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TAXATION AS A REAL INCENTIVE FOR LAND CONSERVATION

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by

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DECLARATION

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ABSTRACT

The objective of the dissertation is to investigate the opportunity to apply taxation incentives to promote land conservation in South Africa.

This dissertation was conducted by means of a critical analysis of current legislation and data available in search of a suggested solution to finding appropriate tax incentives to encourage land conservation. In order to limit the scope of the research, a number of assumptions were made. Conflicting viewpoints underlying certain of these assumptions are discussed.

In arriving at proposals and a conclusion in this dissertation the following have been considered:

- current South African taxation, environmental law and law ancillary to the subject matter,
- certain tax incentives for conservation used internationally,
- how taxes are raised and applied, and
- some proposals for change in taxation law in South Africa.

In concluding it is suggested that:

- the current Income Tax Act be amended immediately to meet the need for land conservation,
- the amendments need to be clear and simple to apply, and
- public-private partnerships appear to be the best mechanism through which to achieve the required outcomes.

The final conclusion of the dissertation is that a new section and a new schedule, dedicated to conservation, be introduced to the Income Tax Act, as soon as practical.

Key words:

Biodiversity.

Land conservation.

Sustainable development.

Tax incentives.

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“If you are thinking one year ahead, sow seed...
 If you are thinking 100 years ahead, educate people”
 Chinese proverb.

CHAPTER 1.

INTRODUCTION.

1.1 Context of the Research.

“We all have a moral duty to ensure that whatever we do today doesn’t compromise the needs of those who come after us. None of us is the owner of the Earth. We are all caretakers, and transient at that. As transient caretakers, we have a duty to save the planet. Our situation can only be improved if corporations, governments and individuals all realise they have a shared interest, namely to improve the quality of life on our planet by reducing the negative impacts on our environment caused by our conduct and the actions of those who came before us.”¹

Whether you are a world leader or just an average community member, each is responsible for, and can make a contribution towards, the sustainability of our Earth. “People, planet and profit can no longer be separated.”²

“Few accountants and business decision-makers ask, “How much of our critical natural resource is left? How many miles of polar ice-cap have our businesses helped melt this year? By how many inches have we raised sea-levels? How many species have we put at risk? How many homes will be flooded, how many people will die of thirst or starvation because of our activities?” These are not comfortable questions – but, by God, they need to be asked.”³

Short term gain is no longer an appropriate strategy for business. Responsible business has to change from how much revenue is made, to how is revenue being made. Individuals must also accept their duties and responsibilities as citizens of the world to enjoy the benefits each requires. To allow business and individuals to address their responsibilities, it is governments’ duty to create the framework within which they can work and to target a national vision built on sound principles embracing environmental, social and economic needs.

Governments raise taxes to run the business of their countries. Are these taxes being appropriately spent? Are new taxes simply a cash cow for subjective allocation by a

¹ King, Mervyn with Lessidrenska, Teodorina, “*Transient Caretakers*”, [2009], page 5.

² *Ibid.*, page 1.

³ His Royal Highness, the Prince of Wales, on the launch of the “*Accounting for Sustainability*” project [6 December 2006] <http://accountingforsustainability.org.uk/file/pdf/A4s/HRH/Speech>, and Terry, Graham, “*Green*”, [2008], page 253.

greedy few in power, or are these taxes being spent on the objectives for which they were raised in the first place? Is there adequate fiscal income to meet the priority needs of the people? And if not, are public-private partnerships appropriately managed and adequately controlled to supplement government spending? Each time we apply our minds to these issues numerous new questions arise. This is not sufficient! Appropriate action must be taken, and soon!

When considering taxation as an incentive to land conservation, specific questions arise. These include:

- 1) How can we motivate land owners to accept their responsibilities towards the future?
- 2) How best can we use taxation as one of the incentives to conserve land, while fairly rewarding the land owners and others who contribute to conservation?
- 3) What tax incentives are available in other countries which we could apply in a South African context?

1.2 Research Objectives.

There is much debate around land conservation internationally and locally. Too little is being done to implement proposals and provide appropriate mechanisms which could encourage land owners to act responsibly towards themselves, others and our planet.

Any proposals introduced must be fair and equitable to all concerned, with an overriding mutual goal of saving our planet from destruction.

The main objective of this dissertation is to motivate further debate on, and to suggest immediate practical action plans for land conservation, using additional tax incentives as part of the solution to achieve this. In doing this, an attempt will be made to answer the three questions posed above.

1.3 Methods, Procedures and Techniques.

This dissertation stands at the intersection of taxation law, land law and environmental law as a balance is sought between the rights of ownership and owners' duty in turn toward others.

To gain an overview of this balance, this dissertation sets out to review our current tax and other legislation as may be appropriate in trying to address some of the questions in 1.1.⁴ It also looks at some alternative options applied in other countries as comparative studies of the incentives given to their land owners and others who choose to be involved in conservation in a meaningful way.

Data has been gathered from local and foreign law, text books, articles, papers, and electronic resources, on the subject.

1.4 Limiting Assumptions.

The interface of taxation and the environment is a vast topic for debate. This dissertation has been restricted to taxation as an incentive for land conservation, concentrating mainly on biodiversity and our environment. The application of the suggested proposals has then been extended, as an example, to minority groups to show how South Africa could change to meet the many challenges of the future, finding acceptable social, economic and environmental solutions simultaneously.

In limiting this dissertation, emissions taxes, mining rehabilitation taxes and marine conservation have been excluded. It is, however, acknowledged that they are an integral part of a global survival policy and the joint public-private initiatives needed to address the world climate change crisis.

⁴ Any cross-references to data in this dissertation are merely indicated by their chapter or sub-chapter number.

1.5 Overview of Chapters to follow.

Chapter 2 sets out the existing tax legislation and strategy considered appropriate to this dissertation, starting with the Constitution as the cornerstone of all legislation. Thereafter, the parameters of existing taxation, wherein farming is introduced into the Income Tax Act, No. 58 of 1962 in Section 26 and the First Schedule, are considered. Reference is then made to Sections 10 and 30, which together with the Ninth Schedule to the Income Tax Act, relate to tax exempt public benefit organisations. This is followed by comments on tax and other matters considered ancillary to the topic of this dissertation.

Chapter 3 looks at environmental law and the statutory environment in which any tax proposals would need to operate.

Chapter 4 reviews tax-related applications in other countries which may be applied in the South African context. Reference is made to Australia and the United States of America, in particular, as they have already implemented successful changes.

Chapter 5 considers how taxes are raised and the funds spent on conservation, taking into account key sustainability issues, conservation payment initiatives, and the introduction of environmental goods and services.

In Chapter 6 possible proposals appropriate to South Africa are put forward, taking into consideration the existing authority to effect change, international examples to follow, and the application of such proposals to biodiversity and minority groups.

Chapter 7 concludes with the way forward and the responsibility to introduce appropriate practical change, including a final proposal as to tax incentives and a few motivational thoughts on the subject matter.

CHAPTER 2.

CURRENT SOUTH AFRICAN LAW and STRATEGY.

Before addressing any taxation matters appropriate to land conservation, the legal background and structure in South Africa must be considered.

2.1 The Constitution of the Republic of South Africa – (the Constitution).

South Africa enjoys one of the most recent and best drafted constitutions available. Chapter 2 of the Constitution deals with the Bill of Rights, which is clear in its guidance to all. “This Bill of Rights is the cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom.”⁵ The State is committed in that it “must respect, protect, promote and fulfil the rights in the Bill of Rights.”⁶

The Constitution is clear on environmental matters in that “everyone has the right -

- (a) to an environment that is not harmful to their health or well-being; and
- (b) to have the environment protected, for the benefit of present and future generations through reasonable legislative and other measures that –
 - (i) prevent pollution and ecological degradation;
 - (ii) promote conservation; and
 - (iii) secure ecologically sustainable development and use of natural resources while promoting justifiable economic and social development.”⁷

Likewise, property rights are well protected with the overriding clause that “Property may be expropriated only in terms of law of general application –

- (a) for a public purpose or in the public interest; and
 - (b) subject to compensation, ...”⁸, and
- “For the purpose of this section –
- (a) the public interest includes the nation’s commitment to land reform, and to reforms to bring about equitable access to all South Africa’s natural resources; and
 - (b) property is not limited to land.”⁹

⁵ The Constitution of the Republic of South Africa, [1996], chapter 2, para 7(1).

⁶ Ibid., para 7(2).

⁷ Ibid., para 24.

⁸ Ibid., para 25(2).

⁹ Ibid., para 25(4).

Paragraph 25(5) and (8) of the Constitution authorises the State to take reasonable steps “to foster conditions which enable citizens to gain access to land on an equitable basis,” and to take appropriate measures “to achieve land, water and related reform” to redress the past racial discrimination.

Health care, food, water and social security are also included in that “everyone has the right to have access to – sufficient food and water.”¹⁰

Further, “cultural, religious and linguistic communities are protected and may not be denied the right, with other members of that community to enjoy their culture, practise their religion and use their language; and form, join, maintain associations and other organs of civil society...”¹¹

It is clear that environmental matters are inherently entrenched in the Constitution and it provides a basic platform on which to build.

2.2 Income Tax Act, No. 58 of 1962 – (the Income Tax Act).

Before considering any proposed options that may be available to use taxation as an incentive for land conservation, it is appropriate to consider how farmers, who with the State are the owners of most of the land, are taxed in terms of the Income Tax Act.

Due to the nature of farming, the computation of taxable income derived from pastoral, agricultural or other farming operations as dealt with in Section 26 of the Income Tax Act is subject to the provisions of the First Schedule to the Income Tax Act.¹²

The First Schedule allows for special compensation, in the form of deductions, to farmers in paragraph 12, in that “there shall be allowed as deductions in the determination of the taxable income derived by any farmer the expenditure incurred by him during the year of assessment in respect of -

- (a) the eradication of noxious plants;
- (b) the prevention of soil erosion; ...

¹⁰ Ibid., para 27(1)(b).

¹¹ Ibid., para 31(1).

¹² Income Tax Act, No. 58 of 1962.

- (d) dams, irrigation schemes, boreholes and pumping plants;
- (e) fences;
- (f) the erection of, extensions, additions or improvements (other than repair) to, buildings used in connection with farming operations, other than those used for domestic purposes ...
- (g) the planting of trees, shrubs or perennial plants ...
- (h) the building of roads and bridges used in connection with farming operations;
- (i) the carrying of power ...”¹³

There is no definition of *farming* in the Income Tax Act, but guidelines have been laid down by the Courts as follows:

(1) “There must be an intention to farm with a reasonable chance of making a profit,” (*ITC 1319* [1980] 42 SATC 263);

(2) the above is supported by Miller J., in *ITC 1185* [1966] 35 SATC 112, recording that it is sufficient to “travel hopefully, even if one is never destined to arrive”, as long as the intention to farm is genuine; yet,

(3) in *ITC 1324* [1980] 43 SATC 22 it was held that farming cannot be for the pure indulgence in a country life, or merely to sell produce surplus to one’s own consumption. *H v COT* [1980] ZLR 518 confirmed that the onus lay on the taxpayer to show that he is a farmer. Further, the Commissioner of Taxes in denying the special deductions for farmers in *ITC 1424* [1989] 49 SATC 99, argued that the taxpayer only farmed as a hobby.

Although both *ITC 1319* and *ITC 1424* above were Zimbabwean cases, they provided interpretation to the phrase “pastoral, agricultural or other farming operations”, which is also used in Section 26(1) of the Income Tax Act.

The above is important as the special concessions given to farmers are linked to farming income or farming taxable income. Section 11 of the Income Tax Act allows for the general deduction of expenses from income. As part thereof, Section 11(e) allows for the write-off of wear and tear on certain machinery, plant, implements, utensils and articles over prescribed periods of time. But Section 11(e), read in conjunction with Section 12B of the Income Tax Act, refers farmers to the First Schedule to the said Act, whereby farmers are allowed to write off certain of their acquisitions of the abovementioned assets in full in the year of purchase.

¹³ Income Tax Act, op. cit., First Schedule, para 12 (1).

Allied to the above concessions to farmers Section 37B of the Income Tax Act was introduced in 2007, which details deductions that may be claimed in respect of environmental expenditure.¹⁴ An allowance of 40% can be claimed of the cost incurred by the taxpayer of an environmental treatment and recycling asset, in the year brought into use, and the remainder is then written off at 20% per annum in the following years. Environmental waste disposal assets may be written off at 5% per annum if they are of a permanent nature, provided these assets are used in a process which is ancillary or similar to a process of manufacture. These assets may be immovable, for example a disposal site, dump or dam.

The Income Tax Act specifically addresses certain other items when dealing with farming.

(1) Section 17A of the Income Tax Act allows the deduction for expenditure incurred on soil erosion works by a lessor, where the lessee is using the leased land for bona fide pastoral, agricultural or other farming operations. This is an example where flexibility is already granted in the Income Tax Act, which could set a precedent for the flexibility needed to give taxpayers, other than the actual farmer or conservationist, a deduction for specific expenditure.

“While ordinary letting of a farm is not income derived from farming, where the consideration for the letting is a share of the produce, crops or livestock such partiarian agreement is accepted as having a share in the farming operations.”¹⁵ This does not detract from the general limitation of paragraph 12 of the First Schedule to the Income Tax Act in that expenditure allowed under this paragraph “must be incurred by the farmer in connection with his own farming operations and not in connection with the farming operations of another farmer nor something else that does fall in the context of farming operations.”¹⁶

(2) Section 10(1)(z) of the Income Tax Act grants an exemption from tax on amounts received as a subsidy from the State for interest payable by a farmer in respect of loan capital used for bona fide pastoral, agricultural or other farming operations; and

(3) Section 11(a) and Section 12B, of the Income Tax Act, allow for the deduction of expenditure incurred in the production of income, and the accelerated write-off of certain capital expenditure by farmers, respectively.¹⁷

¹⁴ Income Tax Act, Section 37B.

¹⁵ *ITC 166* [1930] 5 SATC 85.

¹⁶ *Ernst v CIR* [1954] (1) SA 318 (A).

¹⁷ Cost may be written off over three years, in the ratio 50%:30%:20%.

(4) Paragraphs 12, 13 and 13A of the First Schedule to the Income Tax Act deal with specific farming expenditure of a capital nature, sale and purchase of livestock due to drought, stock disease, and fire damage to grazing or plague. The South African Revenue Service's Practice Note 6. of 1999 allows for the inclusion of game farming as a farming activity. Often, game farming and hunting are carried out in addition to other farming operations and it is almost impossible to distinguish between the two activities. Taxpayers, who run game farms and wish to be treated as farmers, must convince Revenue that game is purchased, sold, and bred by them on a regular basis. Practice Notes are not the law but are useful guidelines, for Revenue and taxpayers, when dealing with applied interpretations of the Act. For example, residential housing for safari-goers and hunters is not considered farming expenditure and is not deductible under paragraph 12(1) of the First Schedule; however the wear and tear write-off is allowed, in terms of Section 11(e) of the Income Tax Act, on furniture and equipment used in camps and accommodation supplied to visitors. In *ITC 885* [1960] 23 SATC 336, the cost of a school and medical clinic on a farm were disallowed as not being used in connection with farming operations.¹⁸ This decision was followed by *COT vs Swaziland Ranches Ltd* [1982] 40 SATC 232 wherein the costs of a school and beer hall for the benefit of farm employees and their families intended to create satisfactory conditions of employment was allowed as deductible.¹⁹ Although the later case is a Swaziland case, the relevant provision in their Act is identical to paragraph 12(1)(f) of the First Schedule to the Income Tax Act.

Section 20A of the Income Tax Act ring-fences any assessed loss of certain trades, one being farming. However, Section 20A(1)(b)(vi) then excludes such ring-fencing, provided the taxpayer carries on farming, animal-breeding or activities of a similar nature on a full-time basis. Not ring-fencing such losses is important as proposals later in this dissertation require that certain expenses making up such losses be shifted to the benefit of other taxpayers partaking in the funding of conservation and the like.

¹⁸ *ITC 885* [1960], 23 SATC 336.

¹⁹ *COT v Swaziland Ranches Ltd* [1982] 40 SATC 232.

2.3 The Revenue Laws Amendment Act, No. 60 of 2008.

In more recent years, the need arose to encourage public-private partnerships in order to achieve participation by both government and taxpayers in conservation efforts.

Amendments were introduced to the Income Tax Act to encourage proper participation by private landowners to conserve land in certain areas for the public good.

The environmental legislation is discussed in Chapter 3 of this dissertation. In reciprocation for landowners performing government responsibilities, landowners are allowed to deduct maintenance expenditure and the cost of the loss of use of land that is applied to conservation purposes, provided it is in terms of biodiversity agreements controlled by the National Environmental Management: Protected Areas Act, No. 57 of 2003 and the National Environmental Management: Biodiversity Act, No 10. of 2004, particularly Section 44 of the latter.

Normally amounts incurred in the production of income are allowed to be deducted in terms of Section 11(a) of the Income Tax Act, read in conjunction with Section 23(g) when part of carrying on a trade. The Revenue Laws Amendment Act, No 60. of 2008, at Sections 46 and 57, creates flexibility to allow for the deemed deduction of certain expenses incurred on conservation in terms of the National Environmental Management Acts referred to above. The Revenue Laws Amendment Act introduced Section 37C, specifically allowing a deduction for expenses incurred for environmental conservation and maintenance purposes. A requirement of Section 37C(1) is that the expense must be incurred to conserve and maintain land, per a biodiversity management agreement of a minimum period of five years. The deduction is limited to the income earned from the land use and excess expenditure is carried forward to the next tax year. This flexibility is further extended by Section 37C(3) in that, if the agreement concluded in terms of the National Environmental Management: Protected Areas Act is for a minimum of thirty years, the expenditure is deemed to be a Section 18A donation in terms of the Income Tax Act. Section 18A allows a deduction limited to an amount which does not exceed ten percent of the taxable income of the donor. This change has been a big step in the right direction in

encouraging investment in conservation, but this is not considered sufficient if a real impact is to be made.

Following the approval to deduct non-farming expenditure per Section 37 of the Income Tax Act, the First Schedule to the Income Tax Act, paragraph 12, was amended by adding sub-paragraph (1A). This amendment now allows farmers to deduct expenditure incurred on land conservation and maintenance from their farming income. Again, this does not go far enough to encourage taxpayers, who are not farmers, to commit fully to conservation investments.

2.4 Tax Cases appropriate in identifying “Farming Operations”.

In *CIR v D&N Promotions (Pty) Ltd* [1995] (2) SA 296 (A), 57 SATC 178, the taxpayer earned its income mainly from farming sugar cane. It also earned “retention interest”, being interest earned on the balance of its account at the sugar mill where it sold its sugar cane. The Commissioner of the South African Revenue Services (“the Commissioner”) assessed the taxpayer on the basis that the interest did not constitute income derived from farming operations. The Court found that “there is no definition of “farming operations” in the Act and the question whether or not a person’s economic activity constitutes “farming operations” was essentially a question of fact.”²⁰ It followed that if the farmer had invested surplus funds that earned interest it would not normally be regarded as income from farming operations. But, in this case the interest earned was part of the remuneration earned by the farmer for delivering sugar to the miller. Distinction is drawn between the above and *ITC 639* [1947] 15 SATC 226, *ITC 1285* [1978] 41 SATC 73 and *ITC 1373* [1989] 45 SATC 181, wherein the taxpayers earned income from two activities distinct from each other and hence were found to be carrying on two businesses.

In *SARS v Smith* [2002] 65 SATC 6, the taxpayer was a doctor who purchased a farm which had no reasonable chance of making a profit from farming. The Court held that “a proper assessment of the taxpayer’s *bona fides* took account of his *ipse dixit* and objective elements against which his word could be tested, ...” The issue therefore was whether farming operations can be carried on as per Section 26(1) of the Income Tax Act when there is

²⁰ *CIR v D&N Promotions (Pty) Ltd* [1995] (2) SA 296 (A), 57 SATC 178.

no reasonable chance of making a profit from such operations. Section 26 provides a framework for a taxpayer, who carries on farming operations, to be taxed as a farmer. The First Schedule to the Income Tax Act, expressly or by necessary implication, may override or supplement the general provisions of the Act. “It is (also) not necessary in order to constitute farming operations that they should be conducted on an extensive scale or on an extensive area, but the scale on which they are conducted is a factor to be considered as to whether the taxpayer is in fact conducting the business of farming.”²¹

Other jurisdictions also experience problems in the treatment of taxpayers who carry on farming operations and incur profits or losses from this second source of income. This second source of income, from farming or a business, has been addressed in Australia and New Zealand and is referred to when setting a precedent for South Africa. In the New Zealand case *Grieve v CIR* [1984] 1 NZLR 101, with reference to the Australian case *Tweedle v FCT* [1942] 2 AITR 360 it was noted that “the definition of “business” in the Australian legislation does not contain any reference to “for pecuniary profit” but referred to the philosophy underlying the income tax legislation in that “it is not suggested that it is a function of the income tax Acts, or of those who administer them, to dictate to the taxpayer in what business they shall engage or how to run their business profitably or economically.”²² This interpretation is further highlighted by the New Zealand authorities that “while the Courts are justified in viewing circumspectly a claim that a taxpayer genuinely intended to carry on a business for pecuniary profits when looked at realistically there seems to be no real prospect of profit, an actual intention once established is sufficient. The legislation sensibly allows for deduction and allowances to be claimed even where the overall result is a trading loss.”²³ In *SARS v Smith*, when the Court referred to the above, it concurred that the philosophy underlying the South African Income Tax Act is, in respect to taxpayers who carry on farming operations, no different from that which was recognised in New Zealand. It was therefore concluded “that a taxpayer who relies on S26(1) is (over and above proof that he is engaged in an activity in the nature of farming) only required to show that he possesses at the relevant time a genuine intention to carry on farming operations profitably.”²⁴

The above will be revisited later in this dissertation when suggesting possible options in the use of taxation as an incentive for land conservation in chapter 6.

²¹ Meyerowitz, David, [2007-2008], “*Meyerowitz on Income Tax*”, para 20.11.

²² *Tweedle v FCT* [1942] 2 AITR 360, as referred to in *Grieve v CIR* [1984] 1 NZLR 101.

²³ *CIR v Europa Oil (NZ) Ltd* [1971] NZLR 641 and *Europa Oil (NZ) Ltd v CIR* [1976] 1 NZLR 546.

²⁴ *SARS v Smith* [2002], 65 SATC 6.

2.5 How South Africa is introducing “Green” Taxes.

Eco-taxes (or “green” taxes) are taxes, duties, levies and fees raised by governments to encourage companies and individuals to be more environmentally aware and to encourage the reduction in pollution levels. They may be as simple as deposits on cans and bottles, taxes on “dirty” industries, incentives to encourage cleaner technology or reduction of an ecological footprint or a carbon tax, which itself is an eco-tax.

All problems present both challenges and opportunities. Climate change is no different, and South Africa, like many other countries, has directed its attention towards dealing with climate change and energy supply at the macro level. With reference to the Deloitte Climate Change and Business Conference, March 2010,²⁵ currently:

- 1) There is Presidential commitment to reduce greenhouse gas emissions with targets of 34% by 2020 and 42% by 2025. It appears that initial interest lies in exploring opportunities for a formal market trading in carbon credits and related products, see 2.6. For this to be effective, investments in sustainable technologies need to be appropriately priced.
- 2) The Department of Environmental Affairs is working towards the National Climate Change Policy White Paper, which was due by the end of 2010.
- 3) The King III Report concentrates on sustainability and places it at the centre of good corporate governance. An appropriate reporting framework is currently being debated for introduction by listed companies in 2011.
- 4) The Department of Trade and Industry, (the DTI), is making grants available for research and development, particularly for renewable energy projects. These include the Critical Infrastructure Programme grant of 10% to 30% for specific infrastructural projects; the Renewable Energy Finance and Subsidy Office subsidy for renewable energy projects; and the Enterprise Investment Programme, 15% to 30% capital investment grant for establishing or expanding new manufacturing facilities for renewable energy products. This follows the direction that the National Budget has

²⁵ Newman, Duane, “*Green is the new black*”, Deloitte Climate Change and Business Conference, [18 March 2010].

taken in more recent years, moving away from tax incentives, to grants for production of goods and services.

The DTI does recognise the impact of climate warming and emissions on the economy and the opportunity to develop new green and energy efficient goods and services. It and others realise the need to fund numerous developments in facing the challenges before us. Development of industrial energy efficiency, solar water heating, concentrated solar thermal energy, wind energy, biomass and waste management, efficient water usage, and the feasibility of bio-fuels all require full investigation, development and funding. In reality, the public sector may be able to provide 20% of the funds required, but the rest will have to come from the private sector. The question is, how best can this be achieved? Communications on the subject will have to improve; businesses will have to adopt an integrated approach including sustainability; and any new tax implications must be considered upfront, to name some of the items to be on all new business agendas.

5) The carbon pricing policy paper being developed by National Treasury appears to prefer to raise carbon taxes rather than cap-and-trade controls. These options are referred to in 2.6 below.

The National Treasury Expenditure Vote 28 is committed to promoting the development of clean and renewable energy focusing particularly on electricity, nuclear and solar energy.

6) The above policy is followed by the South African Revenue Services (“SARS”) in granting incentives for energy efficiency initiatives and strategic infrastructure, including clean technologies. Recent changes to the Income Tax Act include:

- a) Section 11D allows the funder of research and development expenditure a 150% deduction for expenditure in renewable and clean technology;
- b) Although it is difficult to measure energy efficiency, Section 12I gives an additional 35% or 55% allowance, within set parameters, in respect of capital projects with a cap-and-cost of R1.6 billion. These industrial/manufacturing projects must include skills development and use new technology resulting in improved energy efficiency and are sometimes referred to as “greenfield projects”.

c) The Section 12K allowance allows the originator of a *carbon credit*,²⁶ disposed of after 11 February 2009, to be exempt from tax, both normal and capital gains tax. Unfortunately the expenditure incurred in producing the carbon credit is not tax deductible.

d) Section 12L encourages energy efficiency, giving taxpayers an allowance in the first year when energy is saved, where such saving is certificated as an energy efficiency saving.

e) Other “environmental or stealth taxes” are to be investigated and may be introduced in terms of their governing Acts, including a wastewater discharge levy, via the National Water Act, No 36. of 1998; an air pollution levy per the National Environmental Management: Air Quality Act, No 39. of 2004; and possible levies on waste streams, landfill taxes and even traffic congestion charges.

2.6 Carbon Pricing.

A very brief description of carbon is as follows: “*Carbon* is a building block of the molecules which make up living cells and is an essential element for life on Earth. It is a basic ingredient of bones, carbohydrates, connective tissue, hormones, nerve cells and proteins. *Carbon dioxide* is a gas that occurs naturally in the air and is produced when animals breathe, vegetation rots and when material containing carbon is burnt or broken down. *Carbon monoxide* is a colourless gas produced by incomplete combustion, mainly from motor vehicles and cigarettes. A *carcinogen* is any substance that is capable of causing cancer in animal tissue.”²⁷

“How much heat the Earth retains depends on two things – the amount of greenhouse gases present in the atmosphere and how light or dark the surface of the Earth is. It makes sense that if you increase the amount of greenhouse gases trapping heat, you will increase the amount of heat that stays in the

²⁶ A “*carbon credit*” is a permit that allows the holder to emit one ton of carbon dioxide. Credits are awarded to countries or groups that have reduced their green house gases below their emission quota. The carbon credit system was ratified in conjunction with the Kyoto Protocol. Its goal is to stop the increase of carbon dioxide emissions. For example, if an environmentalist group plants enough trees to reduce emissions by one ton, the group will be awarded a credit. If a steel producer has an emissions quota of ten tons, but is expecting to produce eleven tons, it could purchase the carbon credit from the environmental group. The carbon credit system looks to reduce emissions by having countries honour their emission quotas and offer incentives for being below them.

“*Carbon Credits*”, *Investopedia*, Barron’s Online, 2010, [February 2011].

²⁷ Hoogervorst, Arend, Rosenberg, Eureka, and others, “*The Enviropaedia*”, [2006-2008], pages 41 and 43.

system”.²⁸ Through climate change, which is not unnatural or unusual, the rise in overall global temperature is due to the anthropogenic increase of *greenhouse gases*²⁹ in the Earth’s atmosphere responsible for trapping heat on the earth. The Kyoto Protocol³⁰, wherein signatory countries agreed to set emission limits and reduction targets per country for six gases – carbon dioxide, methane, nitrous oxide, hydro-fluorocarbons, perfluorocarbons, and sulphur hexafluoride. The Protocol allows for three flexible carbon-trading mechanisms, namely: joint implementation, the clean development mechanism and emission trading. In order to trade, a pricing method had to be found.

Carbon pricing may be approached in two ways: raising a carbon tax or cap-and-trade, to limit the amount of a pollutant that may be omitted. These two models³¹ are described below:

a) *Carbon tax* is an environmental tax levied on the emissions of carbon dioxide or other greenhouse gases.

It may be charged at a flat rate or as a progressive tax on the final consumer of the “dirty output” or the producer of the “dirty output.”

If carbon taxes are raised on all emissions, it will raise costs, having a negative economic impact, mostly borne by the consumer. If such a tax is levied on actual carbon dioxide, it will have the largest impact and potentially raise large revenues.

b) *Cap-and-trade* limits or caps the amount of emissions that may be emitted. Emission permits are issued to hold a number of allowances or credits.

Should an entity need to emit more emissions, it must buy credits from those polluting less – such transferring of credits is called “trading in credits”.

²⁸ Joubert, Leonie S., “*scorched. South Africa’s changing climate*”, [2006], (Wits University Press), page23.

²⁹ Energy in the form of radiation is received by the earth from the sun. Some of this incoming solar radiation is reflected but most is absorbed and warms the surface of the earth. Infra-red photons emitted by the surface are meant to escape back into space but due to a build up of “*greenhouse gasses*” they are absorbed by, and heat, the atmosphere. An increase in greenhouse gasses causes more infra-red photons to be absorbed by the atmosphere which has a warming effect resulting in climate change. The main greenhouse gas is carbon dioxide caused by the burning of fossil fuels by delinquent industries. Terry, Graham, op.cit., page 25.

³⁰ The Kyoto Protocol is the document recording the obligation on developing countries to reduce greenhouse gas emissions. Arising from the United Nations Framework Convention on Climate Change (UNFCCC) parties meet annually at the Conference of the Parties (COPs) to assess progress. The third COPs meeting was held in Kyoto, Japan. South Africa signed the UNFCCC on 15 June 1993 and ratified it on 29 August 1997. Terry, Graham, “*Green*”, SAICA., page 61.

³¹ Newman, Duane, op.cit., page11.

The cost of such credits is market determined, not generating any direct revenues, although taxes are raised on the income from the trade thereof.

In contrast to the rest of the World “Africa is the smallest emitter of greenhouse gases outside of Antarctica – yet stands to bear the brunt of climate change.” In an attempt to obtain some equity under these circumstances, the Common Market of Eastern and Southern Africa (COMESA), “a coalition of 26 African countries is calling for the inclusion of carbon credits generated through afforestation, reforestation, agroforestry, reduced soil tillage, and sustainable agricultural practices in future climate agreements” and “the group believes that financial incentives for mitigating climate change can simultaneously lift some of the world’s poorest out of poverty”³² by using the carbon market to reward Africa’s resource-poor farmers.

2.7 General Anti-Avoidance Rules – (GAAR).

Sections 80A to 80L of the Income Tax Act are collectively referred to as the general anti-avoidance rules (GAAR). GAAR allows the Commissioner the powers to collect any taxes due that were avoided, postponed or reduced by an “impermissible avoidance arrangement”. Such an “arrangement” may be any transaction, operation, scheme, agreement or understanding including all the steps therein or parts thereof, resulting in a tax benefit; where the sole or main purpose of the arrangement was to obtain a tax benefit or exhibited certain “tainted characteristics”. These tainted characteristics include:

- 1) The lack of “commercial substance”. Section 80C of the Income Tax Act provides that if the transaction results in a significant tax benefit for a party, but does not have a significant effect on the business risk of either party or the net cash flow of such party then the transaction/arrangement is considered to lack commercial substance.
- 2) Creation of rights or obligations not normally created when dealing at arm’s length.
- 3) A direct or indirect misuse/abuse of any provision of the Income Tax Act. The onus for showing that there has been misuse/abuse rests with the Commissioner.

³² Butler, Rhett A., “Africa proposes its own solution to global warming”, <http://www.mongabay.com/2008/2010-africa.html>, [10 December, 2008].

However, the taxpayer may enjoy certain tax concessions that would not constitute such a misuse or abuse.

GAAR has been raised here because whenever proposals are made to amend legislation, as in chapter 6 of this dissertation, there is the risk that unscrupulous taxpayers may take advantage of them. The proposals being made are to encourage participation by a broad spectrum of taxpayers to become more involved in conservation. Therefore any conflicts of interest, misuse or abuse of the flexible tax concessions being proposed must be discouraged.

2.8 International Taxation.

It is necessary to consider international taxation for the following reasons:

- 1) public-private partnerships may well include non-South African participation;
- 2) certain taxable income may be earned by non-residents from conservation activities; and
- 3) one of the incentives for persons to become involved in conservation is that they will be allowed a tax deduction for the contributions made towards such projects.

While international tax treaty provisions are designed to relieve international double taxation on income, the proposal in this dissertation is that we recognise funders of conservation, both resident and non-resident, as taxpayers with a special tax dispensation. Whether we treat them as “farmers” or “conservationists” under a new section and schedule to the Income Tax Act, the tax treatment of their income and expenditure will have to be equitable. To achieve this, South Africa’s tax treaties may have to be revisited.

2.9 Public Benefit Organisations.

Non-profit organisations (NPO’s) play an important role in society, assisting Government to meet its social and development responsibilities through the forum of a public-private partnership. NPO’s need to be registered in terms of the Non-profit Organisation Act, No. 70 of 1997. In recognition thereof South Africa, like most

governments, provides encouragement by granting certain tax relief to the said entities.

There is no automatic tax relief. An NPO may be granted exemption from normal tax in terms of Section 10(1)(cN) of the Income Tax Act, provided it first has the Commissioner's approval in terms of Section 30, recognising it as a "public benefit organisation" (a PBO).

Section 30 of the Income Tax Act introduced PBO's, by first defining a "public benefit activity" (PBA) as "any activity listed in Part 1 of the Ninth Schedule; and any other activity determined by the Minister from time to time by notice in the Government Gazette to be of a benevolent nature, having regard to the needs, interests and well-being of the general public."³³

Thereafter it follows that a "public benefit organisation" means any organisation –

(a) "which is-

- (i) a company formed and incorporated under section 21 of the Companies Act, 1973 (Act No. 61 of 1973), or a trust or an association of persons that has been incorporated, formed or established in the Republic; or
- (ii) any branch within the Republic of any company, association or trust incorporated in terms of the law of any country other than the Republic that is exempt from tax on income in that other country;

(b) of which the sole or principal object is the carrying on of one or more public benefit activities, ..."³⁴

For an NPO, merely being registered as a Section 21 company in terms of the Companies Act, No. 61 of 1973 is not sufficient. It must also apply for PBO status to enjoy the exemption provided in Section 10(1)(cN), read in conjunction with Section 30 of the Income Tax Act.

Included as PBA's in the Ninth Schedule, per header and activity, as appropriate to this dissertation, are:

"1) Welfare and Humanitarian

- (f) the provision of poverty relief;
- (j) the promotion or advocacy of human rights and democracy;
- (p) community development for poor and needy persons and anti-poverty initiatives;

³³ Income Tax Act, No 58 of 1962, Section 30.

³⁴ Ibid., Section 30.

including –

- (i) the promotion of community-based projects relating to self-help; ...
- (ii) the provision of training, support or assistance to community-based projects; ...
- (iii) ... to emerging micro enterprises to improve capacity to start and manage businesses; ...

3) Land and Housing

- (e) the promotion, facilitation and support of access to land, housing and infrastructural development for promoting official land reform programmes;
- (g) the protection, enforcement or improvement of the rights of poor and needy tenants, labour tenants or occupiers, to use or occupy land or housing;...

6) Cultural

- (a) the advancement, promotion or preservation of the arts, culture and customs;
The promotion, establishment, protection, preservation or maintenance of areas, collections or buildings of historical or cultural interest; ...

7) Conservation, Environment and Animal Welfare

- (a) engaging in the conservation, rehabilitation or protection of the natural environment, including flora, fauna or the biosphere;
- (b) the care of animals, including the rehabilitation, or prevention of the ill-treatment of animals;
- (c) the promotion of, and education and training programmes relating to, environmental awareness, greening, clean-up or sustainable development projects; ...

10) Providing of Funds, Assets or Other Resources

The provision of –

- (a) funds, assets, services or other resources by way of donation;
- (b) assets or other resources by way of sale for a consideration not exceeding the direct cost to the organisation providing the assets or resources;
- (c) funds by way of loan at no charge; or
- (d) assets by way of lease for an annual consideration not exceeding the direct cost to the organisation providing the asset divided by the total useful life of the asset;

To any –

- (i) public benefit organisation which has been approved in terms of section 30;
- (ii) institution, board or body contemplated in section 10(1)(cA)(i);
which conducts one or more PBA's in this part (other than in this paragraph);
- (iii) association of persons carrying on one or more PBA's; ...
- (iv) department of state or administration in the national or provincial or local sphere of government; ...

11) General

- (a) the provision of support services to, or promotion of the common interests of public interest organisations contemplated in section 30 or institutions, boards or bodies contemplated in section 10(1)(cA)(i), which conduct one or more PBA's

contemplated in this part.” (“The legislation now provides that a PBO is entitled, under certain conditions to donate funds to a voluntary or informal group of persons carrying on PBA’s, despite such voluntary or informal group of persons not having a formal founding document and not being approved as a PBO).”³⁵

The PBA’s selected above demonstrate that the Ninth Schedule to the Income Tax Act covers many categories of activity, including the provision of funds, assets and other resources that may be needed to achieve conservation objectives. Some of these categories could be expanded, or a newly designated category introduced to accommodate the conservation proposals in Chapter 6 of this dissertation.

A PBO may also carry on a trading operation as a secondary object, provided that this is in terms of its aims and objects. Unfortunately, the trading limitation may negatively impact on the proposals made later in this dissertation. PBO’s may trade or carry on an undertaking or activity within the limiting parameters, as set out below:

- 1) Per Section 10(1)(cN)(ii)(aa) of the Income Tax Act, trading must be:
 - a) integral and directly related to the sole/principle object of the PBO;
 - b) carried out on a basis mainly to recover costs;
 - c) be such that it does not result in unfair competition to taxable entities;
- 2) Or, per Section 10 (1)(cN)(ii)(bb):
 - a) be of an occasional nature, and
 - b) such trading must be done mainly with the assistance of volunteers;
- 3) Per section 10 (1)(cN)(ii)(cc), it may have ministerial approval; and
- 4) As an over-riding parameter, per section 10(1)(cN)(ii)(dd), where other than that in (aa), (bb), or (cc) above, a percentage of income and a Rand value limit is placed upon the tax free portion of income derived from any trading activity.

In practice, one must be aware of the source of a PBO’s income. “If a PBO is the beneficiary of a trust that carries on trading activities and the trustees exercise their discretion to distribute an amount in accordance with section 25B(2) of the Act, such amount will be deemed to be from a business undertaking or trading activity in the hands of the PBO. This distribution will be taken

³⁵ South African Revenue Services, “*Tax Exemption Guide for Public Benefit Organisations in South Africa*”, Third Issue, [10 October 2007].

into account in the determination of the basic exemption of the PBO.”³⁶ Likewise, “business” is not defined in the Act. However, based on tax law, it is generally accepted to include anything which occupies time, attention and labours of man for profit. There are no hard and fast rules in determining what is business. However, a number of factors will be taken into account, such as the intention, motive, frequency and the nature of the activity.”³⁷

As for further preferential treatment in addition to relief from normal taxation, PBO’s enjoy an exemption from:

- 1) Capital Gains Tax (as per the Eighth Schedule of the Income Tax Act) on any profit arising from the disposal of an asset.
- 2) Donations tax payable at 20% by the donor in terms of Section 54 of the Income Tax Act.
- 3) Estate Duty also charged at 20% on the dutiable amount of a deceased estate in accordance with the Estate Duty Act, No. 45 of 1955.
- 4) Transfer Duty payable on the transfer of property per the Transfer Duty Act, No. 40 of 1949. This includes transfers to taxable entities which are wholly controlled by a PBO.
- 5) Stamp Duty levied on instruments such as leases, and Securities Transfer Tax on marketable securities in terms of the Securities Transfer Tax Act, No. 25 of 2007.
- 6) Skills Development Levies on salaries and wages, if the PBO solely carries out approved PBA’s in terms of the Skills Development Act, No. 9 of 1999.
- 7) Although a PBO is not defined in the Customs and Excise Act, No. 91 of 1964, Schedule 4 of that Act provides for partial or full rebates on the importation of specific goods, providing the required flexibility to assist PBO’s.

To manage PBO’s, officers and employees may be employed at reasonable market-related remuneration to carry out its objects for non-profit with philanthropic intent. PBO’s operate just as any other entity, requiring staff to assist them in achieving their objects and they have same employer/employee relationship as other employers and employees do. Employee income is taxed in accordance with Section 89bis, read in conjunction with the Fourth and Seventh Schedules to the Income Tax Act.

³⁶ Ibid., page 11.

³⁷ Ibid., page 11.

An advantage for any donor is that, if the PBO carries on certain PBA's as per Part II of the Ninth Schedule to the Income Tax Act, the donor will be entitled to a tax deduction on a portion of the value of the donation. "A taxpayer making a bona fide donation in cash or of property made in kind to a Section 18A approved organisation, is entitled to a deduction from his taxable income."³⁸ A taxpayer must have an appropriate Section 18A certificate to be allowed to calculate any tax relief per the applicable formula against the taxpayer's overall taxable income.

Donation is defined in Section 55(1) of the Income Tax Act as "any gratuitous disposal of property including any gratuitous waiver or renunciation of a right." But, when reviewing the interpretation of a "donation" reference should be made to *Welch's Estate v Commissioner, SARS* [2005] (4) SA 173 (SAC), 66 SATC 303 particularly, with regard to the donation being made without any *quid pro quo* being given or expected.

The Value Added Tax Act, No 89. of 1991, (VAT Act), is independent of the Income Tax Act. It is also applicable to *associations not for gain* and *welfare organisations*, with a few specific exemptions. It is important to appreciate that the *association not for gain* definition includes a *public benefit organisation* and a *welfare organisation*. A *public benefit society* qualifies as an *association not for gain* and therefore will enjoy any special provisions in the VAT Act. It follows that a welfare organisation must first apply and qualify as a PBO to also qualify as an association not for gain for VAT purposes.

The above demonstrates the relatively wide parameters within which PBO status may be granted. These parameters provide fair flexibility within which to accommodate the proposals made later in this dissertation.

2.10 The Law of Property.

Before concluding this Chapter, it is appropriate to touch on the law of property, being a matter relevant to all the other discussions in this dissertation.

³⁸ Ibid., page 25.

The rights to property are protected by the Constitution, as referred to in 2.1 above.

The definition of “property” itself signifies various different, but distinct legal concepts:

- 1) the right of ownership in a legal thing, or
- 2) the legal thing to which a right relates, or
- 3) a variety of legal relationships qualifying for protection as such under the Constitution.³⁹

Most of this dissertation refers to immovable property, “such an approach obviously has implications for security of title, access to land and generation or maximisation of wealth”, but to which the concept of divided ownership (*duplex dominium*), or diversification or fragmentation of rights, may be applied to allow “for different kinds of rights to property that afford optimal security of title.”⁴⁰

Co-ownership may be governed by an agreement between the parties, so-called “bound co-ownership” (*gebonde mede-eiendom*) or limited to a legal relationship between parties called “free ownership” (*vrye mede-eiendom*). Any adaptation to common law co-ownership of land creates rights and obligations of co-owners when allowing numerous interested parties the opportunity to take ownership and responsibility of the land in question. “As all co-owners are entitled to a share in the whole property it is obvious that no co-owner has a right to destroy (*ius abutendi*) in respect of it and neither may one co-owner prevent any other co-owner from using the joint property reasonably and in proportion to his or her undivided share.”⁴¹ For this to work, an association of co-owners would have to be established to agree and achieve common goals, parameters within which to operate, and to provide continuity. Due to the mix of landowners, there is the possibility that they will have varying needs, and a flexible solution will be required to bring them together successfully.

³⁹ Badenhorst, Pienaar, Mostert; “*Silberberg and Schoeman’s The Law of Property*”, Fourth Edition, [2002], (LexisNexis Butterworths, Durban), page 1.

⁴⁰ Ibid, pages 5 and 6.

⁴¹ Ibid, page 127.

We must not forget that rights are types of property belonging to someone. “A right is a claim of a legal subject to a legal object as against other persons,”⁴² and may be seen to include patrimonial rights to patrimonial objects which themselves have economic or material value. Such objects include things, immaterial property and performances.

Further, “things out of commerce (*res extra commercium*) are things which cannot be privately owned.”⁴³ These include:

- 1) “common things (*res omnium communes*) are things which by natural law are common to all men, but belong to no-one,”⁴⁴ but it is possible to own a specific portion thereof. Examples of these are the sea, the sea shore and public rivers.
- 2) “public things (*res publicae*) are things which belong (though not in private ownership) to an entire civil community and are often referred to as state property,”⁴⁵ or community property.
- 3) “things (*res universitatis*) which belong to a corporate body (*universitas*) and not to individuals.”⁴⁶ These flow from Roman Law, distinguishing that belonging to an entire community or part thereof with the distinction between juristic persons recognised by public law (for example, municipalities and statutory bodies) and those recognised by private law (for example, companies, close corporations, banks, and associations not for gain), and
- 4) things classified as *divini iuris*,⁴⁷ being religious things in Roman Law, which were often rights of way. This concept could be applied within an African context when respecting traditional rights and property.

In contrast, “things in commerce (*res in commercio*) are things which can be privately owned.”⁴⁸

These may be split into two categories:

- 1) things in commerce privately owned, by a legal subject, at a point in time, by an individual (*res singulorum*) or corporate body (*res universitatis*); and
- 2) unowned things (*res nullius*), not owned by anyone at a particular point in time, including:

⁴² Ibid, page 19.

⁴³ Ibid, page 33.

⁴⁴ Ibid, page 33.

⁴⁵ Ibid, page 34.

⁴⁶ Ibid, page 36.

⁴⁷ Ibid, page 37.

⁴⁸ Ibid, page 38.

- a) animals, birds, fish, insects, and
- b) abandoned or derelict things such as jetsam. Immovable property in this category can be problematic.

When considering the proposals made later in this dissertation with regard to the conservation of land, one must take cognisance of the following:

- 1) The distinction between limitations imposed on property by the Constitution and those imposed by ordinary statutes;
- 2) Allied to this is the application of servitudes, registered and not registered. A *servitude* is a limited real right between the holder of the servitude and the property, compared to the contractual right against the current owner of such property.⁴⁹ When seeking to conserve land, numerous servitudes may need to be considered:

- a) *the right of way to access* the land or things being conserved;
- b) *a right of way of necessity* of a permanent nature;
- c) *water servitudes* needed to draw water and convey it to other land;
- d) *grazing servitudes* giving the right to graze cattle on servient land.⁵⁰

Distinctions must be drawn between the above and personal servitudes that are also real rights. They include the usufruct (*usus fructus*), use (*usus*) and habitation (*habitatio*)⁵¹;

- 3) Should a lease be used as the method of acquiring the use of land for conservation purposes, “a lessee in respect of land acquires a real right in the circumstances in which the rule “*huur gaat voor koop*” applies”⁵²;
- 4) “the state has no general common law power to expropriate”⁵³. Any such expropriation must be conducted particularly per Sections 1, 2(1), 5(1) and 12(1)(b) of the Expropriation Act, No. 63 of 1975, as amended, for public purpose and against a payment of compensation;
- 5) the restrictions with regard to the sub-division of agricultural land in terms of Section 3(a)-(e) of the Subdivision of Agricultural Land Act, No. 70 of 1970;

⁴⁹ Ibid, page 297.

⁵⁰ Ibid, pages 298, 299 and 301.

⁵¹ Ibid, page 113.

⁵² Ibid, page 90.

⁵³ Ibid, page 101.

6) if any person possesses another person's property, (including immovable property), uninterrupted, for over thirty years *nec vi, nec clam, nec precario* (without force/peacefully, openly, and with the intention to acquire ownership) then that person shall obtain that right of ownership, per the Prescription Act, No. 68 of 1969; and

7) the real right to any land may conveyed from one person to another only by means of a deed of cession, following the principle of *coram iudice loci rei sitae* ("this phrase encompasses the requirement that transfer had to take place before the Court of the place where the land was situated⁵⁴), requiring such transaction to be duly registered in terms of Section 16 of the Deeds Registries Act, No. 47 of 1937.

When considering the proposals in Chapter 6 of this dissertation, one notes that they apply to many stakeholders – government and quasi-government bodies, resident and non-resident corporate and non-profit organisations, resident and non-resident individuals, including farmers. When planning to conserve land, the above principles of the law of property and the many ancillary rights and obligations thereto will have to be considered when trying to find the best solution to encourage conservation and at the same time respect the rights of the parties involved in any proposal.

2.11 Land Reform in South Africa.

Three programmes were introduced to implement land reform in South Africa⁵⁵.

1) The Land Redistribution Programme of 1995 is aimed at providing the landless or poor with land for housing or productive purposes. It is intended to uplift the rural poor, farm workers, labour tenants and emergent farmers and provide some financial assistance to them.

2) The Land Reform (Labour Tenants) Act, No. 3 of 1996 was put in place to redress the denial of access to land and the exploitation of those who were called "farm workers" but who were actually "labour tenants", address the right to occupy land and the deprivation of that right, and place limitations on evictions.

⁵⁴ Ibid, page 190.

⁵⁵ Ibid, page 489.

3) The Provision of Land and Assistance Act, No. 126 of 1993 was promulgated to designate certain land, regulate sub-division and the settlement of persons. This Act, was amended by Act No. 26 of 1998, also provides for financial assistance for the acquisition, development, improvement and security of tenure rights.

Prior to the introduction of the Communal Properties Association Act, No. 28 of 1996, communities could enjoy joint or common ownership of land, through a trust or juristic person which both required appropriate administration and sound financial footing. This act allows for the registration of a provincial or communal property association. Both types of association are required to have a fair decision-making mechanism, equality of membership, democratic process, fair access to the property and proper transparency and accountability. The main difference is that the community is to administer its own property, not a trustee.

The necessity for a single procedure for land development led to the Development Facilitation Act, No. 67 of 1995, which sets out the parameters governing all future land development, in both rural and urban areas, including land tenure issues, appropriate planning and conservation provisions.

The cover story of the publication, *Finweek*, dated 29 July 2010, stated that land reform is an ongoing development and the statutes go a long way towards improving security of title for communities and individuals occupying traditional community land. However, this is a complex matter. Rural Development and Land Reform Minister Guile Nkwinti recognises that the Government's redistribution target of thirty percent of South Africa's productive farmland into black hands by 2014 will not be met. He thinks that 2025 would be more realistic. The land reform process has become a risk for food security. Unisa Professor Dirk Kotze argues that under-funding, the lack of skill and efficiency and post-settlement support for beneficiaries, and due to Government not exercising oversight as to whom it gives land to when there are others who really want to be successful commercial farmers, are all contributing to the lack of success of the programme. Over the last fourteen years the number of commercial farmers has dropped from sixty thousand to forty thousand. Stellenbosch University agricultural economist, Nick Vink, commented that

“uncertainty and trying farming conditions are further exacerbated by a shortage of incentives for established farmers to look for new opportunities in different kinds of farming and crops.”⁵⁶

The conservation of land and biodiversity could also assist in the area of land reform, job creation and poverty relief. Each development requires funding and Government, with its limited resources, has difficulties in prioritising the allocation of such funds. Therefore, the need for public-private partnerships is increasing, but it must be attractive for the private sector to get fully involved.

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⁵⁶ Whitfield, Bruce and Lund, Troye, “*Land Reform - Playing Politics with Food*”, Finweek, [29 July 2010].

CHAPTER 3.

A BROAD OVERVIEW of ENVIRONMENTAL LAW.

It is appropriate to consider other legislation which interfaces with our taxation legislation, if we are to make a proposal as to how taxation may best be used as a real incentive for land conservation and other similar objectives.

Global environmental issues are high on the agenda in the minds of individuals and governments alike. Environmental issues of global warming, species extinction and food security are debated daily. Environmental problems have no borders. However, policies that distort markets and provide incentives for unsustainable development intensify the very problems that some are trying to address.

3.1 South Africa – Environmental Law.

“Environmental law consists of all legal principles which “have in common not so much their special character, but the subject they regulate.” This subject is, in short, environmental management.”⁵⁷ There are a few core and distinctive environmental law principles that apply, including:

- 1) the *polluter pays principle*, including the proactive costs of prevention and compensatory costs associated with dealing with the consequences of pollution caused by an activity, and
- 2) the *precautionary principle*, which is “essentially the application of preventative measures in situations of scientific uncertainty where a course of action *may* cause harm to the environment”.⁵⁸

Building on the above, the South African National Environmental Management Act, No. 107 of 1998, as amended, known by its acronym NEMA, requires that a risk-averse and cautious approach be taken when applying the above principles in an attempt to best manage the environment and to deal with those who may cause a negative impact on the environment.

⁵⁷ Kidd, Michael, “Environmental Law”, [2009], (Juta & Company Ltd); page 4, quoting Cowen, Denis V, “Towards Distinctive Principles of South African Environmental Law: Some Jurisprudential Perspectives and a Role for Legislation”, [1989].

⁵⁸ Ibid., page 8.

This approach leads to further principles⁵⁹ including:

- 1) Sustainable development,
- 2) Duty of care to avoid harm to the environment,
- 3) Life cycle responsibility,
- 4) Environmental justice, and
- 5) Co-operation between responsible parties.

The National Environmental Management Act, No. 107 of 1998 provides that “the environment is held in public trust for the people, the beneficial use of environmental resources must serve the public interest and the environment must be protected as the people’s common heritage.”⁶⁰

This is the underlying principle of the *public trust doctrine*.

The environmental right in the South African Constitution’s Bill of Rights has two elements:

- 1) the right of humans to a safe and healthy environment; and
- 2) the rights of everyone not to have the environment itself degraded.

The Constitutional property right is provided for in Section 25 of the Constitution.

In this regard, it is noted that: “The question which this clause raises for environmental conservation is whether the Constitution prevents the imposition of restrictions on property rights for environmental purposes and, if not, whether such restriction will result in compensation having to be paid to the holder of the right in question. This will depend on whether the restrictions amount to an expropriation, or whether they are seen as a mere deprivation.”⁶¹

South African legislative competence is delegated to nine provinces, each with legislative authority, *inter alia*, to pass legislation for its province regarding matters within that said functional area.⁶² This authority extends municipalities which have the right to govern, on their own initiative, the local affairs of their communities, subject to national and provincial legislation. While national legislation is overriding, there is the risk of conflict between legislative bodies due to a lack of clarity as regards the

⁵⁹ Henderson, Paul G. W., “Some thoughts on distinctive principles of South African environmental law”, [2002], page 139.

⁶⁰ National Environmental Management Act, No. 107 of 1998, Section 2(4)(o).

⁶¹ Kidd, Michael, *op.cit.*, page 25.

⁶² The Constitution, *op.cit.*, para 104(1) and 151(1).

functional areas. Likewise, the administration of certain environmental legislation was assigned to the provinces, including certain sections of:

- 1) The Environmental Conservation Act, No. 73 of 1989;
- 2) The Mountain Catchment Areas Act, No. 63 of 1970;
- 3) The Physical Planning Act, No. 125 of 1991;
- 4) The Sea-shore Act, No. 21 of 1935; and parts of
- 5) The Health Act, No. 63 of 1977.

An effort to bring all of the above matters together is contained in the National Environmental Management Act, No. 107 of 1998 (known by its acronym, NEMA).

3.2 South Africa - Water Law.

Water scarcity is of serious concern to South Africa. South Africa is an arid country with a rainfall which is less than the world average and unevenly distributed across a large land mass. Water resources, per person, is less than that of its neighbours, Namibia and Botswana, which are perceived to be drier countries. Demand for water is largely from domestic use in growing urban areas, industry, mining and agriculture⁶³.

The National Water Act, No. 36 of 1998 was drafted to ensure that water resources are “protected, used, developed, conserved, managed and controlled so as to, inter alia:

- 1) Meet basic human requirements;
- 2) Provide equitable access to water;
- 3) Promote efficient, sustainable and beneficial use of water;
- 4) Protect aquatic and associated ecosystems;
- 5) Reduce and prevent pollution and degradation of water resources;
- 6) Manage floods and droughts.”⁶⁴

The Water Services Act, No. 108 of 1997 operates in tandem with the National Water Act, in that its objective is to manage, assess the services required to provide, and to conserve, water. It also governs the management of basic sanitation.

⁶³ Department of Water Affairs and Forestry, “*White Paper on a National Water Policy for South Africa*”, [April 1997], page 14.

⁶⁴ Kidd, Michael, op.cit., page 69.

3.3 Conservation of Biodiversity.

South Africa ranks as the third most biologically diverse country in the world⁶⁵. The impact of global warming on South Africa's biodiversity⁶⁶ is of great concern. "Not only do biodiversity and its components have intrinsic value, but also ecological, genetic, social, economic, scientific, educational, cultural, recreational and aesthetic values. Probably most importantly, biodiversity requires conservation because of its critical importance for evolution and for maintaining life sustaining systems of the biosphere"⁶⁷. Of the approximately 18000 vascular plant species found in South Africa, eighty percent are found nowhere else in the world. South Africa also boasts being the only country having one of the six plant kingdoms, the Cape Floral Kingdom⁶⁸, entirely within its borders. This fact is expanded upon as an example in 5.7. The country is also rich in terrestrial and marine species. This uniqueness makes conservation of its biodiversity important for the country and the world.

There are several acts governing conservation, the main one being The National Environmental Management: Biodiversity Act, No. 10 of 2004 (referred to as the Biodiversity Act). *Nature conservation* is mainly regulated at provincial level, including the ownership of wild animals. The conservation legislation concerning both wild animals and plants was, and is, fragmented.

The Biodiversity Act's objectives are "to provide for the management and conservation of South Africa's biodiversity within the framework of the National Environment Act, 1998: the protection of species and ecosystems that warrant national protection; the sustainable use of indigenous biological resources; the fair and equitable sharing of benefits arising from bio-prospecting involving indigenous biological resources; the establishment and functions of a South African National Biodiversity Institute; and for matters connected therewith"⁶⁹.

⁶⁵ World Conservation Monitoring Centre, "Development of a National Biodiversity Index", [1992].

⁶⁶ "Biodiversity" can be defined as "the variability among living organisms from all sources including, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are a part and also includes diversity within species, between species, and of ecosystems" – from the National Environmental Management: Biodiversity Act, No. 10 of 2004.

⁶⁷ Kidd, Michael, op.cit., page 89.

⁶⁸ Ibid., page 89.

⁶⁹ The National Environmental Management: Biodiversity Act, No. 10 of 2004.

This is a tall order in a country with much demand on resources, including cash and skills resources. If the country is to provide for the protection of ecosystems and species, to conform to the Convention on International Trade in Endangered Species of Wild Fauna and Flora 1973, (CITES), and to ensure that utilisation of biodiversity is sustainable, then appropriate planning needs to be put in place.

Concerns around the implementation of the legislation include bureaucratic delays; the risk of over-bureaucratisation of the Biodiversity Act; outstanding data collection, for example listing species of ecosystems; and that the controls that are put in place prove unenforceable.

This critical status will be addressed later in this dissertation when discussing the application of the proposals made in Chapter 6.

Ancillary legislation includes:

- 1) The National Environmental Management: Protected Areas Act, No. 57 of 2003 governing special nature reserves, national parks and wilderness areas, and protected environments;
- 2) The World Heritage Convention Act, No. 49 of 1999;
- 3) The Marine Living Resources Act, No. 18 of 1998;
- 4) Specially protected forest areas, forest nature reserves and forest wilderness areas, proclaimed per the National Forests Act, No. 84 of 1998;
- 5) The Mountain Catchment Areas Act, No. 63 of 1970;
- 6) Sanctuaries and breeding stations fall under the Sea Bird and Seals Protection Act, No. 46 of 1973;
- 7) Allowance is made for conservatories, normally groups of farmers who combine resources for improved conservation;
- 8) Biosphere reserves, being internationally designated protected areas per the National Environmental Management: Protected Areas Act, No. 57 of 2003;
- 9) The National Heritage Resources Act, No. 25 of 1991; and
- 10) Certain land subject to military control under the Defence Act, No. 44 of 1957.

Through these pieces of legislation, an effort is made to manage and control the components of biodiversity. Wild animals, plants, marine resources, endangered species, soil and wetlands all fall under the umbrella of the Biodiversity Act. It also specifically deals with threats like alien and invasive species and genetically modified organisms.

The positive effects achieved through the management and control of the components of biodiversity will be diminished if the negative effects of pollution and waste are not also addressed. While pollution control and waste management are not addressed in this dissertation, it is mankind who is the biggest threat to itself, through its disregard for, the abuse of, and sometimes ignorance about, the environment. Such negative behaviour is so often just casually referred to as “pollution” with little or no real thought as to the implications of such behaviour, or action against the perpetrators of this bad behaviour. It should be noted that the term *pollution* may be defined as “the introduction by man into the environment of substances or energy liable to cause hazards to human health, harm to living resources and ecological systems, damage to structures or amenity, or interference with legitimate uses of the environment”.⁷⁰ It is not limited to human sources. Because pollution is a by-product of modern civilization and can not altogether be eliminated a balance needs to be found as to what level of pollution is acceptable and what is not.

3.4 Land Use.

The planning of land use is an important part of environmental management and control. The development of South African common law took its roots from Roman-Dutch principals, before environmental concerns were an issue. “One of the major obstacles to the development of environmental land-use control is the feature of our common law of property which regards ownership as an absolute, abstract and exclusive right that allows an owner to use his property as he deems fit.”⁷¹

⁷⁰ Holdgate, MW, “*A Perspective of Environment Pollution*”, [1979], page 7.

⁷¹ Kidd, Michael, op.cit., page 177, quoting A J van der Walt, “*Roman-Dutch Land and Environmental Land-use Control*”, [1992], 7 SA Public Law, page 1.

The Physical Planning Act, No. 125 of 1991 provides for a hierarchy of policy plans in each region and “it may provide that land shall be used only for a particular purpose...⁷² The policy plan’s object is to promote the orderly physical development of the area to which that policy plan relates to the benefit of all its inhabitants.”⁷³

Constitutional rights, the law of property and Land Reform have already been commented on in this dissertation. They must be integral to any solution proposed for the proper land conservation required.

3.5 National Heritage.

The National Heritage Resources Act, No. 25 of 1999 replaced what were known as *national monuments* with *heritage resources*, being any place or object of cultural significance and refers to the cultural heritage resources as the *national estate*, be they of cultural significance or other special value for the present community or for future generations.

In 6.7.2 it is suggested that taxation relief may also be an incentive to be applied to encourage investment in cultural heritage and to assist minority groups.

3.6 Mining.

Mining and the environment is an important aspect as far as land is concerned, but is not covered in this dissertation because the topic justifies a paper dedicated to it alone. Mining is now governed by the Mineral and Petroleum Resources Development Act, No. 28 of 2002, which replaced the Minerals Act, No. 50 of 1991, and “affirms that the State’s obligation is to protect the environment for the benefit of present and future generations, to ensure ecologically sustainable development of mineral and petroleum resources and to promote economic and social development.”⁷⁴

⁷² Physical Planning Act, No. 125 of 1991, Section 6(2).

⁷³ Ibid., Section 5.

⁷⁴ Kidd, Michael, op.cit., page 187.

3.7 Coastal Zone.

The sea shore is the water and land between the low-water and high-water marks of the coast of South Africa. This is governed by the Sea-shore Act, No. 21 of 1935, vesting ownership of the sea and sea shore in the President.

3.8 Enforcement.

With reference to Michael Kidd's book, *Environmental Law, chapter 8, Implementation and Administration of Environmental Law*, to ensure compliance with legislation, the State can either regulate by the *command and control method* or rely on *self-regulation* by individual members of the public. The *command and control method* relies on strict monitoring by the authorities and offenders are prosecuted under criminal law, whereas *self-regulation* relies on individuals monitoring themselves, subject to possible periodic "audit" by the authorities.

A review of South African environmental law shows, for example, that it has lists of protected or alien vegetation, requires permits or licences for specific activities and outlaws certain conduct. Non-compliance is met with extensive provisions for criminal sanction, but there are not many successful prosecutions in environmental cases. This is due to inherent weaknesses of the *command and control method* which include the burden of time and proof, procedural safeguards, preparation of cases and the "moral" aspects of criminal law, coupled with the contingent weaknesses of inadequate policing, the lack of public awareness of the difficulties of investigation and court expertise, to name but a few.

Alternatively, if *self-regulation* is relied upon, there must be additional incentives to encourage appropriate behaviour. These may include "economic or market-based instruments designed to encourage environmentally-beneficial behaviour by altering (which in some cases means setting a price that has not existed before) the price of environmental resources in order that they reflect more accurately the environmental costs of production and/or consumption."⁷⁵

⁷⁵ Ibid., page 221, quoting Jonathan Hanks, "Achieving industrial sustainable development in South Africa: What role for "self-regulatory" and "co-regulatory" instruments?", [1998] 5 SAJELP 298.

Hopefully, such instruments will encourage persons to go beyond compliance through taxes and charges, permits, bonds, subsidies and deposit/refund systems.

There is a move towards interactive relationships by way of an agreement or covenant between parties with a common goal. These agreements/covenants set the objectives and implementation is negotiated, creating co-regulation by those involved. This could, in some circumstances, lead to self-regulation normally through market forces, or the desire to gain a competitive edge, or to achieve a mutual objective. Such an agreement/covenant could be made for land or other conservation purposes.

3.9 “Environmental Justice.”

This dissertation does not enter into the *environmental justice* debate, other than to note that the issues of environmental justice in South Africa differ considerably from that of the United States of America (the USA). In the USA, “there is particular emphasis on the siting of locally-undesirable land uses (LULU’s), like waste disposal sites and industries emitting hazardous emissions, with the view being held that LULU’s are sited disproportionately in neighbourhoods which have, on average, a higher percentage of racial minorities and which are poorer than communities which do not have LULU’s...”⁷⁶ In South Africa it is the majority rather than the minority which suffers the environmental injustice, based on “that the concept of justice is concerned with the distribution of benefits and burdens in a society, ...”⁷⁷

While the above demonstrates how the poor are often put nearest dirty or polluting industries or on poor and degraded land, thus denying them a fair opportunity to resist or change their circumstances, the poor also naturally gravitate to these areas looking for shelter while they seek employment and housing. As *sustainable development* is seen to underpin international environmental law, the concept of basic needs of humanity (food, clothing, housing and employment) must be met, noting that “the limits to development are not absolute but are imposed by present states of technology and social organisation and by their impacts upon the environmental resources and upon the biosphere’s ability to absorb the effect of human activity.”⁷⁸

⁷⁶ Michael Kidd, op.cit., page 231.

⁷⁷ Ibid., page 236.

⁷⁸ Ibid., page 239, quoting Hinrichsen, Don, “*Our Common Future: A Reader’s Guide*”, Earthscan, London, [1987], page 7.

The National Environmental Management Act, No. 107 of 1998 addresses this in that it states in Section 2(4), “Environmental justice must be pursued so that adverse environmental impacts shall not be distributed in such a manner as to unfairly discriminate against any person, particularly vulnerable and disadvantaged persons...” This is a noble pursuit but how will human population growth affect social and economic development in the future when the world population has grown from two billion in the 1930’s, to six and a half billion eighty years later, with an expected increase to nine billion in the next forty years? “Population is at the centre of the debate about issues as wide-ranging as climate change, water resources and the destruction of biodiversity. ... Meanwhile, multinationals are seeking to benefit from the demand they anticipate will come not only from population growth but also from rapidly increasing urbanisation and the emergence of a burgeoning and demanding middle-class consumer.”⁷⁹

To achieve that which is necessary there is the need for public participation in the environmental decision-making process but this will not work unless the people involved have access to the appropriate information.

South Africa has the dual challenge of meeting the needs of economic and social development as well as sustainable environmental development.

3.10 International Law and Custom.

Just as within a country environmental problems are not limited to one area, likewise they cannot be contained by national boundaries and we have to co-operate and rely on international treaties, governed by international law, to address the many environmental challenges.

To achieve a required cross-border environmental outcome, which includes say rural communities, cognisance may have to be taken of both international law and of custom. “Custom can be seen as the common law of the international community, and two main requirements have been identified for the evidence of a rule of custom: settled practice (*usus*) and the acceptance of an obligation to be bound (*opinio juris sive necessitates*).”⁸⁰

Further, the status of international law within South Africa must be taken into account. An international agreement becomes law when it is enacted into law by

⁷⁹ Whitfield, Bruce, “*Food Security – Chew on this*”, Finweek, [29 July 2010].

⁸⁰ Kidd, Michael, *op. cit.*, page 42.

national legislation. This means that such treaties do not become part of municipal law without legislative transformation. To achieve legal status a treaty must be:

- 1) Included in an Act of Parliament;
- 2) Added as a schedule to a statute; or
- 3) When an Act may give the executive power to bring such treaty into a municipal law by proclamation in the Government Gazette.

The National Environmental Management Act contains provisions relating to international law whereby the Minister may make recommendations to the Cabinet and Parliament as regards an international matter.

The World Commission on Environment and Development (WCED) was formed by the United Nations General Assembly in 1983 with the broad directive to provide a “global agenda for change”⁸¹. Its 1987 “Brundtland Report” concluded with a “call for action” which resulted in two contributions from WCED:

- 1) The term “*sustainable development*”, and
- 2) It led directly to the United Nations Conference on Environment and Development (UNCED), the “Earth Summit”, held in Rio de Janeiro in 1992.

Unfortunately the large and complex UNCED Agenda 21 blueprint and action plan for the international community linking development and environmental action for “the fulfilment of basic needs, improved living standards for all, better protected and managed ecosystems and a safer, more prosperous future”⁸² has not become a reality. The reasons for this appear that Agenda 21 is perceived as “soft law”, influencing international environmental law; too large and complex to practically implement; and governments still concentrate on their internal demands ahead of that which is a global responsibility. Agenda 21 is built upon the principle within Article 74 of the United Nations Charter – the principle of good neighbourliness and international co-operation. “This principle is particularly evident in the case of shared resources. It also requires prior

⁸¹ Hinrichsen, Don, “*Our Common Future: A Reader’s Guide*”, Earthscan, London, [1987], page 4.

⁸² Kidd, Michael, op. cit., page 52, quoting Chpt 1, para 1.1, Agenda 21, UNCED Rio de Janeiro, [1992].

notification, consultation and negotiation before activities involving environmental risk take place, as well as notification and due diligence in cases of emergencies.”⁸³

Therefore, while we wait for the international community to honestly and fairly act, we must ourselves make decisions and take what action we possibly can in the interest of ourselves and future generations.

Probably the greatest environmental concern is global warming. The United Nations Framework Convention on Climate Change was adopted at the 1992 Earth Summit and its protocol, the Kyoto Protocol of 1997, was adopted to provide enforcement targets to “achieve stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system,”⁸⁴ through common but differential responsibilities to the varying categories of developed and developing countries, including South Africa.

3.11 Environmental Ethics.

Professor J. Hattingh makes the following statement:

“Environmental ethics is a sub-division of professional and applied ethics that concerns itself with the responsibilities that we as humans have in our interactions with the environment.... Regardless of all the distinctions that can be made on a theoretical level amongst different value positions in environmental ethics, there seems to be a growing need in the world in which we function today to articulate a pragmatic environmental ethic that can guide our actions and decisions in individual, social, professional, corporate and public decision-making contexts.”⁸⁵ There will continue to be debate around the advantages and obstacles of environmental ethics, but it is that very debate that is crucial to keeping the topic alive and flexible in its application. The greatest value is the implementation of such guidelines and the awareness they will generate. To achieve such implementation will require time, energy and funding and that is where tax incentives could play their role.

⁸³ Ibid., page 55, quoting Birnie, Patricia W. and Boyle, Alan E., “*International Law and the Environment*”, second edition, [2002], Oxford University Press, Oxford, pages 126, 127 and 128.

⁸⁴ Ibid., page 56, quoting United Nations Framework Convention on Climate Change, (FCCC), Article 2, Earth Summit, [1992].

⁸⁵ Hattingh, Prof J., “*Environmental Ethics*”, guest essay published in “*The Enviropaedia*”, [2006-2008], page 106.

Appropriate ethics must remain high on everybody's agenda while they work on sustainable development; social responsibilities; environmental reporting; and the responsibility of governments to tax, and taxpayers to pay taxes, fairly.

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CHAPTER 4.

SOME TAX INCENTIVES USED INTERNATIONALLY.

The environmental crisis is a worldwide phenomenon. South Africa enjoys an up to date and bold Constitution, together with a good legislative system. However, there is no reason why other jurisdictions should not be visited to learn how they have applied their minds to the solution of managing and funding their environmental and ancillary problems.

McNeely states: “Incentives motivate desired behaviour, and disincentives discourage behaviour which is not desired. ... Incentives are used to divert resources such as land, capital and labour towards implementing the conservation on biological diversity (CBD), whereas perverse incentives induce behaviour which depletes biological diversity.”⁸⁶ Direct incentives are designated to specific objectives and made in cash or kind, whereas indirect incentives are designed to change behaviours, often without direct cost implications. Government may now find it necessary to introduce new conservation incentives to cancel out the negative impacts of previously implemented “perverse” incentives.

This chapter will examine some samples of tax incentives which are being made available in other tax jurisdictions. This dissertation concentrates mainly on what is happening in Australia and the United States of America, which are considered the most comparable with the South African situation and requirements. Therefore, concepts and ideas have been drawn from the work already done in those countries and added to where considered appropriate. Certain other countries are also mentioned briefly. South Africa has historically adopted foreign legislation and amended it to suit the local scenario. Any future changes that may be introduced in South Africa to encourage land and other conservation could well follow this past practice for expediency.

⁸⁶ Mc Neely, Jeffery A, “*A new approach to Incentives under the Convention on Biological Diversity*”, [March 2006].

4.1 Australia.

Australia has been one of the leaders in conservation legislation, assessing and implementing change, from which other countries have benefited.

Land and Water Australia was established in 1990 to consider an integrated approach to eco-services for a farmer-led regional conservation programme. Its project objectives were:

- 1) “to specify legitimate mechanisms to attract private investment in sustainability and conservation, by marrying existing taxation structures (e.g. managed investment schemes, tax leveraged donations and growth or research financing initiatives) to market instruments (e.g. tradable credits, offsets, ecosystem services) to deliver:
 - a) Privately funded conservation arrangements on both public and private land;
 - b) Accelerated investment into technologies and services in support of sustainable goals; and
 - c) “Fair sharing” of the burdens of public good conservation expenditures,
- 2) to take initial steps to translate this knowledge into application by government and private markets.”⁸⁷

The integrated approach operated in three stages between 1990 and 2009, being:

- 1) 1994 to 2000; understanding vegetation in production landscapes.
- 2) 2000 to 2005; practical considerations for managing native vegetation.
- 3) 2005 to 2009; healthy ecosystems, healthy landscapes.⁸⁸

As can be seen from the above there is no quick fix. Time being of the essence, the time to implement appropriate structures is already overdue.

A holistic approach would be to achieve sustainable economic growth in a responsible, efficient, effective and fair way. The essence of the Land and Water Australia report called, “*Concepts for private sector funded conservation using tax-effective instruments*” is “to outline a conceptual model for the use of taxation to markedly improve the flow of funds to conservation. Its particular focus is the use of private funds to ensure

⁸⁷ Land and Water Australia, “*Improving private sector conservation using tax-effective instruments*”, [Updated June 24th, 2009], lwa.gov.au/projects/2983

⁸⁸ Land and Water Australia, “*Native Vegetation and Biodiversity Program*”, [Updated October 11th, 2009], <http://lwa.gov.au/node/3260>

conservation of high value environments on private farms, through the marriage of taxation arrangements with eco-service markets and regional management of conservation programs by farmer led conservation organisations.”⁸⁹ “The key to a viable national conservation business model is that it must effectively combine philanthropic and self-interested motivations, fully engage the farming community whose lands will be affected and be delivered with minimal overheads.”⁹⁰

To successfully apply the above model, Land and Water Australia required that their taxation provisions, the desire for private conservation investment, and the creation of new markets for eco-services, be co-ordinated and properly interfaced. They had to further recognise philanthropy, commercial environmental goods and services in the marketplace, and motivate private investment in research and development to develop this growing market with its positive spin-offs and find funding which most governments do not have. This required a need to encourage private investment in the conservation, encourage land owners to meet their responsibilities, and allow conservationists to operate in close conjunction with all interested parties.

If the desired planning does not work out because government and private investors do not have a change in mindset towards properly co-ordinated conservation, then governments tend to increase regulation with limited effect while it tries to meet the pressures of socio-economic demands at the cost of conservation.

Farmers also need to recognise their responsibility and ability to generate eco-services linked to market instruments being those of carbon sequestration, water, salt control and biodiversity. Dibley states: “The link between conservation and land management in sustainable agriculture is increasingly being recognised by farmers, NRM practitioners and governments.”⁹¹

⁸⁹ Land and Water Australia, [October 2007], “*Concepts for private sector funded conservation using tax-effective instruments*”, page 1.

⁹⁰ Ibid., page 2.

⁹¹ Dibley, Di, “*Australia’s Future Tax System*”, Greening Australia, [May 2009], page 2.

4.1.1 Conservation Investment Program.

The Australian regional conservation business model operates an investment program through:

- 1) an unlisted trust – “The Farmland Conservation Trust”, which in turn operates three subordinate entities:
 - a) “The Farmland Conservation Philanthropic Fund” allowing appropriate tax deductions including donations and green offsets for carbon omissions which enjoy no future economic benefit,
 - b) “The Farmland Conservation Research Fund” allowing for tax deductions and possible future returns, and
 - c) “The Farmland Conservation Investment Scheme” managing eco-services, the appropriate tax deductions and potential future profits.⁹²

Land and Water Australia states that the commercial value of eco-services lies in income received from sales of the ecosystem services like reduced salination, carbon emissions, water savings and green offsets managed through bio-banking. This new industry of farm-produced eco-services will grow and respond to normal market forces. Tax incentives will prove the catalyst to best develop this market and meet its ultimate objective of sustainable commercial conservation. Land of high conservation value will be managed in the normal way through ownership, lease, licence or easement. Transition areas adjacent to farmland will require capital expenditure including fencing, water holes, access roads and power. The remainder of the land should be used for new eco-services income.

It is further noted in this regard that: “Internationally, increasing pressures to conserve coupled with pressures on government budgets are leading to an increasing interest in taxation innovations. Whilst empirical evidence is limited, anecdotal evidence suggests that the responses to a tax incentive or a disincentive are often disproportionate. Indications from the US in particular are that a tax break for private investment can trigger significant privately funded farmland conservation. ... Australia supports similar observations...Taxation has the advantage of being an already established system for achieving this social objective.”⁹³

⁹² Land and Water Australia, “*Concepts for private sector funded conservation using tax-effective instruments*”, op.cit., page 9.

⁹³ Ibid., page 15.

4.1.2. Tax System Designed to Encourage Conservation.

According to the *Greening Australia* submission,⁹⁴ the taxation system would need to include the following:

1) Tax deduction for conservation investment.

This would entail allowing the deduction of expenditure incurred on improving or protecting the environment, including on-farm conservation and rehabilitation. In other words, the deduction of expenditure incurred in the production of income “or other relevant purposes. The intention being that the term “or other relevant purposes” refers to climate change mitigation and beneficial environmental outcomes.”⁹⁵

And, to limit abuse, investments would have to be linked to accredited conservation programs or organisations doing such work.

2) Make allowance for the deduction of certain prepayments made towards approved, viable eco-service businesses requiring substantial setup capital, including the cost of buying land and other associated costs.

Special rules may have to be introduced, from time to time, for this flexibility including “private rulings” from the Revenue Services. These may include an allowance for the establishment of *biodiverse carbon sink forests*⁹⁶.

3) An extension of the exemption from donations tax and capital gains tax would have to be made to donations and bequests for ecological purposes, as well as exemption from stamp- or transfer duty on transactions related to, for instance, biodiverse carbon sinks. Donations of any kind (property, plant, equipment, investments and vehicles) from any taxpayer (individual, company, trust) should be included.

4) To encourage conservation pooled development funds and similar conservation investment schemes.

⁹⁴ Dibley, Di, op.cit., page 4.

⁹⁵ Ibid., page 4.

⁹⁶ Ibid., page 3 – “*A biodiverse carbon sink forest*” is “a planting that restores a self-replacing diversity of regional native vegetation on land cleared prior to 1990”, effectively “the establishment of a forest system”. “As environmental services have no current market value, the true value of biodiverse sinks is not recognised by the market” such “biodiverse native forest sinks achieve multiple environmental benefits beyond emissions reductions. A tax incentive that recognises the real value of a biodiverse sink, the long-term investment and environmental security associated with it and the higher up-front costs of establishment, is an investment in Australia’s future”.

- 5) To promote conservation research and development including the establishment of new eco-services and markets. Revision for the application of wear and tear, tax losses and allowances would be required, including possible capital write-offs. Specially recognised expenditure should include expenditure to remedy or prevent land degradation. These would include, amongst others, cost incurred to reduce the decline in soil quality, degradation of natural vegetation, the effects of chemical fall-out, deposits of eroded materials and salinisation.
- 6) Serious consideration needs be given to the flow through of such write-offs to the individuals funding these expenditures, as McKerchar et al states: “The focus of the income tax system is on financial self-reliance for producers, rather than environmental concerns” and “it is argued that the income tax concessions directed at environmental sustainability have not been effective in the case of primary producers because they tend to place more emphasis on tax planning (short term) rather than environmental planning (long term) issues. That is, a tax deduction is little incentive when you have minimal tax to pay.”⁹⁷
- 7) To attract private investment capital, tax holidays or time-limited exemptions need also to be considered.
- 8) The above need to be reviewed in the light of equitable distribution of these public good conservation costs and ensure that benefits are used towards environmental sustainability.
- 9) Tax on land/rates could vary depending on the landowner. Here, exemptions and differential rates of tax could be considered.
- 10) A review of land valuations should include recognition of the value of conservation.
- 11) Where conservation covenants are entered into with eligible environmental bodies on prescribed conditions, and the landowner suffers some loss/reduction in the value of his property, there should be an exemption from capital gains tax, even if the transaction is of the kind of a sale/disposal.

⁹⁷ McKerchar, Margaret, Coleman, Cynthia, “*The Australian Income Tax System: Has it helped or hindered primary producers address the issue of environmental sustainability*”, *Journal of Australian Taxation*, No.7, [2003], pages 1 and 10.

Tax incentives may appear to favour those with a higher marginal tax rate, but they must be weighed against “the fact that a failure to protect declining natural resources will result in inefficiency, unexpected harms and distribution inequity.”⁹⁸

Taxation remains dependent on the integrity of the tax system, the political will of those in power, the competing demands for the same funds and the willingness of those who participate to be involved in any project. “The more pressing issue must be to raise the level of community concern about the environment if there is to be any change in government policy. Ideally, policy changes need to be pro-active and visionary rather than simply reactionary and without substance.”⁹⁹ Taxation solutions are only a part of a complex solution involving many other interventions needed to succeed.

The Australian model suggests “that focused tax provisions using an appropriate investment vehicle, combined with government regulation and market-based instruments can be highly effective in promoting conservation outcomes.”¹⁰⁰ This can be achieved through targeting on-farm conservation; effective and efficient private conservation investment opportunities; a well-established tax system and private market; and the need for funds to be attracted to rural investments as the catalyst to attract private money needed in conservation investments.

These must be assessed against the financial impacts of climate change plus the impacts of climate change on threatened species, habitats, increase in invasive weeds and animals and reduced rainfall. The farming community can not bear these costs alone even if they could afford them. Substantial private funds will be essential and will require that the work on private and public land be integrated in good, sustainable projects.

The flow through of tax benefits to private investors is critical to success and often farmers have little income to enjoy and be motivated by the proposed tax incentives. This also applies to other landowners.

⁹⁸ Land and Water Australia, “*Concepts for private sector funded conservation using tax-effective instruments*”, op.cit., page 21.

⁹⁹ Ibid., page 8.

¹⁰⁰ Ibid., page 23.

4.2 Australian Model Summary.

Below is an outline of the Australian model, extracted from the Land and Water Australia report, which includes:

- 1) Land may be bought under a management scheme by sale, donation, lease, licence, or voluntary management;
- 2) Services provided to the scheme include donated time, materials and labour; labour and materials purchased; and possibly better farm productivity through changes to the management of the land;
- 3) Participation in eco-services benefits may range from nil to full participation;
- 4) An investors group could include high net worth individuals; residents who wish to make a small investment or donation; high net worth foreign investors; and resident and non-resident philanthropic funds/organisations;
- 5) Taxes will depend on income levels and asset structure; sources of income; family and demographic arrangements; and any prior tax arrangements; and
- 6) The scheme would have to account for:
 - a) The traded eco-services – water, salt and carbon;
 - b) The potential for biodiversity conservation;
 - c) Any on-going knowledge gaps and uncertainty;
 - d) Capital replacement and protection; and
 - e) Income and expenditure of the scheme.

“Commercial capital is the asset that generates ongoing income. Natural capital (such as high quality landscapes, healthy riverine systems, ecosystems) similarly are the basis for eco-services such as clean air, potable water, food, fibre and cultural and recreational values.”¹⁰¹

“Tax- deductibility of expenditures is the key consideration in the encouragement of conservation,”¹⁰² and hinge on the revenue (deductible) or capital (non-deductible) nature of the expenditure.

¹⁰¹ Ibid., page 60.

¹⁰² Ibid., page 60.

Further, considerations associated with on-farm conservation are:

- a) expenditure incurred on essential research and eco-services marketing, ranging from investment into conservation, remediation and protection, support of sustainable production, and research into harm-reducing technologies or services;
- b) the costs incurred in reducing the impact on the environment; and
- c) the cost of conservation itself.

To accommodate these types of expenditure, special deductions need to be considered.

Further options could include:

- a) special purpose trusts;
 - b) small business concessions;
 - c) the possible introduction of prescribed private funds as registered environmental organisations;
 - d) deductions for individuals entering into perpetual conservation covenants, wherein the covenant is over land owned by that individual; of a permanent nature; with restrictions on the activities that may be conducted on the land resulting in a reduction in the economic value of that land; such limitations to be so registered on the title deed; and the covenant to be approved by the authorities;
- 7) a joint venture with a philanthropic fund; and
- 8) the use of managed investment schemes focused on eco-services income.

The impact on landowners must also be considered, particularly when dealing with a real right which is independent of the ownership of the land involved. Such transactions may inadvertently trigger capital gains tax or donations tax.

4.3 United States of America.

In 2007, Lindstrom made the following statements in his Tax Guide:

“Voluntary land conservation, resulting from increasingly alluring tax benefits, has significantly changed the face of land use in the United States...There are more than 1500 land trusts in the U.S. today, administering conservation easements over millions of acres of land that have been permanently

protected by these easements. Most of these land trusts depend heavily upon the significant income or estate tax benefits offered by the federal tax code as an incentive for voluntary land conservation.”¹⁰³

“A conservation easement is a restriction placed on a piece of property to protect its associated resources”, they “protect land for future generations while allowing owners to retain many private property rights and to live on and use their land, at the same time potentially providing them with tax benefits.”¹⁰⁴

The concept of using special interest entities to facilitate better distribution of land is not new to the United States of America. State government funds, known as Land Conservation Funds (LCF) have been used for many years. An LCF would not be the land owner; rather it “would be a politically salable transfer mechanism that would make financially possible a redistribution of land.”¹⁰⁵ Nor would an LCF operate farms or trading entities - that is done by public or private entities. Special taxes would fund these separate LCF’s and the revenue earned would be allocated to designated projects and “once established, would be self-perpetuating and relatively immune to political sabotage.”¹⁰⁶ Barnes suggests that the taxes funding the LCF would include “severance taxes” on oil, gas, minerals and timber, and a capital gains-type of tax raised on the unrealised revaluation of land values. Besides providing funds to buy back land for additional open spaces, it could be used to assist co-operatives of low income families to establish new businesses and provide housing; fund community development corporations; gain land for water and energy resources; and create non-profit land trusts for minority groups. Restrictions and limitation must be built in to ensure that only legitimate non-profit organisations and only low or moderate earners benefit.

Different applications are made by the different States of the United States of America. “*Guiding Growth: A Survey of Tax Incentives*”, completed by the New England Environmental Finance Centre, provides a good short reference to many such incentives already introduced.

¹⁰³ Lindstrom, Timothy, “*A Tax Guide to Conservation Easements*”, [2007].

¹⁰⁴ The Nature Conservatory, “*How we work Conservation Methods, What are Conservation easements, and Conservation Tax Incentives for Easements*”, [2005].

¹⁰⁵ Barnes, Peter, “*Buying back the Land*”, page 1; reprinted from “*The People’s Land, A Reader on Land Reform in the United States*”, edited by Peter Barnes for the National Coalition for Land Reform, [1975].

¹⁰⁶ *Ibid.*, page 1.

To provide an idea as to how they vary some of the applications are scheduled below:

1) “In *Virginia*, conservation easement donors may pay their state taxes with their Land Preservation Tax Credits. Land Preservation Tax Credit purchasers help finance preservation of *Virginia*’s unique natural resources.”¹⁰⁷

2) “The *North Carolina* Conservation Tax Credit (CTC) is a special tax benefit offered to a landowner who places permanent conservation restrictions on property. The landowner either donates property to a qualified organisation or keeps the property and formally gives up the right to develop the property by implementing a conservation agreement (also known as an easement). In exchange, the state may give that landowner a credit towards his or her state income tax. The landowner may also qualify for federal and state income tax deductions, lower property taxes and estate tax benefits.”¹⁰⁸

3) In the State of *New Mexico*, personal, corporate or fiduciary tax credits may be given for donations to private non-profit or public conservation agencies for conservation purposes. These tax credits may be used or carried forward for up to twenty years.¹⁰⁹

4) *Massachusetts* has recently (14 January 2009) had success in passing into its law the Land Conservation Incentives Act (House 5080) providing tax credits with effect from 1 January 2011.¹¹⁰ This being amongst the youngest pieces of legislation it is considered appropriate to provide detail here for further reference.

It establishes a “state income tax credit for land owners who donate qualifying conservation land to a municipality, the Commonwealth or certain private non-profit corporations organised for the purpose of land conservation.”¹¹¹

The abovementioned qualifying taxpayers’ benefit, provided their donation of land is made by deed or conservation restriction of a permanent nature, by:

¹⁰⁷ Land Conservation Concepts, Inc., “*Virginia Land Preservation Tax Credits – A powerful financial tool*”, [2010].

¹⁰⁸ The Open Space Protection Collaborative, “*A Guide for the North Carolina Landowner*”, [2007].

¹⁰⁹ State of New Mexico – Taxation & Revenue Department, “*Land Conservation Incentives tax credit Instructions*”, [April 2008].

¹¹⁰ Partridge Snow & Hahn llp, Counsellors at Law, “*New Tax Incentives for Land Conservation*”, [February 2009], page1.

¹¹¹ *Ibid.*, page 1.

- a) a tax credit of 50% of the appraised market value of the donation;
- b) the tax credit is limited to \$50,000, per donation;
- c) the tax credit can not exceed the taxpayers' annual state tax liability, but any unused portion may be carried forward for up to ten years;
- d) the state tax credit may be enjoyed irrespective of any charitable deductions claimed at federal level for the same qualified donation of "certified lands".

The benefit of the above tax credits is that they not only reduce income tax but also estate duties.

Property donated is defined as *certified land* if the donation is considered to be in the public interest for natural resource protection and includes wildlife habitat, biodiversity preservation, drinking water supplies, agricultural and forestry production, and land or restrictions with recreational, scenic, and cultural, value.¹¹² These may also include historical landmarks or structures.

Donations of conservation land can be either:

- a) transfers under a conservation easement,¹¹³ gaining a tax deduction of the market value of the land; or
- b) may restrict land through a qualified conservation easement. Examples of this is land preserved for education, recreation, common open spaces, preserving habitat and places of historical importance. The value of the land will also be duly reduced for estate duty purposes.

The following has been noted regarding the abovementioned legislation:

"The Act is a sea-change in environmental policy in Massachusetts in that it provides taxpayers with a tangible economic incentive for land stewardship and conservation efforts, and serves as an additional tax planning tool for a philanthropic individual."¹¹⁴

¹¹² Massachusetts Land Trust Coalition, "*Land Conservation Tax Incentive becomes Law!*", Land Conservation Incentives Act (House 5080), effective 1 January, 2011.

¹¹³ "'Conservation easement': a deed restriction landowners voluntarily place on their property to protect resources such as agricultural land, wildlife habitat, wetlands. The landowner authorizes a qualified conservation organization or agency to monitor and enforce restrictions enclosed in the contract.", New England Environmental Finance Center, "*Guiding Growth: A Survey of Tax Incentives*", [January 2003].

¹¹⁴ *Ibid.*, page 20.

5) *Maine* has seen much development along its coastline and in secluded forest areas, placing increasing responsibilities and costs on its municipalities to deliver services, particularly police, schooling, and fire services. This development is also in conflict with protecting natural resources. Any successful remedy is dependent on the co-operation and co-ordination of landowners, including developers. “A long-term multidisciplinary approach integrating environmental, economical and social interests should, in order to optimize results, be developed to fit the needs and concerns of communities, business, and the government.”¹¹⁵

The above referenced survey of tax incentives shows that many states, including Maine, encourage appropriate land use and discourage land speculation by introducing Land Value Taxation (LVT), or split-rate-tax, which was introduced using differential rates of tax to levy a lower rate of tax on buildings as opposed to land. The impact of LVT is that it favours dense development but puts the onus on “land-rich, money-poor, private land owners.”¹¹⁶ However, they may then make use of the conservation easement facility as available elsewhere.

In Maine the current tax system is designed to encourage tree growth and protect farmland and open spaces, therefore authorities have considered penalty revenues to further increase open spaces with long term environmental conservation and have even decided to apply this tax reform to include waterfront development. It is further noted that: “For many, Maine’s natural resources are a part of their livelihood”, therefore “preserving natural areas will be to the benefit of Maine’s economic vitality, the well-being of its current and future residents”, and “modifying the state’s taxation system could induce changes in public behaviour and influence land use decisions.”¹¹⁷

6) *Vermont*, introduced a special capital gains tax on potential property speculation transactions to reduce short term speculation and subdivision of properties, placing a minimal six year cap on the ownership of property, whereafter the special tax does not apply.

¹¹⁵ New England Environmental Finance Centre, “*Guiding Growth: A Survey of Tax Incentives*”, [January 2003], page 3.

¹¹⁶ *Ibid.*, page 5.

¹¹⁷ *Ibid.*, page 18.

Vermont Land Trust projects¹¹⁸ include donations of conservation easements, property fully donated and a few where a life estate/usage is reserved by donors for themselves, a spouse or family. (Where life usage is reserved it is valued as for a usufruct in South Africa). These donations are favourably considered for federal and certain state income tax purposes. The property is also ignored for estate value purposes. “Charitable gifts of land have had an enormous impact on the growth and success of the Vermont Land Trust’s conservation program,”¹¹⁹ which seeks to protect land now and in the future.

7) In *Maryland*, a different approach has been adopted, through their “Live Near Your Work Program” (LNYW), by giving a grant to employees who purchase their homes near their place of work.¹²⁰ It is argued that this builds better neighbourhoods through “increased homeownership and the linkage between employers and the community”, while “slowing down sprawl and reduced commuter traffic.”¹²¹ The grants are made subject to set parameters to encourage commitment on the part of the employees.

Maryland also provides tax credits to small and medium enterprises which invest in the state and create full-time permanent jobs.

The New England Environmental Finance Centre survey included other tax tools introduced in various States. Some examples are listed below:

1) An exemption from sales tax in certain downtown *Vermont* cities to preserve the economic activities in such “historic” downtowns.

2) *Oregon*’s authorities are trying to shift dependence/reliance of its people from the government to them being independent through *environmental provisions* of:

- a) pollution control tax credits;
- b) introducing excise taxes on fertilizers and pesticides; and

¹¹⁸ Vermont Land Trust, “*Conserving land for the future of Vermont information series*”, [revised 2008].

¹¹⁹ *Ibid.*, page 3.

¹²⁰ New England Environmental Finance Centre, *op. cit.*, page 7.

¹²¹ *Ibid.*, page 7.

c) to build environmental goals into the state revenue service.

3) *Rhodes Island* has addressed the link between land usage and the taxation thereof.

4) The *Minnesota* Site Value Taxation system decreased tax on buildings while increasing tax on land. “This taxation recognizes that government investments in infrastructure and community services create private wealth in the form of higher land values.”¹²²

5) Whereas *New Jersey* allowed tax credits to “encourage more environmentally and economically sustainable development patterns and practices”, these tax credits “are purely incentives; they do not prohibit or mandate specific development.”¹²³

6) Fees or tolls charged on new developments “aim to generate additional revenue to offset expenditure related to new developments. Impact fees are a tool to recover capital costs only, and may not be used punitively,”¹²⁴ and there must be a direct link between charge and the capital project it is funding; be it a road, school or other capital expenditure.

7) In order to change human behaviour taxpayers need to be provided with alternatives to choose from and “the goal of tax shifts is to encourage changes in human behaviour that will benefit environmental sustainability.”¹²⁵ Tax shifting is not about higher or lower taxes, it merely moves taxes away from productive activities (labour and income) onto activities that should be discouraged. A simple example is the choice of taxpayer to use of public transport or to be taxed for using their own car.

8) *Arkansas* allows tax credits for donations to conservation easements in wetlands and riparian zones, i.e. the interface between land and rivers/streams.

¹²² Ibid., page 14.

¹²³ Ibid., page 15.

¹²⁴ Ibid., page 17.

¹²⁵ Ibid., page 17.

9) The *Californian* Natural Heritage Preservation Tax Credit Act tax credits are managed by state-resourced agencies for wildlife and plant habitats, open spaces and water rights on private property. Colorado, Connecticut, Georgia, Iowa, Mississippi, New York, North, and South Carolina and Delaware operate on a similar basis.

10) While *Florida* has no state income tax, it does provide tax exemption for properties with permanent conservation easement and provides a “Conservation Assessment” for land that is used for conservation.

The above examples of tax tools were introduced to stimulate change in the thinking and behaviour of taxpayers. Therefore, “it is important for the state and municipalities to explore the possibility and flexibility of implementing innovative tax techniques to address current development pressures on sensitive natural areas.”¹²⁶ Taxation should always be part of all environmental management strategies.

“Our land feeds our bodies and souls, and it is the most important legacy we can pass on intact to our children and grandchildren.”¹²⁷

4.4 Brazil.

Anna Marmo on “green taxation” stated: “The environmental legal dictionary has a new entry. The word is incentive, an economic benefit granted by the government, through taxes, to stimulate economic, social, and cultural activities.”¹²⁸

Through active control, the aim is to encourage positive behaviours and attitudes. This is a shift from the *polluter pays policy* to the *user pays policy*. “The integration of market instruments and self-regulation into national regulation is imperative, in order to balance long-term economic activity and ecosystem well-being.”¹²⁹ Re-enforcing environmental stewardship by “paying conservation bonuses to producers is much more efficient”¹³⁰ than are negative sanctions against defaulters. This said, some jurisdictions still prefer higher taxation for those

¹²⁶ Ibid., page 18.

¹²⁷ Land Trust Alliance, “*Conserving Places We Love*”, [September 2010].

¹²⁸ Marmo, Anna Mey, “*Green Taxation*”, [November, 2009], (original article in Portuguese by Lopes, Juliana with Addario, Ana Carolina).

¹²⁹ Ibid. page 2.

¹³⁰ Ibid. page 2.

with the highest impact on the environment. The Brazilians introduced three changes with their tax reform to:

- “1) introduce the principle of environment “extrafiscality” (possibly of using taxes as a mechanism for encouraging or discouraging activities) for the entire set of taxes in the country;
- 2) establish tax immunity in favour of goods and services considered environmentally beneficial; and
- 3) distribute tax revenues, among the entities of the Federation, using environmental criteria.”¹³¹

“Legal Amazon”, created in 1953, is a good example of an economic development area which was given much support to expand agricultural businesses, and now undertakes preservation to further develop these and others services, thus becoming a sustainable economic development area. Although Brazil has concentrated its efforts on inland water and forest biodiversity, it also encourages its companies to assess the environmental risks and opportunities associated with their goods and services.¹³²

4.5 Canada.

The Canadian legislation encourages private conservation through the donation of ecological gifts of land and conservation easements. In turn, donors receive non-refundable federal tax credits, to the value of the donation, which may be set off against other taxable income.

Like the United States of America, at Federal level and in the different Canadian provinces different incentives are provided¹³³:

1) *British Columbia* encourages the reduction of air pollution, for example the efficient use of waste from logging. This was done by introducing permit fees for burners which are traded as a one hundred and ten percent rebate for approved research into alternative waste disposal.

It also allows deductions/exemptions, for both business and private activities involving energy savings and alternative fuels. It has gone as far as to waive sales tax on the purchases of bicycles and energy conservation equipment.

¹³¹ Ibid., page 3.

¹³² Ibid., page 2.

¹³³ Deloitte Canada, “Incentives for going green”, [2011],
http://www.deloitte.com/view/en_CA/ca/services/tax/greenincentives/index.htm

2) *Ontario* is advanced in providing incentives for “going green” from research and development, people and technical skills, energy savings. For example, it even allows a sales tax exemption on purchases used for the modernisation of farm buildings.

3) *Manitoba* offers green energy equipment and manufacturing tax credits as well as a property tax credit recognising owners’ conservation efforts.

4) *Nova Scotia* has concentrated on energy tax credits by granting tax, among others, credits to companies that comply with ISO 9000 and ISO 14000 standards, which are environmental management system standards and are examples of self-regulation approaches used in an attempt to reduce greenhouse gasses and other pollution.

4.6 United Kingdom.

Exemption from inheritance and/or capital gains tax is granted as an incentive to protect *heritage land*, provided the new owner agrees to conserve and allow public access to the property. *Heritage land* includes land of natural beauty, great historical interest, scientific interest and special areas for the conservation of flora and fauna. Certain relief is also given to individuals and companies for donations to designated charities.¹³⁴

4.7 Scandinavia.

It is appropriate to mention the Scandinavian countries, because as early as the 1980’s Denmark, Norway and Sweden had environmental policies on their agendas.¹³⁵

¹³⁴ HM Revenue and Customs: Heritage Assets –Terms of Exemption, “*The UK’s Heritage – The Conditional Exemption Tax Incentive*”, [2011], <http://www.hmrc.gov.uk/heritage/terms.htm>

¹³⁵ Daugbjerg, Carsten, and Pedersen, Andres Branth, “*New Policy Ideas and Old Policy Networks: Implementing Green Taxation in Scandinavia*”, [May-Aug., 2004], *Journal of Public Policy*, Vol 24, No 2, page 224.

The principle of “green taxes” has gained acceptance in most industrialised countries as a tool to cope with pollution problems; mainly those generated by the use of pesticides and carbon dioxide emissions.¹³⁶

In contrast to the above, the following is noted regarding Scandinavian countries’ perceptions:

“Basically, farmers and businessmen are opposed to green taxes because they increase production costs and are burdensome since they create uncertainty about future tax levels. Therefore, producers usually oppose green taxes.”¹³⁷ Agri-environmental tax and industrial carbon tax schemes that are in place have had to be implemented through existing political structures which were set up long before environmental problems became political issues and have had to address the two conflicting groups – those representing the polluters and those representing environmental interests.

4.8 Global Tax Reform.

Many other countries throughout the world have introduced, or are considering the introduction of, “green taxes”. Most existing incentives concentrate on anti-pollution, or are designated to specific objectives encouraging favourable behaviour towards nature. Examples of certain conservation payment initiatives are given in 5.2 where such initiatives are grouped by category.

Maybe the time to review all tax policy is overdue. It is estimated that ninety-three percent of the worldwide tax collections come from the taxation of labour and productive capital.¹³⁸ Maybe this should be shifted onto land and natural resources. We accept that most “poor” countries are not poor. Rather, their people are poor, because the countries’ valuable land and other natural resources are controlled by only a few.¹³⁹ The consideration of land value taxation, green tax shifting or resource rentals could result in wealth being more fairly distributed providing a feasible way of dealing with poverty, while promoting both urban and rural land reform, simultaneously. Of

¹³⁶ Ibid., page 119.

¹³⁷ Ibid., page 223.

¹³⁸ Earth Rights Institute, “*Land Value Taxation and Resource Rent approach to Financing for Development*”, <http://www.earthrights.net/docs/fin4devt.html>, [November 2000], page 1.

¹³⁹ Ibid., page 2.

interest, “some cities in the Republic of South Africa have had the benefits from collecting a portion of land rent as revenue. The Land Resettlement Minister of Namibia is currently working to implement this approach. It is also under serious consideration by the Russian parliament, the Duma.”¹⁴⁰

The need for a macro policy, with long term sustainability, should be a high priority, but unfortunately this is not so around the world.

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¹⁴⁰ Ibid., page 2.

CHAPTER 5.

HOW TAXES ARE RAISED and FUNDS ARE APPLIED.

This chapter examines some possible methods of raising funds for environmental sustainability through taxes, donations, and business partnerships.

Before this it is appropriate to understand the issues at hand and to accept that environmental sustainability can not be separated from social and economic sustainability. The reason why climate change is so relevant is because a small change in global temperature can easily cause a vast change in worldwide weather patterns which could immediately impact on the world's population.

5.1 Key Sustainability Issues.

There are many issues related to sustainability. The twelve key sustainability issues highlighted by Sustainabilitysa,¹⁴¹ are listed alphabetically below and not in any order of priority:

- a) *Acid rain* generated by factory and vehicle emissions, is highly toxic, raising acidity in water and killing vegetation and micro-organisms.
- b) *Agriculture and food supply* impacted by climate change contributes to food shortages and high prices. Simultaneously unsustainable farming practices are increasing greenhouse gas emissions.
- c) *Biodiversity and conservation* must address the need to protect the whole ecosystem in which endangered flora and fauna species exist because “biodiversity measures the relative diversity among organisms present in different ecosystems.”¹⁴²
- d) *Climate change* caused by global warming through human mismanagement is accelerating “with potentially catastrophic consequences.”¹⁴³
- e) *Disease* caused by climate variations and as a result of natural disasters.
- f) *Fresh water* is fast becoming scarce due to growing populations, droughts and pollution.

¹⁴¹ Sustainabilitysa, South African Institute of Chartered Accountants, “*Understanding Sustainability Issues*”, www.sustainabilitysa.org/sustainabilityissues, [February 2011], page 1.

¹⁴² Ibid., page 1.

¹⁴³ Ibid., page 1.

- g) *Land degradation, deforestation, and desertification* due to bad management is each having an impact on agriculture, food and water supplies and on poverty, often resulting in the migration of people—simply transferring their problems to another location.
- h) *Oceans* continue to be polluted and over-fished, damaging valuable ocean ecosystems. This, together with global warming is resulting in rising sea levels threatening two-thirds of the world’s population who live within sixty kilometres of the coast line.
- i) *Ozone depletion* was first addressed by the 1987 Montreal Protocol when restrictions were placed on those substances which were believed to be causing ozone depletion. It is now reported that these restrictions have resulted in some improvement in the ozone layer.
- j) *Population growth* results in ever increasing demands on Earth’s limited resources, particularly food, water and energy, with an increase in generated waste.
- k) *Poverty* is defined by the World Bank as living on less than \$1 per day. Unless this can be addressed, “many of the environmental issues will not be solved, because poverty-stricken people will do anything to survive.”¹⁴⁴
- l) *Wetlands* are a critical part of balanced ecosystems, acting as Earth’s natural filtration and water flow control systems.

5.2 Conservation Payment Initiatives.

In trying to address some of the conservation issues, *conservation payment initiatives* have been introduced worldwide. While they often do achieve their designated goal, they do not always address the total ecosystem where they are put into effect.¹⁴⁵

There are multiple ecosystem conservation payments initiatives taking place worldwide,¹⁴⁶ but all have one of the following characteristics:

- 1) a variable payment, be it cash or in kind, designated to a particular outcome;

¹⁴⁴ Ibid., page 1.

¹⁴⁵ Ferraro, Paul J, Georgia State University, “*Global Conservation Payment Initiatives*”, [2007].

¹⁴⁶ Ibid., page 1.

- 2) a contribution by the buyer where the seller still has *de facto* control over the habitat or outcome; and
- 3) a voluntary participation by the seller in a contractual arrangement.

Conservation performance payments may be grouped into a number of categories. Some examples of these, per category, extracted from Ferraro's article are:

1) *initiative by contracted outcome:*

a) *Watershed services:*

In *Brazil, Costa Rica, Guatemala, Dominican Republic and Ecuador* farmers receive monthly payments for the conservation of soil and stabilisation of river banks.

In *Mexico*, forest owners are paid for watershed protection; changing to forest policies includes the establishment of community forest businesses and prohibits changes in land use.

b) *Wildlife:*

In the *United States of America*, landowners are rewarded by the Wolf Habitat Fund to allow wolves to raise their pups on their property.

In *Mongolia*, rural handicrafts are sold at a premium for community assistance in protecting the snow leopard.

In *Mexico*, communities are compensated for not logging certain areas to protect the Monarch butterfly's habitat.

In *Kenya*, coastal villagers are paid to protect the nests of the green turtle, particularly to discourage the harvesting of its eggs.

c) *Habitat:*

Worldwide, many wetlands, grasslands, forests and other bio-diverse area projects pay landowners to protect and restore wetlands and sensitive ecosystems on their property.

In *Australia*, certain national parks are jointly managed by the government and traditional Aboriginal landowners, who receive rent for their services in protecting biodiversity.

In *Madagascar*, poor rural farm communities are paid to preserve forests, where otherwise they would continue with their destructive "slash-and-burn" agricultural methods.

d) *Compensation for wildlife damage:*

In *Russia*, money is paid for the protection of the Amur leopards and tigers of Siberia, as opposed to refunding stock losses.

In *Tanzania*, payment is made to “villages located in biologically sensitive areas for specific conservation practices, including sustainable wildlife and natural resource management.”¹⁴⁷

2) *Initiatives by Contract with Recipient:*

a) *Individuals and Entities:*

In *Brazil*, rubber tappers receive remuneration for their role as forest stewards.

In *Australia's* State of Victoria, the Bush Tender provides direct payment to landowners for maintaining and improving areas of native vegetation on their property.

China also compensates owners for conservation efforts on their land.

b) *Community:*

The *Tanzanian* Land Conservation Fund pays local villages within the migration routes compensation for damage caused by animals on the move.

In *Sweden*, reindeer farmers are paid to protect the predatory species of wolverines, wolves and lynx within their grazing areas.

In the *Netherlands*, farmers are encouraged to allow bird breeding success.

c) *Government:*

Brazil awards municipalities who have conservation areas within their limits by transferring tax back to them.

American Samoa has another type of example whereby the United States of America has leased the area covering the National Park of American Samoa from that government for designated conservation purposes.

And in *South Africa*, the Richtersveld Wilderness Area has been established as a contractual park, including the local community and farmers.

For any conservation payment initiative to be effective, it should be treated favourably within its country's tax regime.

¹⁴⁷ Ibid., page 13.

5.3 People and Parks.

This dissertation would be incomplete without mention of the impact on the people who pay and benefit from taxes and the conservation measures gained from such taxation.

“The relationship between people and nature, particularly in the context of PA’s (Protected Areas), is highly political, embracing issues of rights and access to land and resources, the role of the state (and increasingly non-state actors in NGO’s and the private sector), and the power of scientific and other understanding of nature.”¹⁴⁸

When decisions are made to declare a protected area, the social impacts of conservation can not be overlooked. There is a fine balance between the ecological and financial aspects of biodiversity conservation, and the social and political impact of imposing such protected areas on any people living in the area, including the compatibility of conservation and poverty alleviation. There is a fundamental difference of discipline between the natural science-trained conservationists and the social science-trained critics of conservation. In this regard, it has been noted that “the field of political ecology explicitly addresses the relations between the social and the natural, arguing that social and environmental conditions are deeply and inextricably linked.”¹⁴⁹

Only approximately seven percent (two million square kilometres) of the total land area of Africa is protected.¹⁵⁰ While the drier eco-regions are more protected than tropical evergreen broadleaf forests, the opportunity still exists for pro-active measures to conserve bio-diversity. “The presence of croplands in legally protected areas is an indicator that biodiversity cannot easily be preserved in the face of human competition for the same land. ... More effort should be made to understand the socioeconomic factors associated with the protection of biodiversity; local stakeholders must have a role and economic incentive to conserve biodiversity.”¹⁵¹

¹⁴⁸ Adams, William M and Hutton, Jon, “*People, Parks and Poverty: Political Ecology and Biodiversity Conservation*”, [2007], Conservation and Society Journal, vol., 5, issue 2, page 3.

¹⁴⁹ Ibid., page 2.

¹⁵⁰ World Conservation Monitoring Centre, (WCMC), “*Development of a National Biodiversity Index*”, [1992].

¹⁵¹ United Nations Environment Programme (UNEP), “*Biodiversity-Rich Ecoregions in Africa Need Protection*”, Information for Decision Making Series, [August 2008].

The above must be seen against the capacity of the continent itself to be sustainable. Africa produces only ten percent of the world's food production, yet has approximately twenty-five percent of the world's arable land. "The tension between rapidly rising resources consumption is sure to prove one of the next decade's critical pressure points, write the global consultancy, McKinsey, researchers."¹⁵² Food production is complex and exceeds merely the availability of land. Gareth Ackerman, the new chairman of Pick 'n Pay, recently commented on the impact locally of global corporate consolidation in food retail, distribution and production, including that global groups are making an effort to secure top quality domestic food production for export, making it difficult for South African retailers to access suppliers competitively. "This is an alarming issue. Governments around the world need to be taken to task and be challenged about the reforms they institute, which could ultimately impact food security", he says.¹⁵³

The continuous balance between people's needs and conservation must be carefully maintained, as it can go horribly wrong as seen in the following examples. Adams and Hutton sight examples including the unethical declaration of protected areas resulted in the forced removal of 500 people in southern *Ethiopia*, in 2004, when the Nechasar National Park was handed over, without consultation, to the Dutch NGO appointed to manage the park. And, the fortunate outcome when the *Botswana* government's eviction of Bushmen from the Central Kalahari Game Park was overruled in 2006. The Botswana High Court ruled that the eviction was "unlawful and unconstitutional" and that the Bushmen had the right to live on their ancestral land.¹⁵⁴

"The political ecology of conservation is highly complex and diverse" and "takes place against the backdrop of a wider social assault on nature through processes of industrialisation, urbanisation, pollution, and the conservation of terrestrial and marine ecosystems to industrial purposes."¹⁵⁵ Sharing some of Adams and Hutton's points the new political ecology of conservation must enhance at least:

- 1) The ideas of nature; balancing "nature" and humans.

The "rules" "about who can use nature and where, when and how they can do so."¹⁵⁶

- 2) The impact of protected areas, particularly on the people it may displace.

¹⁵² Whitfield, Bruce, op.cit., page 16.

¹⁵³ Ibid., page 17.

¹⁵⁴ Adams, William M, and Hutton, Jon, op. cit., page 3.

¹⁵⁵ Ibid., page 9.

¹⁵⁶ Ibid., page 1.

3) The economy of conservation benefits.

Protected areas often provide economic benefits within its boundaries and for its neighbours.

4) The rights and needs of indigenous people.

There is the common interest between indigenous people and their rights to land and the conservationists who wish to protect the habitat. Further, when trying to broker partnerships, it is imperative to recognise the indigenous people as equals at the outset of any negotiations.¹⁵⁷

5) Poverty alleviation, conservation and sustainable development.

The linkages between conservation and poverty are as many as are they complex. Is it reasonable, for instance, to expect park management to cure “structural problems such as poverty, unequal land and resource allocation, corruption, injustice and market failure?”¹⁵⁸

A good example of current research is the Biodiversity Monitoring Transect Analysis (BIOTA) southern Africa project, which has been carried out over the past decade in Namibia and western South Africa recognising that “there is a group of local farmers, land owners, and land user communities, who are directly interested in knowing about their specific land in a local context. They would like to get information regarding the value of “their” biodiversity and “their” local ecosystems services, the changes and trends and the vulnerability of “their” ecosystems.”¹⁵⁹ This highlights the real and perceived values attached to the “ownership” of land and related matters. Information about these values should be provided at local level. The fiscus needs to be proactive and get directly involved by assisting those who are using and owning land and those willing to directly assist in the conservation thereof. The integrative main themes of BIOTA southern Africa include:

- 1) The natural dynamics in space and time.
- 2) An understanding of natural processes of change.
- 3) An understanding of human use, value and impact in space and time.
- 4) Appropriate interventions for sustainable use of biodiversity and biodiversity management.

¹⁵⁷ Ibid., page 7.

¹⁵⁸ Ibid., page 8.

¹⁵⁹ Jurgens, Norbert, Schmiedel, Ute, (University of Hamburg) and Hoffman, M. Timm, (University of Cape Town), “*Biodiversity in southern Africa*”, University of Hamburg, [2010], Vol. 1, page vii.

5) An informed policy on local, national and international level.

When managing conservation of the region studied by BIOTA “...it will be very important to use the BIOTA observation data as an early warning system. Hopefully, it will be possible to distinguish between various potential causes, be they related to climate, land use, biological invasions, diseases, pollution, or other influences.”¹⁶⁰ This methodology could prove to be a useful way in which to assist other areas.

The Kirstenbosch Botanical Garden is a good urban example of a successful public-private partnership where government-owned conservation land is managed from suburbia, through a structured botanical garden with eco-services, to the Table Mountain Reserve, all within a short distance. Much of the funding required for the development and sustainability of this magnificent garden has been, and continues to be, provided by private sources mainly through the Botanical Society of South Africa.

To continue to achieve this and similar successful projects, consideration must be given to the tax deductibility of donations, legacies and sponsorships, which are largely catered for by Section 30 and the Ninth Schedule to the Income Tax Act. Taxpayers should be allowed to buy into protected conservation land and approved conservation projects and be given tax incentives in return. Consideration should also be given to a value added tax (VAT) exemption on the sale of certain merchandise by approved entities. Possible exemption from VAT and other taxes should be granted on purchases needed to effect conservation. These suggestions could be extended beyond conservation to certain community organisations, projects and sites.

5.4 Environmental Goods and Services – EGS.

The core role of EGS is sustainable development. These technologies and services structured for environmental conformity are a new industry sub-sector.¹⁶¹ South Africa needs to stabilise its EGS sub-sector and become more competitive because it has good growth and job creation potential and it falls within the DTI’s objectives. Certain tax incentives already exist to assist micro and small-medium enterprises.

¹⁶⁰ Ibid, page 5.

¹⁶¹ Visagie, Marba, (Department of Trade and Industries), “*Environmental Goods and Services (EGS)*”, article published in “*The Enviropaedia*”, [2006-2008], page 111.

Further consideration must be given to the funding of job creation and poverty relief structures and empowering and funding new entrepreneurs in this sub-sector.¹⁶²

A good example of “green investment” is the benefit already gained in southern Africa. The region received the most global “foreign direct investment” (FDI), reaching ninety billion US dollars last year for renewable electricity generation, recycling and manufacture of environmental technology.¹⁶³

5.5 Learning from our Neighbours.

Namibian environmental law is a complex system of statutes, policies, common-, customary-, and case law. The Namibian Constitution is also clear on biological diversity and its protection, and provides the framework for national policies and laws in support of sustainable development and sustainable use of natural resources. The current National Biodiversity Strategy and Action Plan were put in place to protect eco-systems, biological diversity and ecological processes. Their Environmental Management Act, No. 7 of 2007 requires adherence to the principle of optimal sustainable yield in exploration of all natural resources, including water, which are vested in the State, unless otherwise legally owned. While they propose a Parks and Wildlife Management Act to protect all indigenous fauna and flora, this is still being finalised and is linked to Article 95 of their Constitution which includes the mutually beneficial co-existence of humans with wildlife. The new act is being prepared to meet Namibia’s obligations under the Convention on Biological Diversity (CBD), the Convention on International Trade in Endangered Species of Wildlife Fauna and Flora (CITES), and the various protocols of the Southern African Development Community (SADC).¹⁶⁴

¹⁶² “The environmental goods and services industry consists of activities which produce goods and services to measure, prevent, limit, minimise or correct environmental damage to water, air and soil, as well as problems related to waste, noise and eco-systems, This includes cleaner technologies, products and services that reduce environmental risk and minimise pollution and resource use.” Ibid.,2 page 110.

¹⁶³ Shirley, Beth, “SA benefits from green investment”, I-Net Bridge, Business Day, 23 July 2010.

¹⁶⁴ Davis, U. C., “Namibia’s implementation of Conservation on Biological Diversity”, Political Science 107, Spring term 2002.

With reference to BIOTA's, "Biodiversity in southern Africa, Vol. 2 – Patterns and Processes at Regional Scale", we can not ignore that the majority of indigenous Namibians live in accordance with their customary laws. In applying international-, constitutional- and statutory law, this must be taken into account as traditional societies have their own unique versions of how to use natural resources, and often customary laws override other legislation. For example, trees on communal land are perceived to be owned by the major stakeholder, the community. It is therefore understandable that customary law, traditional belief and the concept of aboriginal title to land come into immediate conflict with new forestry and conservation laws as to what constitutes "illegal logging".

The above demonstrates "the huge behavioural differences observed within and between the two countries (South Africa and Namibia) demonstrated that socio-cultural, historical and ecological contexts are important. Therefore, policy-makers need to broaden their understanding of social norms and interactions amongst target groups before implementing new policies. Experiments offer an appropriate and low-cost tool to investigate the efficiency and impact of projects before they are implemented in the real world."¹⁶⁵ This reality is equally applicable to any amendment to tax legislation as it is to any other change. In the Southern African context, if the complexity and diversity of the people who are to implement change and those to be affected by it is ignored, any chance for real and sustainable improvement is doomed.

Any proposal put forward for change and land conservation will need proper planning and process to succeed. This will include stakeholder involvement, scientist interaction, time, money and commitment. Trans-disciplinary research, including joint research and regular joint research processes of integrated research teams, will generate the best results, including proposed tax reforms encouraging the injection of fresh capital into conservation programmes.

5.6 Sustainable Rural Livelihoods in South Africa.

The World Conservation Union, South Africa (IUCN-SA) suggested that incentives, probably tax relief, should be used to encourage farmers to farm with indigenous

¹⁶⁵ Jurgens, Norbert, Schmiedel, Ute, (University of Hamburg) and Hoffman, M. Timm, (University of Cape Town), op.cit., Vol 2, page 269.

breeds. The commercialisation of indigenous breeds has been neglected. Agrobiodiversity¹⁶⁶, (defined below), could assist rural communities in building sustainable development.

“Agrobiodiversity is the result of careful selection and inventive action by farmers, herders and fishers over millennia. It refers to the variety and variability of animals, plants and micro-organisms that are important for food and agriculture, which result from the interaction between the environment, genetic resources and the management systems and practices used by people. Agrobiodiversity is essential for food security, sustainable livelihoods, agricultural productivity and innovation concerning food. The important thing about agrobiodiversity is that it is very much intertwined with people, cultures and practices. One could even argue that the two are mutually reinforcing. It is the authors’ view that, as traditional cultures are eroded, so are the social norms and values attached to agrobiodiversity.”¹⁶⁷

There are numerous restraints¹⁶⁸ in rural areas due to socio-economic circumstances. These include:

- 1) *Food insecurity and poverty.*
- 2) *Access to land*, although current land reform is trying to address this, albeit with limited success.
- 3) *Lack of agricultural support*, which among other matters led to the switch from farming indigenous Nguni breeds to exotic commercial beef cattle, together with the wrong perception that indigenous breeds are inferior. Nguni cattle are tick resistant, heat tolerant and fertile even under harsh conditions.
- 4) *Lack of basic infrastructure* – roads, telecommunications and electricity.
- 5) *The rural farmers have retained a good base of indigenous knowledge* that could be taken advantage of.

It is time to reassess the situation. Research needs to be done as to the feasibility of commercialised farming with indigenous cattle; awareness raised of the benefits of indigenous farming; policy reviewed in this respect and incentives provided, including tax incentives; and rural communities uplifted.

¹⁶⁶ Mahlase, Ellen M and Fakir, Salien, “*The Use of Indigenous Animal Genetic Resources to Promote Sustainable Rural Development in South Africa*”, IUNU-SA, [2003], page 1.

¹⁶⁷ Ibid., page 2.

¹⁶⁸ Ibid., page 3.

5.7 The Cape Lowland Archipelago.

When considering land conservation, the areas in and around towns and cities can not be ignored. The western coastal Lowlands of the Cape Floristic Region (CFR) in which many people reside is a good example. It stretches from the Olifants River in the north to False Bay in the south and is bordered by the Cape Fold Mountains with three main vegetation types – Strandveld, Sand Fynbos and Renosterveld. While this region has been inhabited for tens of thousands of years, the real human impact has only occurred in the last few hundred years. “The natural vegetation is highly transformed and fragmented, and the remaining remnants are threatened by further conversion for housing or agriculture, invasive alien species and global climate change... the Cape lowlands are poorly protected, and few statutory reserves exist... conservation targets for the protection of species are unattainable, as a significant proportion of the natural habitat has already been transformed. In addition, more than three-quarters of the Cape lowlands are in private hands, making new approaches to conservation necessary.”¹⁶⁹ Management options for the vegetation remnants include alien control; the fire regime which is an integral part of especially Fynbos and Renosterveld conservation; and the re-introduction of large indigenous herbivores being integral to the Renosterveld vegetation type. The effect of reduced alien invasion and improved habitat connectivity on population dynamics of Proteaceae has been positive. The Biodiversity and Wine Initiative, the CapeNature Stewardship Programme, the Threatened Species Programme (TSP) and Custodians for the Rare and Endangered Wildflowers (CREW) have also demonstrated that scientific support to conservation management, landowners and decision makers can make a difference.¹⁷⁰ Conservation outside protected areas of multiuse landscapes is proving to be a necessity, requiring the ecological joint management of the mosaic of areas in natural habitat and areas under agricultural production. This is known as conserving biodiversity through “ecoagriculture”.

Each intervention requires skills and funding in applying new approaches to such conservation. Part of the funding challenge has to be met from private sources as the State can not afford that which is urgently needed. Again, some encouragement may be made through appropriate tax concessions.

¹⁶⁹ Jurgens, Norbert, Schmiedel, Ute and Hoffman, M, Timm, op.cit., Vol. 3, page 152.

¹⁷⁰ Ibid., page 174.

CHAPTER 6.

SUGGESTIONS FOR SOUTH AFRICA.

6.1 Existing Authority to Effect Change.

The will to change must be executed within appropriate parameters and duly authorised.

In the previous chapters, legislation and required authorisations have been touched on. With reference to these, the required framework does exist and could be amended prior to the introduction of fresh law. These include:

- 1) The Constitution, which sets out the fundamental rights of citizens to a healthy environment (Constitution, paragraph 24); property (Constitution, paragraph 25); and provides the authority of the Government to effect change in the good interest of its people (Constitution, paragraphs 8 and 25, and as referred to in 2.1).
- 2) The Income Tax Act, which may be amended by changing Section 26 and the First Schedule which deals with farming; (as referred to in 2.2), and Section 30 and the Ninth Schedule setting out the parameters for Public Benefit Organisations, (as referred to in 2.9). Alternatively, due to the importance and magnitude of the topic, a new Schedule specifically dealing with *conservation* could be introduced.

When considering change, it will be necessary to review the current case history/jurisprudence in that decisions and any restrictive interpretations may no longer be applicable to conservation expenditure as they have been applied to farming activities. Previously, authorities were trying to prohibit the deduction of “farming” expenditure by anyone other than bona fide farmers. Now we are proposing to form public-private-partnerships and private-private-partnerships which encourage expenditure on conservation. In return, taxpayers who contribute towards conservation will be allowed a deduction against their other than “farming/conservation” type income in arriving at their taxable amount. This is a change in mindset to the tax regime currently in place.

A good Constitution and flexibility to amend laws, in this case the Income Tax Act, lead the way for the application of the requirements set out in the National Environmental Management, and related, Acts (as referred to in Chapter 3) which require that environmental matters be properly addressed. Funds and resources are immediately needed. The State can not meet all the demands placed upon it. Therefore, private funding is essential, but a *quid pro quo* is needed to motivate the private sector.

Our environmental law and responsibilities are fragmented. However, should the funding and applications thereof be better co-ordinated and the public be more included through the opportunity to contribute and gain some tax relief, then using taxation as the catalyst could provide the opportunity to turn theory into a meaningful consolidated reality.

6.2 International Examples to Follow.

There are numerous examples of incentives provided to motivate people to conform to, and assist in the financing of, conservation. Many are project-specific, where funds are designated to that target with possibly some related benefits for those assisting. These incentives may be at national, provincial or local level.

Fair progress has been made through the Revenue Laws Amendment Act, No. 60 of 2008 (as referred to in 2.3), which introduced Section 37C to the Income Tax Act, which deems certain expenses to be deductible when incurred within set parameters. It is the authors' opinion that this does not go far enough and further encouragement is needed. It remains appropriate to draw on the knowledge and experiences of other countries.

The summary of that which has been achieved in Australia and the United States of America, (USA), are shown as examples and comparatives (referred to in Chapter 4). The USA model, while nationally co-ordinated, is mostly state-driven and controlled. Australia is similar to South Africa in many ways; geographically, in diversity, and in tax legislation. Therefore, amendments following their legislation may be most useful to South Africa. Preferably we should adopt a tax strategy including the holistic

Australian guidelines; include some of the state policies of the United States of America; and maintain the specific project approach which is the best suited to the conservation objective and is mutually beneficial to all parties.

6.3. Amendments to Existing Tax Legislation.

To consider any proposed amendments that are needed, one must step back and objectively view the tax legislation as it currently is, and consider how it could be better related to South African conservation efforts.

At national level, the Department of Environmental Affairs and Tourism strategy includes as its vision: “a prosperous and equitable society living in harmony with our natural resources”¹⁷¹ and a mission statement to create the above. While the Department of National Treasury has the “aim to promote economic development, good governance, social progress and raising living standards through accountable, economic, efficient, equitable and sustainable management of public finances,”¹⁷² in its mission and objectives, it does not mention *sustainable development*. This highlights just how disjointed some of our legislation, is and maybe this is where the changes should start?

To best encourage supporters of conservation, we need simple rules of engagement, with tight controls, accountability and transparency, ensuring that funds are properly spent as planned and a system whereby the taxpayer receives fair tax treatment in the process.

6.3.1 Proposal 1: To amend Section 26 and the First Schedule.

Most of the land in South Africa is owned by private farmers and the State. What must not be forgotten is that any conservation effort could well cross over landowners’, provincial/state, and even national boundaries. How are we to deal with conservation of all land, irrespective of the owner thereof, including non-farming entities and individuals?

¹⁷¹ Terry, Graham, op.cit., page 121.

¹⁷² Ibid., page 131.

The taxation of farmers is well catered for in Sections of, and the First Schedule to, the Income Tax Act, (as referred to in 2.2). Paragraph 12 of the First Schedule already lists special compensation for approved types of expenditure, including the eradication of noxious weeds, planting of trees, shrubs or perennial plants and farming infrastructural expenses.

Section 26 and the First Schedule of the Income Tax Act refer to the “determination of taxable income derived from farming,” and the “computation of taxable income derived from pastoral, agricultural or other farming operations”. We are seeking a solution beyond this; the deliberate drafting of new legislation so as not to restrict income and expenditure to be related to farming.

Decisions of the Court have to be relied upon for an interpretation of “farming”. If the existing legislation is expanded to further encourage conservation, the current definitions and interpretations will have to be revisited to allow for non-farming entities and individuals to be treated as if they are “farmers” when calculating their taxable income, in so far as they have contributed towards approved conservation expenditure.

Sections 46 and 57 of the Revenue Law Amendments Act, No. 60 of 2008 provided for some flexibility regarding specific conservation expenditure with the introduction of Section 37C into the Income Tax Act, which provided some relief by treating certain funding as donations in terms of Section 18A. These amendments are not considered adequate if tax is to be a real incentive for land and other conservation. Taxpayers must be allowed to contribute as much as they wish towards conservation and get the maximum tax benefit therefrom, as soon as possible.

In this proposal, taxpayers who are not actually farming would have to be defined as farmers for their conservation activities, and allow such taxpayers to have more than one “trade”. It would also be appropriate to remove the restriction of ring-fencing any such conservation/farming expenditure from other income sources.

This proposal may be difficult to monitor and fairly apply in practice. It also could leave open the way for tax avoidance by some wishing to take unfair advantage of the relief.

6.3.2 Proposal 2: To amend Section 30 and the Ninth Schedule

In general, donations are not tax deductible unless they fall within the parameters of Section 18A of the Income Tax Act. The donations must be paid to recognised public benefit organisations and made within the special dispensation provided for in the Income Tax Act. There is the opportunity to expand the current public benefit organisation categories to better accommodate expenditure incurred on, and donations made towards, conservation.

This could be achieved by expanding the *approved public benefit activities* as laid out in the Ninth Schedule, in particular paragraph 7, which already deals with conservation (as referred to in 2.9); or, by recognising a category of public benefit organisation specifically dedicated to conservation matters and managed in terms of the requirements of NEMA (as referred to in 3.1).

Of interest is that the Revenue Laws Amendment Act, No. 60 of 2008 has now allowed for the inclusion of multilateral humanitarian organisations, such as United Nations specialised agencies, as acceptable recipients of Section 18A donations, provided they are registered as local public benefit organisations. This flexibility should be extended to conservation and sustainable development which interface with humanitarian issues. All are international matters needing international solutions.

Although not covered in this dissertation, as international action is taken there is the likelihood that foreign persons may contribute towards local projects. This may require a review of the application of, or the need to amend, the current international taxation treaties.

6.3.3 Proposal 3: To introduce a new Section and a new Schedule dedicated to Conservation in its wider aspects.

Section 26 of the Income Tax Act introduces the First Schedule dedicated to *farming* and the special parameters appropriate thereto. A new section could be added to the Income Tax Act so that *conservation* is treated separately, with its own new Schedule to the Act to clarify the computation of taxable income where the taxpayer has contributed, directly and indirectly, to conservation.

Currently, Section 37B allows for the deduction of expenditure on *environmental treatment and recycling assets* and *environmental waste disposal assets*. This is too limited. Operating expenditure incurred on conservation is what is under discussion, together with the right of the funding/paying taxpayer to enjoy a special deduction. This could be addressed by including further definitions of *environmental expenditure* which, thereafter, would be allowed as special deductions to any taxpayer, with the proviso that such expenditure can not create an assessed loss in any one year and that the unused portion can be carried over to the next period of assessment.

6.4 What a new Conservation Schedule may include.

The introduction of a new Schedule into the Income Tax Act, specific to conservation is preferred due to:

- 1) the magnitude of matters conservational;
- 2) the opportunity to expand such a Schedule to include other sustainable development expenditure which will be dealt with in a manner similar to conservation expenditure; and
- 3) the need to keep these expenditure elements separate, easily referenced, and to have practical application of the law clearly understood by all taxpayers.

In order to best introduce the above and manage the changes arising from this challenge the problem solving techniques to be used are all basically the same as those used for any other problem. Therefore, the following needs to be identified and analysed:

- 1) What is the real or perceived problem?
- 2) What are all the components of the equation?
- 3) Who are those involved and how do they inter-relate?

- 4) What are the strengths and weakness?
- 5) What is the appropriate process to find a workable solution?
- 6) Who is going to manage and control the process?
- 7) And, through a joint effort, what is the most mutually beneficial solution?

The proposed solution to introduce a new conservation Schedule into the Income Tax Act must seek to address the tax implication in each step and how it impacts on each tax paying person involved. Particularly, the need to realign taxation provisions with the need to increase the appeal of private conservation investment and the creation of new markets for eco-services must be emphasised.

Therefore, from a land conservation perspective, at least the following needs to be considered:

- 1) What is to be conserved?
 - 1.1) Dependent on the objective of the project - land, fauna or flora, biodiversity, heritage or culture, or one of many others - income and expenditure may be of a capital or revenue nature for tax purposes and therefore incur different tax consequences.
- 2) What is involved in conserving the said matter?
 - 2.1) Preservation, rehabilitation and education vary, therefore the tax implications will also vary.
- 3) Who owns the asset, and how? Who else is involved, and how? Will the conservation effort introduce other players? What changes of ownership may be envisaged, and at what price to whom?
 - 3.1) Whoever is the owner – the State, individual, farmer, partnership, trust, corporate entity, joint venture, public benefit organisation or combinations of the former - will dictate the tax regime appropriate. This could also include owner/tenant, lesser/lessee relationships.
- 4) Is the project feasible and sustainable?
 - 4.1) Will it be possible to make a difference, and how long will it last?
- 5) Who is going to fund the project, and how?
 - 5.1) The nature of the funding – loan, rental or donation and from whom - the State, taxpayers, public benefit organisations or philanthropic funds, will

determine the taxes that may be applicable. A donation may be in cash or in kind, wholly or partial or even a usufruct/right of use.

6) Who will take ownership to see the project through?

6.1) Dependent on (3.1) above, and how they may be rewarded.

7) Will the project prove cost-, tax-, and conservation effective?

7.1) Dependent on all the above and whatever tax relief may be granted.

In answering the above questions, South Africa needs to bring together the State, farmers and other taxpayers in appropriately structured partnerships to effect on-site conservation with tax-linked incentives.

The introduction of a specific Section and separate Schedule applicable to conservation and ancillary matters would provide ease of reference and also reduce any misunderstandings that could arise when the Commissioner may wish to apply General Anti-Avoidance Rules, (see 2.7 above).

6.5 Progress in Environmental Law in South Africa.

The National Department of Environmental Affairs and Tourism (DEAT), applying The National Environmental Management Act, No. 107 of 1998 (NEMA) prepared The National Biodiversity Strategy and Action Plan (NBSAP) as a twenty year strategy for the conservation and sustainable use of the biodiversity. It provides a good structure within which to maintain the provinces within a national guideline for bioregional plans based on sound science. It also provides a guide for land-use planning, environmental assessments and natural resource management for government departments and agencies including private landowners. In doing so the latter have information about the biodiversity value of their property and ensures that land use is compatible with biodiversity conservation by securing priority sites in stewardship contracts in some provinces. It does not address the most important issue of funding and the urgency to act now. NBSAP interfaces with the National Strategy for Sustainable Development (NSSD), which was released by DEAT in 2006, to

provide an integrated framework to shift our development path in a South Africa specific direction including social, economic and ecosystem factors.¹⁷³

Further, the NBSAP correctly uses the South African National Biodiversity Institute (SANBI) to roll out its bioregions and bioregional plans. This does not go far and fast enough to implement change at the farmland level timeously. There are other reputable private entities (for example, the Botanical Society of South Africa and the World Wildlife Fund) that are already involved in major conservation projects, and together with other authorised public benefit organisations, could be the controlling authority over, and the conduit for private funds to be spent on, approved projects.

The proposed public benefit organisations would be duly authorised to expedite the conservation projects and would perform the controlling function over funds and the scientific aspects of the project. Their constitutions would have to allow for these responsibilities and they would have to be registered public benefit organisations in their own right. Paragraph 11 of the Ninth Schedule of the Income Tax Act would have to be further amended. Recently it was amended to allow those public benefit organisations that did not carry out a public benefit activity themselves, to be the conduit for funds to other public benefit organisations which were doing so. With the proposed introduction of public-private, and private-private, -partnerships, the entity carrying out the activity may not be a public benefit organisation itself. This would also necessitate an amendment. It would then allow for conservation-orientated public benefit organisations, and for other like-minded entities – e.g. a partnership, joint venture or association not for gain, which operate under the auspices of a registered public benefit organisation - to attend to the conservation required.

6.6 Appropriate International Examples.

In Chapter 4 of this dissertation some tax incentives used internationally are summarised. Part of the solution to the implementation of a successful tax system, accommodating conservation and the incentives required to motivate conservation

¹⁷³ Van Schalkwyk, Marthinus, Minister of Environmental Affairs and Tourism, “2006- *The year of the National Strategy for Sustainable Development (NSSD)*”, exclusive publication in “*The Enviropaedia*”, [2006-2008], page 298.

investment through a controlled programme, is set out in 4.1.1. The use of an unlisted trust or a public benefit organisation provides the vehicle needed for fund accumulation and controlled spending. Paragraph 4.1.2 sets out elements of the tax system needed to allow the conservation investment programme to function effectively.

The main elements are:

- 1) Tax deduction for conservation investments.
- 2) Allowance for pre-payments, required to establish eco-service businesses.
- 3) Exemption from taxes on donations and bequests for ecological purposes.
- 4) Encouragement of pooled development schemes.
- 5) Promotion of conservation research and development.
- 6) The flow through of write-offs to individuals.
- 7) Differential rates of tax on land.
- 8) Favourable capital gains tax adjustments for taxpayers incurring a reduction in value of their assets placed into conservation conservatories, covenants or easements.

Well-researched and established working models are The Farmland Conservation Trust of Australia (as referred to in 4.1.1) and the Land Conservation Funds of the United States of America, (as referred to in 4.3), both of which have proved successful. Even though the South African system remains fragmented, it would be good if some provinces adopt the above models or other like applications working in the different states in the United States of America.

6.7 Application of Proposals.

In researching this dissertation, the objective was to find real incentives through taxation to:

- 1) conserve land and its biodiversity for future generations; and

2) seek a practical and achievable way to preserve our heritage, including “the right to indigenous people to freedom – not only the freedom of movement, but also the freedom of choice and the freedom to develop themselves according to their own history, culture and aspirations.”¹⁷⁴

6.7.1 Application of Proposals to Biodiversity.

This dissertation has visited the current South African taxation legislation, environmental law and tax incentives applied internationally. Suggestions for consideration to stimulate change for improved and accelerated conservation of our biodiversity, while simultaneously allowing for sustainable development, were raised.

Proposals for the benefit of biodiversity were discussed in detail in 6.3 above, presenting the difficulties, challenges and possible practical changes in taxation law to encourage landowners to act together in a responsible manner and to encourage interested benefactors/investors to contribute towards the preservation of our biodiversity for generations to come.

6.7.2 Application of Proposals to Minority Groups/Cultural History.

The proposals raised may be expanded for the benefit of matters other than land conservation. For example, South Africa has many cultural and historic treasures which need to be protected.

The Cradle of Humankind and similar sites.

Historically and culturally, South Africa can boast the *Cradle of Humankind* in the famous Sterkfontein Valley which yielded evidence of the origins of modern humans.¹⁷⁵

Approximately two and a half million years ago, the gene *Australopithecus* evolved into modern humans (*Homo sapiens sapiens*) who left fossilised footprints at

¹⁷⁴ Mountain, Alan, “*The First People of the Cape*”, David Philip Publishers, [2003], page 87.

¹⁷⁵ Berger, Prof. Lee R, and Hilton-Barber, Brett, “*A guide to Sterkfontein the Cradle of Humankind*”, [2006], page 12.

Langebaan Lagoon, recording that an anatomically modern man walked across the area over one hundred and seventeen thousand years ago.¹⁷⁶ There are many other archaeological sites countrywide, which deserve research and protection. Such attention requires time and money and it is in the national interest to care for them. Possibly, they could be funded by public-private partnerships enjoying some form of special tax dispensation.

The San.

“The San, people of the Later Stone Age, whose generic origins can be traced back to the beginning of modern humanity, were the indigenous inhabitants of the subcontinent.”¹⁷⁷ In 1881, Theophilus Hahn, custodian of the Grey Collection, wrote that “the word “Sonqua” is derived from the root “sa” (plural “san”) and means “native”, “aborigine” or “established inhabitant of the land”. This equates to the Nama word “San” (pronounced with a long a, “Saan”), meaning “foragers” which was used by the Namaqua to describe their hunter-gatherer neighbours.”¹⁷⁸ The National Khoi-San Council was established by the Government in 2001 to negotiate Constitutional accommodation of the Khoi-San. The National Council of Khoi Chiefs’ task was to resurrect historically accurate traditional leadership.¹⁷⁹ The Working Group for Indigenous Minorities of Southern Africa (WIMSA)¹⁸⁰ and a few other non-governmental organisations were established for the protection of San culture and heritage. The !Khwatla Culture and Education Centre on the West Coast is a good example of a project playing “a relevant role in the cultural survival and economic development needs of the remaining 100 000 San people living in southern Africa.”¹⁸¹

The Nama.

Namaqualand is the world’s most biodiverse desert and lies in the Succulent Karoo Biome. The Nama people were the first pastoralists and only a small area of their communal grazing land remains. Over time, their culture has changed radically and their language reduced to minimal usage in the far north. The shortage of usable land has even restricted their traditional “stock post” system, whereby herds are taken out from the stock post each morning to graze on the commons, which is land used by all.

¹⁷⁶ Mountain, Alan, op.cit., page 13.

¹⁷⁷ Ibid., page 22.

¹⁷⁸ Ibid., page 23.

¹⁷⁹ Ibid., page 83.

¹⁸⁰ Ibid., page 84.

¹⁸¹ Ibid., page 85.

To improve the use of these “unmanaged commons”, new innovative approaches had to be used because the normal problems related to land reform arose. These basic problems include land not being available; owners colluding not to sell; and land being too expensive. Added to these problems is that sustainable livestock farming in an arid environment is a big challenge; there is a lack of investment capital and a lack of conservation-worthy land which fetches higher prices than are affordable. Even the initiative of acquiring land through the Municipal Commonage Programme is experiencing socio-economic problems.¹⁸² This again highlights the need to link conservation objectives with livelihood objectives and the need for sound management of properly funded sustainable programmes.

Part Proposal.

Cultural survival is relevant today. People’s “confidence, pride and self-esteem come from their history, their knowledge of themselves and the security of their national identity”¹⁸³

Each of the above is an example where cultural preservation and development are working hand in hand. However, all projects must be financially viable and sustainable to maintain a positive impact. They each need funds and funders need encouragement to invest or donate towards the objectives.

It is proposed that any new conservation Section and Schedule introduced into the Income Tax Act be drafted broad enough to accommodate not just flora, fauna and biodiversity, but also must include consideration of minority groups/cultural history. The Constitution recognises cultural diversity and symbolised in the coat of arms is a culturally diverse and vibrant society – “!ke e: /xarra //ke” – “unity in diversity”, (or taken from /Xam, an extinct San language, it literally means “people who are different join together”¹⁸⁴). There must be a funding method to fast track these needs.

¹⁸² Environmental Monitoring Group, “Caught in the middle”,
http://www.unccd.int/cop/cop9/sideevents/docs/09_EMG_South_Africa_COP_9.pdf, [2009],
page 1.

¹⁸³ Mountain, Alan, op.cit., page 87.

¹⁸⁴ Ibid., page 79.

CHAPTER 7.

CONCLUSION.

The main objective of this dissertation was to motivate further debate on, and propose immediate practical action plans for further land conservation using additional tax incentives as part of the solution.

This final Chapter will reflect on the questions raised in Chapter 1. These were:

- 1) how to motivate landowners to accept their responsibility for the future;
- 2) how to use tax incentives to conserve land, fairly rewarding landowners and those who invest in conservation; and
- 3) how South Africa could introduce tax incentives to achieve the above.

This has been done by setting out the current legislation, mainly taxation and environmental law; considering other international jurisdictions to observe how they are trying to address the worldwide conservation crisis; and then suggesting some proposals which could be applied in the South African context.

Whereto from here?

7.1 The Millennium Development Goals.

“The *Millennium Development Goals (MDGs)* are eight goals to be achieved by 2015 that respond to the world’s main development challenges. The MDGs are drawn from the actions and targets contained in the *Millennium Declaration*. The *Declaration* was adopted by 189 nations and signed by 147 heads of state and governments during the *UN Millennium Summit*, held in New York, in September 2000.

The eight MDGs are:

- Goal 1 - Eradicate extreme poverty and hunger.
- Goal 2 - Achieve universal primary education.
- Goal 3 - Promote gender equality and empower women.
- Goal 4 - Reduce child mortality.
- Goal 5 - Improve maternal health.
- Goal 6 - Combat HIV/AIDS, malaria and other diseases.
- Goal 7 - Ensure environmental sustainability.
- Goal 8 - Develop a global partnership for development.

These goals have been implemented according to a Road Map, which outlines potential strategies for action. We are now at the midpoint between the adoption of the MDGs and the 2015 target date. So far, the collective record is mixed. There have been advances in some areas but there have also been significant set-backs.”¹⁸⁵ The United Nations is monitoring progress of the MDGs. As at 1 November 2007, South Africa was said to be on track to achieve the goals by 2015, other than goals 4, 5 and 6 which were still possible to achieve if some changes are made. Internationally, goals have been set to achieve a better life for the citizens of the poorest countries in the world. All of the goals require time, money and commitment. How are the goals being funded? Timeous action is overdue!

Scientists have long spoken. The GreenFacts Scientific Board in its “Millennium Ecosystem Assessment – Ecosystems and Human Well-being”, stated:

- “1) Biodiversity loss is driven by local, regional, and global factors, so responses are also needed at all scales;
- 2) Responses need to acknowledge multiple stakeholders with different needs;
- 3) Given certain conditions, many effective responses are available to address the issues identified;
- 4) Responses designed to address biodiversity loss will not be sustainable or sufficient unless relevant direct and indirect drivers of change are addressed;
- 5) Further progress in reducing biodiversity loss will come through greater coherence and synergies among sectoral responses and through more systematic consideration of trade-off among ecosystem services or between biodiversity conservation and other needs of society.”¹⁸⁶

7.2 South Africa’s Responsibility.

South Africa is at risk. It is already experiencing the impacts of climate change with droughts, floods, lightening strikes, and the resultant possible food shortages. It has serious social and economic challenges to face with limited funds, and a very special historical and natural heritage to protect; as is so often emphasised, “South Africa ranks amongst the most mega-diverse countries in the world. This extraordinary rich biodiversity is unfortunately under extreme pressure.”¹⁸⁷

¹⁸⁵ Sustainabilitysa, South African Institute of Chartered Accountants, “*Understanding Sustainability Issues*”, [September 2008], www.sustainabilitysa.org

¹⁸⁶ Green Facts Digest, “*Ecosystems and Human Well-being: Biodiversity Synthesis*”, [2005].

¹⁸⁷ Biodiversity Education & Empowerment Division, South African Biodiversity Institute, [2009], page 1.

The Government's South African National Biodiversity Institute (SANBI) is working through its Education and Empowerment Programme concentrating on four focal areas, namely:

- 1) curriculum at schools;
- 2) professional development;
- 3) greening initiatives and engaging stakeholders; and
- 4) careers in conservation.¹⁸⁸

SANBI cannot alone carry full responsibility for all conservation matters. Existing respected private entities, like the Botanical Society of South Africa, the World Wildlife Fund and others, plus newly registered entities, will have to be given more authority and responsibility to assist with this national and worldwide challenge.

Still, they all will fail without a complete turnaround in the mindset of the public who must act respectfully and responsibly in conserving that which is South Africa.

7.3 Taxation, Tax Incentives and Application of these Funds - A Final Proposal.

Chapters 2 and 3 set out an appreciation of the legislative parameters within which we have to operate.

Chapters 4 and 5 provided some insight of that which is being done internationally in the tax arena. We looked at certain tax incentives, particularly those of Australia and the United States of America, upon which a sound South African tax base for conservation could be founded. While the methods of collecting taxes vary, so will the incentives rewarding taxpayers who invest in an appropriate conservation strategy.

Proposals were considered in Chapter 6. These suggest that existing tax legislation could be amended to accommodate the needs of conservation, or a new approach from outside South Africa could be introduced and adjusted to meet local requirements. It is proposed that the latter be adopted as the best alternative to address this large and

¹⁸⁸ Ibid., page 2.

complex challenge, involving many interfacing pieces of legislation and affecting many stakeholders and their tax regimes.

7.4 Some Final Thoughts.

7.4.1 A Thought from Afar.

“Looking back on the “Earth Rise” image, Apollo 8 Commander Frank Borman said that “it was the most beautiful, heart-catching sight of my life, one that sent a torrent of nostalgia, of sheer homesickness, surging through me. It was the only thing in space that had any colour to it. Everything else was simply black or white. But not the Earth.”

350.org founder Bill McKibben explains that it’s kind of fun to imagine some other intelligence peering down through their telescopes at our blue-white orb, trying to make sense of these giant images suddenly spreading across snowfield and desert and lagoon, What they’d see is the planet’s immune system coming alive – conscious, alert human beings doing their best to help safeguard the future.

Today we’re in desperate need of an updated mix of art, activism, and political change. Scientists have produced all the charts, facts and figures we need to recognise the threat of climate change and understand its urgency. Economists have shown how to transition our countries towards low-carbon economies. Non-profit organisations have rallied, lobbied, and pleaded for progress. And yet, by all measures, we’re still not making the progress we need. While it is growing day by day, our movement has a lot of work to do. That’s why it’s time to bring in the artists.”¹⁸⁹

7.4.2 A Thought from Africa.

“In Africa there is the concept known as *ubuntu* – the profound sense that we are human only through the humanity of others; that if we are to accomplish anything in this world, it will in equal measure be due to the work and achievements of others. *Ubuntu* could be referred to as “brotherhood”, it comes from the Zulu proverb, *Umuntu ngumuntu ngabantu*, which is often translated as, “A person is a person through other people.” The idea is that we do nothing entirely on our own, a concept that is poles apart from the notion of individualism that has characterised the West since the Renaissance, *Ubuntu* sees people less as individuals than as part of an infinitely complex web of other human beings. It is the idea that we are all bound up with one another, that me is always subordinate to we, that no man is an island.”¹⁹⁰

Everyone is locked into nature. We may use nature, but not abuse it without serious repercussions just as we are experiencing today.

¹⁸⁹ organizers@350.org, “*This picture changed the world*”, 18 November 2010.

¹⁹⁰ Stengel, Richard, “*Mandela’s Way*”, (Virgin Books), [2010], pages ix and 231.

7.4.3 A Thought from Near.

However, it is not just a physical needs relationship we share, but also an inner connection we have with the environment around us. Even, “on Robben Island, where there were few pleasures, Mandela’s garden had become his own private island. It quieted his mind. It distracted him from his constant worries about the outside world, his family, and the freedom struggle. While so much was withering outside, his garden was thriving. Mandela has always had great powers of concentration, and the other prisoners noted how absorbed he was when he was gardening. He got lost in it. He loved that garden.”¹⁹¹ Further, “Rolihlahla, as only a few people know is Mandela’s real first name. It means Tree Shaker in Xhosa.”¹⁹² It is rather ironic that after all he has done, we need a Rolihlahla now to assist to meet the major environmental challenges currently facing the world.

Maybe we South Africans must look to the past to face the future. We are the Cradle of Humankind, our San people are the DNA source of all modern humans; maybe we must accept greater leadership responsibility and take up the real challenge for everyone’s future.

With the will of the people, good governance, and appropriate tax incentives to provide the cash required, together we can take up the challenge and make the difference which is needed.

“Man has the fundamental right to freedom, equality and adequate conditions of life, in an environment of a quality that permits a life of dignity and well-being; and he bears a solemn responsibility to protect and improve the environment for present and future generations.”¹⁹³

First principle of the declaration produced by the United Nations Environment Programme, June 1972.

¹⁹¹ Ibid., page 220.

¹⁹² Ibid., page 227.

¹⁹³ Brown, William, The Brooking Institute, “*Global Environmental Quality: Recommendations for Rio+20 and beyond*”, [August 2011].

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