

methods of habitat and species protection, as well as innovative instruments, ranging from the use of intellectual property rights to the regulation of biotechnology. Traditional legal approaches to general conservation in Namibia are outlined in section 5.3 below, while innovative methods which are still new to the country are discussed in section 5.4.

A second feature of the CBD is that it does not lay down substantive rules. Instead, it lays down overall principles, objectives and goals, leaving it up to contracting states to develop and adopt detailed means to achieve these. It is **facilitative rather than substantive**. With this framework in mind, the CBD leaves it up to individual countries to determine exactly how to implement most of its provisions. Therefore, major decisionmaking is placed at a national level.

Unlike other treaties related to the conservation of biodiversity, the CBD lays down no lists of accepted sites or species to be protected. These are left to individual countries to determine.

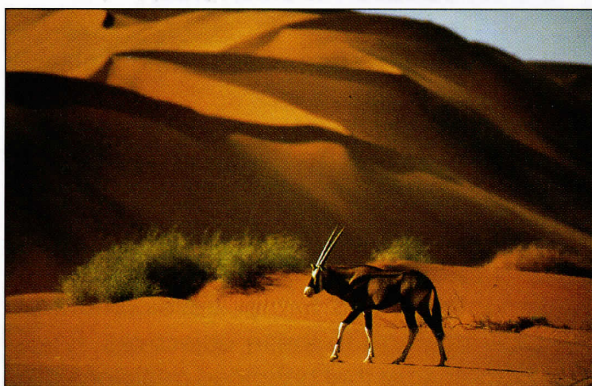


Fig. 5.1 Courtesy P Tarr

5.2 Threats to biodiversity in Namibia

The Convention recognises that the conservation of global biodiversity is a common concern of humankind, and a common and shared responsibility exists based on its paramount importance to the global community. While recognising that biodiversity knows no national borders and that international legal instruments must thus be adopted, the CBD respects national sovereignty.

Any programme to conserve biodiversity must recognise underlying reasons for biodiversity loss. The root causes of diversity loss recognised globally² also apply to Namibia:

- population growth and increasing resource consumption;
- ignorance about the roles of species and ecosystems;
- poorly conceived policies;
- effects of global trading systems;
- inequal resource distribution;
- failure to account for the value of biodiversity.

It is evident from this that human actions, economies and policies are the cause of most biodiversity loss. Legal efforts to address this loss must urgently consider these and other factors, and not only focus on the species and habitats which require direct priority action.

5.3 Environmental law in the context of Namibia's political and legal system

Namibia is a young country, having only attained Independence in March, 1990. It then inherited Roman Dutch common law from South Africa, and took over laws put in place by that country. Many of its environmental laws are accordingly outdated and inappropriate for the newly independent country, still reflecting vestiges of its colonial *apartheid* past.

For these reasons, Namibia is undertaking a four year donor-funded programme to review and revise its environmental legislation, and has appointed an environmental lawyer to manage the project.

The Namibian Constitution stipulates that both common law (its Roman Dutch legal heritage) and customary law shall remain

valid to the extent that they do not conflict with the Constitution or statutes (Article 66). When considering current and new laws for conservation, both western and customary legal models must be kept in mind.

5.4 Pertinent obligations under the CBD

Biodiversity must be conserved for continued human survival, as well as for its own sake. This is why the CBD's preamble affirms that biodiversity is humankind's common concern. Although national sovereignty is recognised, States are also obliged to conserve biodiversity and regulate the sustainable use of its component resources.

In situ conservation (Box 5.1) first requires contracting States to establish a system of protected areas or areas where special measures are needed, including guidelines for their selection and management. Second, it requires the conservation of biodiversity and maintenance of viable populations in these areas.²

Box 5.1 *In situ* and *ex situ* conservation

To comprehend the obligations created by the CBD, especially those requiring international co-operation, one must understand the distinction between *in situ* and *ex situ* conservation. The CBD defines *in situ* conservation as where the maintenance and recovery of habitats, species and populations occur in their natural surroundings or, for domesticated or cultivated species, in the place where they developed their distinctive properties (Article 2). *In situ* species conservation cannot occur without also conserving species habitats. *Ex situ* conservation, on the other hand, is the conservation of components of biodiversity outside their natural habitats, for example in zoos and aquaria. It is complementary to *in situ* conservation. *Ex situ* conservation also refers to species domesticated in a place where they have not developed their distinctive features, for example on farms.

The CBD involves several general obligations:

a. Contracting parties must cooperate with each other regarding areas beyond national jurisdiction and other matters of mutual interest.

This will be done directly or, where appropriate, through competent international organisations (Article 5). The jurisdictional scope of a contracting party includes the land within its internationally recognised borders, its territorial waters, and maritime zones adjacent to them. A State may make rules for areas in its national jurisdiction and the biological resources found there. It can also regulate all processes and activities occurring there, whether by nationals or foreigners. These powers are derived from a State's sovereignty over its territory.

The situation is, however, different for areas beyond the limits of national jurisdiction. These areas are outside the sovereignty of any State, and are often referred to as global commons. They include, for example, the high seas and the upper atmosphere. In these areas, States may only regulate the activities of their nationals in order to achieve the CBD's objectives.

The need for cooperation can not be over-emphasised, since transfrontier impacts by one State, for example via pollution, may profoundly affect another State's biodiversity. Second, species migration takes place between States and many species range over several national boundaries.³ Namibia's Caprivi Strip, which is closely ecologically linked to Angola, Zambia and Botswana, illustrates this vividly.

Two other obligations of every contracting party are (Article 6:a,b):

b. Countries must develop and adapt national biodiversity strategies, plans or programmes;

and

c. Countries must integrate the conservation of biodiversity and the sustainable use of its components into relevant sectoral or cross-sectoral plans, programmes and policies.