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**CONSTITUTIONAL
ASSEMBLY**

THEME COMMITTEE 3

**RELATIONSHIP BETWEEN
LEVELS OF GOVERNMENT**

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Hoofkantoor

Leydsstraat 643, Muckleneuk, Pretoria
Posbus 787, Pretoria, 0001
Tel: Ad: NATPARK, Telex: 3-21324 SA
Tel: Admin (012) 343-9770 Faks (012) 343-0907
Tel: Besprekings (012) 343-1991, 8h00-15h40

Head Office

643 Leyds Street, Muckleneuk, Pretoria
PO Box 787, Pretoria, 0001
Tel: Ad: NATPARK, Telex: 3-21324 SA
Tel: Admin (012) 343-9770 Fax (012) 343-0907
Tel: Reservations (012) 343-1991, 8h00-15h40

Fax 27-12-3439959

GAR/pvds (alg/ebrahim)

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The Executive Director: Constitutional Assembly

Mr Hassim Ebrahim

P O Box 15

Cape Town

8000

Fax 021-241160/1/2/3

Dear Mr Ebrahim

SUBMISSION TO WORKING GROUP 3

The present deliberations of the Working Group 3 of the Constitutional Assembly concerning the allocation of national and provincial powers are of direct relevance to the National Parks Board and in particular to the future control and management of national parks.

I have prepared a written submission which will be forwarded to you as soon as possible for discussion. In addition, I would like to enquire whether it would be possible to give oral evidence to Working Group 3 in order to discuss and motivate our submission? I realize that you must be facing a very tight schedule and can assure you that I will not take up too much of your time. *

Thank you very much for the kind invitation. I shall also forward the request to the chair of the Working Group, Prof Dirk du Toit for his information.

Yours sincerely

**DR G A ROBINSON
CHIEF EXECUTIVE
NATIONAL PARKS BOARD**

c.c. Prof D du Toit
Chair: Working Group 3
Fax: 021-241160/1/2/3

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SUBMISSION

on the

"MANAGEMENT AND CONTROL OF NATIONAL PARKS"

to

WORKING GROUP NO 3

of the

CONSTITUTIONAL ASSEMBLY

made by

**DR G A ROBINSON
CHIEF EXECUTIVE
NATIONAL PARKS BOARD**

MANAGEMENT AND CONTROL OF NATIONAL PARKS IN THE NEW CONSTITUTION

1 INTRODUCTION

The allocation of the management and control of national parks to national or provincial governments is an important matter that has to be defined by the new constitution. During the Kempton Park negotiations the National Parks Board proposed that "national parks" should be treated as a national asset and that they should consequently constitute a matter on which the national institutions should have exclusive legislative and executive powers. The National Parks Board also argued in a submission to the Commission on the Demarcation of Provinces that those national parks that transcend provincial boundaries, such as the Kruger Park, should for managerial and administrative purposes be treated as indivisible entities rather than placing them under the sole jurisdiction of one or two provincial governments. This approach is based on the mission of the National Parks Board which is formulated as follows:

"...to establish a system of national parks representative of the country's important and unique natural features and to conserve and manage them in such a manner that they will be preserved for all time in their natural state for the benefit and inspiration of the present and future generation of South Africans and the sustainable economic growth of the region and its people."

The National Parks Board consequently fully supported the provision in the interim constitution that stipulates that national parks will fall under the jurisdiction of the national parliament and cabinet.

2 POINTS OF DEPARTURE

The following points of departure form the basis of the argument of the National Parks Board that national parks should be treated as a national asset by the constitution and placed under the jurisdiction of national governmental institutions:

2.1 National parks, as the pride of the entire South African nation, should

be managed and protected in a manner which not only ensures accessibility to all, but which also conforms with international standards and principles regarding nature conservation and the management of national parks. National parks are by definition national assets and should be managed for the good of the nation as a whole as well as the international community.

2.2 There are numerous financial constraints which require national support and participation in the management of national parks. Few of the current national parks could exist without some form of government subsidy and cross-subsidization by some of the other national parks.

2.3 The growth of tourism in general and ecotourism in particular, and the important contribution national parks are making and can increasingly make, as earners of foreign exchange and as generators of internal tourism, requires that national norms and standards of management be adhered to.

2.4 The management and control of national (and provincial) parks should occur within a co-operative partnership in which the national government (parliament and cabinet), the National Parks Board, provincial governments, the population in general and structures in civil society, participate. The management of national parks should be legitimate, effective and representative in order to ensure firstly that such parks are accessible to and enjoy the support of the population at large, and secondly that the most important ecosystems of the country are identified, protected and managed in accordance with international norms and standards.

3 NATIONAL PARKS, INTERNATIONAL LAW AND THE INTERIM CONSTITUTION

The following considerations should be born in mind when the management and control of national parks are considered in the context of international law and the formulation of the interim constitution:

3.1 In terms of international law the national government (cabinet and parliament) is compelled to ensure compliance with all treaties,

conventions and other international agreements to which the country is a party - even in instances where a particular power or function has been decentralized to provincial or local governments by law or by the constitution. This also applies to nature conservation and parks. The internal organization of a state - whether unitary, federal, decentralized or a hybrid (mixed) - does not affect the fact that the national government is primarily responsible for ensuring that international agreements are adhered to. The constitutional court of Germany has for instance formulated this responsibility as follows: "The federal state acts as a unit in international law" (BVerfGE 2.237). A similar argument has been accepted in the USA, namely that "all treaties made are the supreme law of the land, anything in any state constitution or law to the contrary notwithstanding..." (Corwin, 1965: 297). The same applies in Switzerland where a constitutional expert summarizes the situation as follows: "In international relations there is no division of powers between the Federation and Cantons...the Federation acts as the sovereign." (Kundert, 1919: 28). In India "parliament is also empowered to override the normal scheme of distribution of legislative powers when implementing a treaty, agreement or conventions..." (Singhvi, 1990:38). This argument applies more strongly to unitary or decentralized unitary systems. The national parliament and executive are therefore responsible for ensuring in regard to nature conservation in general and national parks in particular, that international norms and standards are adhered to in the management and control of such parks. The national government is also obliged to ensure that the management and control of provincial parks and other protected areas comply with international agreements - even if provincial parks do not per definition fall under the control of the national government.

- 3.2 The interim constitution stipulates that the conduct of foreign relations, in particular with regard to concluding treaties and other agreements, falls under the jurisdiction of the President (a82(1)(i), Cabinet (a82(3) and Parliament (a231). The national government is designated to conclude binding international agreements on behalf of the whole country, to pass and administer any law that is required to fulfil such international obligations - even if such a matter is

included in Schedule 6 (provincial powers and functions) of the constitution. This means that as far as national parks (or any other matters such as the environment, agriculture, nature conservation) are concerned, the national government has the right to conclude treaties covering such matter, and subsequently to legislate on them and administer such legislation.

3.3 The interim constitution explicitly excludes national parks from the powers and functions of provincial governments. It is clear from the formulation of the constitution, that the intention of the constitution drafters or the debates which preceded the constitution, that national parks should fall under the exclusive jurisdiction of the national government. The National Parks Board is therefore solely responsible and accountable to the national government for the managing and organization of national parks.

3.4 The allocation of powers and functions to the provinces by the interim constitution should be seen in the context of Article 126 which makes provision for the national parliament to legislate on certain matters even if they are included on the provincial legislative list. The national parliament is thus empowered to legislate on any subject matter if it cannot be regulated effectively by provincial legislation, if uniform norms are required for the country as a whole, if minimum standards have to be met, if conservation requires such legislation, and/or if a provincial law may be detrimental to the interests of other provinces or the country as a whole. The history and experience of the National Parks Board show that the management and control of national parks are of such a nature that uniform norms are required, that conservation considerations justify national control, and that provincial legislation cannot effectively deal with the matter. The national parliament can therefore legislate on any matter pertaining to nature conservation, including national and provincial parks as well as other protected areas, in so far as the requirements of Article 126 are met.

3.5 The national parliament can decentralize some of its powers relating to the management and organization of national parks to provincial

governments. The National Parks Board can also expand opportunities for provincial, local and NGO involvement in the management and control of national parks. Such decentralization by Parliament could vary from the allocation of administrative responsibilities to provinces to granting them some legislative powers regarding national parks. To date Parliament has not decentralized any aspects of national parks to provincial governments. The National Parks Board has, however, in recent years taken various steps to increase participation by provincial and local interest groups. Should Parliament decide to decentralize certain aspects of national parks, such decentralization will be based on the following conditions: firstly Parliament will remain the accountable and responsible level of government for all matters pertaining to national parks, and secondly Parliament will have the right to expand or revoke powers that were decentralized. The national government thus remains the level of government that is accountable in terms of the interim constitution and international law for all matters pertaining to national parks.

The following conclusions can be made when interpreting the interim constitution and reflecting on relevant international law:

- * Irrespective of the internal organization of the South African state (whether unitary, decentralized, federal or hybrid), the national government is in terms of international law responsible for ensuring that international norms and standards as formulated in treaties and other international agreements, are adhered to by all levels of government.
- * The interim constitution and the negotiations that preceded it, leave no doubt that national parks fall under the exclusive responsibility of the national level in all matters - managerial, administrative, financial and organizational.
- * The national parliament can decentralize some aspects of the management and control of national parks to provinces. This does not affect the right of parliament to expand or limit the terms of reference on which such decentralization is based, nor does it limit the right of

parliament to exercise final control over such parks.

- * The National Parks Board, which was established by Parliament to control and manage national parks, can through its internal organization and consultation create a co-operative culture between itself, all three levels of government and NGOs. This does not diminish the fact that the National Parks Board is directly accountable to the national government for all its activities.
- * The interim constitution and the practice of international law make it clear that the national parliament can legislate on and administer any matters - even those that may have been allocated to the provinces in Schedule 6 - in so far as the constitution and international responsibilities may require this.

4 RESPONSE TO SOME ARGUMENTS

The National Parks Board has since the promulgation of the interim constitution consulted widely on the future management and control of national parks. Although general support has been expressed in principle for the interpretation in par 3, some provincial role players argue that national parks should either fall under the full control of provincial governments or that all organizational and administrative matters pertaining to national parks should be decentralized.

It is not the purpose of this submission to react to all of these arguments - this can be done when the Constitutional Assembly requires further information. It may however be of value to indicate some of the main arguments that have been raised, as well as the responses to them:

4.1 Argument: The management and control of national parks is a subcomponent of environmental management and should therefore also accrue to the provinces.

Response: There is no indication whatsoever in the interim constitution that the legislative and executive powers regarding national parks should be separated. The

constitutional practice in South Africa is that the level of government responsible for legislation is also responsible for administration unless explicit provision is made for some other arrangement. The expertise, financial resources and infrastructure required for the management of national parks are not always available on provincial levels. There are no compelling arguments that national parks could be better managed on a provincial than on a national level. In addition to these practical realities, the national government remains accountable under international law for ensuring that agreements are implemented. Should any form of decentralization occur, the national government would still be able to legislate on and administer such matters.

4.2 **Argument:** A matter such as national parks should be managed on a national level only if it cannot effectively be dealt with on a provincial level - so-called subsidiarity.

Response: This proposition is based on the principle of subsidiarity which is not only totally unknown in South African constitutional law, but also presupposes that the South African state is being formed through aggregation (independent states uniting such as in the USA), while in actual fact provincial governments are being created from a previously unitary, centralized state. However, even if subsidiarity is used as a yardstick, a matter such as the management and control of national parks is clearly something that requires national norms, standards, infrastructure and training of personnel - all indicating that the national government should be responsible for managing and controlling national parks.

4.3 **Argument:** National parks are so closely linked to provincial and local economies that the management and control of the parks should accrue to provincial governments.

Response: National parks impact strongly on local, provincial and national economies. This is clearly illustrated by the influence a national park such as Kruger Park has on the the national, provincial and local economy. Such impact will increase with the establishment of transnational parks that cross national boundaries. However it should also be remembered that few national parks in South Africa are "profitable" (irrespective of what the general perception may be), with large annual subsidies been paid to assist most of the national parks. These subsidies are sourced from the annual grant from Parliament and from the income of some of the larger parks such as the Kruger Park. Few of the provinces with national parks within their boundaries have the financial, managerial and other resources to manage and control national parks in the same way as the national government does. The mere fact that a national park has an impact on the local economy also does not mean that the management and control of such parks should be decentralized. However, the shared interest that all three levels of government have in national parks, suggests the need for partnership - something which the National Parks Board is striving to accomplish. The National Parks Board also intends channelling some of the income it receives from national parks back to the provinces where such parks are located.

4.4 Argument: The provincial governments have the expertise at their disposal to manage national parks on the same level as that achieved by the National Parks Board.

Reply: The provincial governments together with their conservation agencies have a crucial role to play in the management and control of protected areas, nature reserves and parks. One should refrain from approaching the issue of "national" and "provincial" parks as if they were in competition or even conflict with one another. On the contrary. They should be managed in a manner that ensures optimal employment of

resources and prevents duplication. While some provinces may have considerable expertise at their disposal, this does not apply to all the provinces. The fact that some national parks (Kruger Park and Tsitsikamma) extend across provincial boundaries will increase managerial problems if responsibility for such parks is decentralized to the provinces. The provinces are also not able to cater for transnational parks - which also impacts on matters such as national foreign policy. If all factors are taken into account, it is clear that the National Parks Board is the only agency with sufficient resources to manage and control national parks at the level that is required internationally. Economies of scale in the present system of national parks - such as centralized reservation services, national marketing and uniform employment conditions - would be forfeited if national parks were decentralized to the provinces.

5 Recommendations

On the basis of the above, the following recommendations can be made for consideration when the new constitution is drafted:

- 5.1 The constitution should allocate the management and control of "national parks" in the widest sense to the national government.
- 5.2 The national government should retain its responsibility for concluding treaties and entering into other agreements on matters pertaining to nature conservation in general and national and transfrontier parks in particular, and for ensuring that international norms and standards applicable to national parks are adhered to.
- 5.3 The National Parliament should formulate a classification system for all national and provincial parks. This system should conform with international norms (Guidelines for Protected Area Management, World Conservation Union, 1994) and be drafted in consultation with the National Parks Board and the relevant provincial authorities.

- 5.4 The national government should proclaim national parks, provide for financial and other support for the management and control of such parks, and assist in research development in all matters related to the management and control of such parks;
- 5.5 The National Parks Board and one or more provincial governments may conclude agreements aimed at promoting co-operation in matters pertaining to some national and provincial parks. This will help ensure that national and provincial parks are seen as complementary to each other.
- 5.5 The existing status of national and provincial parks should be maintained, although provision could be made for the National Parks Board and provincial governments to enter into other agreements as long as they conform with the national constitution.
- 5.6 The National Parks Board should be responsible for the management and control of national parks, while being accountable to Parliament for all its activities.
- 5.7 The National Parks Board should continue to liaise closely with provincial and local governments, communities in the vicinity of national parks, and NGOs who may contribute to the fulfilment of the mission of the National Parks Board, in order to manage and control national parks in a manner which is legitimate, representative and scientifically sound. This entails that the custodianship of the national parks enjoys support from the population at large, that the country's most important eco-systems and unique natural features are identified, protected and managed in accordance with international norms, and that the Board of Curators is composed in a manner which reflects the composition of the population.