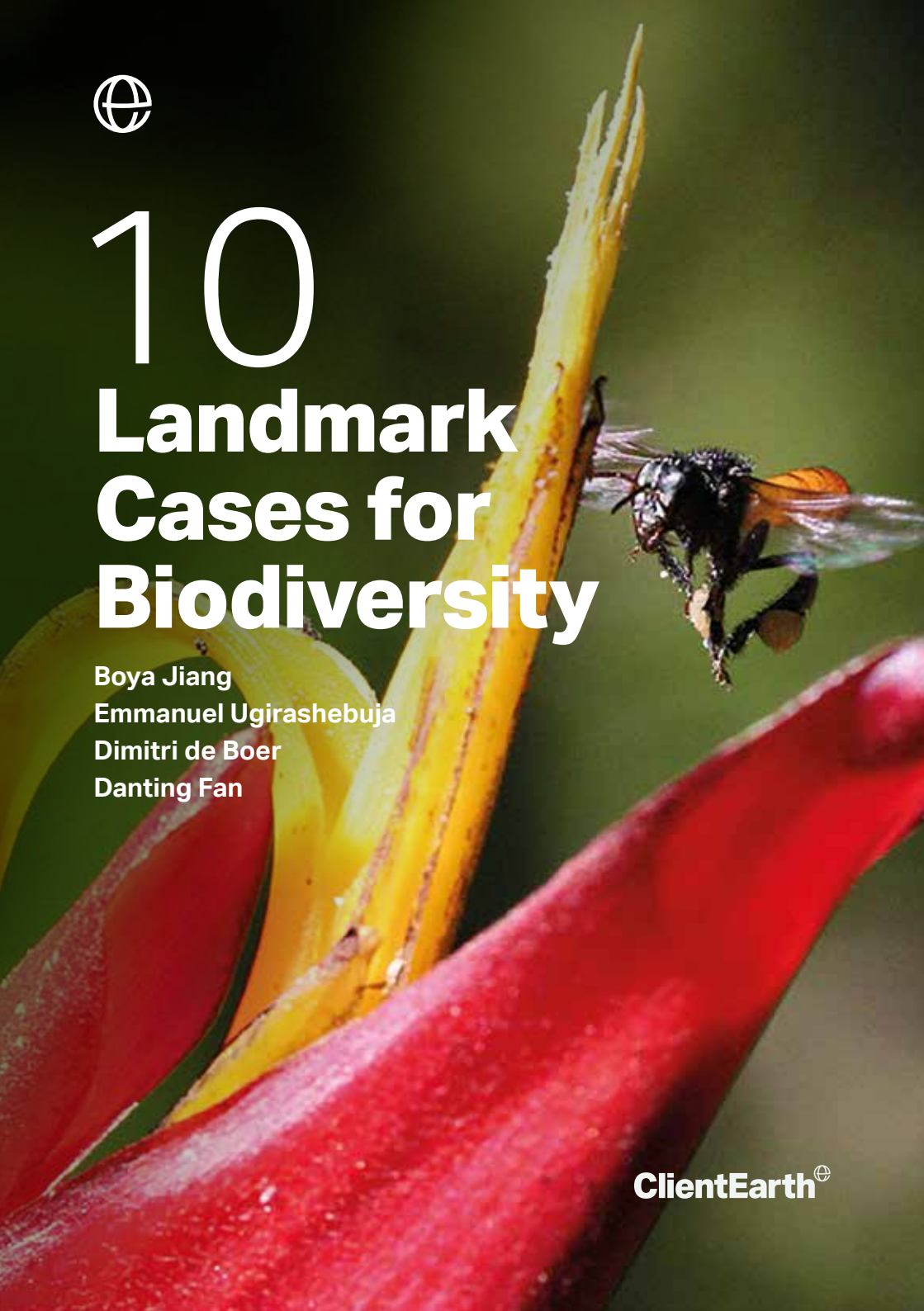

10 Landmark Cases for Biodiversity

Boya Jiang
Emmanuel Ugirashebuja
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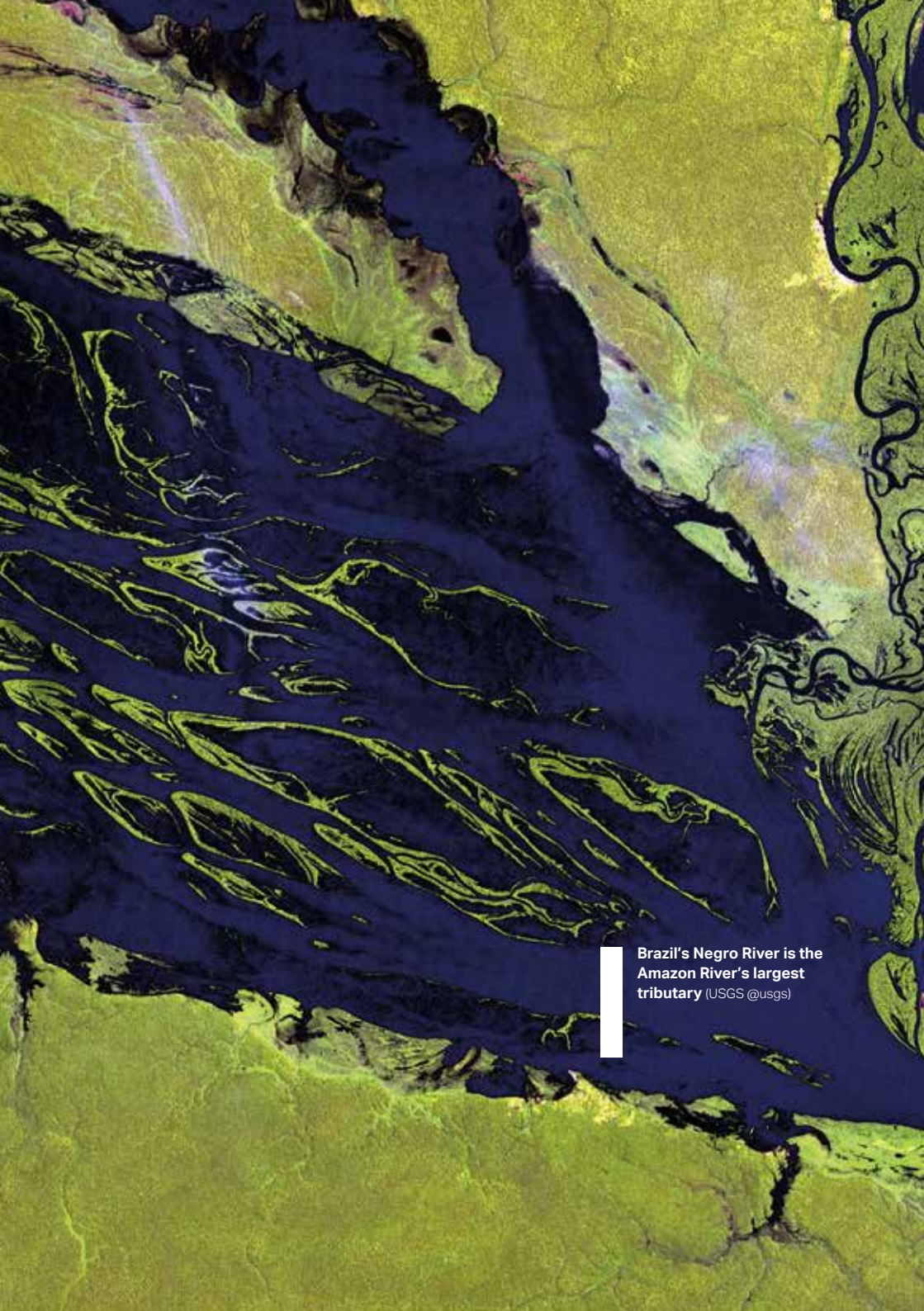
ClientEarth



Brazil's Negro River is the Amazon River's largest tributary (USGS @usgs)

Introduction

Environmental justice is the last line of defense 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.

During March and 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, the number of cases in some important areas of biodiversity falls far short of expectations. For example, despite the ocean losing over 40% of its biodiversity in only the past 50 years, few cases were identified which address marine and coastal biodiversity loss. And efforts to tackle biodiversity remain uneven. We must strengthen governance, legal systems, and the capacity of judges, prosecutors and NGOs and in almost all 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.

May 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 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, and Jean-Paul Paddack. Mengxing Liu, Yanqi Zhang, Gabriel Corsetti and Alain Chevallier contributed with project management, translation, editing and designing.

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Green Peacock. Zhinong Xi

1. **China: the Green Peacock Case**

Unique Bird Habitat Protected from Hydrodam

A Chinese NGO won a case against a proposed hydropower dam in Yunnan, China, to protect a colony of green peacocks, a rare and beautiful bird. A high court in Yunnan Province decided that construction of the 270 MW Jiasa River dam should be halted over concerns that the reservoir would destroy the key habitat. The case became a spotlight for China's pledge to conserve its ecology.

Called "the king of birds" in ancient Chinese literature, the green peafowl's numbers are believed to have slumped to between 235 to 280 individuals in the wild in China, mostly in Yunnan, as a result of habitat destruction, poaching and pesticide pollution etc. The bird is rarer in the country than the emblematic Giant Panda and is classified as "endangered" on the International Union for Conservation of Nature's Red List, though fragmented groups of related species exist in parts of Southeast Asia.

As a civil public interest litigation case for the prevention of harm against endangered wildlife, and shows the progress in China's government and legal system in taking ecological protection seriously.

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 dam builder should immediately suspend work until a new environmental impact assessment is carried out. In December 2020, the Yunnan High People's Court, the court of second instance, issued a final judgement upholding the first-instance decision. The case concerns three leading issues:

Zhinong Xi

1. The river banks risk being flooded by the reservoir of the Dam. So how to determine to what extent the green peacocks will be affected by a damage that is yet to occur?

For this matter, both the Court of First Instance and the Court of Second Instance held the project on the Gasa River posed an imminent and real significant risk to the habitat of the green peacocks and the protected plant Cycas chenii. This case falls under the category of preventive public interest litigation against "the acts of environmental pollution and ecological damage that pose a significant risk of harming public interests" 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. Therefore, it should be considered a preventative public interest litigation case.

2. Was the EIA procedure in this case illegal?

Friends of Nature challenged the legality of the EIA procedure, claiming it lacked comprehensive investigation and fact-based assessment.

The EIA agency argued that the EIA Report in this case had clearly stated that "with limited time and considering the features of wildlife, it is not possible to reach a comprehensive conclusion on either birds or other more secretive animal species in a short period of time". The assessment was based on a combination of literature and interviews and thus reached a conclusion 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, hence explaining the agency's failure to include this protected plant in the EIA report.

The Court of First Instance held that the plaintiff failed to prove that the EIA agency had violated the law in conducting EIA .

The Court of Second Instance held that the ability of EIA report producers to use materials to assess environmental impact and reach conclusions depended on a series of subjective and objective factors such as the producer's cognitive level, evaluation standards and the level of technologies, etc. Having reviewed the EIA report concerned, the court ruled that there was no correlation between its content and the conclusion, nor was there evidence showing the EIA agency had acted unlawfully.

3. Should the construction of the dam be halted? If so, should it be banned just for now or permanently?

The Court of First Instance order the dam builder to immediately stop the work based on the existing EIA report, and not to take or store water from the river or fell the vegetation in the area that risk 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 builder takes an ex-post environmental impact assessment as instructed by the Ministry of Ecology and Environment and submits improvement measures for filling.

Research team investigating the hydropower dam. Wild China Film

The Court of Second Instance supported the verdict and held that, considering the risks facing the habitat of the birds and under the provisions of Environmental Impact Assessment Law on "circumenstances 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 made the ruling to protect the environment from immediate harm. The judge weighed the social and economic impact and made a sensible decision in time, pulling the species back from the brink of extinction and bringing the significant risk to the habitat of the green peafowls under control. The Ministry of Ecology and Environment has ordered an ex-post environmental impact assessment, and the builder is obligated to take one. The decision of banning the construction permanently or not has been left with the competent authorities once the ex-post environmental impact assessment is completed.

The Green Peacock case was a landmark victory. As China's first and most important case of preventive public interest litigation for the conservation of endangered wildlife, it went further and broke away the traditional judicial concept of "an injury is only remediable when it is suffered" and prioritized environmental protection even before the damage is done. It showcases the irreplaceable role of China's judicial system in nature protection.

2. **Brazil: the Amazonia Protection Action**

Supreme Court Ruling Boosts Prosecutors' Campaign Against Deforestation

In November 2017, Brazilian Federal Public Prosecutor Office (Ministério Público Federal) launched the Protect Amazon Project with two main goals: to promote reforestation of degraded areas; and to demand indemnification for material and moral injuries caused by deforestation.

From 2017 to 2020, federal prosecutors in Brazil brought over 3500 cases against deforestation in the Amazon rainforest. A supreme court ruling in February 2021 decided that landowners can be held liable for deforestation in recent years, regardless of whether they owned the land at the time. This is extremely important, because in many cases the Amazon rainforest is illegally logged, and subsequently acquired for cattle ranching or agricultural use by a different person or company.

The ruling is a major breakthrough, clearing the way for the prosecutors to proceed with all outstanding cases. Current landowners will be required to restore the forest and pay compensation. Satellite imagery is used to identify the extent of past deforestation, and to support the prevention of further deforestation. This huge campaign of public interest litigations by the federal prosecutors is of global significance, as it makes a great contribution to protecting the Amazon rainforest, the world's largest terrestrial biodiversity hotspot.

Legal Analysis

AMAZÔNIA PROTEGE

"Amazônia Protege" Logo.

The Protect Amazon Project is a paradigm of tackling deforestation. It was developed in the context of recent expansion of deforestation of Amazon Rainforest, which required a new approach to substitute fragmented and random measures. The Project aims to coordinate and systematize the protection of the Amazon Rainforest to define a precise focus and combining strategies. The conception and coordination of this project

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)

was developed by the 4Th Chamber of Coordination of the Public Prosecutor's Office, with the support of Office of the Attorney General (Raquel Dodge), and measures were taken by Brazilian Federal Prosecutors with jurisdiction over each deforested area. Several Brazilian Federal Public Prosecutor offices act simultaneously throughout the Amazon Rainforest (which covers an immense area in different States, municipalities, national parks, conservation areas, and Indigenous Lands), regarding similar sizes of deforested areas in each project phase:
a. giving the deforester a chance to sign a civil agreement regarding (1) reforestation of the area; (2) paying indemnification with a discount calculated under specific terms previously disclosed.
b. filing an environmental lawsuit demanding (1) reforestation; (2) indemnification calculated under specific terms previously disclosed.

The Project collects information in public databases of different agencies regarding the land, its owners, possessors, users, etc. It involves coordination with environmental agencies, notably IBAMA and 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 was went into court session in late 2020. In this case, the Federal Public Prosecutor's Office and IBAMA filed a Public Civil Action against "an uncertain and not located person, but holder of the embargoed area, due to illegal deforestation" of sixty-seven hectares of forest. The main 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 constitutes one of the most celebrated attributes of the right to property, a related characteristic, in the protection of the environment, with the propter rem environmental obligations. As such, all individuals, the community, and the State find themselves, in the face of negative content duties, compelled to respect the domain of others. Therefore, if lodged with current or future trespassing or imminent trespassing, the private or state owner - or whoever represents him - allows himself, in the search for help, to sue the specified subject or to do so adversus Omnes, if the offender is unknown or uncertain.

Justice Benjamin also 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. In turn, the law establishes that the initial petition must contain, as an extrinsic mandatory procedural requirement, "documents necessary to support the request." The rule is conditioned by a double caveat that documents must a) exist and are available, and b) are absolutely indispensable. It is not for the judge, in the initial petition, to demand documentary evidence beyond that which is strictly essential to the characterization and materialization of the disputed object.

A key point developed from the above leading case as precedent for the Protect Amazon Project is the argument of propter rem obligation. 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. Deforestation has also been a strategy to further legalize trespassing through a registration through public notaries, to demand credit for buying the same land, to raise cattle, or develop agricultural projects on such land through private or public bank loans. Propter rem obligation puts the burden of reforestation and indemnification on the current possessor or owner of the land.

Hence, it developed an argument to define responsibility for deforestation even when the current owner or possessor of the deforested land is not that who had deforested it. It interrupts 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
(AdstockRF)

3. **Colombia: Deforestation in the Amazon**

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

In 2018, 25 plaintiffs aged between 7 and 26 years old filed a *tutela* – a special claim to enforce fundamental rights – against the Colombian government and several municipalities and corporations, alleging violation of their individual and collective rights to a healthy environment, life, health, food, and water, due to climate change caused by the government's failure to reduce deforestation.

The plaintiffs argued that, under its international agreements and its own national law, the Colombian government had a legal duty to reduce the annual rate of deforestation, and yet the rate was in fact increasing. A district court initially ruled against the plaintiffs, but on appeal Colombia's Supreme Court found in their favour. The threat to biodiversity was highlighted in the judgment. The Court emphasized that one of the imminent dangers posed by the deforestation of the Amazon is the massive extinction of animal and plant species.

The Court issued mandatory orders for the defendants to formulate action plans to tackle deforestation and climate change, create an "intergenerational pact for the life of the Colombian Amazon - PIVAC" with wide public participation to reduce deforestation and GHG emissions, and mitigate deforestation within 48 hours of the judgement.

The case is globally significant because the Court took an "eco-centric" approach, regarding the Colombian Amazon as a "subject of rights" entitled to legal protection, whose conservation is a national and global obligation.

Legal Analysis

The district court considered *tutela* as an inappropriate approach to bring this claim due to its collective nature, thus ruled 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 environment deterioration, violation of fundamental rights, and direct harm on the individual was established, and the judicial order would be oriented towards restoring individual rights, not collective ones.

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

Destroyed forest in the south of Colombia (Andrés Cardona)

Ecuadorian Squirrel Monkey in Colombia (Adam Rainoff)

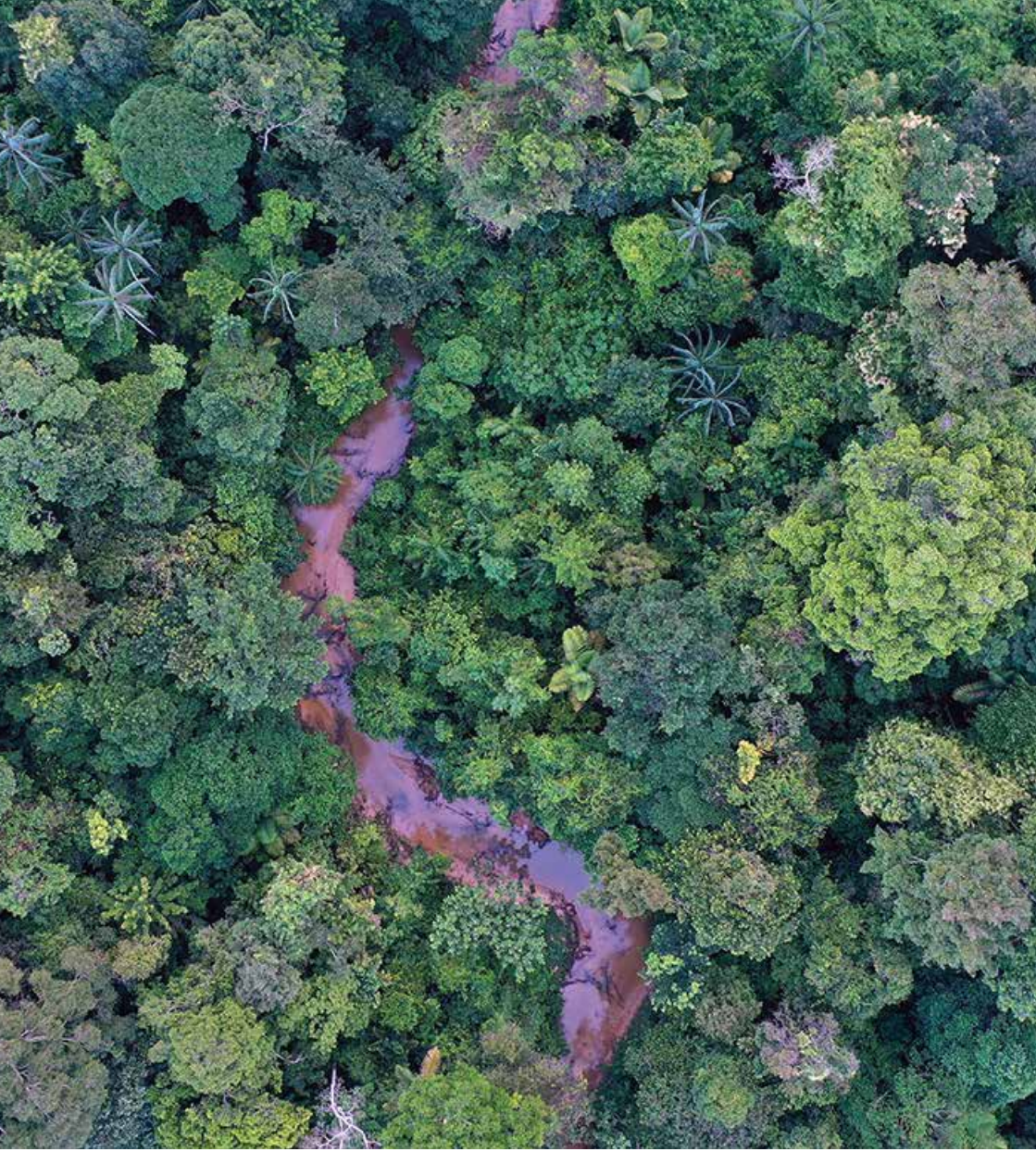
United Kingdom on Reducing Emissions from Deforestation in the Colombian Amazon, and the national Law 1753 of 2015, the Columbian government had a legal obligation to reduce the annual rate of deforestation. However, it was reported that the country lost 178,697 hectares in 2016, that is, that deforestation increased by 44% from the figure reported in 2015 and, of that number, 70,074 hectares were in the Amazon. According to IDEAM, deforestation will increase the temperature by 2.14°C in 2071, within the estimated lifespan of the plaintiffs. Therefore, deforestation will undermine the plaintiffs' fundamental rights.

The Court ruled that the fundamental rights of life, health, the minimum subsistence, freedom, and human dignity are substantially linked and determined by the environment and the ecosystem.

Applying the principle of precaution, intergenerational equity and solidarity, the Court found that threat to the future generations' fundamental rights had been established.

As to the rights of nature, the Court regarded Colombian Amazon rainforest – the main environmental axis of the planet and "lung of the world" – as a "subject of rights", of which conservation is a national and global obligation. By criticizing the anthropocentric and selfish model of the humanity's hegemonic position, the Court adopted the "ecocentric-anthropic" criteria which places human on par with the ecosystem to avoid arrogant treatment of environmental resources.

The Court issued five mandatory orders requesting the defendants: (1) to formulate short, medium and long-term action plans



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

Deforestation in Colombia
(Daniel Henryk Rasolt)

Colombia's youth fighting for the Amazon (Dejusticia)

to tackle deforestation and climate change impacts; (2) to create an "intergenerational pact for the life of the Colombian Amazon - PIVAC" with wide public participation to reduce deforestation and GHG emissions; (3) that all municipalities shall update and implement Land Management Plans and to include an action plan to reduce deforestation; (4) that the Corporation defendants shall create an action plan to tackle deforestation; (5) to mitigate deforestation within in 48 hours following this 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, where it was specified by expert reports that about 57% of tree species were in danger, as well as animals such as the jaguar or the Andean bear, for example. Further, the Court saw ecology as an integrity, pointing out that mass deforestation of the Amazon would break the ecosystem connection with the Andes, causing probable extinction or threat of species inhabiting that corridor, generating "damage in its ecological integrity".

In addition, the Court put great emphasis on the active public participation of the youth generation, the affected communities, scientific organizations or environmental research groups, and the interested population in general. Such orders enhance the bottom-up approach in the conservation of nature 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 protection of the forest itself before courts when the government fails to tackle deforestation.

4. **Costa Rica: Investigation into Pesticide that Harms Bees**

Supreme Courts Orders Scientific Study that May Lead to Ban on Pesticides that Harm Pollinating Insects

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 – among the most commonly used in agriculture worldwide, may have on the populations of bees, the environment, and on public health.

Neonicotinoids account for more than a quarter of the global pesticide market and are used for practically every major crop. They are highly effective – not only

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

Angel bee at hive entrance. (Bee Culture)

Beekeeping in Costa Rica (Bee Culture)

do they kill pests by direct contact, but also penetrate the tissues of the crop plants, and pests die after eating them. Non-target insects are also affected - bees are exposed to neonicotinoids via nectar and pollen.

Scientists have long linked neonicotinoids to the decline of bees – these chemicals have been shown to disrupt the bees' nervous system as well as affect their learning and memory that are essential for social insects which remember and transmit to other bees the information where the food is.

The global decline in pollinating insects has raised the alarm of a nearing ecological crisis. For this reason, the european Union banned three neonicotinoid pesticides in 2015.

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

Use of agro-toxics (Alohaflaminggo/ Shutterstock)

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 side-step 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 have an effect on 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 to health, biodiversity and the environment of Costa Rica, and ordered the adoption of corresponding measures as well to safeguard these constitutional goods that may be at risk or in serious danger.

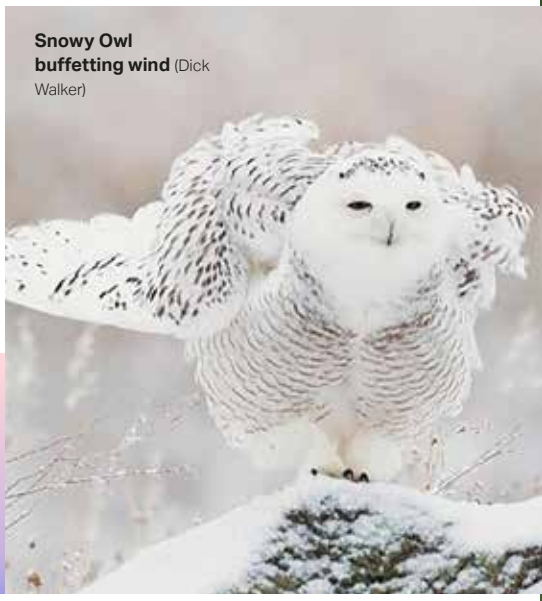
The protection of the environment is a State responsibility to be realized in accordance with the precautionary principle that governs in environmental issues. The State's objective obligation in terms of environmental protection harnesses a subjective right of the people to demand, through judicial bodies, the adoption of suitable measures for the supervision of this right, in light of openly negligent attitudes of public 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 to the protection of 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 the results of the available information are in doubt, 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 its 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 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 not absolute certainty that 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, on the contrary, the authorities are obligated to implement anticipatory and effective measures to prevent the deterioration of the environment and guarantee its sustainability.

In this emblematic precedent, realizing an ample interpretation of the precautionary principle, the Constitutional Chamber of the Supreme Court of Costa Rica in a joint and synergistic manner acted in stewardship of the human rights to life and health, the right to a healthy environment, food security, and biodiversity.



Snowy Owl buffetting wind (Dick Walker)

5. **Belgium: the Smuggling of Protected Birds**

Bird-smuggling gang is convicted following international investigation

Four individuals were convicted of smuggling protected and endangered birds by a court in Belgium, following a long and extensive joint investigation by Belgium, the United Kingdom, Spain, France, Germany, Austria and the Netherlands.

The four were part of a criminal network which would steal the eggs and chicks of protected birds, mainly birds of prey, in Spain and Southern France, and hand them over to collaborators for hatching-out and rearing. The gang would then forge CITES certificates for captive-born and bred species, allowing them to commercialize the birds and make hefty profits. The commerce was extremely profitable: for example, Bonelli's Eagles were sold for 10.000 euro each, Bald Eagles for 5.000 euro, African Fish Eagles for 6.000 euro and Booted Eagles for 5.000 euro.

The defendants were prosecuted and found guilty of participating in a criminal organization, forgery of fraud CITES export permits, the failure to keep a CITES-register and the use of illegal traps and nets. They received fines and brief prison sentences. In the decision, the court stressed that the defendants committed a direct and irreversible assault on biodiversity, and seriously undermined national and international efforts to preserve and protect these already vulnerable bird species. A Belgian environmental NGO, the Bird Protection Organization, also participated in the proceedings as a civil party and was awarded moral compensation of 15.250 euro.

The case is of global significance, as it successfully dealt with international

Egyptian vulture (Tomáš Adamec)

Bird smuggling (Jefta Imagines/Barcroft)

organized crime. Difficult to combat, internationally organized crime networks are a key driver of biodiversity loss, through poaching, smuggling, distribution and sales of illegal wildlife. Another key point is about the standing of environmental NGOs and the damages awarded in wildlife trafficking cases.

Legal Analysis

The Belgian Criminal Court of First Instance of East Flanders (Ghent division) smashed a ring that smuggled birds by convicting four persons guilty of the crime of illegal trade in endangered protected birds. The Court stressed that the accused "committed a direct and irreversible assault on biodiversity".

The Court right underlined 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 took advantage of the "lack of political priority" in committing the crimes that they were accused of.

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

- Laws prohibiting illegal trade 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

Red-footed Falcon (Carolien Hoek)

African Fish Eagle (Wayne Davies)

Regulation has enlisted species which are protected and endangered. The Trade of such species is prohibited. The accused were charged of engaging in illegal trade of certain species of Birds through forgery of breeder's declarations and CITES-certificate regarding endangered species found in Annex A of the Regulation.

Notably, the 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 environmental NGOs are considered to have a sufficient interest to bring 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 *ex aequo et bono*.

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 the biodiversity. Without the international legal cooperation between Belgium, the United Kingdom, Spain, France, Germany, Austria and the Netherlands, it would have been an uphill task to obtain the required evidence to convict the accused persons.

6. **Finland: Wolf Hunting**

The Finnish Government Must Comply with EU Habitats Directive

An NGO established by three local women in Finland brought a series of cases against local governments for issuing wolf hunting permits. One of the cases made it to the european Court of Justice, which clarified that the Finnish government didn't do enough to protect the wolves, and how it should comply with the EU Habitats Directive. Following the european ruling, in March 2020, the Supreme Administrative Court of Finland ruled that the wolf hunting permits were illegal, and instructed government to explore other methods to protect wolves in Finland.

Wolves used to be prevalent across europe but were largely exterminated throughout the middle ages and all the way through to the 1970s. When Finland joined the EU in 1973 it had to apply european directives, but in practice its legislation continued to facilitate the hunting of wolves. The Finnish government had argued that issuing hunting permits would help to protect the wolves from illegal poaching, but it failed to conduct any assessments to prove this point.

Three local women including a biologist and two hunters in Eastern Finland which borders Russia and is habitat to wild wolves, , decided to protect the wolves from extinction by using the law. They established a dedicated NGO and started to bring legal challenges against the permits. This case is of global significance because it concerns a top predatory species, and the clarification of the european Court of Justice applies across the entire EU.

Legal Analysis

Wolves are listed in Annex IV of the EU Habitats Directive (Council Directive 92/42/EEC 1992) as strictly protected species, meaning killing are strictly banned except for very limited reasons. However, Finland negotiated an exception and wolves in certain parts were listed under Annex V, which imposes less restriction, and hunting permits were granted by the Finnish authorities accordingly.

In 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 which finally reached the CJEU. This has led to the changes in stricter national regulation. However, 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", which did not specify a clear purpose thus left space of discretion for authorities. As a result, wolf population kept going down. Worse still, despite objections in public consultation, a new management

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

plan was announced in 2014 to reintroduce management hunting.

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

Therefore, efforts were made by three local individuals to register a small NGO – Tapiola, which covered most of Finland areas in order to be able to litigate the hunting permits issued in several different administrative regions. Tapiola requested those courts to (1) issue injunctions against the permits, and (2) to refer the case to the CJEU because Finnish law was breaching the EU law. However, almost all the regional

"Association for Nature Conservation Tapiola ry" Logo.

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

courts rejected the claim based on lack of standing, for example, because Tapiola's registered office was far away from that particular area.

When the next hunting season came and permits were issued again, Tapiola changed its litigation strategy and split the NGO into 6 regional organizations in order to meet the standing requirement. However, those claims were rejected again either on standing or on merits, but one of the appeal went up to the Supreme Administrative Court, which finally referred the case to the CJEU, asking whether and under what circumstances were hunting of wolves permitted and whether Finland was violating EU law.

The CJEU ruled in 2019, imposing highly stringent restrictions on wolf hunting, essentially agreeing with the claimants on all issues. By emphasizing the main aim of the EU Habitats Directive to "ensur(e) 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

Wounded wolf (Pertti Huotari / Yle)

be established in particular by reference to the population level, its conservation status and its biological characteristics. Therefore, although the CJEU need not 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 lack sufficient reasons. In essence, the Court imposed high burden of proof based on strict science on the government side. Following the CJEU ruling, the Finland Supreme Administrative Court ruled accordingly and declared the hunting permits illegal.

This case witnessed the innovation and wisdom of the locals, in a tremendous effort to protect biodiversity, to "create" a legal standing for themselves, by utilizing every possibility of public participation and access to justice to enforce the EU law, which shall be considered as the cornerstones of environmental justice. Notably, in the initial national proceedings, although the claims were rejected, injunctions were granted in some cases, which later proved to have saved several lives because the hunting season ran out during the litigation period. This approach is worth learning from where the use of injunctions becomes critical to combating imminent biodiversity threats.

7. **Australia: the Bulga Coal Mine Case**

Villagers and NGO Overturn Coal Mine in Biodiverse Area

Mount Thorley Warkworth (Rio Tinto)

The tiny village of Bulga, in New South Wales, took a mining company and the local government to court to challenge a proposed coal mine expansion, and won. In Bulga coal mining has been an important industry for almost 200 years. In 2003, the Warkworth Mining Company applied for an extension to its activities that would expand a coal mine into areas protected for biodiversity, and extend the mining permit for ten years.

The local Community established an association, and went to court, with the assistance of the Environmental Defenders Office, an Australian NGO dedicated to protecting the environment. The case opposed the expansion of the coal mine, and asked the court to reject the permit extension on the basis that the mining would have negative economic and social impacts on the Bulga community, and was contrary to ecologically sustainable development.

The court decided that the project would have significant and unacceptable impacts on biodiversity, as well as unacceptable noise and social impacts. This case is a major victory, as direct harm to biodiversity was prevented from occurring in the first

place. It also contributed to the mitigation of climate change, which is a key driver of biodiversity loss.

Legal Analysis

Residents of Bulga presented an external merits application to the Land and Environmental Court of New South Wales to challenge 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 biological diversity, noise, dust and social impacts. In disapproving the Warkworth project application, the Court relied on the following relevant matters:

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

Squirrel Glider (Gregory Millen © Australian Museum)

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

In reviewing the administrative decision of the Minister of Planning and Infrastructure of granting the approval of the proposed extension of the project, the Court first analysed the statutes which contain the power of the decision maker to make the decision to approve or disapprove and then 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 with a view of ascertaining the nature and type of each impact and 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 matters 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 fauna species. The Court also concluded that "Warkworths 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.

Speckled Warbler
(Duncan McCaskill)

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 s. 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 safe guard for nature conservation.

8. **Tanzania: the Serengeti Road Case**

East African Court of Justice stops Tanzania from building a road through the Serengeti National Park

In 2010, a small Kenya-based NGO known as the Africa Network for Animal Welfare (ANAW) filed a case in the East African Court of Justice, seeking to permanently stop the Government of Tanzania from building a 53 kilometer Super Highway through the Serengeti National Park, a UNESCO World Heritage Site. The NGO argued that the proposed construction would likely cause environmental damage and significantly disrupt the annual wildebeest migration. The Tanzanian government, on the other hand, argued that the road would boost the national economy by connecting communities in the northwest to the rest of the Country.

The East African Court of Justice is a treaty-based judicial body tasked to ensure compliance with the East African Community Treaty of 1999. ANAW argued that the proposed road would violate the Treaty, which enjoined all partner states (including Tanzania) to conserve, protect and manage the environment and natural resources. In 2014, the First Instance Division of the Court ruled that Tanzania's proposed action to build a road across the Serengeti National Park was unlawful.

This case is globally significant as it takes an important step towards protecting the Serengeti National Park, one of the most important biodiversity hotspots in the world. It also makes it clear that the East African Court of Justice can grant injunctions against member states on environmental matters.

Legal Analysis

The inherent powers of the Court to grant an injunction and the threshold of an action of a state are two important aspects, among others, when the Appellate Division of the East African Court of Justice resolved this case.

Tanzania argued that the Treaty does not grant the Court powers to issue injunctions. The Court held that it possessed inherent powers to grant injunctions including those of permanently stopping countries from carrying out any action that are an infringement of the Treaty Establishing the East African Community. Inherent powers enable courts to fulfil their mandates properly and effectively. The inherent powers of a court to issue injunctions is not derived from any written laws, rather, it is a power inherent in the courts in order to empower them to ensure adherence and compliance to the law. Without the inherent power to issue injunctions, courts may be

Lion cub (Omer Salom)

relegated to being "toothless bulldogs" that cannot bite in case of breach of laws.

Tanzania maintained that the project was at its infancy and that it could not be considered to be an "action of a state" which could be faulted for 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. According to Tanzania, a proposal is an idea or plan and not an action attributable to the State. The Court highlighted the difficult in determining the threshold of what would constitute an action of a state that can constitute the breach of the Treaty. In this particular case, the Court opined that the threshold for an initial idea or plan to transform into a challengeable act of a State, the Government need 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
- Practical manifestation of actual commencement of the engineering works (e.g., official field surveys, breaking ground delivery of construction machinery and materials on the site, etc)

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 the Super Highway 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.

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)

The Case provided 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 elucidated the necessary elements for determining whether plans have transformed into actions of a state which can be challenged before the court for the breach of the Treaty provisions on the protection of the environment.

The case brings to the fore the never-ending debate of 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 in the natural habitat and would have caused tremendous stress to the migrating animals seeking food and water for survival.

9. **The Philippines: Dolphins in the Tañon Strait**

Fishermen and NGO Halt Marine Oil Exploration

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

In November 2007, an oil exploration company, JAPEX, commenced offshore oil and gas exploration and began to drill exploratory wells in Tañon Strait. Following a case brought by local lawyers and an NGO, who sued on behalf of resident marine mammals – mainly dolphins, the Supreme Court of the Philippines ruled that oil exploration activities in the Tañon Strait must stop.

JAPEX claimed that it had received a presidential decree to conduct activities. However, the Tañon Strait is an environmentally critical area and was designated as a protected area. Therefore, activities to be carried out must be compliant with protected area laws. Even the presidential decree would be found invalid if it is against relevant legal procedures. Local citizens also alleged that oil exploration activities had adverse impact on the environment as the seismic activities had reduced the amount of fish which can be found in the strait. They also alleged that not consultation or discussion with the local stakeholders had taken place. The court ruled in favor of resident marine mammals and local citizens and held oil exploration in the Tañon Straitillegal.

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

This case has global significance, as it is a powerful case initiated to protect marine biodiversity. The ocean covers two thirds of our planet, and marine biodiversity has declined by 40% since 1970, an extremely alarming rate. In compiling this collection of 10 landmark cases for biodiversity it has been hard to find cases concerning marine biodiversity,. This case is also significant as it contributes to the mitigation of climate change, which is a key driver of terrestrial and marine biodiversity loss.

Legal Analysis

In this case, two major issues need to be considered when the Supreme made the judgment:

- 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, which inhabit the waters in and around the Tañon Strait. They were represented by their "legal guardians and friends" (collectively known as "the Stewards") and an NGO established for the welfare of the fisherfolk. Hence, the consolidated petition involved three different set of plaintiffs: the resident marine mammals, the Stewards of nature, and an NGO as representatives for subsistence fisherfolk and their future generations.

When deciding suitable plaintiffs, the Supreme Court adopted the Rules of Procedure for Environmental Cases, which stipulates 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 liberalizes standing for all cases filed enforcing environmental laws and collapses the traditional rule on personal and direct interest, on the principle that humans are stewards of nature."

Ultimately, the Court held that the standing for animals is no longer necessary because 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, which indicated that the Court is 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. Consequently, no activity outside the scope of its management plan could take place without the delivery of an Environmental Compliance Certificate granted after conducting Environmental Impact Assessment to determine the effect of such activity on the ecosystem. The Court held that the Environmental Impact Assessment System and the National Integrated Protected Area System were not complied with by defendants before 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.

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 Straits is a protected area, the contract would have required to be allowed by a law passed by the Congress. Therefore, the constitutional court cancelled the contract and all the permits related to the oil exploration in the Tañon Straits.

Bantay Dagat or fish wardens. (Gregg Yan)

Tanon Strait from Pebbles Beach (Warren Olandria)

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.

Traditional paddle craft (Gregg Yan/Oceana)

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 environment should be complied with by government agencies tasked to implement them whensoever.

10. **India: the Asiatic Lions Case**

Asiatic Lions Must Be Reintroduced in Kuno

A lioness and her cub at Gir (Anup Dutta)

Two NGOs won a case against the government of India, with the Supreme Court ruling that the Asiatic lion should be reintroduced in a second habitat, the Kuno National Park. The Asiatic Lion is an endangered species which is threatened with extinction, with only about 500 individuals left in the wild.

Asiatic lions almost went extinct in the beginning of the 20th century, but populations recovered somewhat due to effective protection and conservation efforts. Historically, they inhabited much of Western Asia, the Middle East and northern India. Now their range is restricted to the Gir National Park and the surrounding areas in the Indian state of Gujarat.

In 1990, a government-affiliated institute proposed the creation of a second wild population of Asiatic lions to safeguard the species against potential calamities in the Gir National Park. Studies were carried out and concluded that the Kuno Wildlife Sanctuary was the most suitable site for reintroduction. Preparations were carried out, including resettling villages. However, by 2004 the Gujarat state government refused to part with the first batch of lions.

The Centre for Environment Law and WWF India brought a case against the government, seeking to compel it to proceed with the reintroduction. In 2013, they won the case in the Supreme Court, and a subsequent appeal by the government was dismissed. However, at the time of writing the reintroduction still hasn't taken place.

The case is of global significance as it concerns efforts to prevent the extinction of a top predatory species through reintroduction in a previous habitat. It highlights the importance of interventions by Governments in ensuring that endangered species faced with extinction thrive. Further, it deals with the complexities of rewilding, which is a promising new approach to the restoration of biodiverse areas.

Legal Analysis

The issue for determination in this Case before the Supreme Court of India was whether or not there was a necessity for the reintroduction of the Asiatic lion to the Kuno Wildlife Sanctuary, an endangered species under the threat of extinction. While examining the necessity of a second home for the 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 humans benefits" in favour of the eco-centric (nature-centre) approach which propounds 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

The Asiatic lions of the Gir forest (AFP)

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

only protects the human rights "but also casts an obligation on human beings to protect and preserve a specie 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, 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 the expert views that to have a second home for endangered species like the Asiatic lion is of vital importance as well as a detailed study that was conducted which found that the Kuno Wildlife Sanctuary was the most ideal habitat for the reintroduction of the Asiatic lion, the Supreme Court held that reintroduction of the Asiatic lion in Kuno was a priority that could not be delayed if the specie is to be protected from extinction. The Court took into consideration the fact that the Asiatic lion had historically existed in Kuno and that

there was an important prey ratio density which guaranteed that the reintroduction should take place. 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 and reduce the possibility of its extinction. The Court applied an eco-centric approach rather than the 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 specie and prevent it from extinction by reintroducing it to the Kuno Wildlife Reserve.

10 Landmark Cases for Biodiversity

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