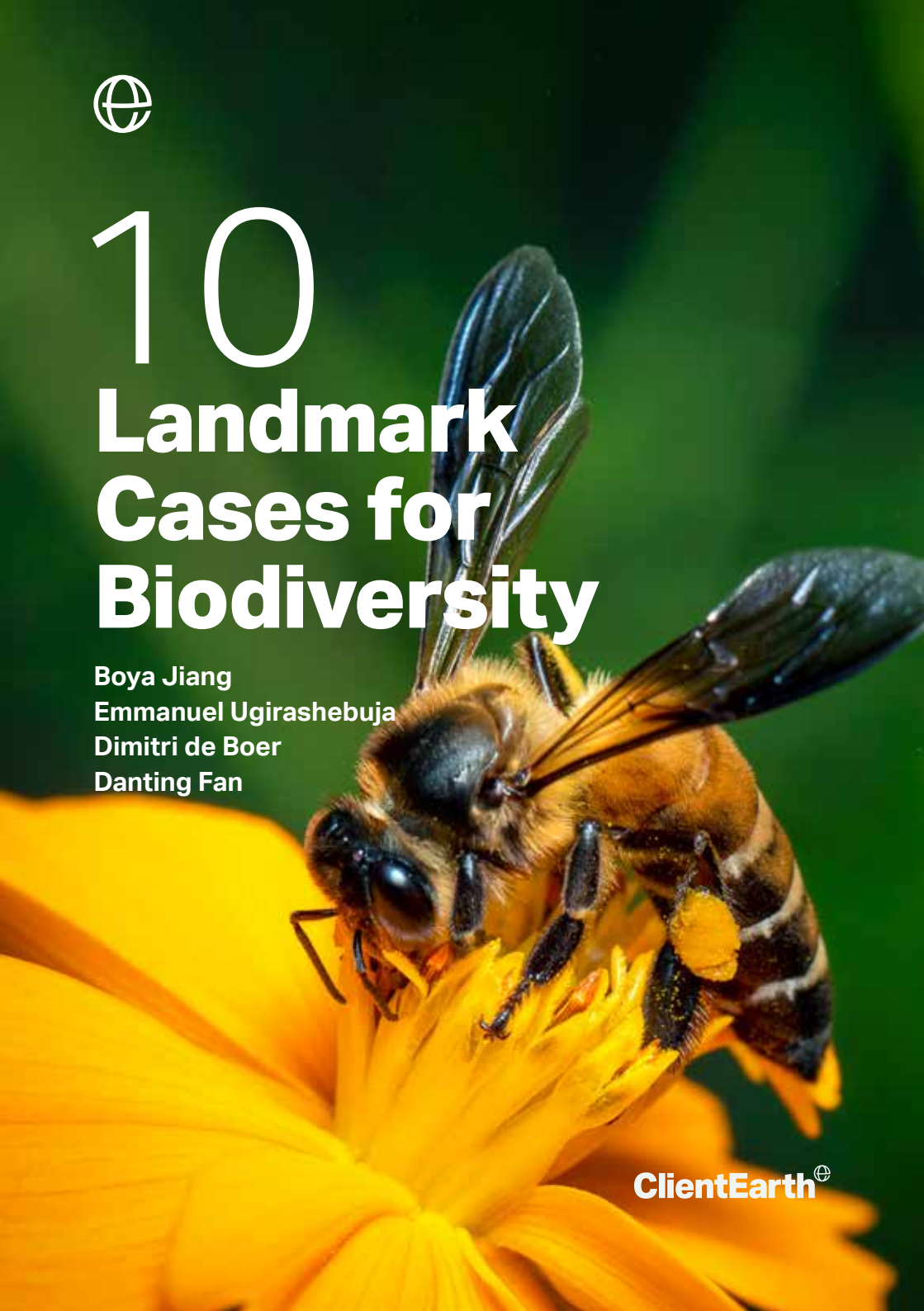

10 Landmark Cases for Biodiversity

Boya Jiang
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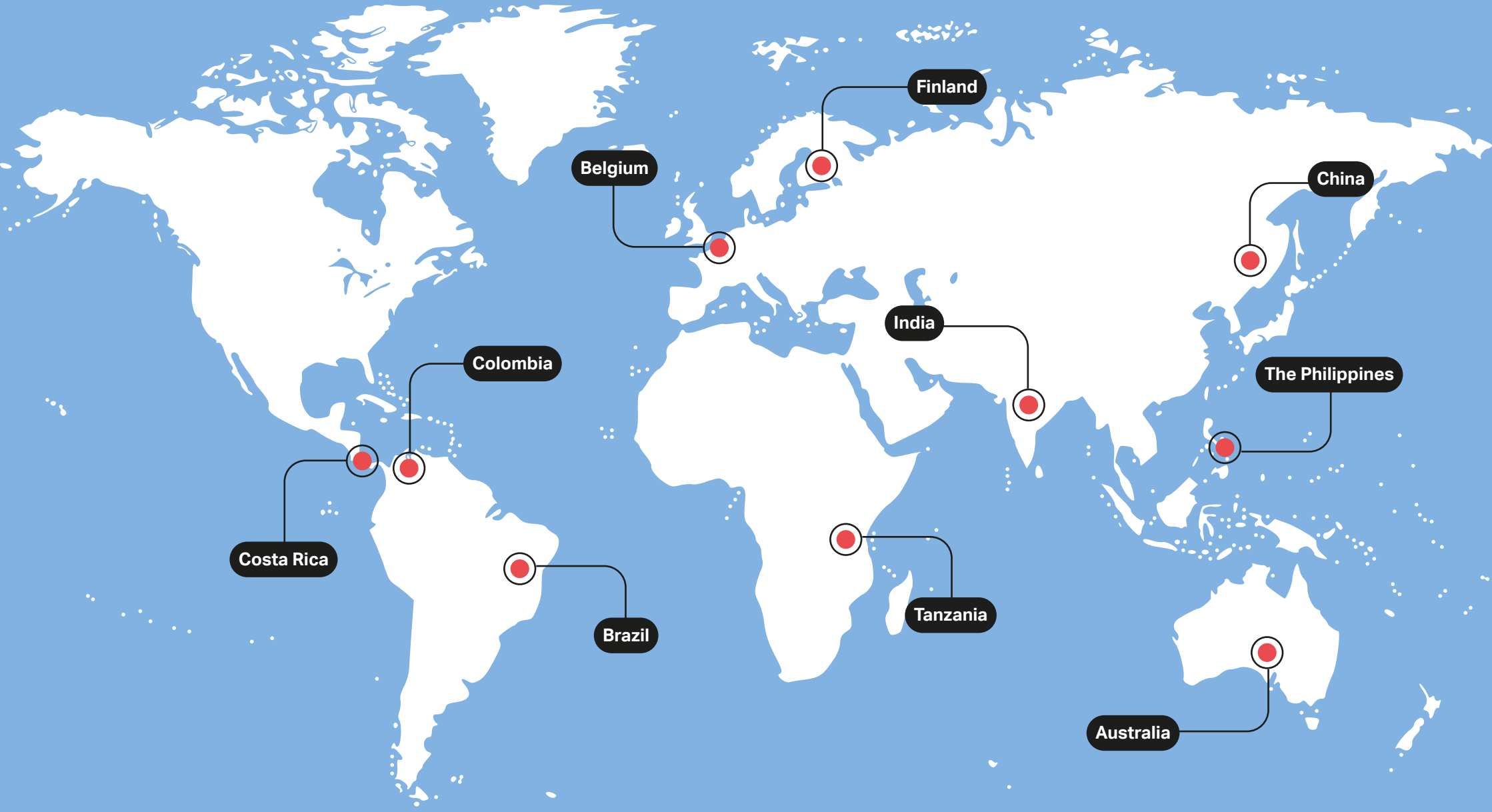
ClientEarth

10 biodiversity cases from all around the world



Hummingbird Rufus feeding on a flower. (Bryan Hanson, Unsplash)

Introduction

Environmental justice is the last line of defence for the environment. In the run-up to the fifteenth meeting of the Conference of the Parties to the Convention on Biological Diversity (CBD COP 15), ClientEarth has compiled this selection of ten landmark cases for biodiversity from around the world.

In April 2021, a survey was conducted among environmental law professionals including judges, prosecutors, experts, and NGO lawyers, to identify outstanding cases for nature conservation. The selected cases represent different geographies, biomes and drivers of biodiversity loss, such as deforestation and habitats loss, illegal trafficking of wildlife, climate change, pesticides, and more.

Despite worldwide efforts to protect biodiversity, the number of cases in some important areas falls far short of expectations. For example, despite the ocean losing over 40% of its biodiversity in the past 50 years alone, few cases were identified that address marine and coastal biodiversity loss. Efforts to tackle biodiversity remain uneven. We must strengthen governance, legal systems, and the capacity of judges, prosecutors, and NGOs, across almost all global regions.

Our humanity depends on biodiversity. We must urgently reverse biodiversity loss, and learn to live in harmony with nature. We hope that the stories of these ten landmark cases will help leaders understand the power of litigation, and inspire legal professionals around the world to take action.

September 2021

The stories and analyses of the selected cases are based on the court judgements and additional materials provided by contributing experts. We are grateful to all those who helped provide materials on good cases, including Antonio Herman Benjamin, Raquel Elias Ferreira Dodge, Patrick Parenteau, Canfa Wang, Friends of Nature, James Thornton, Claudia S. de Windt, Luc Lavrysen, Brian Preston, Rocky Guzman, Yaffa Epstein, Gregorio Rafael Bueta, Jean-Paul Paddack, Anna Heslop, and Brian Rohan. Mengxing Liu, Yanqi Zhang, Pavel Toropov, Gabriel Corsetti, Jon Bennett, Fran Warburton, Alain Chevallier contributed with project management, translation, editing and designing.

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The green peacock is an element in the COP 15 logo

Green Peacock (Zhinong Xi)

1. China: Habitat of Green Peacock Saved from Hydroelectric Dam

High court halts construction to save critically endangered species

Friends of Nature, a Chinese NGO, won a landmark case in the high court of Yunnan Province in South West China, stopping the construction of a partially completed hydropower station on the Jiasa river. At the time of the ruling, tens of millions of dollars had already been spent on the construction of the 270 MW station.

The Jiasa Hydropower Station threatened the country's largest remaining habitat of green peacocks. Rare across its whole range in South East Asia, the green peacock is critically endangered in China. There are less than 300 wild birds left in the country, and the Jiasa dam would have submerged the home of more than half of all of China's peacocks.

Yunnan, China's second largest producer of hydropower electricity, prides itself on being the most biodiverse province in the country.

This symbolic ruling prioritized Yunnan's iconic biodiversity over the interests of one of the province's main industries – a testament to China's commitment to protect the environment.

Legal analysis

After almost three years and several hearings, in March 2020, the Kunming Intermediate People's Court ruled in the first instance that the contractor had to immediately suspend work until a new environmental impact assessment (EIA) was carried out. In December 2020, Yunnan High People's Court issued the final, second-instance judgement upholding the decision of the first-instance trial. The case concerns three leading issues:

1. The river banks are at risk of being flooded by the dam's reservoir. How to determine to what extent the green peacocks will be affected by this damage, that is yet to occur?

The courts of both first and second instances held the project on the Jiasa river as posing a real, imminent, and significant risk to the habitat of green peacock and *Cycas chenii*—a protected species of plant. This case falls under the category of preventive public interest litigation against "acts of environmental pollution and ecological damage that pose a significant risk of harming public interests", as listed in the Interpretation of the Supreme People's Court on Several Issues Concerning the Application of Law to the Adjudication of Environmental Civil Public Interest Litigation. This case has been widely hailed as the first major example of a preventative environmental public interest litigation case in China.

2. Were laws broken in the EIA process?

Friends of Nature challenged the legality of the original EIA procedure, claiming that the procedure was not thorough enough and lacked facts.

The EIA Agency, affiliated to a state-owned power company, argued that their Jiasa Hydropower Station EIA report had clearly stated that "with limited time and complex characteristics of wildlife, it is not possible to reach a comprehensive conclusion on either the birds, or other more secretive animal species". The assessment was based on a combination of literature review and interviews, and a conclusion was made that the construction of the dam would not affect the survival of the green peacocks in the area. Also, the report was prepared and approved at a time when *Cycas chenii* had not yet been formally described and included in the World Cycas List, explaining the EIA Agency's failure to include this protected species in the EIA report.

The court of first instance held that the plaintiff failed to prove that the EIA Agency had violated the law while conducting the EIA.

The court of second instance held that the ability of a party producing an EIA report to assess the extent of environmental impact and reach conclusions depends on a series of subjective and objective factors such as the party's expertise, their evaluation standards, and the technology the party employs. Having reviewed the Jiasa Hydropower Station EIA report, the Court ruled that there was no evidence that the EIA Agency acted unlawfully when conducting the assessment.

3. Should the construction of the dam be halted permanently?

The court of first instance ordered the contractor to immediately stop building work and prohibited the extraction and storage of water from the Jiasa river and the clearing of vegetation in the area at risk of being flooded by the dam. However, the injunction was granted against the construction plan based on the existing EIA. The competent authorities will decide what to do next with the dam after the contractor conducts an ex-post environmental impact assessment as ordered by the Ministry of Ecology and Environment and submits improvement measures for filling.

The court of second instance supported the verdict and held that, considering the risks facing the habitat of the birds, and

Research team investigating the hydropower dam (Wild China Film)

under the provisions of Environmental Impact Assessment Law on "circumstances where non-compliance with the approved EIA documents occurs in the course of the construction and operation of a project", the court of first instance had made the ruling to protect the environment from an immediate harm.

The judge at the first instance weighed the social and economic impact and made a decision that would significantly reduce and control the risk to the habitat of green peacock, pulling the species back from the brink of extinction. The Ministry of Ecology and Environment has ordered an ex-post environmental impact assessment, and the decision whether or not to stop the construction permanently will be made by the competent authorities once the ex-post environmental impact assessment is completed.

The green peacock case was a landmark victory. It was China's first and most important case of preventive public interest litigation for conservation of endangered wildlife, and it broke away from the traditional judicial concept of "an injury is only remediable after it has been suffered", prioritizing environmental protection even before the damage has occurred. The case also highlights the crucial role of China's judicial system in the protection of nature.

Zhinong Xi

2. **Brazil: Landowners are Now Liable for Using Illegally Deforested Land**

Supreme Court closes a loophole used by destroyers of Amazon rainforest

Landowners in Brazilian Amazonia are now liable for the deforestation on the land they own, even if they purchased the land after it had already been deforested by someone else—Brazil's Supreme Court ruled in February 2021. If found in possession of illegally-deforested land, the landowners also have to restore the forest and pay penalties.

Over the last few years deforestation rates have soared in Brazilian Amazonia—5,000 square kilometres of rainforest were lost in 2020 alone. A painfully effective scheme of laundering the illegally deforested land has been to quickly sell it to a business who then put it to cultivation or ranching, while claiming they were not aware of the land's prior illegal deforestation.

Brazil's federal prosecutors have been countering the rising deforestation in the Amazon by bringing public litigation cases against the destroyers of the forest. More than 3,500 such cases were brought between 2017 and 2020, using the deforestation data provided by Protect Amazonia Project launched in 2017 by Brazil's Federal Public Prosecutor Office.

All these outstanding cases can now be heard because the landowners' claims of ignorance about the illegal deforestation of their land are no longer valid. Dismantling this legal loophole is a huge step towards saving the Amazon rainforest—home to the world's greatest biodiversity and one of the planet's largest carbon sinks.

"Amazônia Protege" Logo.

Macaw taken at Parque Nacional De Pacaás Novos, Brazil (Diogo Hungria @ hungriadb)

Aerial view of the Amazon rainforest (2011CIAT/NeilPalmer)

Brazil's Amazon rainforest and development at a crossroads (AP Photo/Leo Correa)

Legal Analysis

The Protect Amazon Project was developed in the context of the increasing deforestation of the Amazon rainforest, which required a new approach to substitute fragmented measures. It coordinates the protection of the Amazon rainforest with a clearer focus and more integrated strategies. The project was conceived, developed, and coordinated by the Public Prosecutor's Office, with the support of the Office of the Attorney General. Brazilian federal prosecutors took concrete measures against deforestation in their jurisdictions. Under this project, Federal Public Prosecutor Offices took actions simultaneously across different areas in the Amazon rainforest, covering states, municipalities, national parks, conservation areas, and Indigenous Lands. Each action, which covered deforested areas of similar size, followed two specific steps:

1) Giving the deforester a chance to sign a civil agreement regarding (i) reforestation of the area; (ii) paying indemnification with a discount calculated under specific terms previously disclosed.

2) Filing an environmental lawsuit demanding reforestation and indemnification calculated under specific, previously disclosed terms.

The cases are brought based on information from public databases of different agencies regarding the land,

its owners, possessors, users, etc. It involves coordination with environmental agencies, notably the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) and the Chico Mendes Institute for Biodiversity Conservation (ICMBio) who oversee the enforcement of environmental law, apply administrative sanctions, and control logging, transportation, wood processing in sawmills, and exportation of wood.

A landmark case for the Protect Amazon Project went to court in late 2020. The Federal Public Prosecutor's Office and IBAMA filed a Public Civil Action against "an uncertain and not locatable person, holder of the embargoed area", due to illegal deforestation of sixty-seven hectares of forest. The request was to conduct reforestation of the degraded area and to pay indemnification for material and moral environmental damages.

Justice Antonio Herman Benjamin ruled that the Erga Omnes effect (obligations are owed towards all), which is usually associated with the right to property, can also be applied when it comes to environmental protection. As such, all individuals, the community, and the State must respect the domain of others, such as the Amazon rainforest. Therefore, in the event of current or imminent trespassing, the private or state owner of the property is entitled with the right to sue the offender, even if they are unknown or uncertain.

Correspondingly, Justice Benjamin also explained the procedural requirements that would help cases against uncertain offenders to have access to the court. He ruled that in lawsuits regarding imminent trespassing, trespassing, deforestation, or environmental degradation of any kind of public or private land, the law obviously does not require the impossible, i.e., the individualization of the uncertain or unknown defendant. The mandatory procedural requirements of an initial petition only ask for "documents necessary to support the request". Such documents must a) exist and be available, and b) be absolutely indispensable. It is not for the judge, in the initial petition, to demand documentary evidence beyond that.

Another key point developed from the above leading case is the argument of propter rem obligation, which refers to the environmental liability of the owner. In the vast and remote areas of the Amazon rainforest, it is easy to deforest because of the absence of people for thousands of miles. Satellite photos of the same areas throughout the years, documenting logging and wood processing, as well as transportation documents, are evidence of trespassing. The fact that the land is already deforested has been used as a strategy to obtain legal registration through public notaries, to demand credit for buying the same land, to raise cattle, or develop agricultural projects on the land through private or public bank loans. But now, with the principle of propter rem obligation, the burden of reforestation and indemnification will be put on the current possessor or owner of the land.

Hence, the above case developed an argument to define responsibility for deforestation even when the current owner or possessor of the deforested land is not the one who deforested it. It interrupted the chain of illicit events that links trespassing, deforestation, and regularization of deforested areas in the name of the invaders or of those who acquire land titles from them.

The blue poison dart frog
(AdobeStock)

3. **Colombia: Deforestation in the Amazon –a Violation of Fundamental Rights**

Supreme Court approves a case brought by young people against deforestation of the Amazon

In Colombia, when a person's fundamental rights are threatened, he or she can file a *"tutela"*—a type of constitutional case against government to protect individual rights—with any court in the country.

In 2018, twenty-five people between the ages of 7 and 25 delivered a collective tutela to a district court. In their *tutela*, the young people claimed that their right to a healthy environment and life in the future is being violated, because in the coming years climate change will affect the quality of life in their hometowns and cities.

According to the petitioners, the Colombian government was complicit in the change in climate by failing to control the deforestation in the country's Amazon region. The petitioners argued that, rather than fulfilling its duty in preventing deforestation, the government let it increase—over 40% per year since 2015. However, the district court ruled against the *tutela*.

The plaintiffs then appealed to the country's Supreme Court, which upheld the *tutela*, ruling that the Colombian state's failure to protect the Amazon rainforest affected the fundamental rights of all Colombian citizens.

The Supreme Court ordered the formation of the Intergenerational Pact for the Life of Colombian Amazonia, and instructed the stakeholders and governments in the Colombian Amazon to formulate immediate plans to halt the deforestation.

Finally, in a historic ruling, the Supreme Court recognized Colombian Amazon as an entity that has rights – entitled to protection, maintenance and restoration by the state.

Legal Analysis:

The district court considered *tutela* as an inappropriate approach to bring this claim due to its collective nature, thus ruling against the plaintiffs. On appeal, the Supreme Court of Columbia overruled, deciding that the conditions for filing a *tutela* were sufficiently met, because the connection between environmental deterioration, violation of fundamental rights, and direct harm to the individual was established, and the judicial order would be oriented towards restoring individual rights, not collective ones.

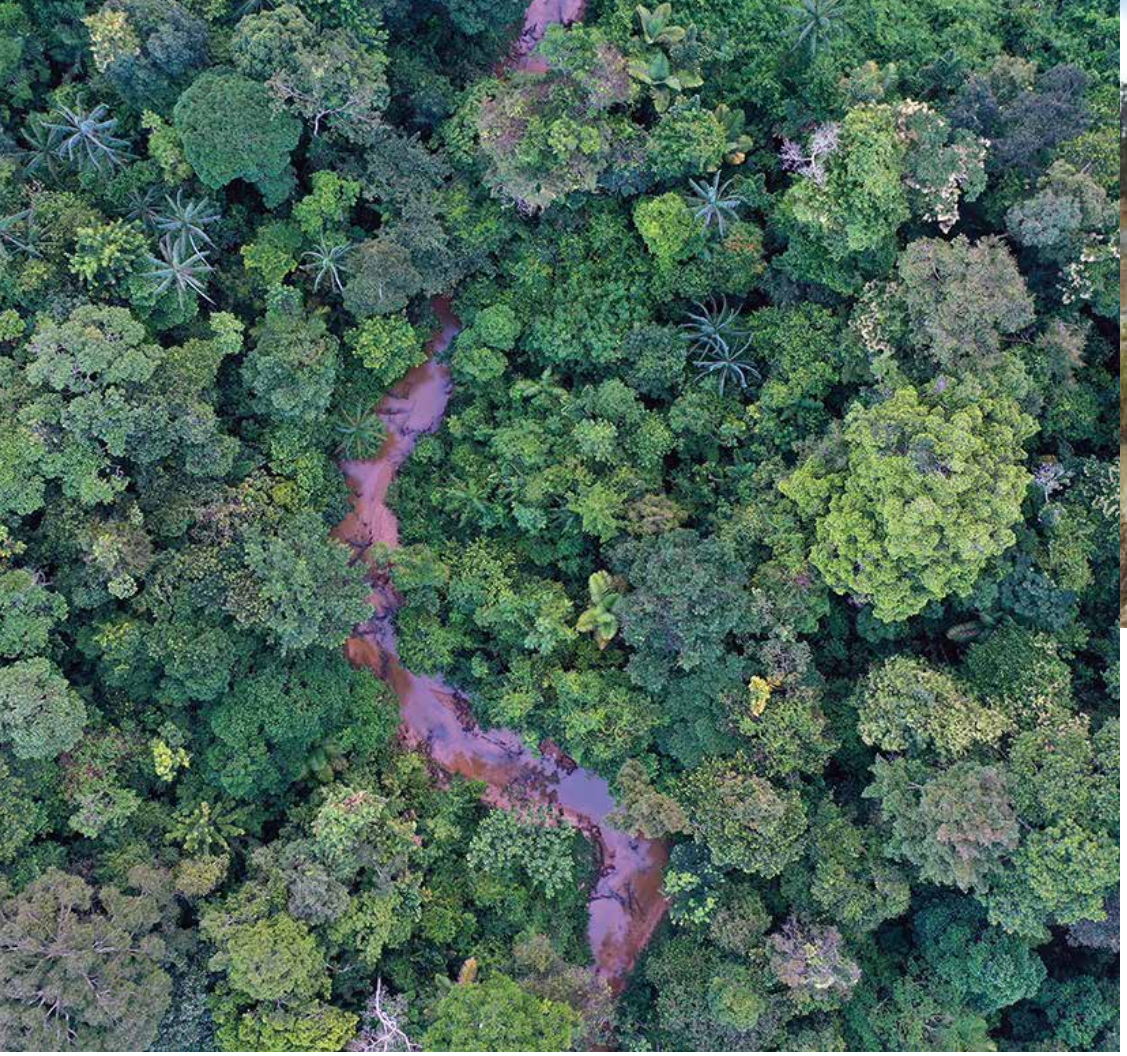
Destroyed forest in the south of Colombia (Andrés Cardona)

Ecuadorian Squirrel Monkey in Colombia (Adam Rainoff)

On the issue of the government's legal obligations, the Court supported the plaintiffs' argument that under the Paris Agreement, the Joint Statement of Colombia, Germany, Norway and the United Kingdom on Reducing Emissions from Deforestation in the Colombian Amazon, and the national Law 1753 of 2015, the Colombian government had a legal obligation to reduce the annual rate of deforestation. Despite this, the country was reported to have lost 178,697 hectares in 2016, a 44% increase on the figures reported in 2015, with 70,074 hectares of deforested areas in the Amazon. The plaintiffs claimed that according to the Institute of Hydrology, Meteorology and Environmental Studies (IDEAM), deforestation will increase average temperatures by 2.14°C by 2071, which is within their estimated lifespan. Therefore, by contributing to global warming, deforestation will undermine the plaintiffs' fundamental rights. The Court supported this claim.

The Court ruled that the fundamental rights of life, health, minimum subsistence, freedom, and human dignity are substantially linked and are determined by the environment and the ecosystem. Applying the principle of precaution, intergenerational equity and solidarity, the Court found that, by failing to prevent deforestation, a threat to the future generations' fundamental rights had been established.

As to the rights of nature, the Court regarded the Colombian Amazon rainforest —the "lungs of the world"—as a "subject of rights", and its conservation as a national



Rainforest creek in the Colombian Amazon (Rhett A. Butler)

and global obligation. By criticizing the anthropocentric and selfish model of humanity's hegemonic position, the Court adopted the "ecocentric-anthropic" criteria, which places humans on par with the ecosystem, to avoid the arrogant treatment of the natural environment by humans.

The Court issued five mandatory orders:

(1) Formulate short, medium and long-term action plans to tackle deforestation and climate change impacts;

(2) Create, with wide public participation, an Intergenerational Pact for the Life of the Colombian Amazon –(PIVAC) to reduce deforestation and GHG emissions;

(3) All municipalities shall update and implement Land Management Plans and include an action plan to reduce deforestation;

(4) The corporate defendants shall create an action plan to tackle deforestation;

Deforestation in Colombia
(Daniel Henryk Rasolt)

Colombia's youth fighting for the Amazon (Dejusticia)

(5) Mitigate deforestation within 48 hours of the judgment.

The threat to biodiversity is highlighted in the reasoning part of the judgment. The Court emphasized that one of the imminent dangers posed by deforestation is the massive extinction of animal and plant species, and quoted expert reports that approximately 57% of the tree species of the Colombian Amazon were in danger, as well as animals such as the jaguar and the Andean bear.

Furthermore, the Court identified the integration between ecosystems, pointing out that a mass deforestation of the Amazon would break the ecological connection with the Andes, potentially threatening or causing the extinction of the species inhabiting that corridor, and generating "damage to ecological integrity".

In addition, the Court put great emphasis on the active public participation of the young generation, the affected communities, the scientific organizations, and the environmental research groups, as well as the general population. Such orders enhance the bottom-up approach in conservation to help ensure full compliance of the government, especially on the local level, as observed through the enforcement of this case.

By recognizing for the first time that the Colombian Amazon is a "subject of rights" entitled to protection, conservation, maintenance, and restoration led by the state and the territorial agencies, the Court paved the way for citizens to demand the protection of the forest when the government fails to tackle deforestation.

4. **Costa Rica: Investigation into Pesticides that Harm Bees**

Supreme Court orders scientific study that may lead to ban on pesticides that harm pollinating insects

In keeping with the country's tradition of environment-first policies, the Supreme Court of Costa Rica ordered the country's Ministry of Agriculture and Livestock to conduct a scientific study on the effects that neonicotinoid pesticides may have on the environment and public health, and on the populations of crucial pollinators —bees.

Neonicotinoids account for more than a quarter of the global pesticide market and are used for practically every major crop. They are highly effective, but non-target insects are also affected. Bees are exposed to neonicotinoids via nectar and pollen.

Protest against the sale of bee-harming pesticides (Mitja Kobal /Greenpeace)

Angel bee at hive entrance. (Bee Culture)

Beekeeping in Costa Rica (Bee Culture)

Scientists have long linked neonicotinoids to the decline of bees—these chemicals have been shown to disrupt bees' nervous system as well as affecting their learning and memory, which are essential for social insects.

The decline in the numbers of pollinating insects, including bees, led the European Union to ban three neonicotinoid pesticides in 2015. However, the legal defence for the Costa Rican Ministry of Agriculture cast doubt on the evidence that neonicotinoids can affect bees in the wild, because these scientific findings were laboratory-based.

However, the Supreme Court ruled that despite lack of scientific certainty, measures had to be taken to prevent potential risks to biodiversity, adding that it was the duty of the state to prevent such risks.

Legal analysis:

The major issue discussed in this case is whether and when to apply the precautionary principle and take preventive action.

In order to circumvent the scientific evidence that neonicotinoids directly harm individual bees, the Costa Rican Ministry of Agriculture and Livestock argued that these effects are observed in laboratory conditions, and that there is no evidence that these effects occur in nature and can affect bee populations with knock-on consequences for the environment.

However, Costa Rica's Supreme Court judged that a risk for environmental and public health damage existed and that preventive action had to be taken. The Court ordered a scientific study on the effects of the use of agrochemicals that contain neonicotinoids on health, biodiversity, and the environment of Costa Rica, as well as the adoption of measures to safeguard these constitutional goods, which may be at risk or in serious danger.

The protection of the environment is the state's responsibility, to be realized in accordance with the precautionary principle that governs in environmental issues. The state's obligation in terms of environmental protection harnesses a subjective right of the people to demand, through judicial bodies, the adoption of suitable measures for the supervision of this right, in light of openly negligent attitudes by the public

Male orchid bee collecting fungus filaments from tree bark in Costa Rica (Gil Wizen)

Use of agro-toxics (iStock/Nelic)

authorities, or similarly of natural persons or legal entities. The possibility to judicially demand a type of beneficial activity on the state's part, in compliance with its duty towards the protection of the life, health or environmental rights of its inhabitants, includes the clear verification of an imminent threat to biodiversity and hence against the rights of these persons.

With respect to the constitutional doctrine developed in this judgement on the preventive and precautionary principles in environmental matters, the Court affirmed that the state must implement actions to prevent the generation of risks to biodiversity and to the environment. For example, when an activity produces negative environmental impacts and there is certainty about the risks or the environmental impacts that can arise, in application of the preventative principle, an evaluation or inspection of said environmental impact must be done before initiating, as to limit or prohibit it.

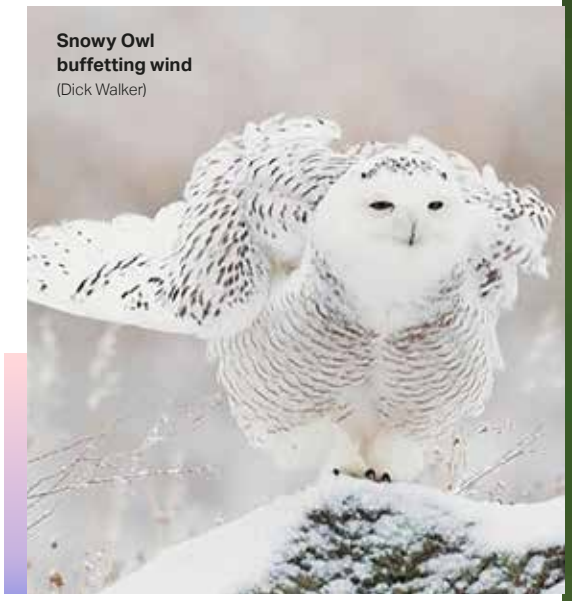
However, if there is no scientific certainty on the environmental sustainability of an activity, because doubt can be cast on the available information, in accordance with the precautionary principle, the state cannot use the lack of certainty as reason to postpone the adoption of effective measures that prevent the deterioration of the environment or harm to biodiversity. In sum, "the difference [between these principles] lies in the level of knowledge and the certainty of the risks that an act or activity produces".

With regards to the obligation to guarantee the rights to health and to a healthy and biologically balanced environment, it is necessary that the precautionary and preventive principles are the dominant principles in order to guarantee that deterioration and violation of the environment is minimized. The authorities must adopt suitable measures to regulate the risks that may derive from the use of pesticides in Costa Rica. In accordance with the precautionary principle, when there is a lack of absolute certainty over the scientific information available on the dangers or environmental impact that an act or activity can produce, the state cannot utilize this state of doubt to postpone the adoption of measures for environmental protection, but on the contrary, the authorities are obligated to implement anticipatory and effective measures to prevent the deterioration of the environment and guarantee its sustainability.

This is an example case where the precautionary principle has been fully interpreted and applied. The Constitutional Chamber of the Supreme Court of Costa Rica handed down a decision safeguarding the human rights to life and health, the right to a healthy environment, food security, and biodiversity.

5. **Belgium: Traders in Protected Bird Species Sentenced**

Criminal organisation broken up following an international investigation



Snowy Owl buffetting wind (Dick Walker)

Law enforcement agencies of seven European countries—Belgium, the United Kingdom, Spain, France, Germany, Austria, and the Netherlands, together brought down a sophisticated international criminal network that traded protected species of birds, mainly large eagles.

In Spain and France, the network plundered nests for eggs and chicks that were then reared in captivity. The birds were laundered as captive-born using CITES certificates forged by the network, and put on the global market for thousands of euros.

In a Belgian court, the defendants were found guilty of being part of a criminal organisation, forgery of CITES export permits and use of illegal traps and nets. The judge ruled that their crime was a direct and irreversible threat to biodiversity, and compared the profits in the illegal wildlife trade to those in drugs and weapons trafficking.

Illegal international wildlife trade is one of the key drivers of global biodiversity loss. Yet, this trade is often not considered a priority by law enforcement, and is operated by global criminal networks that are difficult to identify and prosecute.

This case shows that, given international cooperation and political will, these criminal organisations can be brought to justice and dismantled.

Egyptian vulture (Tomáš Adamec)

Bird smuggling (Jefta Imagines/Barcroft)

Legal Analysis

The Belgian Criminal Court of First Instance of East Flanders (Ghent division) dismantled a bird-smuggling ring, convicting four persons of illegal trade in endangered protected bird species. The Court stressed that the accused "committed a direct and irreversible assault on biodiversity".

The Court emphasized that "international trade in endangered plant and animal species has approached a scale and lucrativity comparable to international drugs and arms trafficking". The Court also noted that the accused, when committing their crimes, took advantage of the "lack of political priority" attached to the wildlife trade.

In convicting the accused, the Court relied on the following:

- Laws prohibiting the illegal trade of protected and endangered birds;
- A long and extensive judicial review;
- International legal cooperation between Belgium, the United Kingdom, Spain, France, Germany, Austria, and the Netherlands.

The basis for this case was the EU-CITES-Regulation 338/97, which implements the Convention on International Trade in Endangered Species of Wild Fauna and Flora within the European Union. The Regulation lists species which are protected and endangered, and the trade in such species is prohibited. The accused were charged of engaging in illegal trade in several species of birds through forgery of breeder's declarations and CITES certificates regarding endangered species as specified in Annex A of the Regulation.

Red-footed Falcon (Carolien Hoek)

African Fish Eagle (Wayne Davies)

Notably, the Belgian NGO Bird Protection Organization was recognized as a civil party to the proceedings. Under Belgium criminal law, a victim can bring an action for damages before the criminal court as a civil party. For environmental NGOs, the current Belgium case law interprets the admissibility requirements in line with the Aarhus Convention, meaning that environmental NGOs are considered to have sufficient interest in bringing actions against violations of environmental law. In this case, while the court of first instance only awarded a symbolic 1 euro compensation for moral damages, the Court of Appeal of Ghent reversed and awarded full compensation.

This case also highlights the importance of international legal cooperation in acquiring evidence to convict suspects of transboundary illegal trade in endangered species, which are both indispensable and vulnerable elements of biodiversity. Without the international legal cooperation between Belgium, the United Kingdom, Spain, France, Germany, Austria and the Netherlands, it would have been extremely difficult to obtain the evidence to ensure the convictions.

6. **Finland: Wolf Hunting Declared Illegal**

Long campaign by an NGO makes Finnish government comply with the EU law

In March 2020 the Supreme Administrative Court of Finland made it illegal to hunt wolves in the country, ruling that wolf hunting permits issued to Finnish hunters were against the law. The case was brought by Tapiola, an NGO established by three local citizens to protect wolves.

Wolves were once hunted to near extinction in Western Europe, but the numbers are now increasing, and the species is quickly recolonizing its former territory. In Finland, however, wolves are met with hostility and fear from people.

Every year, the Finnish government issued a fixed number of licences to cull the so-called "problem wolves" classified as animals who have killed dogs or livestock. The authorities argued that these licences were a safety valve that prevents the killing of wolves in retribution to the harm the wolves do.

This loophole allowed wolf hunting in Finland to continue despite being in violation of European law—wolves are a protected species in the EU, which Finland is a member of.

Tapiola argued that the government failed to show any scientific backing to the claim that licences in any way contribute to the protection of Finnish wolves. This claim was accepted by the European Court of Justice (CJEU).

The ban on wolf hunting in Finland is of global significance: the return of wolves to their former habitats has been shown to be immensely beneficial for ecosystem health and biodiversity.

Legal Analysis

Wolves are listed in Annex IV of the EU Habitats Directive (Council Directive 92/42/EEC 1992) as a strictly protected species, meaning that their killing is strictly prohibited, except for a very limited number of reasons. However, Finland negotiated an exception for wolves in certain parts of the country to be listed under Annex V that imposes fewer restrictions, so that hunting permits could be granted by the local Finnish authorities.

In response to a previous complaint brought by a large Finnish environmental NGO in 1997 to the European Commission, the Commission initiated a formal infringement procedure against Finland that finally reached the CJEU. The result was stricter national regulation in Finland, however wolf killing permits were still allowed under section (e) of Article 16(1): "under strictly supervised conditions, on a selective basis and to a limited extent", without specifying a clear purpose and

Grey wolf (*canis lupus*) in snowing (Grey Wolf Hide Photography Finland)

leaving a space for the discretion of authorities. As a result, wolf populations kept going down. Worse still, despite objections arising from public consultation, a plan was announced in 2014 to reintroduce managed wolf hunting.

Although environmental organizations are generally allowed to bring public interest litigation under the Finnish law pursuant to the access to justice requirement under the Aarhus Convention, challenges to hunting permits in the country are nonetheless regulated by the Hunting Act. This means only local and regional associations are eligible to sue.

"Association for Nature Conservation Tapiola" Logo.

For this reason, three local individuals registered a small NGO called Tapiola, which covered most of Finland's territory in order to be able to litigate the hunting permits issued in different administrative regions. Tapiola

Hunter Ari Turunen with one of his dogs.
(Davide Monteleone/*The Guardian*)

Wounded wolf (Pertti Huotari / Yle)

requested courts in different Finnish regions to (1) issue injunctions against the permits, and (2) refer the case to the CJEU because Finnish law was breaching the EU law. However, almost all the regional courts rejected these claims based on lack of standing. For example, the location of Tapiola's registered office was located too far from the region in question.

In order to meet these requirements, Tapiola then changed litigation strategy, splitting the NGO into six regional organizations. However, claims were rejected again either on standing or on merits, but one of the appeals went up to the Supreme Administrative Court that finally referred the case to the CJEU, asking whether and under what circumstances wolf hunting was permitted and whether Finland was violating EU law.

In 2019, the CJEU ruled in favor of the claimants on all issues, imposing highly stringent restrictions on wolf hunting. By emphasizing the main aim of the EU Habitats Directive to "ensure biodiversity through the conservation of natural habitats and of wild fauna and flora", the Court ruled that:

(1) The said objective of the permits – to reduce illegal hunting – is not stated in a clear and precise manner and the authorities failed to establish that the killing was appropriate to achieving that objective, which shall be supported by rigorous scientific data;

(2) The authorities failed to establish that no other satisfactory alternatives existed;

(3) The authorities failed to guarantee that the hunting permits will not harm wolf populations concerned at a favorable conservation status in their natural range;

(4) There had been no impact assessment of the wolves' conservation status when issuing the hunting permits;

(5) Not all conditions under Article 16(1)(e) are satisfied, compliance with which must be established in particular by reference to the population level, its conservation status and its biological characteristics.

Therefore, although the CJEU did not have to determine on issues of fact in a preliminary judgment as such, it concluded that the permits at issue did not appear to satisfy the EU law and lacked sufficient reasons. The Court imposed a high burden of proof, based on rigorous science, on the government side. Following the CJEU ruling, the Supreme Administrative Court of Finland ruled accordingly and declared wolf hunting permits illegal.

This case is a testament to how innovative and intelligent legal strategies can be used by members of the public to protect biodiversity. In order to enforce the EU law, the NGO Tapiola created a legal standing and fully utilized public participation and access to justice.

Even though Tapiola's claims were rejected during the initial national proceedings, injunctions were nevertheless granted in some cases. This saved the lives of wolves because the hunting season finished during the litigation period. This approach—using injunctions to counter imminent threats to biodiversity, is worth learning from.

7. **Australia: Local Community and NGO Stop Coal Mining Expansion**

Court rejects proposal that would have destroyed biodiverse habitats

Mount Thorley Warkworth
(iStock/Zetter)

In 2013, the residents of Bulga, a small village in the state of New South Wales, won a legal challenge against a mining company and the local government over proposals to expand a nearby coal mine.

Coal mining in Bulga is an important industry that goes back almost two centuries. In 2010, at the time when exploiting unprofitable coal deposits became economically viable because of rising coal prices, Warkworth Mining Company applied for a permit to extend their mining operations around Bulga.

Going against the agreement the company had made when they first started operating in the village, Warkworth Mining applied to start extracting coal in areas originally set aside for non-disturbance because of their unique habitats and biodiversity. Moreover, the new mining operations would be a lot closer to the village than the limits that had been agreed .

In response, Bulga's residents established an association and went to court, with the assistance of the Environmental Defenders Office, an NGO in Australia. Together, they asked the Land and Environmental Court of New South Wales to reject Warkworth's application on the basis that the extension of mining operations was contrary to ecological sustainable development and would have negative economic and social impacts on the Bulga community.

The Court agreed that the proposed coal mine expansion would have an unacceptable impact on local biodiversity, would create noise pollution, and would cause other negative consequences to the people of Bulga. Thus, the application by Warkworth Mining was disapproved.

This case is a major victory. Not only did it prevent a direct harm to biodiversity from occurring, but the Court's decision

contributed to mitigation of climate change, which is a key driver of biodiversity loss.

Transporting Coal in NSW
(Jessica Hromas/*The Guardian*)

Squirrel Glider (Gregory Millen © Australian Museum)

Speckled Warbler
(Duncan McCaskill)

Legal Analysis

Residents of Bulga presented an external merits application to the Land and Environmental Court of New South Wales. This challenged an administrative decision of the Minister for Planning and Infrastructure granting approval to a proposed expansion project for an existing open cut coal mine operated by Warkworth Mining Limited. The residents (Appellants) claimed that the project should be refused, because of the significant and unacceptable impact on biological diversity, noise, dust and social impacts. In disapproving the Warkworth project application, the Court relied on the following relevant matters:

- Impacts on biological diversity;
- Noise and dust impacts;
- Social impacts;
- Economic issues;

In reviewing the administrative decision granting the approval of the proposed mine extension, the Court first analysed the statutes which contain the power of the decision maker to make the decision to approve or disapprove an application. It then analysed the power of the Court to review the merits of the decision in order to determine the nature, scope and parameters of the powers that the Minister is bound to consider and those that he has a discretion to consider. The Court then proceeded to undertake fact-finding and inference drawing from the evidence before it in order to determine the likely impacts of the project on the environment. This was undertaken with a view of ascertaining the nature and type of each impact and the efficacy of the proposed measures in the application for approval or "that could be imposed as conditions of approval, to prevent, mitigate or compensate for each type of impact". The Court review involved determination of how much weight each relevant matter of impacts on biodiversity, noise, dust, social and economic issues should receive. The Court finally "weighted matters to be balanced, each against others".

Relying on the facts as well as extensive expert witnesses' reports, and after the balancing exercise of all relevant matters, the Court concluded that the Project extension would likely have significant impacts on endangered ecological communities, and key habitats of the species of the local fauna. The Court also concluded that "Warkworth's offset package and direct offsets and other compensatory measures would not adequately compensate for the significant impacts that the Project would have on the extant endangered ecological communities in the disturbance area.

The Court, in arriving at its final conclusion of disapproving the Warkworth Project application, undertook an exercise of balancing the negative and positive impacts, especially the economic benefits and positive impacts in the broader area and region.

This case is momentous for having set aside an administrative decision approving the application for extension of activities of the Warkworth Project to protect nature. The Court in this case laid down the standard of review for administrative decisions on approval of projects which may have environmental impact and illuminated the process of balancing relevant matters of impact on the environment. The Judgment shows a step-by-step process of reviewing the merits of administrative decision (s) by courts of projects which may have environmental impacts, thus providing a stronger legal safeguard for nature conservation.

8. Tanzania: Road Construction in the Serengeti National Park Rejected

East African Court of Justice stops Tanzania from building a road that would disrupt animal migrations

In 2010, Africa Network for Animal Welfare, a Kenya-based NGO, filed a case in the East African Court of Justice to prevent the government of Tanzania from building a highway through the iconic Serengeti National Park.

The NGO objected to the construction of the highway on the grounds that it would cause environmental damage and disrupt migrations of wildlife. According to the Tanzanian government, the road was necessary to boost the economy by connecting the northwest of Kenya with the rest of the country.

Africa Network for Animal Welfare took the case to the East African Court of Justice, arguing that the proposed road would violate the East African Community Treaty which binds all member states to conserve, protect and manage the environment and natural resources.

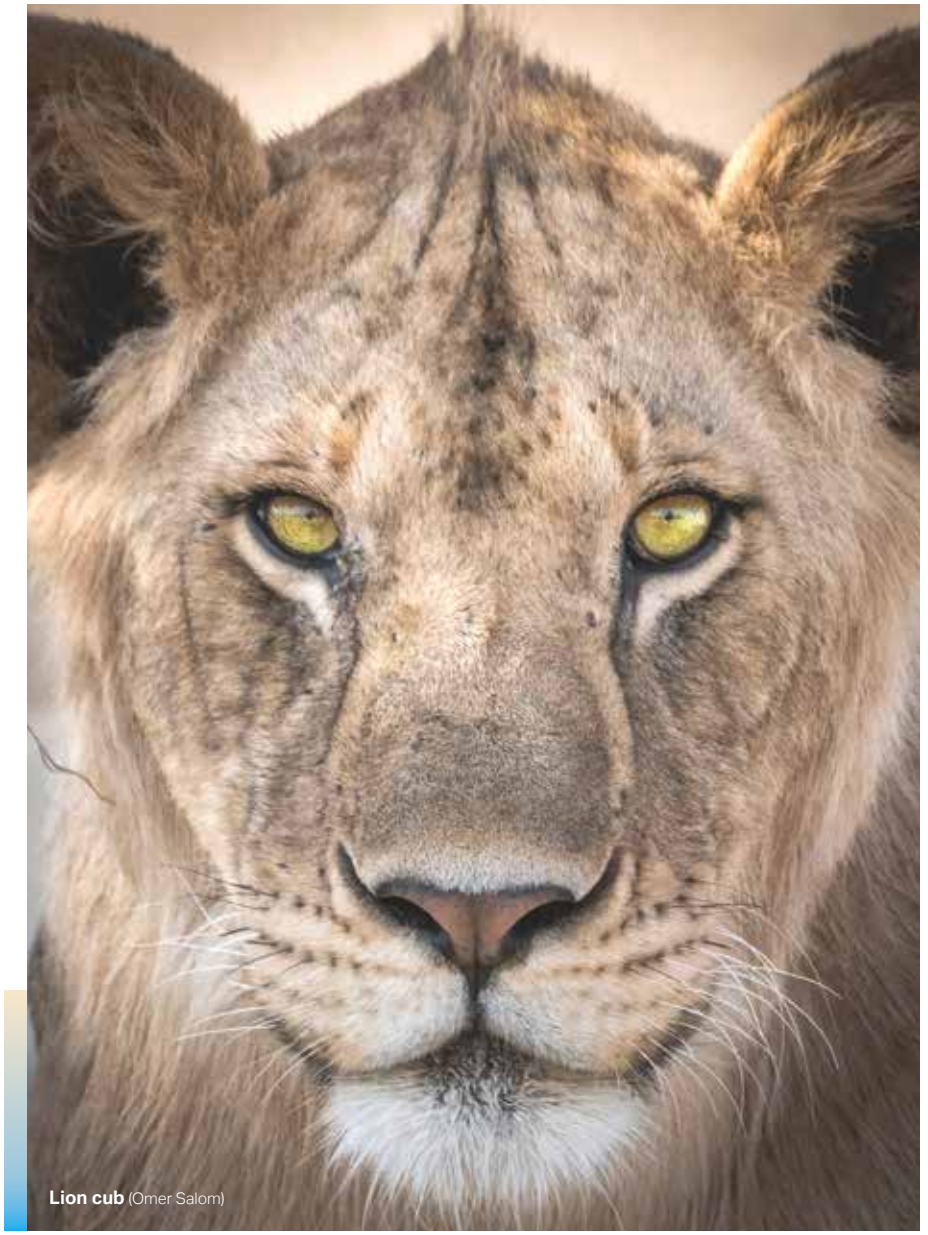
The East African Court of Justice is the judicial arm of the East African Community that consists of six states in the Great Lakes Region, including Tanzania. In 2014, the First Instance Division of the Court ruled that Tanzania's proposal to build a highway across the Serengeti was unlawful.

Not only does this ruling safeguard the future of the Serengeti National Park, one of the most important biodiversity hotspots in the world, but it was a historic decision —a transnational judiciary in East Africa making a national government prioritise environmental protection in economic decision-making.

Legal Analysis

Two important aspects of this case are the inherent power of the East African Court of Justice to grant an injunction and the threshold of a state action.

Tanzania argued that the East African Community does not grant the Court the power to issue injunctions. The Court, however, held that it possessed inherent power to grant injunctions including those of permanently stopping countries from carrying out any action that is an infringement of the East African Community Treaty.



Lion cub (Omer Salom)

Inherent powers enable courts to fulfil their mandates properly and effectively. The power of a court to issue injunctions is not derived from any written laws, rather, such power is inherent in the courts so that they are able to ensure adherence and compliance with the law. Without the inherent power to issue injunctions, courts become toothless—unable to dispense appropriate punishment when laws are broken.

According to Tanzania, a proposal is an idea or plan and not an action attributable to the state. Tanzania, therefore, maintained that since the project was in its infancy at the time of ruling, it could not be considered to be an "action of a state", which could be faulted for a breach of the Treaty. Tanzania held that the First Instance Division had erred in declaring that the proposed "initial proposal to build the road" breached the Treaty.

The Court highlighted the difficulty in determining the threshold of what would constitute an action of a state that can constitute a breach of the Treaty. However, in this particular case, the Court opined that in order for a threshold to exist for an initial idea or plan to transform into a challengeable act of a state, the government needed to have in place, among other things, the following:

- Agreed architectural plans and drawings;
- Bills of quantity;
- Cabinet approval of the project;
- Appropriate budget, endorsed or approved by parliament;
- Commencement of loan processed for financing the project where necessary;
- Commencement of procurement processes (whether public or private bidding), as appropriate, and;
- Practical manifestation of actual commencement of engineering works (such as official field surveys or delivery of construction machinery and materials to the site).

In the view of the Court, "the above accompaniments – whether singly or in multiples – and whether separately or in combination (s) – would signal the manifestation of an "action" or a series of "actions" on the part of the government to actualize its plans to construct the impugned Super Highway" and pass the bar of what would constitute an action of a state set by Article 30 of the Treaty. Despite finding that the proposal to build a superhighway in the Serengeti had not reached the threshold of an action of Tanzania, the Court declined to lift the permanent injunction issued by the First instance Division of the Court given that evidence showed that if the "initial plan" was to crystallize into an action, it would result in "imminent risk of irreversible damage" to the ecosystem of Serengeti.

The case required the Court to declare in equivocal terms its inherent powers to grant injunctions, including permanent injunctions, even where the Treaty did not expressly grant those powers. The Court clarified the necessary elements for determining whether plans have transformed into actions of a state which can be challenged before the courts for the breach of the Treaty provisions on the protection of the environment.

The case brings to the fore the never-ending debate on the conflict between economic development and protection of the environment. The case is significant for having, after weighing economic benefits and the need for protection of biodiversity, permanently stopped any future plans of construction of a road in the Serengeti which would have intruded on the natural habitat and caused tremendous stress to migrating animals.

African elephants taken in Serengeti (Marcel Kovačič)

Baby monkey looking hesitant and curious taken on safari in Tanzania. (Magdalena Kula Manchee)

Great wildebeest migration crossing Mara river at Serengeti (Jorge Tung)

9. The Philippines: Oil Exploration in the Tañon Strait Stopped

Presidential decree is overruled in a win for local people and marine mammals

In November 2007, oil exploration company JAPEX started drilling exploratory wells in the Tañon Strait in the Philippines. The Tañon Strait is a globally important whale and dolphin habitat and migration route, but the number of marine mammals there has been steadily declining.

Local lawyers and an NGO sued JAPEX on behalf of both whales and dolphins, and local fishermen. The case went to the Supreme Court of the Philippines, who ruled that oil exploration in the Tañon Strait had to stop.

JAPEX's Iwafune-oki oil and gas field (JAPEX)

Spinner dolphins in Tañon Strait (Danny Ocampo/Oceana Philippines)

JAPEX claimed that a presidential decree allowed the company to explore for oil in the Tañon Strait. However, the Strait is a protected area, where, according to the legislation of the Philippines, special protected area laws have priority—even over a presidential decree. JAPEX, however, disregarded these laws.

Moreover, according to the local residents, JAPEX held no consultations or discussions with the local stakeholders before starting to explore for oil, and the fishermen's livelihoods suffered after the drilling in the sea drove away the fish. The Court ruled in favor of the local residents and marine mammals and declared oil exploration in the Tañon Strait illegal.

Marine biodiversity has declined by over 40% since the 1970s, but this case is important not only because it involved a key marine biodiversity site. The decision by the Supreme Court of the Philippines ensured that even highest powers of a government must comply with the laws that safeguard the environment and biodiversity.

Legal Analysis

In this case, two major issues need to be considered regarding the judgment made by the Supreme Court:
- Who has the legal standing to sue as plaintiffs;
- The validity of the presidential decree.

Here, the original plaintiffs were the resident marine mammals, including toothed whales, dolphins, porpoises and other cetacean species that inhabit the waters in and around the Tañon Strait. They were represented by "legal guardians and friends" (collectively known as "the Stewards"), and an NGO was established for the welfare of the fishermen. Hence, the consolidated petition involved three different sets of plaintiffs: the resident marine mammals, the Stewards (of Nature), and an NGO as representatives for subsistence fishermen and their future descendants.

When deciding the eligibility of the plaintiffs, the Supreme Court adopted the Rules of Procedure for Environmental Cases, which stipulate that "any Filipino citizen in representation of others, including minors or generations yet unborn, may file an action to enforce rights or obligations under environmental laws". In the Annotations to these rules, the Supreme Court commented that "to further encourage the protection of the environment, the Rules enable litigants enforcing environmental rights to file their cases as citizen suits". This provision relaxed the restrictions on the eligibility of plaintiffs filing cases to enforce environmental laws. It recognized that all humans are stewards of nature, and one doesn't have to have a personal and direct interest in this matter to bring a case as required by the traditional doctrines.

Ultimately, the Court held that the standing for animals was no longer necessary because of the adoption of the Rules of Environmental Procedure. The wording of the petition reflects that the plaintiffs ideally wanted standing granted to the resident marine mammals for their own sake. However, the Court denied standing to the dolphins on the basis that humans, as stewards of nature, can bring actions on nature's behalf to enforce rights of obligations under environmental laws. This indicated that the Court was embracing a more anthropocentric view of the role of "stewards of nature".

It is worth noting that, although this case was filed in 2007, years before the Rules of Procedure for Environmental Cases came into effect, it has been consistently held that rules of procedure "may be retroactively applied to actions pending and undetermined at the time of their passage and will not violate any right of a person who may feel that he is adversely affected, inasmuch as there is no vested rights in rules of procedure".

The validity of the presidential decree was also discussed in the ruling. The Court held that because the Tañon Strait was designated as a protected area in 1998, no activity outside the scope of its management plan could take place without obtaining an Environmental Compliance Certificate, which is only granted after an Environmental Impact Assessment has been conducted. The Court held that the Environmental Impact Assessment System and the National Integrated Protected Area System were not complied with by defendants before the implementation of the seismic survey. Therefore, the Court held the defendant to be in violation of the National Integrated Protected Areas System Act of 1992.

Bantay Dagat or fish wardens. (Gregg Yan)

Tanon Strait from Pebbles Beach (Warren Olandria)

Traditional paddle craft (Gregg Yan/Oceana)

Furthermore, the Court held that the presidential decree which was used as a legal basis for the service contract between the government and the oil company in charge of the oil exploration activities was ultra vires. In fact, because the Tañon Strait is a protected area, the contract required a law passed by the Congress. Therefore, the Constitutional Court cancelled the contract and all the permits related to oil exploration in the Tañon Strait.

The precautionary principle is quite material to show that further destruction of the marine ecosystems through offshore drilling and other destructive projects such as reclamation will further aggravate the already precarious condition in the protected seascape.

The Tañon Ruling is a categorical statement by the judiciary which demonstrates the important rights of animals and reiterates environmental protection as a primordial duty of the state that must never be compromised. The constitution and the national laws of the state which contain safeguards to protect the environment should be complied with by government agencies tasked to implement them whensoever.

10. **India: Asiatic Lions Gain Another Foothold**

Asiatic lions must be reintroduced to Kuno National Park, rules India's Supreme Court

A lioness and her cub at Gir (Anup Dutta)

The Centre for Environment Law and WWF India won a case against the Indian government when the country's Supreme Court ruled for Asiatic lions to be reintroduced to Kuno National Park.

Asiatic lions once roamed from Northern India to Turkey. Now they are critically endangered, surviving as one population of about 500 individuals in a single location in India—Gir National Park in the state of Gujarat.

Being confined to one population in a small area makes Asiatic lions extremely vulnerable, and in 1990, Indian scientists proposed the creation of a second wild population to safeguard the big cats. Kuno Wildlife Sanctuary in the state of Madhya Pradesh was identified as the best site for reintroduction. Preparations were carried out, including resettling villages. However, by 2004 the project stalled.

The Centre for Environment Law and WWF India brought a legal case against the government, seeking to compel it to proceed with the reintroduction. In 2013, the NGOs won the case in the Supreme Court, and a subsequent appeal by the government was dismissed.

Rewilding, bringing back the original fauna, is a promising approach to tackle the loss of biodiversity. However, reintroduction of top predators, such as lions, is controversial and difficult. This case is a victory for the reintroduction of top predators—promoters of biodiversity that are vital for ecosystem health.

Legal Analysis

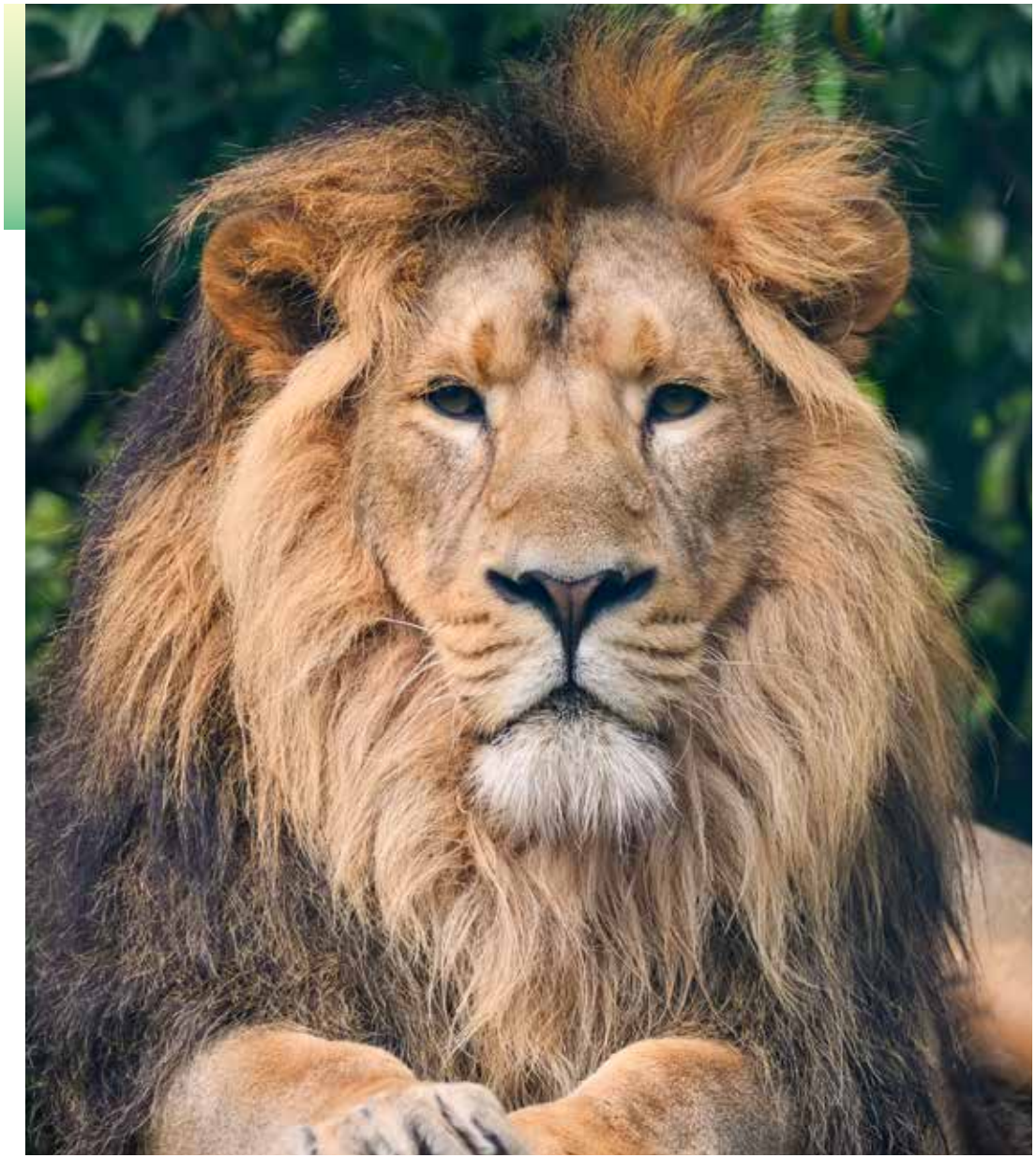
The issue for determination in this Case before the Supreme Court of India was whether there was a necessity for the reintroduction of the Asiatic lion, a species under the threat of extinction, to the Kuno Wildlife Sanctuary. While examining the necessity of a second home for Asiatic lions, the Supreme Court relied on the following relevant matters:

- The anthropocentric v. eco-centric approaches;
- Kuno historical habitat re-introduction;
- Prey Density at Kuno

The Supreme Court took the eco-centric approach rather than the anthropocentric approach and applied the species best interest, that is the best interest of the Asiatic lions. The Court disregarded the anthropocentric approach which postulates that "humans take precedence and that human responsibilities to non-humans are based on human benefits" in favour of the eco-centric (nature-centre) approach which assumes that "humans are part of nature and non-humans have intrinsic value". The Supreme Court opined that Article 21 of the Constitution of India ("Right to Life") not only protects the human rights "but also casts an obligation on human beings to protect and preserve a species becoming extinct, protection of environment is an inseparable part of right to life". The Court relied on the doctrine of public trust as enunciated in its earlier decision in M. C. Mehta v. Kamal Nath and Others (1997) 1 SCC 388. The doctrine suggests that certain common properties such as rivers,

The Asiatic lions of the Gir forest (AdobeStock/Veneratio)

The entrance to the Palpur-Kuno sanctuary (Sameer Garg)



seashores, waters, forests and air "are held by the government in trusteeship for free and unimpeded use of the general public" and that "the State, as a custodian of the natural resources, has a duty to maintain them not merely for the benefit of the public, but for the best of flora and fauna, wildlife and so on". In line with the doctrine, the Court opined that "human beings have a duty to prevent the species from going extinct and have to advocate for an effective species protection regime".

Relying on the uniformity of expert views that endangered species like the Asiatic lion should have a second home, as well as on a detailed study that found the Kuno Wildlife Sanctuary to be the best habitat for the reintroduction of the Asiatic lion, the Supreme Court held that the reintroduction of the Asiatic lion in Kuno was a priority that could not be delayed if the species is to be protected from extinction. The Court supported their directive for reintroduction with the facts that the Asiatic lion had historically lived in the wild in Kuno and that sufficient prey density now existed in Kuno. The Supreme Court ordered the Ministry of Environment and Forest to issue a directive to reintroduce the Asiatic lion in Kuno within six months.

The Asiatic lion case is significant for having compelled a government to intervene with a view of ensuring that the endangered species is adequately protected, reducing the possibility of its extinction. The Court applied an eco-centric rather than an anthropocentric approach. In doing so, the Court extrapolated the rights of nature from the existing human right to life and extended it to the duty of the Government of Gujarat to protect the Asiatic lion species and prevent it from going extinct by reintroducing it to the Kuno Wildlife Reserve.

Asiatic lions
(iStock/Scooperdigital)

10 Landmark Cases for Biodiversity

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