboundary conservation goals should include benefits for local communities. International law lacks the means of ensuring compliance that is found within domestic law. It is therefore crucial to gain the sincere support of states for transboundary initiatives.

To strengthen the political will for biodiversity conservation the true value of biodiversity needs to be recognized at each level of political organization. Appreciation of the value of transboundary collaboration in the place-specific context is also important. The development of indicators which demonstrate the value of the ecosystem services from the transboundary conservation initiative is one way in which to develop support for the establishment and long-term maintenance of transboundary initiatives.

Successful transboundary management requires good governance at all levels of political organization. It is therefore important to establish transparency and accountability between higher and lower levels in the control of land and resources.<sup>2</sup>

**Respondents were asked the following questions:**

- **Does the hypothesis above provide an accurate representation of the issues? Yes/No, Comments.**
- **Please indicate further challenges for garnering political will and fostering good governance.**
- **What measures can/have enhance/d political will and foster good governance?**
- **Give examples of instances where initiatives have successfully communicated the values of biodiversity conservation to the stakeholders involved with transboundary conservation?**

***Does the hypothesis above provide an accurate representation of the issues?***

***Yes/No, Comments:***

Most respondents answered 'yes'. One respondent answered 'no' as they felt that ensuring community participation was not enough in itself. One respondent did not provide a yes/no answer but rather indicated that in the Middle East political will at national government level was more important than community level decision making.

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<sup>1</sup> Harry van der Linde et al, *Beyond Boundaries: Transboundary Natural Resource Management in Sub-Saharan Africa* (Biodiversity Support Program, 2001) 28.

<sup>2</sup> van der Linde et al. above n 1, 112.

Most respondents elaborated on or qualified their 'yes' statement. The additional points raised were the additional complexity of the cross-border dynamic; the need to consider poverty issues and the dependence of local communities on local resources.; that the strengthening of local efforts must also include actions at the level of individual protected areas and enabling interaction and collaboration with counterparts across international boundaries; the need for appreciation of the true value of biodiversity and the value of transboundary collaboration was also emphasized. From this a call was made for investment in thorough biodiversity inventories that demonstrate the importance of biodiversity and the economic importance of ecosystem services. Other recommendations included the creation of an inventory of ongoing activities and an analysis of the economic and political issues in order to provide a common starting point from which to discuss transboundary collaboration.

Qualifications to 'yes' responses stressed that only considering local community interests is insufficient. Other issues that should be taken into account include the need for collective education on all sides; using the concept of ecosystem services to enable parties to understand the dollar value of the assets of transboundary conservation; establishing greater prominence of field level management structures and cooperative relationships between Protected Area managers on both sides of the border.

Other qualifications included the need to acknowledge the increase in transaction costs when working across political boundaries; and to establish ecological and economic baselines and predetermined measures of success; and that all transboundary areas are different; and acknowledge that initiatives should not limit themselves to considering legal endorsement and recognize that the actual challenge is to make activities operational.

***Please indicate further challenges for garnering political will and fostering good governance:***

Challenges were identified at the international, transboundary and local level.

The challenges identified at the International/transboundary level included insecurity and political unrest; the mismatch between contemporary issues which do not recognize borders and the concepts of sovereignty and the nation state; illegal trans-boundary trade linked to corruption; transboundary conservation driven by donor interests which are generally short-term with limited objectives.

The challenges identified due to the difference between participating countries included different languages in participating countries; different interests regarding the area selected; different institutions, varying levels of capacity and governance on each side of the boundary. One response stressed the need for a thorough understanding of and respect for the differences between participating countries because progress only occurs as fast as the slowest participant.

The challenges identified at the local and protected area level were the challenge of ensuring real participation of all levels of political organization and of establishing adequate institutional frameworks to ensure representation of local stakeholders in decision making processes; the lack of local capacity to implement well structured and resourced programs; and the need for local stakeholders to have robust internal communication and transparency to facilitate their engagement with higher levels of

governance; and lack of will at the Protected Area Authority level when Protected Area Authorities do not recognize the importance of transboundary collaboration and/or the benefit of this collaboration to protected area governance. One response recommended that caution should be applied to prevent the transboundary collaboration process from being used for individual political gain particularly when this can have a negative impact at the local level.

The challenges identified in linking the various levels in the transboundary process included differences across the scales of organization in the transboundary collaboration process (between local and regional and international, between urban and rural within a country); Reconciling international and national goals with local aspirations without imposing the former on the latter; and artificial local problems created by international and national level tensions. Other challenges included that of providing scientific evidence of ecological, economic and political benefit; the length of time involved and doubts over whether transboundary protected areas deliver on the claimed benefits for peace, biodiversity and tourism.

### ***What measures can/have enhance/d political will and foster good governance?***

Most responses to this question emphasized the importance of local stakeholder participation, clear objectives and recognition of the importance of natural resources and transboundary collaboration.

Responses that recommended bottom-up approaches and the involvement of local level stakeholders emphasized the importance of shifting the focus from high-level meetings to the involvement of all levels during transboundary negotiations. It was also suggested that the bottom-up approach should incorporate negotiations between the highest levels of government but not be overtaken by higher level objectives. Responses also recommended bottom-up processes that force accountability of the state to the local level; broad participation to ensure transparency, accountability and continuity; local autonomy and decentralised decision making; strong trust and coordination between contiguous Protected Areas as the foundation for government support at a higher level; ensuring that communication with local communities is not restricted to community leaders; demonstrating that illegal trade can be tackled at the grass-roots level; having a neutral platform and an ad-hoc mechanism for local communities to work together and enable non-political, science based cooperation; regular meetings between cross-border stakeholders, particularly decision-makers.

Other responses stressed the importance of recognizing the value of biodiversity and transboundary collaboration as measures to enhance political will and good governance. Recommendations included advocacy of the importance of the natural resources at play; acknowledging the importance of ecological connectivity across borders; recognizing the value of ecosystem services. The value of access to ecosystem goods was highlighted as having the potential to play a significant role in motivating transboundary conservation. One response indicated that conservationists have been slow to package biodiversity arguments within the context of ecosystem services. Similarly another response recommended biodiversity maintenance and recognition of its dollar value, its potential to stimulate the economy and future value. Linkages to economic benefits and local and/or national/regional pride was provided as an additional way to enhance political will and encourage good governance.

One response highlighted the importance of long-term efforts of an individual or organization willing to champion the cause of transboundary conservation to help make it a reality. It was indicated that NGOs have often filled this role and that once a transboundary project looks like it will be successful political support will often follow. Another response stated that well trained negotiators (as opposed to diplomats in the traditional mould) could help bring people to consensus over issues like a transboundary park. One response pointed to neofunctionalist arguments of working together across a variety of issues.

The legal and institutional issues raised included the need for clear boundary and usage rules as well as clear means of adjudication; a clear legal framework that creates an 'enabling environment'; nested approaches to territorial plans; strengthening capacity of relevant organizations building up to the national and transnational level.

***Give examples of instances where initiatives have successfully communicated the values of biodiversity conservation to the stakeholders involved with transboundary conservation?***

The initiatives cited included Kgalagadi Transfrontier Park; Waterton- Glacier International Peace Park; Maloti-Drakensberg Transfrontier Project; Finnish-Russian Transboundary Project in Karelia; Mercantour/Alpi Marittime National Parks (France/Italy); Conservation of the Cross River Gorilla across the Cameroon-Nigeria boundary; The Transfrontier Conservation Areas of the Peace Parks Foundation in Southern Africa; The Sulu Sulawesi Marine Ecoregion; Transboundary initiatives of the International Centre for Integrated Mountain Development (ICIMOD); Parque Internacional La Amistad.

One response listed 'mountain gorillas conservation'. This has been interpreted as International Gorilla Conservation Program's (IGCP) project in the Virunga-Bwindi Region.

Some respondents elaborated on the examples listed. The Maloti Drakensberg Transfrontier Project was cited to demonstrate the feasibility of establishing agreements for the Payment for Ecosystem Services which relate to watershed/catchment services. The response indicated that although this had yet to be implemented there had been continuous support for the concept from within the National Department of Water Affairs and the South African National Biodiversity Institute. The response also indicated an agreement to deliver water through the Lesotho Highlands Water Authority between South Africa and Lesotho had been concluded. The response lamented the lack of direct biodiversity conservation benefits from the agreement but indicated that such agreements provide a basis from which to work.

In the Sulu Sulawesi Marine Eco-region, WWF worked for 10 years with the three countries surrounding the Sulu Sulawesi seas to build support and implement collaborative projects at the local and national levels. This enabled the 3 governments to sign an MOU which expanded into the much larger 6 country CTI. Stakeholder support is described as being critical to achieving this outcome.

The Mountain Gorilla's initiative was cited as an outstanding example of successful implementation of the bottom up approach. The response indicated that this approach led to a dramatic change in the response of local stakeholders.

Other examples included joint celebrations and festivals such as those between Mercantour/Alpi Maritime National Parks (France/Italy) which provided the opportunity to communicate biodiversity values to stakeholders and cross river gorilla conservation across the Cameroon-Nigeria boundary which involves governments and communities at different levels. A further response indicated that initiatives most successfully communicate the values of biodiversity to stakeholders where a direct economic benefit is demonstrated.

***Which elements are essential for effective governance (eg. shared vision, financing mechanisms, sufficient capacity, empowerment of local stakeholders etc). ?***

Many of the responses indicated the importance of one or all of the examples cited in the question. A majority of responses indicated the essential nature of common interests and a shared vision. A variation on this response was that parties at all levels need to recognize a clear shared benefit from transboundary collaboration. Many responses indicated that capacity was essential. One response indicated the need to consider the capacity of various stakeholders to exert influence. Another called for peer-assisted capacity building aimed at equalizing capacities of different parties. A related response called for the creation of law enforcement capacity through cooperation between the countries and with external support. Other responses indicated the need for a supportive legal framework; and the creation and maintenance of cooperation mechanisms to ensure security and law enforcement.

Many responses referred the importance of sustainable financing mechanisms for ensuring the long-term operation of transboundary initiatives. One response recommended assessing the economic viability of the TFCA before and throughout its establishment. Responses also referred to the equitable sharing of costs and benefits. Other recommendations included the need for the equitable distribution of economic benefits; Securing fair cost and benefit sharing between and within the countries involved, with special focus on securing the local communities' rights and benefits; maintaining the non-political aspect of biodiversity conservation and the benefits of conservation for all.

One response highlighted the importance of demonstrating the value of transboundary conservation by generating tangible benefits for affected communities. The emphasis was on the benefits being tangible and obvious. These benefits need to manifest themselves as soon as possible to ensure the credibility of the initiative.

Local stakeholder consultation, participation and empowerment were often cited as being essential to effective governance. One response indicated the need for support from national institutions and another indicated that it was essential for awareness and willingness of political leaders at higher levels of political organization to involve local communities in a meaningful way. Another recommended enabling and securing stakeholder consultation mechanisms in order to achieve this. A further response indicated that incentives and opportunities for those involved to “tell their stories” is essential for effective governance and buy-in from all parties. Another response highlighted the importance of reward systems for employees.

Transparency was often cited as being important. Other responses included motivation; accountability (including financial accountability); leadership and access to government by stakeholders.

Two responses indicated that integrated territorial planning across jurisdictions and local, national and transboundary scales was essential. One of the responses added that the technical, financial and organizational capacity to implement this was also important.

Three responses referred to the need for clear roles and responsibilities. This included clear and tangible job descriptions and working to achieve specific outcomes such as delivering public goods.

Other points raised included the need to address human-wildlife-conflict issues; share information; the importance of the commitment of managers and the knowledge of managing local communities; knowledge of managements concepts used by the counterpart; confidence-building between Protected Area managers. One of these responses added that the political will of all parties with decision making power is critical; the other included tools and technologies.

Two responses indicated that the components listed in the summary of issues (i.e. shared vision, financing mechanisms, sufficient capacity, empowerment of local stakeholders) were all essential.

## Q2 LEGAL INSTRUMENTS AND LEGAL ISSUES

Q 2 was accompanied by this summary of issues:

There are many types of legal instruments that can play a role in the establishment and management of Transboundary Protected Areas (TBPAs). These vary in their level of formality and range from treaties to informal verbal agreements between adjacent villages.<sup>3</sup> Informal agreements can promote co-operative, friendly relations where the situation is not favourable to more formal arrangements.<sup>4</sup> Formal agreements however provide the strongest legal basis for long-term transboundary cooperation. The conclusion of a formal treaty maybe necessary if detailed rights and obligations are to be laid down.<sup>5</sup> However, given the generally more complex procedures required for establishing formal agreements the importance of informal agreements needs to be acknowledged because informal exchanges at all levels often lead to more formal arrangements.<sup>6</sup>

Transboundary cooperation can be hampered by different and or conflicting laws; lack of parity in the ratification of international protocols; and differential commitment from State parties as well as their levels of economic development and professional standards.<sup>7</sup> Therefore, in addition to the creation of a transboundary instrument in most cases it will be necessary to amend each State party's laws and or regulations in order to incorporate such principles and to harmonize area-based rules.<sup>8</sup>

<sup>3</sup> van der Linde et al. above n 1, 43.

<sup>4</sup> Trevor Sandwith et al, *Transboundary Protected Areas for Peace and Co-operation*, Best Practice Protected Area Guidelines Series No. 7 (IUCN, 2001), s30.

<sup>5</sup> Ibid.

<sup>6</sup> Jaidev ('Jay') Singh, *Study on the Development of Transboundary Natural Resource Management Areas in Southern Africa - Global Review: Lessons Learned* (1999), 21.

<sup>7</sup> L S Hamilton et al, *Transborder Protected Area Co-operation* (1996) cited in Sandwith et al, above n 5, 14.

<sup>8</sup> Clare Shine, 'Legal Mechamisms to Strengthen and Safeguard Transboundary Protected Areas' (Paper presented at the Parks for Peace- International Conference on Transboundary Protected Areas as a Vehicle for International Cooperation, Somerset West, South Africa, 16-18 September 1997).



The degree of political commitment from each party is a key consideration in determining what types of policy and legal instruments might be used in the development of a transboundary conservation area.

**Respondents were asked the following questions:**

- **Does the hypothesis above provide an accurate representation of the issues? Yes/No, Comments:**
- **What types of and what combination of instruments (at both the international and national level) are most effective in facilitating the transboundary conservation process?**
- **In what circumstances would formal/binding instruments be most appropriate?**
- **In what circumstances would informal arrangements be most appropriate?**

***Does the hypothesis above provide an accurate representation of the issues? Yes/No, Comments:***

Most respondents answered 'yes'. Two responded 'no'. Of the 2 'no' responses 1 respondent indicated that the statement was not the case for every region. The other 'no' response indicated that there should already be space within existing legal instruments which would enable sufficient collaboration across the international boundary to secure the transboundary area. Further comments within the response suggest exploring the linkages that can be made through existing laws that enable cross-border trade, movement of people and the sharing of non-politically sensitive information.

Another response highlighted the prohibition in many areas against concluding direct agreements between Protected Area managers across borders as one of the most important impediments to efficient transboundary cooperation. The comment stated that in Europe transboundary conservation initiatives are increasingly led directly by territorial communities and/or Protected Area managers. This is facilitated by the recognition of the possibility of direct involvement of Protected Area managers.

Other comments stated the importance of national level legislation and the harmonization of rules on each side of the boundary to achieve long term success. Another response expressed the importance of resolving boundary delimitation as a delimited boundary is an important institutional arrangement which impacts on jurisdictional zones; emphasising the stand alone legal status of Transboundary Protected Areas acknowledging that states may/should lose sovereignty over specific legislation and territory; considering managers of adjacent Protected Areas; and the need for multiple and varied underlying incentives and reasons why this area is being protected. There have to be intrinsic reasons for its success and sustainability beyond the legal framework, which won't be enough to maintain it if the underlying foundations are not strong enough.

Other responses indicated that informal measures could be useful as short-mid-term measures considering the complexity of formal legal endorsement and the time needed to achieve this; and the need for a thorough analysis of existing legal national and/or international instruments and potential impediments created by these instruments. It was indicated that the results of such an analysis would help to define the appropriate legal regime for the development of a transboundary conservation area.

***What types of and what combination of instruments (at both the international and national level) are most effective in facilitating the transboundary conservation process?***

There were no responses to this question.

***In what circumstances would formal/binding instruments be most appropriate?***

Responses to this question varied from those which felt that formal/binding instruments would be appropriate in all situations and to those that indicated that formal instruments would be most appropriate 'when feasible'. All responses indicated that a binding instrument in some form would be appropriate at some stage in the process. Some responses indicated a particular stage in the collaboration process where formal instruments would be most appropriate, others indicated which level of political organization or particular situations where formal/binding instruments would be most suitable.

The responses that indicated that formal/binding instruments would be necessary 'when feasible' indicated the need to consider the particular context that formal agreements with formal instruments especially necessary where relations between the participating countries have been hostile or unfriendly.

One response indicated that formal instruments should only be used at the highest level in order to articulate a shared vision and to officially designate a transboundary protected area. It was indicated that apart from that everything else should occur at lesser levels of formality.

Responses varied in terms of which stage in the process formal agreements would be most appropriate. One response indicated that the conclusion of formal agreements is the important first step in many circumstances. Another called for the use of informal agreements when there is the need to provide an enabling environment for more informal agreements such as the where formal agreements are needed to ensure the legality of local level instruments and where there is the need to influence local dynamics through changes in the legal frameworks higher up the hierarchy.

In contrast three responses indicated that formal agreements would be most appropriate:

- When cooperation is at a more developed stage;
- Once effective conservation work has been established at the local level;
- As soon as the level of cooperation aimed at requires it and any case where stakeholders want to come to an agreement on common institutional mechanisms or on the harmonization of national legislation.

One response indicated that formal instruments would be most appropriate between democratic countries, and if the TBPA is located in more than 2 countries; another response indicated the appropriateness of formal agreements for joint control and vigilance activities. Other responses indicated that formal instruments would be most useful where:

- institutional stability is lacking and a legal agreement could facilitate the continuity of transboundary collaboration; where national and/or international laws hinder cross-border activities (e.g., joint patrols by rangers carrying weapons);
- Where governments do not have a strong history of transboundary collaboration such as in areas of political upheaval. It was indicated that formal/binding instruments can send a strong message that things are changing and help change attitudes amongst the population.
- Where legal/social/cultural/ecological/financial differences between states are at their most different. The response indicated that there is less need for formal instruments when the listed differences are aligned to a certain extent from one country to the next.
- Where the relationships are not harmonious. This response was qualified by indicating that in such cases the transboundary protected area might not work anyway.
- Where Payment for Ecosystem Services may be considered;
- Where a large development or infrastructure project may have transboundary impacts

Recommendations provided in the responses were that 1) countries involved should agree on harmonized legislation in relation to land tenure, ownership of natural resources and their use, securing the local communities' rights and fair benefit sharing and 2) formal instruments should be linked to the Global Legal Framework and with the Ecosystem Approach advocated by the Convention on Biological Diversity.

***In what circumstances would informal arrangements be most appropriate?***

Five responses indicated that informal arrangements are always needed; one stated that informal arrangements are not sustainable; four responses indicated that informal responses would be most appropriate where formal arrangements were unlikely to be effective. Other responses stated particular cases where informal arrangements would be needed.

Of the responses that indicated that informal arrangements are always appropriate:

- One stated that most cooperation and coordination occurs at levels of detail far beyond the treaty or Memorandum of Understanding.
- Another stated that informal arrangements will always be present and that informal frameworks are good starting points to move transboundary conservation forward.
- One response stated that informal arrangements should accompany all negotiations at all levels.
- One response stated that ideally informal arrangements would always be in place. This was qualified by the statement that in practice most situations would probably require formal arrangements.
- One response stated that there could be a host of informal arrangements within a framework provided by an international agreement. It was stated that such an approach could make implementation more attainable.
- One response stated that informal arrangements would be most appropriate at initial stages of cooperation. In contrast another response indicated this is most appropriate when there is already good coordination and dialogue between governments.
- One response stated that informal arrangements are most appropriate where there are already many similarities (legal, cultural, ecological, financial) across the boundary.

The following responses indicated that informal arrangements would be most appropriate where formal approaches would be unlikely to be effective.

- One response indicated that informal arrangements would be useful when formal arrangements are politically unrealistic or administratively challenging.
- One response indicated that in the case of a dictatorship informal arrangements might facilitate conservation when formal agreements would not work.
- Another indicated that informal arrangements would be most appropriate whenever Protected Area managers are prevented from concluding formal agreements across borders.
- In line with these another response indicated that informal arrangements would be appropriate where neighbouring countries are engaged in political conflict.

One response stated that informal arrangements would be appropriate when focusing on particular activities such as promoting eco-tourism, research, monitoring, information sharing and training.

### Q3 INSTITUTIONAL ISSUES

**Q3 was accompanied by this summary of issues:**

Creating the necessary institutional architecture to facilitate transboundary conservation is critical. In some cases, this may be completely absent. Often initial institutional support comes from NGOs and international organizations. However, over time that support may not be available and participating countries often do not have the financial means to provide long-term support for transboundary infrastructure.

The establishment of a transboundary institution is itself a major challenge. Though the management of a single ecosystem unit by different institutions, in accordance with different legal rules, is unsatisfactory the establishment of a single authority may be perceived by parties to be politically unacceptable or premature in the early stages of transboundary cooperation.<sup>9</sup> One of the main obstacles to the establishment of an overarching governance body in charge of the management of the transboundary ecosystem is the sovereignty concerns of states. Recognizing the political challenges of setting up completely new institutions an alternative would be to work with existing agencies to establish regular coordination between the lead agency in each country involved. Responsibility for coordination could rotate between the agencies.<sup>10</sup>

Regardless of the instrument/s chosen to regulate the environment, all require efficient institutional backing and adequate implementation resources.<sup>11</sup> The optimum result arises when various instruments work in concert and are supported by credible institutions with appropriate resources.<sup>12</sup> An increasingly globalized world requires institutions that link the local level to the various higher levels of social and political organization. It is therefore important to develop institutional systems that link transboundary planning to planning at national and local levels.<sup>13</sup> For this reason transboundary initiatives which build on existing internal natural resource management and work through existing organizations are more likely to be successful.<sup>14</sup>

**Respondents were asked the following questions:**

- **Does the hypothesis above provide an accurate representation of the issues? Yes/No, Comments:**
- **Please indicate what further challenges exist for the establishment of effective institutions for transboundary conservation;**
- **What works better: an overarching transboundary institution; designated bodies within each country; or a hybrid of both? Comments.**

***Does the hypothesis above provide an accurate representation of the issues? Yes/No, Comments:***

The majority responded 'yes'. One respondent was undecided on what is the best institutional arrangement for transboundary conservation.

Two respondents elaborated on their 'yes' response stating that:

<sup>9</sup> van der Linde et al., above n 1, 41.

<sup>10</sup> Ibid.

<sup>11</sup> Paul V Martin et al, 'Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers' (Australian Farm Institute, 2007) ix.

<sup>12</sup> Ibid.

<sup>13</sup> Jennifer Mohamed-Katerere, *Review of the Legal and Policy Framework for Transboundary Natural Resource Management in Southern Africa*, The IUCN-ROSA Series on Transboundary Natural Resources Management (IUCN Regional Office for Southern Africa, 2001), 113.

<sup>14</sup> van der Linde et al, above n 1, 114.

- The institutional framework should be based on local and national mechanisms that can be secured over time and to enable sustainable operation the costs of institutional structures should be minimized;
- The capacity and effectiveness of relevant institutions and ensuring that the transboundary initiative is well supported within the wider network of local and national institutions are important aspects of achieving successful TBPA's.

Three respondents qualified their 'yes' response stating that:

- The issues of linking national and local levels need to be explored further. In particular the role of rural communities and the different institutional players of national parties;
- In relation to the statement in the summary of issues which called for transboundary initiatives to build on existing internal structures and existing organizations it is critical that existing organizations support the transboundary initiative and are willing to drive the process;
- Each situation is different therefore no single template will work for all situations. It was therefore recommended that there is the need to involve local, national and regional stakeholders to determine their needs and create the appropriate institutional structures. It was also pointed out that if the country or countries involved in the process have experienced civil strife then it will be more difficult to use existing institutions than creating new ones.

***Please indicate what further challenges exist for the establishment of effective institutions for transboundary conservation:***

A range of challenges were identified. Many referred to the challenges of reconciling the difference between parties; ensuring participation; capacity; and unstable political climates.

Differences between parties was often raised as an impediment. Specific challenges that were identified were differences in the pace of development of parties; language and communication challenges; and political differences between ruling parties in neighbouring countries. In line with these responses two responses emphasized the need for common goals. One called for common values, vision and mission and that people need to be constantly reminded of these. Another stated joint management, planning and setting up conservation goals jointly as the most important issue to address.

Local-level participation was also an often cited challenge. One response raised the question of how to incorporate multiple local level institutions into the governance process; another listed the challenge of involving all stakeholders and all territorial levels within the transboundary institutions established. Other related responses included the challenge of creating adequate mechanisms (at minimum costs) to enable the constant participation of all stakeholders and local stakeholders in particular in decision making processes and the follow-up stages; transboundary initiatives operating at levels of political that are too high up and leave out local communities that live around the transboundary protected area. It was indicated that this leaves initiatives being overly dependent on external funding and/or intervention and vulnerable to changes in political will.

One response highlighted the importance of the equitable distribution of the costs and benefits of transboundary conservation. The example given was to consider the situation if one country receives more tourism visitors than the other side. Another highlighted the need for equitable funding for the functioning of transboundary conservation institutions.

Three responses stated political instability and conflict as challenges. This included instability in government agencies, countries in political crisis; regional conflict; regional dominance. One response indicated the need for means of adjudication for disagreements and conflict resolution mechanisms.

One response identified capacity as a challenge and pointed out that if existing institutions are to take-over from the technical staff of NGOs and international organizations local staff should have hands-on experience in fulfilling the technical roles before the external advisors leave. Another highlighted the challenge of securing resources to enable communication between agencies.

Other issues that were raised were the marginalization of biodiversity conservation within national and local agendas; Sovereignty concerns; and conflicts of interests. Recommendations made were to:

- recognize the role that a transboundary conservation institution can play as a broker for Payment for Ecosystem Services agreements which will generate income for all concerned. It was recommended that there should be a 'commission' to keep the institution funded. It was also stated that there should be a requirement that the funding received be used to support the coordination role of the institution. As far as possible the transboundary institution should remain within the realm of the existing conservation bodies within the participating countries.
- provide scientific evidence so that existing institutions will see transboundary conservation as a priority.

***What works better: an overarching transboundary institution; designated bodies within each country; or a hybrid of both? Comments:***

Many expressed a preference for a hybrid system. The system would ideally recognize relevant stakeholder participation. Technical issues would be dealt with by designated bodies within each country and transboundary political issues addressed by a transboundary committee consisting of political representatives of the countries involved. Another suggested option was that of country-based and local-based institutional frameworks in combination with efficient and low cost transboundary communication and negotiation mechanisms. For the overarching transboundary institution component of the hybrid system, some suggested a rotating secretariat or a transboundary "coordination" institution. One response suggested that the establishment of a transboundary institution may not be necessary for the preservation of ecological corridors and that cooperation in transboundary planning between national institutions may be sufficient. A further response suggested that a third party could play an important role in developing a joint strategy, facilitating communication and addressing differences between the parties.

## Q4 FUNDING AND CAPACITY ISSUES

Q4 was accompanied by this summary of issues:

Funding and capacity are essential components of transboundary conservation. The two are critically linked as the availability of funding will determine the ability to invest in training and capacity building. Transboundary conservation initiatives should structure implementation strategies which best match available resources at each level of authority. Disparities in economic power and levels of development between State parties can create special challenges for transboundary collaboration.<sup>15</sup> These differences can lead to varying priorities for natural resource management which are not always compatible.<sup>16</sup> Unequal partnerships can undermine the success of transboundary initiatives.<sup>17</sup> This highlights the importance of capacity-building of national bodies, especially in less-developed partner nations.<sup>18</sup> Enhanced capacity will also enable equitable participation in regional meetings among nations.<sup>19</sup>

Local level capacity building is also important. While time and place information may be extensively developed and used by local communities, local groups are likely to have relatively limited access to scientific know-how.<sup>20</sup> It is therefore important to develop the capacity of government to provide support for local level initiatives.<sup>21</sup> It is consequently important to secure a flexible and multiple source funding base which demonstrates clear links between benefits and costs at the local level and ensuring the equitable sharing of benefits on both sides of the border.<sup>22</sup>

NGOs and international organizations can initiate transboundary conservation initiatives but states may not have the political will to execute them. Sometimes the lack of political will is due to the lack of technological and financial resources needed to manage a transboundary conservation area. In order for transboundary conservation areas to become sustainable these areas should be able to generate enough income, through eco-tourism or other activities, to support their management. In some cases this might not be possible because the infrastructure required to generate the desired income is not in place and/or adequate funding is not available.

The incorporation of 'transboundary thinking' into normal management operations and the opportunistic use of existing funds can go a long way to achieving funding sustainability. Transboundary collaboration can also provide opportunities for securing funding through the establishment of cooperative budgets as integral parts of transboundary financial plans, joint revenue generating and fundraising activities and joint project proposals.<sup>23</sup>

Respondents were asked the following questions:

**Does the hypothesis above provide an accurate representation of the issues? Yes/No, Comments.**

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<sup>15</sup> Mohamed-Katerere, above n 13, 118.

<sup>16</sup> van der Linde et al, above n 1, 59.

<sup>17</sup> Yemi Katerere, Ryan Hill and Sam Moyo, *A Critique of Transboundary Natural Resource Management in Southern Africa*, IUCN Series on Transboundary Natural Resource Management (2001),27.

<sup>18</sup> Singh, above n6 .

<sup>19</sup> Ibid.

<sup>20</sup> KP Andersson and E Ostrom, 'Analyzing Decentralized Resource Regimes from a Polycentric Perspective' (2008) 41 Policy Science 71.

<sup>21</sup> J Prior and R Holt, *Tools for International Landcare- Lessons Learnt From South Africa and Australia* (Melbourne, Australia 2006).

<sup>22</sup> van der Linde et al, above n 1, 61.

<sup>23</sup> Sandwith et al, above n 4, 31.



**Please indicate further challenges for building capacity:**

**What measures have/can enhance/d capacity building?**

**How effective are the following funding mechanism?**

- funding from donors, foundations and NGOs;
- financing through a trust fund;
- appointing an NGO as manager of a transboundary protected area and catalyst for funding

**Can you recommend further options?**

***Does the hypothesis provide an accurate representation of the issues?***

***Yes/No, Comments:***

The majority agreed with the hypothesis. It was pointed out that the expectation that a TBCA will eventually become financially sustainable cannot be always realized. It was therefore recommended that planning for long-term financial support and the use of permanent national and international mechanisms is required. The responses highlighted that differences in capacity between countries is a critical issue that should be addressed through extensive capacity building and peer-assistance programmes. It was suggested that the creation of adequate mechanisms for sharing could be assisted by an examination of strengths, weaknesses, threats and opportunities early in the process. This could help address inequalities and identify the needs of each party.

One response noted that political will is often independent of funding, as it is related to historical transboundary conservation issues, sovereignty, border disputes, access to valuable natural resources (minerals, oil and gas, water, timber, etc). The influence of key stakeholders over government, the security of the political leader's position, the timing of an election, and broader international geo-political issues was stressed. In contrast another response indicated that funding should not be the sole driver of transboundary conservation. As funding could be limited capacity-building and information-sharing across the borders from within communities in and around protected areas was emphasised.

***Please indicate further challenges for building capacity:***

One response noted that those involved in transboundary conservation initiatives often have a background in natural sciences and lack managerial skills. Other barriers cited were the absence of qualified institutions and expertise, lack of investment priorities, communication experts, political will and education, corruption and poverty. Another challenge that was highlighted was the competition among levels of government as national governments may not want the capacity at the local level strengthened as this could present a threat to national level control.

One response suggested that extensive and in-depth capacity needs-assessment is required. This should be followed by the elaboration and implementation of comprehensive capacity building programmes at

all levels. It was also recommended that conservation agencies use a phased approach to establish transboundary conservation areas targeting the most feasible areas first and then building on these within a systematic expansion strategy. Another response noted the challenge of operating within an environment where funding is often based on short timelines whereas true capacity building and conservation is an endless process.

### ***What measures have/can enhance/d capacity building?***

Responses suggested the following to enhance capacity building:

- Recognition that TBPA's are about managing people and their interactions with the natural world. The training of natural science technical staff in dealing with people should therefore be a priority. The involvement of social scientists from the start of the process was listed as a further option;
- Defining biodiversity conservation within the context of the benefits derived from the ecosystem goods and services that are produced and recognition of the international legal principle of common but differentiated responsibilities;
- Bringing a TBPA under the umbrella of a regional organization;
- Developing shared learning experiences and local knowledge;
- Providing evidence of the potential benefits (ecological, economic, political) of transboundary conservation.

### ***How effective are the following funding mechanisms?***




#### ***- funding from donors, foundations and NGOs;***

#	Answer		Response	%
1	Ineffective		3	17%
2	Neither Effective nor Ineffective		3	17%
3	Effective		12	67%
	Total		18	100%

Comments:

The majority indicated that funding from donors, foundations and NGOs is effective. Further comments noted an exit strategy and continuity should be provided. This should include securing long-term funding through national and international (UN) mechanisms. It was suggested that donors and NGOs do not take-over the decision-making processes. Another response noted that an initial injection of resources only raises expectations which cannot be met once the funding period expires. It was therefore recommended that participating agencies should be encouraged to find innovative ways of resourcing transboundary initiatives.

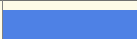

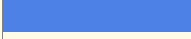
- ***financing through a trust fund;***

#	Answer		Response	%
1	Ineffective		2	13%
2	Neither Effective nor Ineffective		2	13%
3	Effective		12	75%
	Total		16	100%

Comments:

Some responses cited the difficulty of securing an endowment to set up a fund. While recognized as an apt funding mechanism to ensure the sustainability of a TBPA, one participant noted that the success of a trust as a mechanism would depend on the role of players involved and their capacity to drive it.

- ***appointing an NGO as manager of a transboundary protected area and catalyst for funding***

#	Answer		Response	%
1	Ineffective		5	29%
2	Neither Effective nor Ineffective		5	29%
3	Effective		7	41%
	Total		17	100%

Comments:

Some suggested that the appointment of an NGO can be an effective temporary measure as long as an exit strategy and continuity are secured from the start, and as long as the NGO does not take over the decision making process. Others indicated that NGOs should facilitate the process though their role should not create a dependency on external funding. It was therefore suggested that state leadership is more important than NGO involvement. It was also suggested that NGOs often have limited agendas that are not specific to TBPA governance, making it difficult for them to justify operation in most of the TBPA Network.

***Can you recommend further options?***

Recommendations included:

- Combining different sources of funding;
- Peer-assisted cooperation between countries;

- Start-up funds for transboundary initiatives originated by country parties to demonstrate their commitment;
- Framing biodiversity conservation within the context of ecosystem goods and services;
- Establishing a common budget for the TBPA in question;
- Targeting financing at international donors that have interests beyond conservation (e.g. cultural institutes financing language trainings);
- Bringing the TBPA under the umbrella of existing regional framework or Intergovernmental institution;
- Clarifying mandates and secure long-term transparent funding.