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by Alexander Paterson

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ABSTRACT

Area-based conservation initiatives have historically been a key component of international efforts to conserve biodiversity and promote climate mitigation and adaptation. Significant strides have been made over the past decade to expand the coverage, effectiveness and equitable management of these initiatives, fuelled by global commitments made by parties to the Convention on Biological Diversity (CBD) in 2010, specifically Aichi Target 11 embedded within the Strategic Plan for Biodiversity (2011-2020). However, these strides have been skewed in favour of protected areas with other effective area-based conservation measures (OECMs) largely playing second fiddle. The delay in defining what are OECMs and developing guidelines to clarify their form and nature, have been identified by several commentators as key reasons for them playing second fiddle. OECMs nonetheless remain a key component of the future global agenda with the draft Post-2020 Global Biodiversity Framework anticipating a target of ensuring that 'at least 30 percent globally of land areas and of sea areas, especially areas of particular importance for biodiversity and its contributions to people, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures and integrated into the wider landscapes and seascapes'. Efforts under the auspices of the CBD and International Union for the Conservation of Nature to introduce Scientific and Technical Advice on OECMs (including a definition) and Guidelines on Recognising and Reporting OECMs in 2018 and 2019 respectively, have brought much needed clarity relating the form and nature of OECMs. These efforts are, however, largely silent on the potential influence of law. Law may have a significant influence on OECMs, and this article has sought to scope this potential and develop understanding on it, with the aim of promoting the increased recognition of OECMs across the globe. It identifies an array of generic legal issues which domestic law and policymakers could use as an initial frame of reference to evaluate the current and potential influence of their domestic legal frameworks on OECMs. It uses several elements of the definition of OECMs to structure this scoping exercise, concluding that law has a significant potential influence on each. It acknowledges that: legal interventions need to be tailored to the specific domestic context; law brings both potential benefits and constraints and these need to be carefully managed; a blend of many different areas, spheres and levels of law may be of influence emphasising the need to promote legal alignment and integration; and that legal pluralism should be recognised and promoted where relevant as OECMs may frequently overlap areas subject to customary tenure and governance systems.

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1. THE CONTEXT

As was highlighted by the Intergovernmental Science Platform on Biodiversity and Ecosystem Services in 2019, the “biosphere, upon which humanity as a whole depends, is being altered to an unparalleled degree across all spatial scales” and “biodiversity ... is declining faster than at any time in human history”.¹ This global biodiversity crisis is complemented by a global climate crisis, with the Intergovernmental Panel on Climate Change Working Group II’s contribution to the Sixth Assessment Report² capturing the transformative changes humans have caused to the Earth’s climate and ecosystems. This latter report noted with high confidence that “safeguarding biodiversity and ecosystems is fundamental to climate resilient development” and that “maintaining the resilience of biodiversity and ecosystem services at a global scale depends on effective and equitable conservation of approximately 30 percent to 50 percent of Earth’s land, freshwater and ocean areas, including currently near-natural ecosystems”.³ The close link between climate change and biodiversity, and specifically the “critical role of protecting, conserving and restoring nature and ecosystems in delivering benefits for climate adaptation and mitigation” was furthermore highlighted in the *Glasgow Climate Pact* emanating from the United Nations Framework Convention on Climate Change COP26 held in Scotland in late 2021.⁴

For several decades, significant international attention has focussed on area-based conservation as one tool for conserving biodiversity and promoting options for climate mitigation and adaptation.⁵ Their value as a tool for promoting the attainment of the United Nations Sustainable Development Goals has also been acknow-

ledged.⁶ Not surprisingly, area-based conservation has featured centrally in the international policy response, most notably through the *Convention on Biological Diversity* (CBD).⁷ It imposes an obligation on parties to, “as far as possible”, establish a “system of protected areas or areas where special measures need to be taken to conserve biological diversity”.⁸ Inherent in this obligation is reference to both protected areas and other area-based conservation measures. This distinction permeated the *Strategic Plan for Biodiversity 2011-2020* and the *Aichi Biodiversity Targets* adopted by parties to the CBD in 2010,⁹ with Aichi Target 11 having set the following aspirational goal:

By 2020, at least 17 percent of terrestrial and inland waters, and 10 percent of coastal and marine areas, especially areas of particular importance for biodiversity and ecosystem services, are conserved through effectively and equitably managed, ecologically representative and well-connected systems of protected areas and other effective area-based conservation measures and integrated into wider landscapes and seascapes.

Significant progress was made during the United Nations Decade of Biodiversity (2011-2020)¹⁰ to achieve the goals embedded within

¹ Eduardo Brondizio and others (eds), *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES Secretariat 2019) xiv.

² Intergovernmental Panel on Climate Change, *Climate Change 2022: Impacts, Adaptation and Vulnerability – Working Group II Contribution to the Sixth Assessment Report of the IPCC* (IPCC 2022).

³ *ibid* 35.

⁴ UNFCCC, *Glasgow Climate Pact, Decision 2f/CP.26* 13 November 2021 (Advanced Unedited version) 1.

⁵ See generally: Nigel Dudley and Sue Stolton, *Leaving Space for Nature - The Critical Role of Area-Based Conservation* (Routledge 2020) 79-114; Lucas N Joppa, Jonathan E M Baillie and John G Robinson (eds), *Protected Areas: Are they Safeguarding Biodiversity?* (Wiley Blackwell 2016); Nigel Dudley, Diana Allen and Kathryn Campbell, ‘Natural Solutions: Protected Areas are Vital for Human Health and Well-being’ (IUCN 2015); Sue Stolton and others, ‘Values and Benefits of Protected Areas’ in Graeme L Worboys and others (eds), *Protected Area Governance and Management* (ANU Press 2015) 145; and Nigel Dudley and others (eds), ‘Natural Solutions: Protected Areas Helping People Cope with Climate Change’ (IUCN-WCPA, TNC, UNDP, WCS, World Bank and WWF 2010).

⁶ See generally: UNEP-WCMC and IUCN, ‘Protected Planet Report 2016’ (UNEP-WCMC and IUCN 2016); and Nigel Dudley and others, ‘Editorial Essay: Protected Areas and the Sustainable Development Goals’ (2017) 23(2) *PARKS. The International Journal of Protected Areas and Conservation* 9.

⁷ *Convention on Biological Diversity*, Rio De Janeiro, 5 June 1992, 1760 UNTS 79 (CBD).

⁸ CBD, art 8(a).

⁹ CBD, ‘Strategic Plan for Biodiversity 2011-2020’ (2010) UN Doc UNEP/CBD/COP/DEC/X/2.

Aichi Target 11. As reflected in the *Protected Planet Report 2020*,¹¹ the decade saw vast growth in the global coverage of protected areas and other effective area-based conservation measures (OECMs), which cumulatively are estimated to cover approximately 16.64 percent of terrestrial and inland water areas.¹² The report highlighted that the global protected areas system was becoming more representative of the full range of ecosystems and that connectivity among protected areas and OECMs was improving.¹³ However, while acknowledging the potential of OECMs to make a significant contribution to global coverage targets and improved connectivity, it did indicate that additional information was needed on the identification and recognition of OECMs,¹⁴ with their contribution to global coverage targets accounting for less than one percent of terrestrial and inland water areas.¹⁵ While the concept of OECMs was entrenched within Aichi Target 11 over a decade ago, progress has been far slower in defining, identifying, recognising and reporting on OECMs in comparison to their protected areas counterpart. This is also starkly reflected in the World Database on Protected Areas (WDPA) and World Database on OECMs (WD-OECM), which respectively record 268930 of the former and only 668 of the latter.¹⁶

As highlighted by some commentators recently, “protected areas alone cannot stem the loss”, “biodiversity needs every tool in the box” and OECMs can play an “important and complementary role” to protected areas by expanding the available toolbox, promoting equitable outcomes and increasing the overall effectiveness of the global conservation system.¹⁷ Their po-

tential to expand the remit of area-based conservation to include key biodiversity areas has also been noted.¹⁸ Other commentators have argued that OECMs “will not only be helpful but essential in reaching the ambitious conservation targets” given the opportunities they provide to expand the remit of area-based conservation initiatives by recognising and supporting those undertaken by indigenous peoples and local communities (IPLCs) in respect of areas falling under their tenure or management.¹⁹ This expansion appears crucial given that an estimated 48.6 percent of shared landscapes²⁰ and 43.6 percent of large wild areas²¹ on the Earth fall under indigenous tenure or management.²²

The importance of OECMs is heightened as parties negotiate the Post-2020 Global Biodiversity Framework for hopeful adoption at the continued CBD COP 15 to be held in Montreal, Canada, in December 2022. On 12 July 2021, the CBD Secretariat released the first official draft of the Post-2020 Global Biodiversity Framework²³ and a set of proposed headline indicators for monitoring its implementation.²⁴ While the text of the former is yet to be finalised, the draft in-

¹⁰ Declared in terms of UNGA Res 65/161 (2011) Convention on Biological Diversity.

¹¹ UNEP-WCMC, UNEP and IUCN, *Protected Planet Report 2020* (2021), <https://livereport.protectedplanet.net/chapter-1>

¹² *ibid.* See further: Kathy MacKinnon and others, “Editorial Essay: Protected and Conserved Areas: Contributing to More Ambitious Conservation Outcomes Post-2020” (2021) 27(1) *PARKS- The International Journal of Protected Areas and Conservation* 7.

¹³ *ibid.*

¹⁴ *ibid.*

¹⁵ Georgina Gurney and others, “Biodiversity Needs Every Tool in the Box: Use OECMs” (2021) 595 *Nature* 646.

¹⁶ World Database on Protected Areas <https://www.protectedplanet.net/en>

¹⁷ Gurney (n 15) 646-647.

¹⁸ Paul F Donald and others “The Prevalence, Characteristics and Effectiveness of Aichi Target 11’s ‘Other Effective Area-Based Conservation Measures’ (OECMs) in Key Biodiversity Areas” (2019) 12(5) *Conservation Letters* 1.

¹⁹ Nigel Dudley and others, “The Essential Role of Other Effective Area-Based Conservation Measures in Achieving Big Bold Conservation Targets” (2018) 15 *Global Ecology and Conservation* 1. See further Stephen T Garnett and others, “A Spatial Overview of the Global Importance of Indigenous Lands for Conservation” (2018) 1(7) *Nature Sustainability* 369.

²⁰ “Shared landscapes” are characterised by a high human footprint where less than half of land is composed of intensive land-use. The other half is comprised of land uses with very high potential to conserve biodiversity. These landscapes incorporate 64.9 percent of the Earth’s key biodiversity areas. See further: Harvey Locke and others, “Three Global Conditions for Biodiversity Conservation and Sustainable Use: An Implementation Framework” (2019) 6(6) *Natural Science Review* 1080.

²¹ “Large wild areas” are characterised by a low human footprint where less than 0.5 percent of land is composed of intensive land-use. These landscapes incorporate 24.6 percent of the Earth’s key biodiversity areas. See further: Locke (n 20) 1080.

²² *ibid.* See further: Erle Ellis, “To Conserve Nature in the Anthropocene: Half Earth is Not Nearly Enough” (2019) 10 *One Earth* 163.

²³ CBD, “First Draft of the Post-2020 Global Biodiversity Framework” (5 July 2021) UN Doc UNEP/CBD/WG2020/3/3.

cludes an array of goals and action-orientated targets, one of which relates to area-based measures. This draft target to a large degree mirrors Aichi Target 11, retaining reference to both protected areas and OECMs, but anticipates ratchetting up the coverage ambition to 30 percent.²⁵

According to some commentators, achieving this target will require a ‘three-pronged approach’, namely: establishing new protected areas in areas important for biodiversity; improving the effectiveness of management and governance arrangements in existing and new protected areas; and recognising and supporting OECMs.²⁶ OECMs have formed part of the global agenda for the past decade and will seemingly remain a crucial part of it for the forthcoming decade following calls at both the International Union for the Conservation of Nature’s (IUCN) World Conservation Congress²⁷ and the first phase of the CBD COP15²⁸ held late 2021 for countries to protect and conserve 30 percent of land and sea areas through well-connected systems of protected areas and OECMs by 2030.²⁹ Clarity on the form and nature of OECMs is needed to ensure that they can play a more significant role in the forthcoming decade to meet this aspiration.

International calls to clarify what is meant by the term OECM date back to 2012.³⁰ Several commentators lamented at the time that in the absence of such clarity, conservation law and policy would continue to ‘inappropriately and/or

inadequately recognise the great diversity of forms of conservation and sustainable use of ecosystems’.³¹ Others have attributed the leisurely pace characterising the domestic recognition of OECMs on the absence of guiding principles and criteria.³²

This void in the international discourse relating to OECMs has partially been filled by various initiatives spearheaded by the CBD and the IUCN’s World Commission on Protected Areas (WCPA). Parties to the CBD adopted a formal definition of an OECM³³ and Scientific and Technical Advice on OECMs³⁴ at COP 14 held in 2018. Subsequently the WCPA released guidance on Recognising and Reporting OECMs³⁵ (OECM Guidelines) in 2019.

Given the contemporary nature of this guidance, it is naturally orientated towards the broad distillation of principles, concepts and approaches. It is not specifically focussed on the tangible mechanisms to give effect to them, such as those facilitated through law. While a plethora of guidelines have been developed over the years by the IUCN relating to protected areas,³⁶ including some specifically focussing on the role and influence of law,³⁷ the available advice and guidelines relating to OECMs contain very few references to the role or importance of law. Cri-

²⁴ CBD, “Proposed Headline Indicators of the Monitoring Framework for the Post-2020 Global Biodiversity Framework” (11 July 2021) UN Doc UNEP/CBD/WG2020/3/3/Add.1.

²⁵ CBD (n 23) 6.

²⁶ MacKinnon (n 12) 7-11.

²⁷ IUCN, “Setting Area-based Conservation Targets Based on Evidence of What Nature and People Need to Thrive” (IUCN, 22 September 2021) WCC-2020-Res-125.

²⁸ CBD, “Kunming Declaration: Ecological Civilization: Building a Shared Future for all Life on Earth” (13 October 2021) CBD/COP/15/5/Add.1.

²⁹ See further: IUCN WCPA, WCS, National Geographic, UN WCMC and Birdlife International, “Conserving at Least 30% of the Planet by 2030 - What Should Count?” (2021) <https://naturebeyond2020.com/wp-content/uploads/2021/09/Conserving-at-least-30-of-the-planet-by-2030-What-should-count-2.pdf>; and Stephen Woodley and others, “Speaking a Common Language on What Should Count for Protecting 30 Percent by 2030?” (2021) 27(2) PARKS- The International Journal of Protected Areas and Conservation 9.

³⁰ IUCN, “Facilitating Conservation Through the Establishment of Protected Areas as a Basis for Achieving Target 11 of the Strategic Plan for Biodiversity 2011-2020” (15 September 2012) WCC-2012-Res-035. See further on initial calls and steps to clarify the term OECM: Dan Laffoley and others, “An Introduction to “Other Effective Area-Based Conservation Measures” Under Aichi Target 11 of the Convention on Biological Diversity: Origin, Interpretation and Emerging Ocean Issues” (2017) 27(51) Aquatic Conservation 130.

³¹ Harry D Jonas and others, “New Steps of Change: Looking Beyond Protected Areas to Consider Other Effective Area-based Conservation Measures” (2014) 20(2) PARKS - The International Journal of Protected Areas and Conservation 111.

³² Sean L Maxwell and others, “Area-based Conservation in the Twenty-First Century” (2020) 586 (7828) Nature 217.

³³ CBD, “Protected Areas and OECMs” (30 November 2018) UN Doc UNEP/CBD/COP/DEC/XIV/8, para 2.

³⁴ CBD, “Protected Areas and OECMs” (30 November 2018) UN Doc UNEP/CBD/COP/DEC/XIV/8, para 3 read with Annex 3.

³⁵ IUCN-WCPA Task Force on OECMs, “Recognising and Reporting Other Effective Area-based Conservation Measures” (IUCN 2019).

³⁶ These guidelines are available at: <https://www.iucn.org/theme/protected-areas/resources/iucn-wcpa-best-practice-guidelines-protected-area-managers-series>

tique levelled against domestic law and policymakers for offering OECMs weak legal protection over the past decade is accordingly not surprising.³⁸

Several commentators have previously recognised the need to involve all rightsholders and stakeholders in the “development and implementation of ... national OECM-related laws, policies, procedures and institutional arrangements”.³⁹ They have also highlighted how the “mindful crafting” of these national OECM-related laws, policies, procedures and institutional arrangements “may represent an important new inflection point in the evolution of conservation policy and practice”.⁴⁰ At a fairly recent Thematic Workshop on Area-Based Conservation Measures for the Post-2020 Global Biodiversity Framework,⁴¹ effective legislation was identified as a necessary condition for ensuring distributional and procedural equity in, and the recognition of, area-based conservation measures.

This article seeks to begin filling this apparent void, informing and hopefully accelerating this “inflection point” and contributing to developing understanding of this “necessary condition”. It aims to broadly scope the potential influence of law on OECMs. This is a vast enterprise, and the ambit of this initial scoping exercise is limited to sketching how domestic legal frameworks could influence the translation of international aspirations and commitments relating to terrestrially-situated OECMs into tangible domestic action. When focussing on domestic legal frameworks,

it is acknowledged that they frequently comprise of an array of sources, including legislation, common law rules and principles and customary law and practice. This legal pluralism is recognised as components of each legal system may be relevant to OECMs.⁴² The focus of this scoping exercise is, however, limited to the influence of domestic legislation in so far as it: enables people and institutions to do certain things; regulates the way they do so; and controls and restricts what can be done. Recognising the diversity of contexts, priorities, institutions, legal cultures and traditions at play in different countries, this scoping exercise focusses on identifying generic legal issues which domestic law and policymakers could then use as an initial frame to think through the current and potential influence of their domestic legislation on OECMs situated in the terrestrial context.

With this important context and broad purpose in mind, the remainder of the article is divided into two main parts. The first part provides an overview of the specific guidance offered by the international community to date on the form and nature of OECMs. This is distilled from the Scientific and Technical Advice on OECMs and the OECM Guidelines referred to above. Having broadly outlined their form and nature, the second part of the article seeks to broadly scope the potential influence of law on OECMs. It is acknowledged that additional voluntary guidance of general relevance to protected areas and OECMs was adopted by parties to the CBD, most notably at the COP14 (2018), and this is referred to where relevant within both the overview and the legal scoping exercise.⁴³

³⁷ These guidelines are: Barbara Lausche, IUCN Guidelines for Protected Areas Legislation (IUCN 2011); Barbara Lausche and others, *The Legal Aspects of Connectivity Conservation. A Concept Paper* (IUCN 2013); and Barbara Lausche, *Integrated Planning - Policy and Law Tools for Biodiversity Conservation and Climate Change* (IUCN 2019).

³⁸ Maxwell (n 32) 225.

³⁹ Harry D Jonas and others, “Editorial Essay: Other Effective Area-Based Conservation Measures: From Aichi Target 11 to the Post-2020 Biodiversity Framework” (2018) 24 *PARKS. The International Journal of Protected Areas and Conservation* 9, 13.

⁴⁰ H Jonas and others, “Will “Other Effective Area-Based Conservation Measures” Increase Recognition and Support for ICCAs?” (2017) 23(2) *PARKS. The International Journal of Protected Areas and Conservation* 63, 71.

⁴¹ CBD, “Report of the Thematic Workshop on Area-based Conservation Measures for the Post-2020 Global Biodiversity Framework” (18 February 2020) UN Doc UNEP/CBD/Post2020/WS/2019/9/3, 54.

⁴² For example: legislation may set out the process to recognise and report on OECMs; the common law may regulate conservation servitudes/easements and other contractual arrangements relating to areas falling within OECMs; and customary law and practice may underpin indigenous and community conserved areas which could constitute OECMs.

⁴³ This includes the Voluntary Guidance on the Integration of Protected Areas and OECMs into Wider Land- and Seascapes and Mainstreaming Across Sectors to Contribute, inter alia, to the Sustainable Development Goals (Voluntary Guidance on Protected Areas and OECMs) and the Voluntary Guidance on Effective Governance Models for Management of Protected Areas, Including Equity, Taking into Account Work Being Undertaken Under Article 8(j) and Related Provisions (Voluntary Guidance on Effective Governance Models) (CBD, ‘Protected Areas and OECMs’ (30 November 2018) UN Doc UNEP/CBD/COP/DEC/ XIV/8, Annexs I and II).

2. UNDERSTANDING THE NATURE AND FORM OF OECMS

Notwithstanding having been referred to in the Strategic Plan for Biodiversity 2011-2020⁴⁴ adopted in 2010, the following definition of an OECMs was only formally adopted at the CBD COP14 held in 2018:

A geographically defined area other than a protected area, which is governed and managed in ways that achieve positive and sustained long-term outcomes for the in situ conservation of biodiversity, with associated ecosystem functions and services and where applicable, cultural, spiritual, socio-economic, and other locally relevant values.⁴⁵

At this same meeting, parties welcomed the introduction of Scientific and Technical Advice on OECMs⁴⁶ that they were encouraged to apply in a "flexible way", on a "case-by-case" basis and in collaboration with IPLCs through both identifying OECMs within their jurisdiction and reporting on them to the WD-OECM.⁴⁷ This Scientific and Technical Advice on OECMs provided much needed clarity on three main aspects: guiding principles and common characteristics of OECMs; criteria for identifying OECMs; and further considerations relating to management approaches and their role in achieving Aichi Target 11.

The guiding principles and common characteristics of OECMs highlight the important contribution they could make to the attainment of Aichi Target 11 and some key general guidance on how OECMs should be identified and recognised.⁴⁸ Building upon these, the Scientific and Technical Advice on OECMs outlines four key cri-

teria for the identification of OECM, namely: the area is not currently recognised as a protected area; the area is governed and managed; the area achieves sustained and effective contribution to in situ conservation; and associated ecosystem functions and services and cultural, spiritual, socio-economic and other locally relevant values are supported, respected and upheld.⁴⁹ Each of these criteria is further clarified through additional sub-criteria and a range of indicators, which largely elaborate on the elements of the definition of an OECM.⁵⁰

To provide clarity on management approaches, the Scientific and Technical Advice on OECMs also highlights that given their potential diversity 'in terms of purpose, design, governance, stakeholders and management', management approaches may be diverse.⁵¹ However, it emphasises that management approaches should stabilise, recognise and support existing initiatives undertaken by IPLCs. It acknowledges that OECMs may be established, recognise and managed either to intentionally promote the in-situ conservation of biodiversity (as a primary management objective) or for another primary purpose with the in-situ conservation of biodiversity being a recognised co-benefit (in the form of an ancillary or secondary management objective). The definition and enabling of specific management measures and associated monitoring and reporting requirements are also identified as key components.⁵²

With a view to assisting parties to interpret and operationalise this broad advice relating to OECMs, and to facilitate the recognition and reporting of them, the IUCN introduced the OECM Guidelines in 2019. They provide guidance on three main issues. Firstly, in respect of each of the elements of the definition of an OECM, they expand upon what they mean.⁵³ This guidance builds upon and largely uses the same terminology reflected in the Scientific and Technical Ad-

⁴⁴ CBD, "Strategic Plan for Biodiversity 2011-2020" (29 October 2010) UN Doc UNEP/CBD/COP/DEC/X/2.

⁴⁵ CBD, "Protected Areas and OECMs" (n 43) para 2.

⁴⁶ Scientific and Technical Advice on OECMs (n 34).

⁴⁷ CBD, "Protected Areas and OECMs" (n 43) paras 3 and 5.

⁴⁸ These guiding principles and common characteristics of OECMs are set out in Part A of the Scientific and Technical Advice on OECMs (n 34) 10-11.

⁴⁹ These criteria for identification of OECMs are set out in Part B of the Scientific and Technical Advice on OECMs (n 34) 12-13.

⁵⁰ *ibid.*

⁵¹ *ibid* 13-14.

⁵² *ibid* 14.

⁵³ OECM Guidelines (n 35) 3-7.

vice on OECMs; and is similarly divided under the four broad criteria outlined in this advice.

Secondly, they provide a screening tool to aid decision-makers to determine whether a particular area-based conservation initiative meets the definitional criteria for an OECM.⁵⁴ Embedded in this screening tool are the following four tests: the area must not already be recognised or recorded as a protected areas; the area must satisfy all the elements embedded in the definition of an OECM; the conservation outcomes for the area must endure over the long-term; and the in-situ conservation target (previously Aichi Target 11 and its future equivalent in the Post 2020 Global Biodiversity Framework) must be the right focus for reporting. If each of these tests are satisfied, the OECM Guidelines provide that the area should be accorded the status of a candidate OECM, following which a detailed empirical review should be undertaken.⁵⁵ The IUCN WCPA has developed a Draft Site-Level Methodology for Identifying OECMs⁵⁶ to guide this more detailed empirical review. The OECM Guidelines provide that areas that pass this detailed empirical review are suitable for reporting in the WD-OECM.⁵⁷ However, prior to doing so, consent must first have been obtained from the legitimate governance authority, mirroring the imperative reflected in the Scientific and Technical Advice on OECMs that all relevant interested and affected parties should be consulted and that when dealing with the territory of IPLCs, their free, prior and informed consent must have been obtained in advance. The Draft Site-Level Methodology for Identifying OECMs draws a distinction between potential and candidate OECMs, with the former being those passing the initial screening process but awaiting the consent of the legitimate governance authority for possible recognition as an OECM; and the latter being those that both pass the screening test and have the necessary consent.⁵⁸ Some countries have experimented with

the application of Draft Site-Level Methodology for Identifying OECMs and recorded their experience,⁵⁹ which will no doubt shape their final version.

Thirdly, the OECM Guidelines emphasise the importance of monitoring the effectiveness of OECMs to ensure that they achieve long-term conservation outcomes.⁶⁰ They furthermore provide some guidance on reporting and verification requirements for recording these areas within the WD-OECM.⁶¹

Interestingly, the above guidance provides very little clarity on the influence or role of law. The Scientific and Technical Advice on OECMs is entirely silent on law. The OECM Guidelines provide a few passing references to law, notably: that the effective management and regulation of activities within OECMs could be undertaken “through legal measures or other effective means (such as customary laws or binding agreements with the landowners)”;⁶² that the probability of an OECM maintaining conservation outcomes over the long-term could be facilitated by similar legal measures;⁶³ and that a governance authority “holds legal or customary authority and responsibility for the site”.⁶⁴ The Draft Site-Level Methodology for Identifying OECMs is slightly less scant when it comes to references to the influence of law, mentioning: law as one tool through which to recognise OECMs;⁶⁵ the importance of law in informing the standing, recognition and sustainability of the governance authority;⁶⁶ and legal measures (including customary laws and binding agreements) as a potentially valu-

⁵⁴ *ibid* 8-12.

⁵⁵ *ibid* 9.

⁵⁶ Daniel Marnewick, Harry Jonas and Candice Stevens, Draft Site-level Methodology for Identifying Other Effective Area-based Conservation Measures (IUCN June 2020) <<https://www.env.go.jp/content/900489165.pdf>>.

⁵⁷ OECM Guidelines (n 35) 9.

⁵⁸ Marnewick and others (n 56) 16.

⁵⁹ See for example: Harry Jonas (ed), PARKS: The International Journal of Protected Areas and Conservation (2018) 24 Special Issue on OECMs (which contains numerous articles focussing on the assessment of areas in several countries as potential OECMs); and Daniel Marnewick and others, “Assessing the Extent and Contribution of OECMs in South Africa” (2021) 27(1) PARKS - The International Journal of Protected Areas and Conservation 57.

⁶⁰ OECM Guidelines (n 35) 13.

⁶¹ *ibid* 13 read with Appendix 3.

⁶² *ibid* 5.

⁶³ *ibid* 9.

⁶⁴ *ibid* vii.

⁶⁵ Marnewick and others (n 56) 8.

⁶⁶ *ibid* 32.

able tool to ensure the effective and long-term in-situ conservation of biodiversity within the OECM,⁶⁷ and managing and regulating activities in them.⁶⁸

Therefore, while rather fleetingly acknowledging law, the above references in no way constitute detailed clarity on the potential influence of law on the form, nature and recognition of OECMs. They clearly do not fill the apparent current void relating to legal guidance.

3. SCOPING THE POTENTIAL INFLUENCE OF DOMESTIC LEGISLATION

Several different approaches could be used when seeking to scope the potential influence of domestic law on OECMs. One approach would be to use the nature and structure of existing international legal guidance relating to protected areas and then adopt it as a lens through which to reflect on the influence of law on OECMs, as both are area-based conservation measures. The most comprehensive and notable of this existing legal guidance is contained in the Guidelines for Protected Areas Legislation⁶⁹ published in 2011. It identifies and canvasses a set of generic elements feasibly found in protected areas legislation, such as: definitions; policies and objectives; institutional arrangements; planning for protected areas; establishment of protected areas; protected areas management; regulation of activities; environmental impact assessment; compliance and enforcement; and financing.⁷⁰

However, there appear to be three key reasons why such an approach may not be prudent. Firstly, as highlighted in the preceding part of this article, the Scientific and Technical Advice

on OECMs and the OECM Guidelines make it very clear that OECMs are not protected areas and therefore relying on the Guidelines for Protected Areas Legislation to create a lens through which to reflect on the influence of law on OECMs would seem inappropriate. Secondly, the Guidelines for Protected Areas Legislation were developed after decades of extensive global “experimentation” with protected areas legislation and accordingly are exceptionally detailed and reflective of the global experience, with suggestions supported by domestic best practices and legal case studies collated over time. With OECMs having only been formally defined recently, there is a comparative dearth of similar global experience upon which to build or justify the generation of similarly specific guidance. Finally, the Guidelines for Protected Areas Legislation are a decade old, and accordingly somewhat outdated.

One alternate and possibly more suitable approach to adopt given the novelty of the concept and the relative dearth of experience on the domestic recognition of OECMs, would be to use the definitional elements identified in the Scientific and Technical Advice on OECMs and the OECM Guidelines as a starting point. These elements feasibly provide a workable lens through which to begin the legal scoping exercise, to seek to generate broad understanding on the potential influence of law.

The following elements can be distilled from the OECM definition: other than a protected area; geographically defined area; governed; managed; in ways that achieve positive, effective and sustained long-term outcomes; for in situ conservation of biological diversity; with associated ecosystem functions and services; and where applicable, cultural, spiritual, socio-economic, and other locally relevant values. Some of these definitional elements are seemingly more orientated towards being influenced by the law. These would include ascertaining that the area is not a protected area, how the OECM should be geographically defined and recognised, the determination of governance and management arrangements for the OECM, and systems to plan for, monitor and report on whether the OECM is achieving positive/effective and sustained long-term outcomes. Some of these definitional elements are more orientated

⁶⁷ *ibid* 14.

⁶⁸ *ibid* 36.

⁶⁹ Lausche, *IUCN Guidelines for Protected Areas Legislation* (n 37).

⁷⁰ *ibid* 107-208.

towards being influenced and informed by physical and social science. These would include determining how practically to promote in situ conservation of biological diversity, support and manage ecosystem functions and services and where applicable cultural, spiritual, socio-economic and other locally relevant values. The focus of the subsequent legal scoping exercise is orientated to the former grouping of definitional elements.

3.1. Other than a protected area

Both the Scientific and Technical Advice on OECMs and the OECM Guidelines dictate that OECMs are not protected areas as each contribute in their own right to global area-based targets.⁷¹ They are complementary in nature with the crucial distinction between the two being that while protected areas always have nature conservation as their primary objective, OECMs may or may not.⁷² In the context of OECMs, conservation may be a primary, secondary or ancillary objective.⁷³ OECMs can feasibly be recognised as protected areas as opposed to OECMs, where their primary management objective becomes conservation and the governance authority supports such designation.⁷⁴

Many domestic laws providing for protected areas contain provisions clearly defining what is a protected area.⁷⁵ These definitions often draw from the definitions developed by the international community, such as under the auspices of the CBD⁷⁶ and IUCN.⁷⁷ However, with the global recognition of different management categories⁷⁸ and governance types overtime,⁷⁹ and domestic lawmakers tailoring definitions to suit their specific context, these definitions are fre-

quently complex and interwoven, with many different types and categories of protected areas defined and recognised in many different domestic laws regulating biodiversity, forestry, fresh water resources, the coastal and marine environment and natural heritage, to name a few. These definitions sometimes contain necessary criteria for qualifying as a specific type or category of protected area, and on other occasions cross-refer to specific parts of the specific law or other associated laws that specifically provide for the recognition of different types or categories of protected areas. Determining what is a protected area can accordingly become complex.

This naturally has a direct impact on OECMs as determining if an area constitutes one, needs to be accompanied by a determination that the area is not a protected area. This is not always an easy distinction to determine.⁸⁰ Accordingly, how domestic protected areas legislation defines what are protected areas has a clear bearing on OECMs. The inclusion of clear definitions in protected areas legislation as to what are protected areas may facilitate the determination of what areas could be regarded as OECMs. The inclusion of clear definitions in domestic legislation as to what specifically are

⁷¹ Scientific and Technical Advice on OECMs (n 34) 12; and OECM Guidelines (n 35) 4.

⁷² OECM Guidelines (n 35) 3.

⁷³ *ibid* 3-4

⁷⁴ *ibid* 4.

⁷⁵ Lausche, IUCN Guidelines for Protected Areas Legislation (n 37) 111.

⁷⁶ Under the CBD (n 7), a protected area is very broadly defined as "a geologically defined area which is designated or regulated and managed to achieve specific conservation objectives" (art 2).

⁷⁷ The IUCN has adopted the following definition for a protected area: "a clearly defined geographical space, recognised, dedicated and managed through legal or other means, to achieve the long term conservation of nature with associated ecosystem services and cultural values" (Nigel Dudley (ed), Guidelines for Applying Protected Area Management Categories (IUCN 2008) With S Stolton, P Shadie and N Dudley, IUCN WCPA Best Practice Guidance on Recognising Protected Areas and Assigning Management Categories and Governance Types (IUCN, 2013) 8).

⁷⁸ The management categories are: Category Ia (Strict Nature Reserve); Category Ib (Wilderness Area); Category II (National Park); Category III (Natural Monument or Feature); Category IV (Habitat/Species Management Area); Category V (Protected Landscape/Seascape); and Category VI (Protected Area with Sustainable Use of Natural Resources). See further: Dudley (n 77) 7-23.

⁷⁹ The governance types are: Type A (Governance by Government); Type B (Shared Governance); Type C (Governance by Private Actors); and Type D (Governance by Indigenous Peoples and Local Communities). See further: Grazia Borrini-Feyerabend and others, Governance of Protected Areas: From Understanding to Action (IUCN 2013) 29-42.

⁸⁰ For a reflection on the key distinctions between OECMs and protected areas in the context of non-state land, see: Brent A Mitchell and others, "PPA or OECM? Differentiating Between Privately Protected Areas and Other Effective Area-Based Conservation Measures on Private Land" (2018) 24 PARKS - The International Journal of Protected Areas and Conservation 49.

OECMs, could further facilitate this determination, with these definitions ideally drawing from the definition reflected in the Scientific and Technical Advice on OECMs and the OECM Guidelines. The opposite is equally true as a failure to include clear definitions of either within legislation may lead to confusion in distinguishing the two. It may also realise the fear of some commentators that areas of low biodiversity value would be recognised and incorporated within OECMs with a view to meeting or inflating reporting on area-based targets.⁸¹ Law seemingly has a vital potential influence in so far as it can provide clear definitions with associated criteria for identifying what are protected areas and OECMs.

3.2. Geographically defined area

To recognise an area, one needs to be able to identify a suitable area and delineate its boundaries. In this regard the OECM Guidelines highlight that this definitional element recognises the need for an OECM to be "spatially delineated with agreed and demarcated boundaries".⁸² Their situation is not limited to the terrestrial context in that they can include land, inland waters, coastal and marine areas.⁸³ When defining the geographical space falling within the OECM, the OECM Guidelines emphasise the need to adopt a three dimensional perspective as achieving conservation outcomes in the area may well include controlling what happens not only on the surface of the land or sea, but what happens above and below it.⁸⁴ The geographical area should also be of "sufficient size" to achieve long-term in situ conservation.⁸⁵

This definitional element triggers many legal issues that could be grouped into two broad questions: first, how is a potentially suitable area

identified; and secondly, how is the area recognised and secured?

Not all areas will naturally qualify to be recognised as an OECM, and as proposed in the OECM Guidelines, some screening process would appear necessary to determine if an area could constitute a potential OECM.⁸⁶ Embedding this screening process in law could promote clarity, certainty and consistency. The law could feasibly prescribe who may initiate the screening process (feasibly including landowners, those in control of the area, those with rights of access and use and/or government authorities) and a set of criteria or tests, building upon those outlined in the OECM Guidelines, indicating to the regulated community what factors should be considered when identifying potentially suitable areas. These factors could be linked to and informed by land-use, biodiversity, coastal and/or marine planning frameworks, with the law prescribing the form, nature, legal status/impact, adoption process, review process and authorities responsible for developing and implementing them. Linking the identification of potentially suitable areas to these important planning frameworks may well aid in promoting the complementarity of, and connectivity between, different area-based conservation measures and aid in promoting alignment with the Voluntary Guidance on the Protected Areas and OECMs.⁸⁷ The law could furthermore prescribe a screening process, through which 'applicants' could themselves submit potential areas for consideration; and/or authorities could identify potential areas for consideration and encourage those owning or controlling them to submit them through the screening process.

Having progressed through the screening process, the potential influence of law would appear equally important. With countries being encouraged to identify and report on OECMs for inclusion in the WD-OECMs,⁸⁸ introducing some formal process to accord them legal recognition through domestic legislation may again improve clarity, certainty and consistency. In addition to including a formal definition of what is an

⁸¹ Helene Alves-Pinto and others, "Opportunities and Challenges of Other Effective Area-Based Conservation Measures (OECMs) for Biodiversity Conservation" (2021) 19 *Perspectives in Ecology and Conservation* 115.

⁸² OECM Guidelines (n 35) 4.

⁸³ *ibid* 4.

⁸⁴ *ibid* 5.

⁸⁵ *ibid* 5.

⁸⁶ *ibid* 8-12.

⁸⁷ Voluntary Guidance on Protected Areas and OECMs (n 43).

⁸⁸ CBD, "Protected Areas and OECMs" (30 November 2018) UN Doc UNEP/CBD/COP/DEC/XIV/8, para 5.

OECM and a possible screening process, crucial components of any such legal framework may include: a formal and detailed assessment process for potential OECMs (feasibly incorporating elements from the Draft Site-Level Methodology for Identifying OECMs);⁸⁹ details on who can initiate the process; provision for public participation, consent and intergovernmental consultation; clarity on which authority is empowered to formally recognise the OECM and how; the prescription of decision-making criteria to improve the quality and consistency of decision-making; how the public is formally notified of the recognition of the OECM; the possible demarcation of different zones within OECMs and if so for what purpose and how; and the impact of the recognition of an area as an OECM on existing rights and interests in the area and resources situated on, under and above it (such as water, minerals, oil, gas and marine living resources). Lawmakers would need to determine whether the same or different procedures applied to the initial recognition of the area and attempts to alter its boundaries at a later stage. They would also need to determine whether similar or different procedures applied to state-owned as opposed to non-state owned land, and OECMs of different governance types. The process to formally recognise an area as an OECM is but one legal component, with the other being how to tangibly secure the area in the long-term through various legal measures. This latter component is dealt with in 3.5 below.

Finally, and perhaps most challenging, given the opportunities OECMs provide to expand the remit of area-based conservation initiatives by recognising and supporting those undertaken by IPLCs in respect of areas falling under their tenure or management, lawmakers would need to tailor the above processes to recognise and align with the form and nature of customary and communal land tenure systems. These systems are often characterised by nested and overlapping rights and interests, and any relevant legal framework would need to grapple with these characteristics when seeking to spatially delineate and demarcate the boundaries of an OECM. The lawmakers would also need to ensure that customary and communal property in-

stitutions administering or holding rights through these land tenure systems are accorded due recognition, respect and a central participatory role in any legally prescribed recognition process. A failure to do so could erode the support of these crucially relevant traditional governance institutions thereby excluding vast areas from possible recognition as OECMs.

3.3. Governed

According to the OECM Guidelines, governed "implies that the area is under the authority of a specified entity, or an agreed upon combination of entities".⁹⁰ Governance diversity is promoted, as it is acknowledged that the four governance types developed in the context of protected areas are equally relevant to OECMs.⁹¹ So too is the notion of effective and equitable governance, with express recognition being accorded to human rights.⁹² When dealing with OECMs governed by IPLCs, self-identification by and the free, prior and informed consent of traditional governance institutions are strongly advocated.⁹³

As a result, the Voluntary Guidance on Effective Governance Models⁹⁴ is seemingly directly relevant to OECMs. It comprises of two components Voluntary Guidance on Governance Diversity and Voluntary Guidance on Effective and Equitable Governance Models, with law potentially playing an integral role in facilitating both in the context of OECMs.

3.3.1. Promoting Governance Diversity

The Voluntary Guidance on Governance Diversity identifies law as a tool to recognise and incentivise the full range of governance types.⁹⁵

⁸⁹ Marnewick and others (n 56) 24-51.

⁹⁰ OECM Guidelines (n 35) 5.

⁹¹ *ibid.*

⁹² *ibid.*

⁹³ *ibid.*

⁹⁴ Voluntary Guidance on Effective Governance Models (n 43).

⁹⁵ *ibid.*, para 1 read with Annex II, Part A, para 7(f).

How could law do so specifically in the context of OECMs? The legal framework could expressly recognise and enable all governance types, with the devolved forms of governance (Types B-D) seemingly highly relevant to OECMs given that potential areas may frequently fall outside of state ownership and control. This could be achieved by enabling voluntary conservation initiatives in respect of non-state-owned or controlled areas, which are often associated with these devolved forms of governance, by for example: recognising the authority of non-state actors; granting sole or shared authority to them by way of delegation, assignment or agreement; providing for easements / covenants / servitudes and/or the recognition of land trusts; enabling the appointment of non-state actors to manage OECMs; making provision for co-management arrangements; and including fiscal and other incentives to encourage non-state actors to play a role in OECM governance.⁹⁶ Recognising that OECM governance arrangements may shift between governance types overtime, lawmakers may need to ensure that any legal framework builds in necessary flexibility to allow governance arrangements to adapt to changing circumstances.⁹⁷

3.3.2. Promoting Effective & Equitable Governance

Turning to the second component of governance, the Voluntary Guidance on Effective and Equitable Governance Models highlights that effective and equitable governance is founded on principles of good governance, and that the latter should permeate the decision-making process and associated outcomes operational across all governance types.⁹⁸ It also acknow-

ledges that these decision-making processes may need to be tailored to suit specific contexts.⁹⁹

The Voluntary Guidance identifies several elements of effective and equitable governance models for area-based conservation initiatives. These include appropriate procedures and mechanisms to ensure: the recognition, legitimate representation and participation of all rightsholders and stakeholders (specifically including IPLCs); the recognition and accommodation of customary tenure and governance systems (including traditional knowledge, customary practices and customary sustainable use); transparency and accountability in decision-making; the equitable sharing of benefits and costs (including appropriate compensation and monitoring arrangements); the fair resolution of disputes and conflicts; and the impartial and effective implementation of the rule of law.¹⁰⁰

The review and reform of relevant laws and policies are suggested actions for CBD parties to realise these elements.¹⁰¹ The Voluntary Guidance appears expressly to accept that law has a key influence in either undermining or promoting good governance principles in the context of all area-based conservation initiatives, including OECMs. Decision-making processes are central to good governance, with a key question then being how law could promote effective and equitable decision-making within OECMs. There appear to be several opportunities in this regard.

Firstly, the law could clearly identify who are the relevant rightsholders and stakeholders relevant to any OECM initiative. These may well include both state and non-state actors, with the latter grouping importantly including IPLCs. In the interests of promoting clarity, certainty and consistency, the law could clearly set out the composition, authority, roles, responsibilities and relationship between these different actors.

Secondly, it could make provision for public participation procedures that ensure the openness

⁹⁶ Additional guidance on these specific options and broad legal considerations informing the intersection between law and governance in the context of area-based conservation initiatives could be drawn from several IUCN publications. See for instance: Lausche, IUCN Guidelines for Protected Areas Legislation (n 37) 75-106 and 160-162; Lausche and others, The Legal Aspects of Connectivity Conservation (n 37) 44-52; and Lausche, Integrated Planning (n 37) 42-48.

⁹⁷ Jamie Benidickson and Alexander Paterson, 'Biodiversity, Protected Areas and the Law' in Charles R McManis and Burton Ong (eds), Handbook of Biodiversity and the Law (Routledge 2018) 42.

⁹⁸ Voluntary Guidance on Effective Governance Models (n 43), para 1 read with Annex II, Part B, para 8.

⁹⁹ *ibid*, para 1 read with Annex II, Part B, para 10.

¹⁰⁰ *ibid*, para. 1 read with Annex II, Part B, para 11.

¹⁰¹ *ibid*.

and transparency of any decision-making process relating to an OECM initiative. This could be facilitated through the law expressly providing for the following: the trigger for the procedure (when is public participation required and whether it is mandatory or not, with mandatory procedures being preferable); the nature of the procedure (what is the form of public participation, with options including notice and comment procedures through to public hearings); the timing of the process (at what stage of the process does public participation occur and is it regular or once off, with regular public participation throughout the process being preferable); the inclusivity of the process (who has a right to participate and how, with inclusivity as opposed to exclusivity being a preferable characteristic); and possible provision for assistance (whether assistance will be provided to enable the public or certain sectors of the public to participate, and if so, what will the form of assistance be and to whom will it be provided and when).

Thirdly, the law could clearly prescribe the decision-making process to promote consistency, predictability and equity. This could be facilitated by the law dealing with the following: the appointment or identification of the decision-maker, which could be an individual or group of persons (ensuring that they are representative and impartial); the prescription of decision-making criteria or prerequisite processes (such as environmental impact assessment); provision for expert review (to enable the decision-maker to solicit expert review where the complexity of the matter dictates the requisition of independent or specialist advice); clear and viable timeframes (for all involved in the process, with a view to providing clarity and accountability); notification of the outcome (with clarity as to whom should be notified, how, when and of what); the form of approval or outcome of the decision (specifically what information should be contained within it, and matters relating to its expiry and/or transferability); procedures to request reasons for the decision (with the law setting out the process and timelines for securing such additional information); and notification of the right to challenge the decision (such as provision for mediation, conciliation, arbitration, appeal or review, with the law setting out the grounds and the process).

Given the potential diversity of governance types at play, regulating decision-making processes identically across different governance types would appear unfeasible. Lawmakers may accordingly need to carefully tailor nuanced forms of decision-making procedures suitable for each of the different government types, ensuring that in each case they do not undermine the ultimate goal of ensuring effective and equitable governance within the OECM. Furthermore, several aspects canvassed in the elements identified in the Voluntary Guidance extend to issues relating to legal pluralism, customary tenure and governance systems, access to information, administrative justice and the rule of law. Relevant domestic legislation seeking to promote effective and equitable governance in the context of OECM initiatives may accordingly traverse legal frameworks dealing with conservation, land tenure, communal property institutions, customary law and constitutional issues (including human rights).

3.4. Managed

To be recognised as an OECM, the area must be managed in a way that achieves positive and sustained long-term biodiversity conservation outcomes.¹⁰² Specifically focussing here on the notion of managed, the OECM Guidelines highlight the following: relevant authorities, rightsholders and stakeholders need to be identified and involved in managing the area; the area needs to be subject to some form of management regime; this management regime should be consistent with the ecosystem approach and be able to adapt to and manage emerging threats; management includes providing 'effective means' to control activities impacting on biodiversity (whether through legal measures, customary laws or binding agreements with the landowners); with integrated management across the seascape or landscape being encouraged.¹⁰³

As with each of the preceding definitional elements canvassed above, this element similarly triggers many questions of potential relev-

¹⁰² OECM Guidelines (n 35) 5.

¹⁰³ *ibid.*

ance. These primarily relate to four main issues, namely: who manages the OECM; what informs their management of it; how they manage it; and how they are held accountable for their management of it? Each of these aspects and the potential influence of law on each is outlined below.

Management denotes their being an entity undertaking this management. The OECM Guidelines make reference to the notion of a management authority, defined as the “organisation or entity responsible for the ongoing management of a site”.¹⁰⁴ It is acknowledged that while the management authority may be the same as the governance authority, they may also be distinct.¹⁰⁵ Again, in the interests of promoting clarity, certainty and consistency, law could influence the process to recognise or appoint some form of management authority for the OECM, by prescribing: the range of entities or institutions that could be recognised or appointed as the management authority (including both state and non-state actors), with feasibly differentiation across different governance types; a set a “suitability” criteria; a process to scope potentially suitable management authorities against these criteria; public consultation and participation requirements relating to the recognition or appointment process; who specifically recognises or appoints them and how; and the duration of their recognition or appointment. Where collaborative management is anticipated, it could also specifically enable such arrangements by way of legal tools, such as co-management agreements. The law could further promote clarity, certainty and consistency by recognising or prescribing the powers and functions of these management authorities, and procedures for holding them to account where mismanagement occurs.

Management cannot occur in a vacuum and is commonly underpinned by a set of principles, objectives, plans and rules (a management regime). Principles and objectives constitute both an important guide to a management authority and an important benchmark against which to measure their performance and adapt management approaches if necessary. The prescription

of set of broad management principles and/or objectives for OECMs within a legal framework may create clarity regarding the general purpose underpinning the recognition of OECMs. It may also create clarity regarding the goal management authorities need to be consistently working to achieve. These principles and/or objectives could be differentiated across management categories and governance types, but would need to align with the overall guidance provided in the OECM Guidelines that while OECMs do not require a primary objective of conservation, “there must be a direct causal link between the area’s overall objective and management and the in-situ conservation of biodiversity over the long-term”.¹⁰⁶ This overarching set of principles and objectives could be complemented at the site-level by enabling the relevant management authority to develop a set of site-specific principles and/or objectives for the OECM, with these aligning and being informed by the set prescribed in the overarching legal framework. Were this approach supported, the lawmakers would need to enable management authorities to do so and prescribe the process they would need to follow in doing so.

The prescription of principles and/or objectives of this nature may go some way towards effective management, but more detailed site-specific planning may be required, with a view to developing a management plan to guide and inform the actions of the management authority in respect of the OECM. Law once again feasibly has an important role to play through providing for management planning, including: who needs to develop a management plan and when; procedures that need to be followed when doing so (such as public participation); the prescription of mandatory and discretionary content for the plan; any approval process; the duration of the plan; and procedures to amend or review the plan.

Management may also frequently entail creating rules and mechanisms to control activities in the OECM that may undermine in-situ conservation of biodiversity over the long-term. Here again law has a potential influence as these rules and mechanisms are invariably embedded in law. In this regard the law could identify

¹⁰⁴ OECM Guidelines (n 35) viii.

¹⁰⁵ *ibid.*

¹⁰⁶ OECM Guidelines (n 35) 5.

prohibited activities and permitted activities. Prohibited activities would feasibly include environmentally-damaging industrial activities and large-scale infrastructure projects that preclude the realisation of positive and sustained long-term outcomes for in situ biodiversity conservation. In respect of the permitted activities, the law could outline: the range of measures through which permission could be granted (such as permits and agreements); to whom permission could be granted; who could grant permission; what process must be followed prior to the grant of permission; necessary decision-making criteria (such as compliance with the principles, objectives and management plan for the OECM); dispute resolution; and sanctions for non-compliance.

With IPLCs potentially frequently being the governance and management authority for an OECM, references to law in the above sense spans both customary law and practice, and statutory legal frameworks. The manner in which the legal system acknowledges and respects legal pluralism and provides a workable interface between customary law and practice and statutory legal frameworks seems vitally important.

3.5. Achieving positive, effective and sustained long-term outcomes

The Scientific and Technical Advice on OECMs and the OECM Guidelines indicate that the governance and management regime underpinning an OECM should "achieve positive and sustained long-term outcomes".¹⁰⁷ The word "positive" is generally used interchangeably with the notion of "effective".¹⁰⁸ Implicit in this definitional element are again several issues of potential legal relevance. These to a degree duplicate those relating to the governed and managed elements discussed above but do raise certain additional specific legal questions, relating to firstly, the temporal nature of the

outcomes; and secondly, monitoring the impact and effectiveness of them.

The outcomes need to be "sustained" (continuous) and "long-term" with sporadic, short-term or temporary management strategies being insufficient.¹⁰⁹ The law could create clarity, certainty and consistency by, for example, defining what is anticipated by satisfactory "sustained" and "long-term" arrangements; and prescribing tangible legal mechanisms to ensure that they can be realised. These legal mechanisms are diverse and could include: formal designation or recognition of the area as an OECM; land purchase; land expropriation; conservation agreements (feasibly regulating management, access and use rights and benefit sharing arrangements); covenants / servitudes / easements; land trusts; and/or the prescription of prohibited and permitted activities. The choice of the appropriate individual or blend of legal mechanisms would naturally need to be context specific, with the law also where necessary providing for the registration of any legal rights, obligations and restrictions against the title deeds of the property thereby ensuring their long-term duration. With a view to promoting the sustainability of these outcomes, legal provision may need to be made to support those seeking to achieve and sustain these outcomes through, for example, carefully tailored assistance and incentive schemes.

The outcomes secondly need to be positive and effective, denoting the need to monitor and report on the impact and effectiveness of measures taken to achieve positive and sustained long-term outcomes. Monitoring has been identified as a potential future challenge for OECMs due to limited monitoring tools, variations in governance and funding constraints.¹¹⁰ These monitoring and reporting requirements are, however, crucial given the recording of OECMs in both the WD-OECMs and Global Database on Protected Area Management Effectiveness (GD-PAME).¹¹¹ Inadequate or inaccurate monitoring and reporting could undermine the utility and credibility of these important databases tracking domestic and global performance. The

¹⁰⁷ Scientific and Technical Advice on OECMs (n 34) 12-13; and OECM Guidelines (n 35) 5-6.

¹⁰⁸ *ibid.*

¹⁰⁹ OECM Guidelines (n 35) 5-6.

¹¹⁰ Alves-Pinto (n 81) 118.

¹¹¹ OECM Guidelines (n 35) 13.

OECM Guidelines highlight how the IUCN Green List of Protected and Conserved Areas Standard¹¹² and guidelines and tools measuring PAME¹¹³ are both instructive, with monitoring and reporting ideally spanning: the sites' biodiversity values; where appropriate, community-based monitoring, participatory mapping and incorporation of indigenous knowledge; conservation actions; governance and management systems; and management effectiveness.¹¹⁴

In this regard the law could again promote clarity, certainty and consistency by, for example: prescribing monitoring and reporting requirements relating to OECMs; detailing the array of criteria, factors or standards relating to these requirements; outlining the nature, timing and frequency of the requirements; identifying who is responsible for them and to whom the reporting must be made; introducing measures to respond to instances where the reporting details instances of non-compliance with the objectives underpinning the OECM; and allowing for procedures to alter these objectives where necessary, aiming to achieve a careful balance between the imperatives of flexibility and long-term certainty. Care would, however, need to be exercised to ensure that any legally prescribed monitoring and reporting requirements were either tailored to suit available resources and capacity, or alternatively supported through the provision of necessary resources and capacity.

As in respect of each of the above definitional elements, when dealing with areas subject to customary tenure and governance systems, the issue of legal plurality comes to the fore, with the influence of law needing to recognise, accommodate and align elements from multiple legal systems.

4. CONCLUSION

¹¹² IUCN and World Commission on Protected Areas, IUCN Green List of Protected and Conserved Areas: Standard, Version 1.1 (IUCN 2017). See further: <https://iucngreenlist.org/>

¹¹³ UNEP-WCMC, Protected Planet: Global Database on Protected Area Management Effectiveness User Manual 1.0 (UNEP-WCMC 2017). See further: <https://www.protectedplanet.net/en/thematic-areas/protected-areas-management-effectiveness-pame?tab=METT>

¹¹⁴ OECM Guidelines (n 35) 13.

The international community has clearly pinned much hope on OECMs to significantly increase the current scope of area-based conservation initiatives across the globe. They are perceived as a key complementary tool to protected areas, crucially recognising and supporting the vital role played by IPLCs in respect of areas subject to their land tenure and management, advocating a diversity of governance approaches, promoting human rights and feasibly building broader political support for area-based conservation initiatives across all state and non-state actors.¹¹⁵

Law has been identified as one discipline that impacts on OECMs. This article has sought to begin partially filling the current dearth of analysis and understanding of the influence of law on OECMs. Using the OECM definitional elements that are seemingly more tangibly influenced or regulated by the law, it has aimed to provide an initial frame of reference, which it is hoped will inform future more detailed discussions and analysis as many countries aim to ratchet up the identification and recognition of OECMs.

It is acknowledged that every country is unique and characterised by different: socio-economic and environmental realities; conservation priorities; legal instruments, traditions, cultures and practices; law-making processes; and institutional frameworks, to name a few. These differences need to be acknowledged when considering the influence of law on OECMs. The generic legal issues scoped in this article accordingly need to be further scoped and considered in each specific context.

It is recognised that law can provide both potential benefits and limitations. On the one hand it can promote clarity, certainty and consistency. This could encourage state and non-state actors to support OECM initiatives. On the other hand, it can be perceived as restrictive and rigid. This could in contrast lead to reluctance to support OECM initiatives where they are perceived as being overly regulated. A careful and creative balance may accordingly need to be sought when utilising the law to recognise and regulate OECM initiatives. As highlighted by some com-

¹¹⁵ Dudley (n 19) 4-5.

mentators recently in the context of the application of the Scientific and Technical Advice on OECMs, a careful balance will need to be sought between “objectivity, rigour and consistency” and “inclusivity, simplicity and flexibility”, to encourage support for OECM initiatives and not impose additional burdens on already overstretched governance and management authorities.¹¹⁶

It is acknowledged that there may be a blend of many areas of laws of relevance to OECMs. These could include, for example: constitutional law; administrative law; property law; fiscal law; development control law; land-use planning law; biodiversity law; protected areas law; forestry law, agriculture law; coastal and marine law; freshwater law; and climate change law. When initially scoping the influence of law in any domestic context against the broad frame of reference outlined in this article, a holistic and integrated consideration of all these areas of law may accordingly be required. Only then will one seemingly be placed to determine what legal reforms to introduce by way of additions and/or amendments to the existing legal framework. These areas of law may operate at or within the national/federal, provincial/state, local/municipal legislation and or village level or sphere. When thinking through options for legal reform, efforts may need to focus on promoting alignment and integration across these different levels and spheres. Considered choices may also need to be made regarding whether to introduce dedicated legislation to deal with OECMs, or rather to mainstream the regulation of OECMs within existing legislation.

Finally, with the anticipation of many potential OECMs being identified and recognised in areas subject to customary tenure and governance systems, legal pluralism comes to the fore. The way domestic legal systems acknowledge and respect legal pluralism and provide a workable interface between customary law and practice and statutory legal frameworks would, accordingly, seem to be a vital factor in determining whether global expectations of OECMs contrib-

uting significantly to increased coverage of area-based initiatives are realised.

¹¹⁶ Harry D Jonas and others, “Equitable and Effective Area-Based Conservation: Towards the Conserved Areas Paradigm” (2021) 27(1) PARKS: The International Journal of Protected Areas and Conservation 71.

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