

Global Trends in Biodiversity Litigation

Webinar, 4th December 2024

Speakers



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Introduction

Elise Calixto Hale Crystal, FAS Advogados in cooperation with CMS

Bart Adriaan de Ruijter, CMS Netherlands

Right to a healthy environment



International
Treaties

Biodiversity
Litigation

“unlike other rights, **protects the components of the environment**, such as forests, rivers and seas, **as legal interests in themselves**, even in the absence of the certainty or evidence of a risk to individuals. This means that it protects nature and the environment, not only because of the benefits they provide to humanity or the effects that their degradation may have on other human rights, such as health, life or personal integrity, but because of their importance to the other living organisms with which we share the planet that also merit protection in their own right” (IACtHR, Advisory Opinion OC-23/17)

- Earth Summit in Rio de Janeiro (Brazil), 1992
- United Nations Framework Convention on Climate Change (UNFCCC)
- Convention on Biological Diversity (CBD)

“any legal dispute at the national, regional or international level that concerns conservation of, sustainable use of” and access to and benefit-sharing of “genetic resources, species, ecosystems and their relations”

Biodiversity protection - COP

COP16

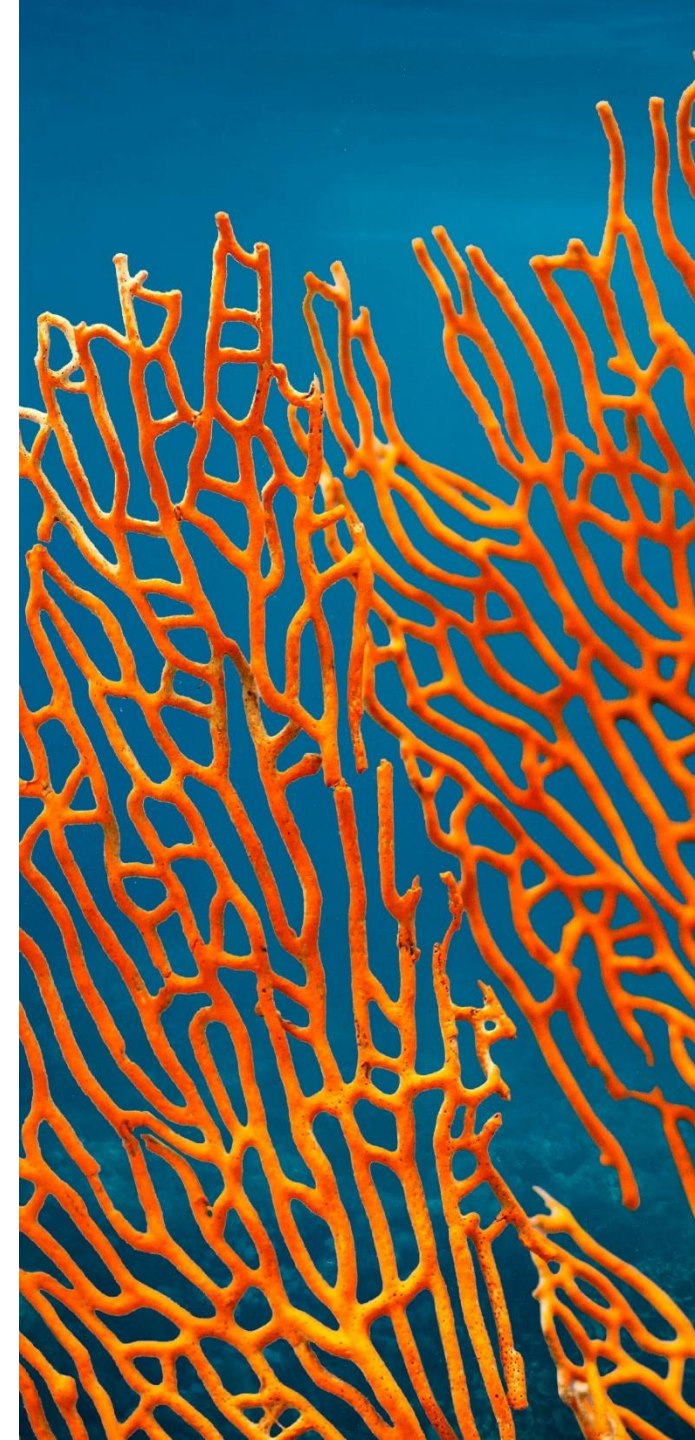
- Implementation of the Kunming-Montreal Global Biodiversity Framework (KMGBF)
- Establishment of the 'Cali Fund'
- Inclusion of Indigenous and Afro-Descendant Communities
- Unresolved Financial Mobilization Issues

COP29

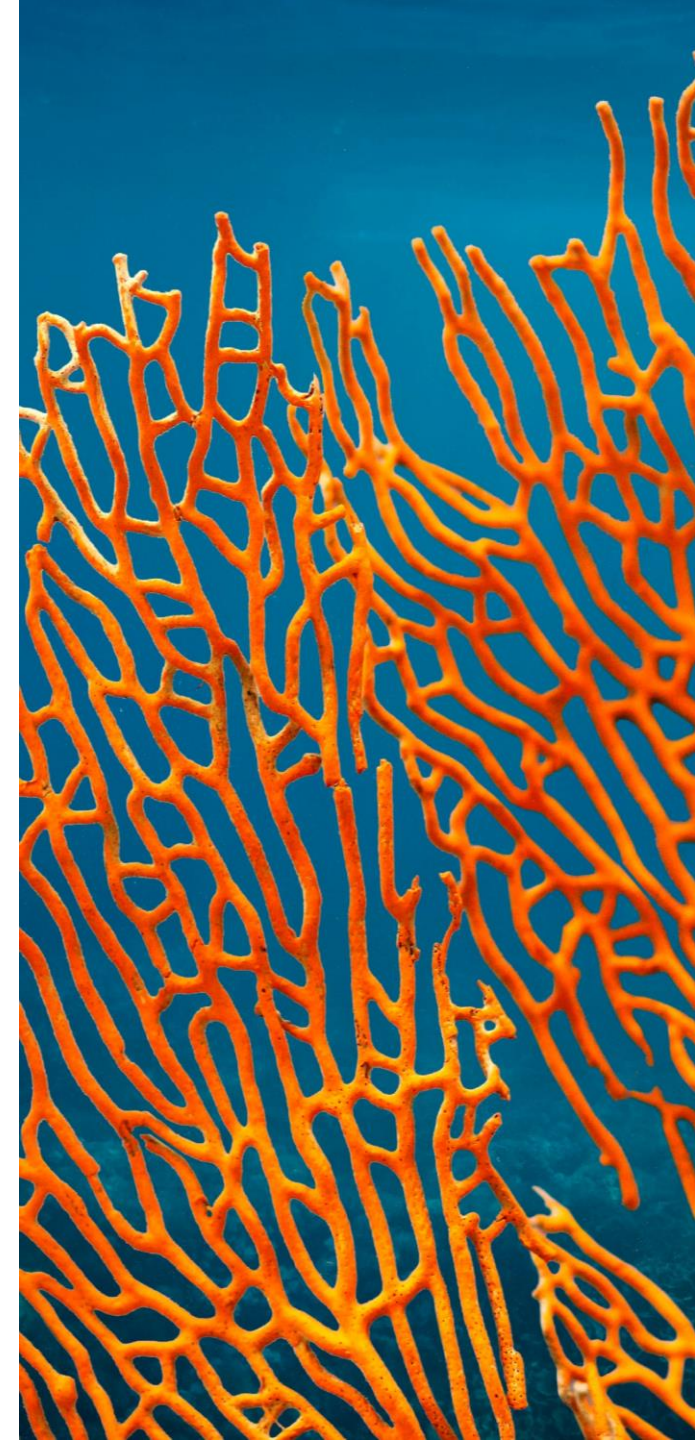
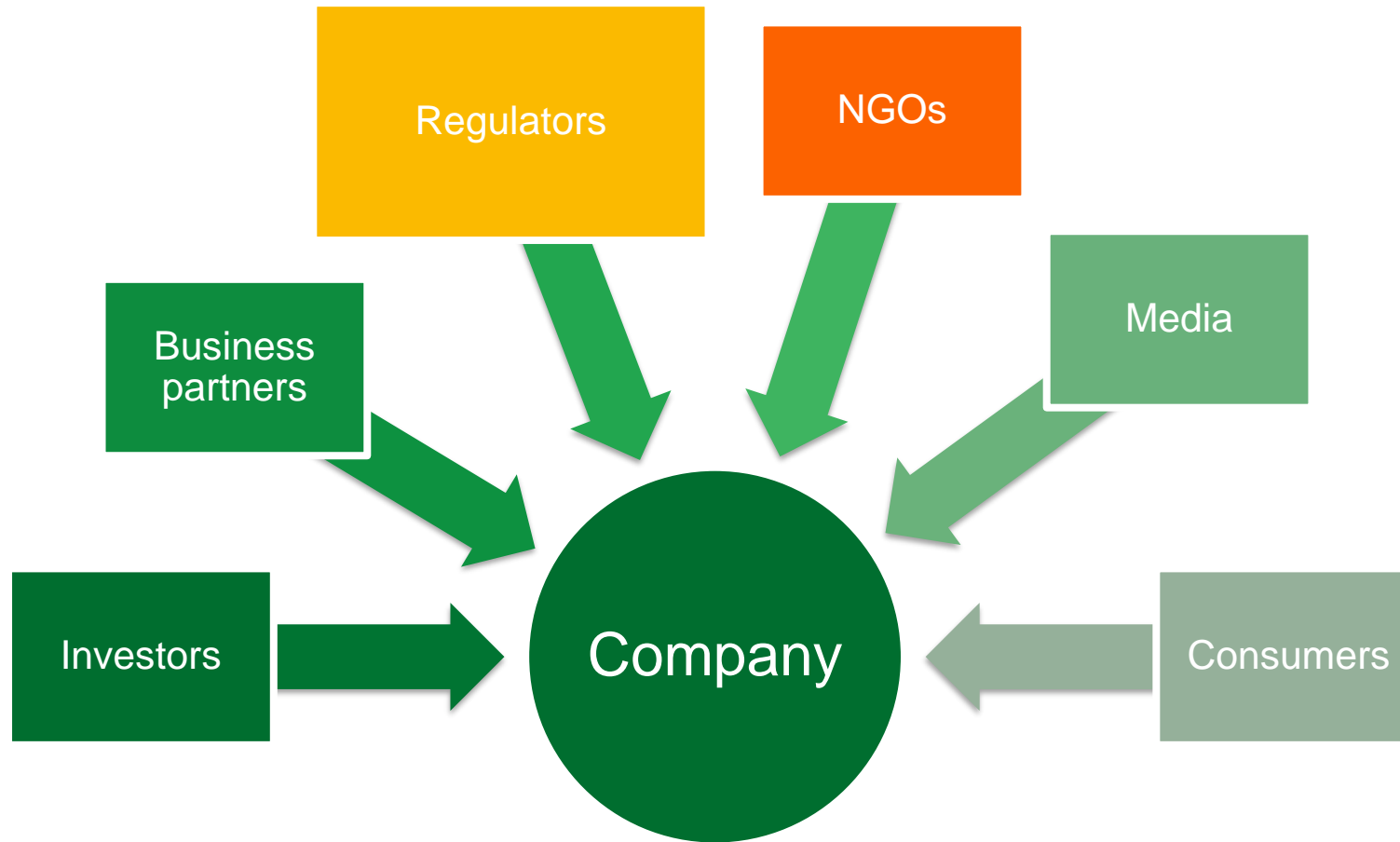
- Climate Finance Commitment
- Finalization of Article 6 Rules
- Emphasis on Nature-Based Solutions
- Brazil's 2035 Climate Pledge

COP30

- Opportunity for Leadership
- Focus on Implementation
- Integration of Biodiversity and Climate Agendas



Biodiversity awareness from all angles



Corporate ESG litigation:

➤ **Specific dynamics:** ESG litigation impacts via media

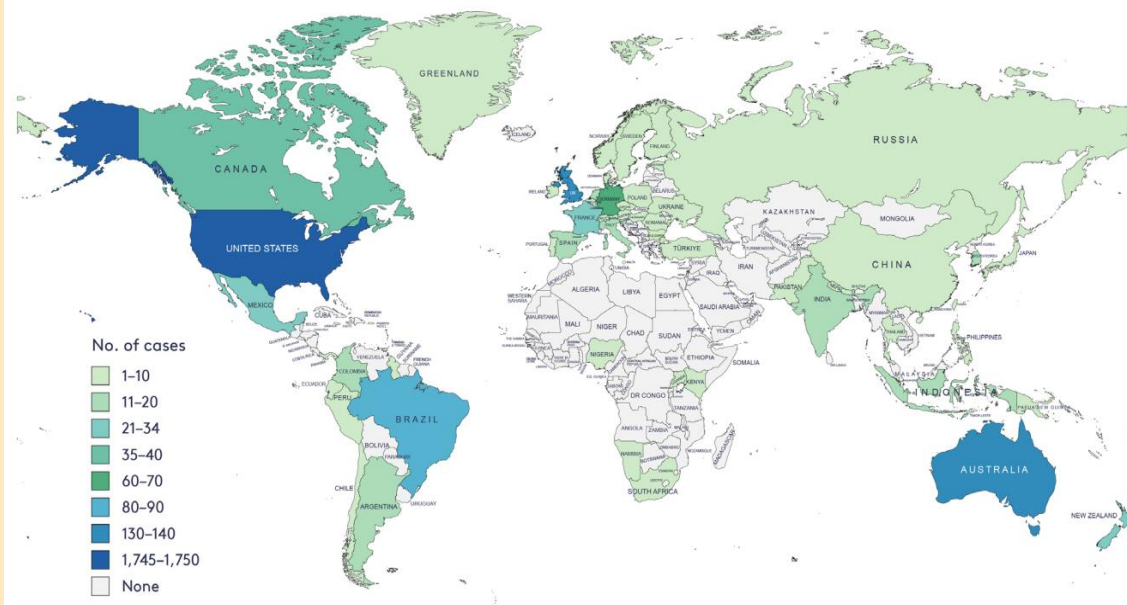
- a) reputation of company
- b) consumer preference of products
- c) stock value

➤ **Categories of ESG litigation:**

- Injunction
- Greenwashing
- Shareholder actions
- Investment/finance
- Damages claims
- Project litigation

➤ **Stakeholder engagement from all sides**

Figure 1.2. Number of cases to date in countries globally



Global trends in climate change litigation: 2024 snapshot

Joana Setzer and Catherine Higham

Policy report

June 2024

‘New’: biodiversity litigation

Significant increase of cases:

- damaging the habitat of an endangered species (Costa Rica);
- deforestation (Brazil, Colombia, India and the Philippines)
- shrimp farming in coastal wetlands (India);
- tourism development in mangrove forests (Mexico);
- fossil fuel development in biodiversity-rich areas (South Africa, Norway, East Africa);
- pesticide spraying (Colombia, Costa Rica);
- mining (Colombia).
- criminal complaint biodiversity (France)
- class actions related to PFAS (Netherlands)

Box 2.8. A legal duty to manage nature and biodiversity risks?

One of the consequences of the legal controversy surrounding prudent management in the face of climate risk has been a fresh focus on other types of environmental risk, particularly nature and biodiversity risks. In March 2024, a legal opinion, commissioned by the Commonwealth Climate and Law Initiative and Pollination, was published in the UK. The opinion argues that UK-based directors can and must consider nature-related risks arising from dependencies and impacts on nature in the course of their duties. The opinion contains considerable reference to the line of cases discussed above.



The Indian Supreme Court case of *M.K. Ranjitsinh* sought to protect the endangered Great Indian Bustard from overhead power lines. Photo: Inside Indian Jungles/Flickr

August 20, 2024

Court Orders Government to Protect Rare Gulf Whales, Sea Turtles, and Imperiled Marine Species from Damaging Effects of Offshore Drilling

Victory — Court rules that the official biological opinion is not adequate to

Legal framework Biodiversity

Global:

- UN Convention on Biological Diversity
- Kunming-Montreal Global Biodiversity Framework (GBF) 2022
- The UN Guiding Principles (UNGPs) and OECD Guidelines for Multinational Enterprises
- Global Reporting Initiative (GRI 101: Biodiversity 2024)

EU:

- Elaborate biodiversity directives patchwork
- CSRD and CSDDD (with also biodiversity obligations)
- Initiatives on reporting (Principles for Responsible Banking) and market for nature-based solutions and funds

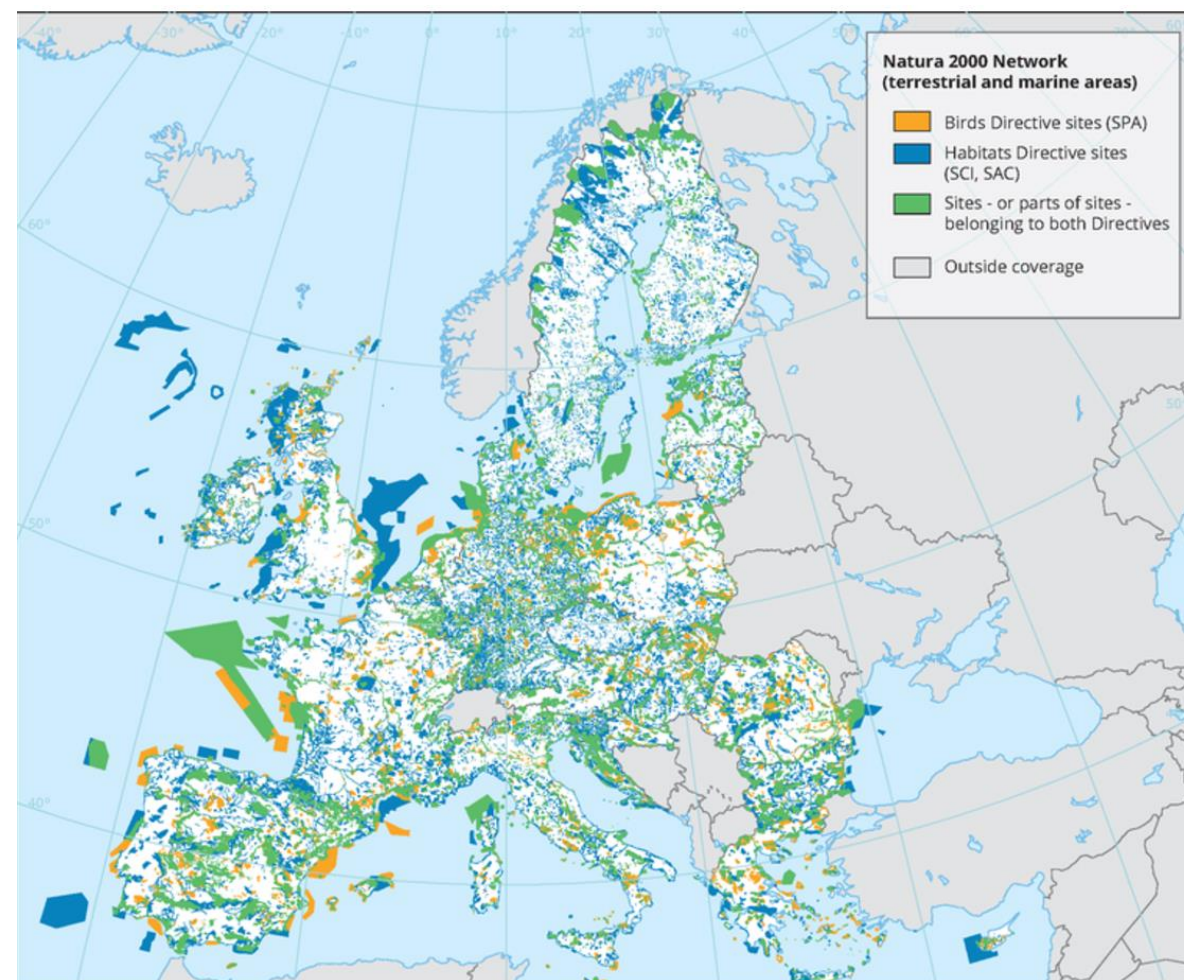


European perspective

Bart Adriaan de Ruijter, CMS Netherlands

Patchwork of significant European legal instruments (selection)

Kind of obligation	Already applicable
Due diligence (incl. reporting)	<ul style="list-style-type: none"> – EU: Corporate Sustainability Due Diligence Directive (CSDDD) – EU: Timber Regulation – EU: Conflict Minerals Regulation – EU: Battery Regulation (February 2024) – EU: Taxonomy – Revised Environmental Crime Directive (April 2024) – EU Deforestation Regulation (30 December 2025) – EU Nature Restoration Law (August 2024)
Reporting only	<ul style="list-style-type: none"> – EU: Non-Financial Reporting Directive (NFRD) – EU: Corporate Sustainability Reporting Directive (CSRD) – Taskforce for Nature Related Financial Disclosures (GRI)
Proposal / bill / draft	<ul style="list-style-type: none"> – UN Treaty – EU: Forced Labour Products Regulation (end 2024) – EU: Deforestation-Free Products Regulation (end 2025) – Netherlands: sustainable business act (supply chain)



Trends in biodiversity litigation - Europe

- Hurdle complexity: **consensus** scientific proof and **vague** target biodiversity

1) Increase scientific proof: Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services (IPBES)

2) Increase legislation: Most climate change cases after Paris Climate Agreement with clear 1,5 C target (2016)

- Kunming-Montreal Global Biodiversity Framework (2022)
- Legislation EU with public enforcement EC (Bialowieza forest-case)

3) Increase case law: Swiss Klimaseniorinnen, Shell judgment

- **Leap forward?** Naturschutz-case (Okt 2024): NGO against Germany to set concrete targets



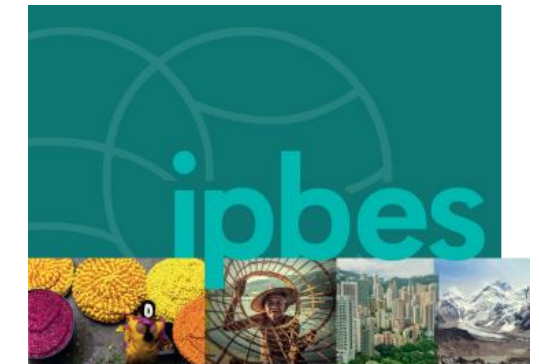
Poland ordered to pay 100,000 euro/day if it continues to destroy Bialowieza forest

Posted on November 29, 2021

Today, the EU Court of Justice decided to impose a daily penalty of EUR 100,000 on Poland if the government continues to defy a ban against logging activities in the EU protected Bialowieza Forest. The Court also reiterated its order to immediately halt most logging activities in the forest except close to roads for safety reasons until a final decision is taken. As one of the last remaining primeval forests in Europe, WWF fully supports the court's decision to take a strong stand for forest protection to ensure the well-being and health of local wildlife and communities.



Bialowieza, one of Europe's last virgin forests
© Shreef Elia



Trends in biodiversity litigation - Europe

- Biodiversity litigation mainly impacts **NEW project development** (civil/administrative):

Example: Netherlands: nitrogen-cases in farming and building sector

- More pro-active approach is on the rise: **restoration-based** and target-set claims

Example: Claims to set ambitious restoration programmes for protected species (European hamster)

Greenpeace takes Dutch state to court over nitrogen failings

November 12, 2024



The Dutch news. Photo: Niels van der Pas

BBC

Home News Sport Business Innovation Culture Arts Travel Earth Video Live

European hamster added to 'critically endangered' list

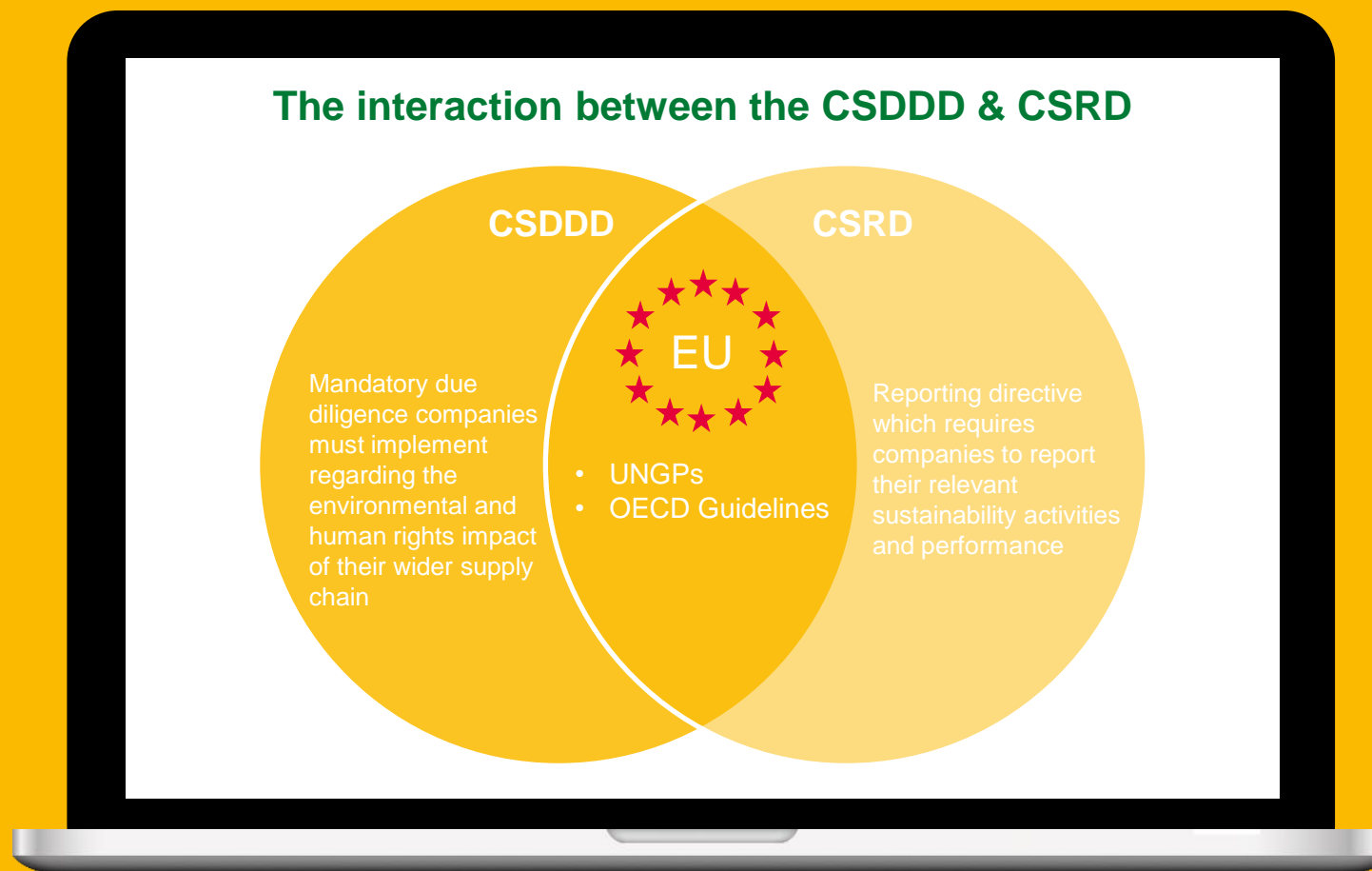
10 July 2020

Share Save





The due diligence twins:





CSRD:

Board responsibility for correct reporting

The only reporting obligation is to be correct about sustainability

Important in this respect is:

1. (the role of) the management board and supervisory board
 2. the most important actual and potential negative effects of activity of company
 3. an assurance about the way the company reports about the information
- If important information is missing this needs to be reported in assurance the statement
 - **RISK:** Misleading information to shareholder(s) → liability and securities claims

Experts: golf aan klimaatclaims dreigt voor bedrijfsleven

Nieuwe rapportageverplichting kan leiden tot bestuurlijke aansprakelijkheid

Rutger Betlem en Orla McDonald
Amsterdam

Experts waarschuwen voor miljardenclaims en bestuurlijke aansprakelijkheid bij de invoering van de nieuwe Europese meldingsrichtlijn CSRD. Beursgenoteerde bedrijven moeten per 2024 gaan rapporteren over hun impact op het klimaat en de leefomgeving.

De nieuwe rapportageverplichting, voluit de Corporate Sustainability Reporting Directive, gaat gelden voor bijna vijftigduizend Europese bedrijven en is onderdeel van de EU-klimaatplannen. Vanaf volgend jaar moeten beursgenoteerde bedrijven gedetailleerd publiceren over hun prestaties op het gebied van duurzaamheid, sociale omstandigheden en bestuur (oftewel ESG, wat staat voor environment, social and governance). De rest van de grote en middelgrote bedrijven volgt stapsgewijs vanaf 2025.

'Dit is een mijlpaal in het ondernemingsrecht', zegt Bart Adriaan de Ruijter, partner corporate litigation bij advocatenkantoor CMS. De nieuwe regels maken straks onder meer duidelijk hoeveel CO₂ een bedrijf uitstoot en hoe groot het risico is op kinderarbeid in de toeleveringsketen. Al die gedetailleerde informatie geeft maatschappelijke organisaties munitie voor klimaatzaken. 'De voormalige advocaat-generaal Jaap Spier waarschuwde jaren geleden al voor klimaatclaims, dat zien we nu ook daadwerkelijk ontstaan.'

Bestuurdersaansprakelijkheid wordt daarbij een belangrijk thema, zegt De Ruijter. Wie bewust het klimaat in gevaar brengt en in zijn

klimaatplannen onvoldoende maatregelen treft om dat te voorkomen, kan opzet of wuste roekeloosheid verweten worden. Verzekering dekt dat niet. Ook accountants die de uitgebreidere klimaatrapportages ten goedkeuren, lopen een vergroot risico op beroepsaansprakelijkheidsclaims.

Het aantal duurzaamheidsprocessen vijf jaar tijd meer dan verdubbeld, aldus rapport van de Verenigde Naties dat afgeleverd werd gepubliceerd. Liepen er in 2021 bijna negenhonderd zaken, in 2022 vonden er meer dan tweeduizend. Het gaat om zaken zoals die van milieuorganisatie M

De verplichting tot rapporteren gaat gelden voor bijna vijftigduizend Europese bedrijven

defensie tegen Shell, dat na de uitspraak broeikasgassen moet verminderen. Nu gaat ook om claims, zoals de financiële pensatie die 1400 omwonenden van Texel eisen van de staalgigant. De CSRD kan tot verregerender rechtszaken leiden, aldus De Ruijter.

Claims komen vaak uit onverwachte hoeken. Zo heeft het Indonesisch eiland Pulau Nipah een zaak aangespannen tegen het 2 miljard omzetten cementbedrijf Holcim over de stijgende zeespiegel. De Ruijter: 'Je kan niet meten hoe vaak in Europa zitten en geen ben voor de schade die je elders veroorzaakt.'

→ Vervolg op pagina 3

Value chain vs. supply chain

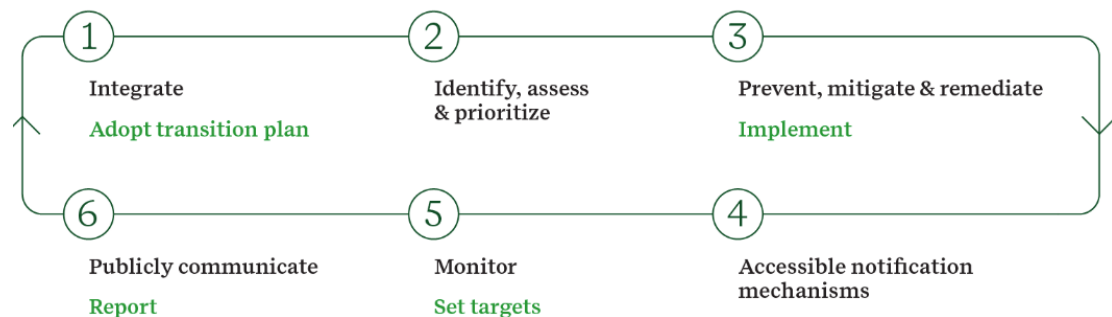
The relationships the undertaking has with business partners, entities in its value chain, and any other non-State or State entity directly linked to its business operations, products or services. Business relationships are not limited to direct contractual relationships. They include indirect business relationships in the undertaking's value chain beyond the first tier, and shareholding positions in joint ventures or investments.



CSDDD: Climate Transition Plan

- CSDDD: Climate Transition Plan includes all negative climate impact

- Including: Biodiversity!

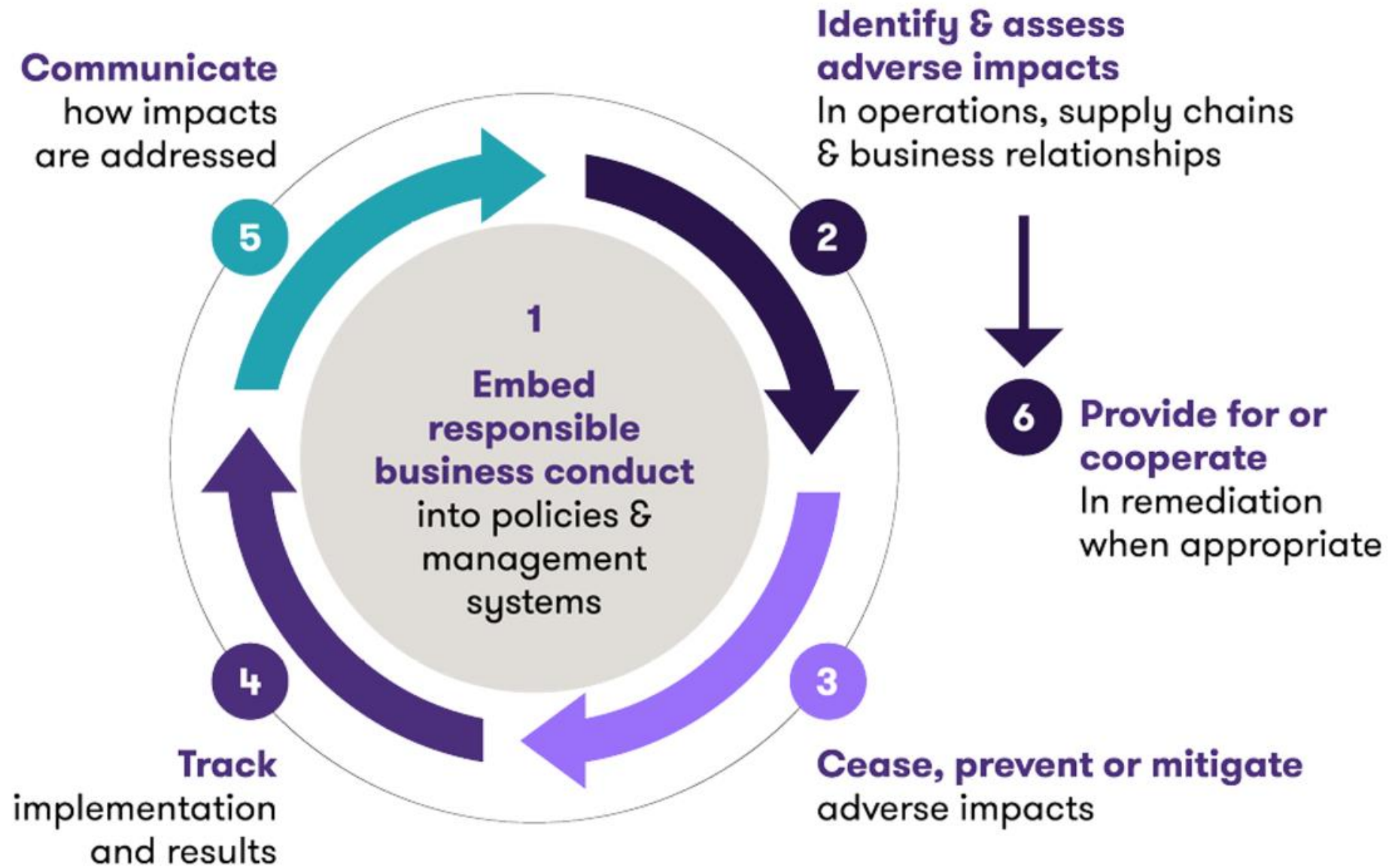


(iii) the plans of the group, **including implementing actions and related financial and investment plans, to ensure that its business model and strategy are compatible with the transition to a sustainable economy and with the limiting of global warming to 1.5 °C in line with the Paris Agreement and the objective of achieving climate neutrality by 2050 as established in Regulation (EU) 2021/1119 (European Climate Law) and where relevant, the exposure of the group to coal, oil and gas-related activities;**

(e) a description of:

(i) the due diligence process implemented **by the group** with regard to sustainability matters, **and where applicable in line with EU requirements on undertakings to conduct a due diligence process;**

(iii) any actions taken **by the group**, and the result of such actions, to prevent, mitigate, **remediate or bring an end to** actual or potential adverse impacts;



Latin American perspective

Elise Calixto Hale Crystal, FAS Advogados in cooperation with CMS



- Approximately 20% of all oil reserves.
- 25% of strategic metals.
- More than 30% of the world's primary forests are found in the region.
- Natural resources represent about 50.7% of the region's total exports.

Trend 1

Expanding Corporate Accountability



Actual environmental damage
and remediation duties



Lack or insufficiency of
sustainable policies to prevent
such damage



Increased pressure from
regulatory bodies and
stakeholders to adopt proactive
environmental governance

Trend 2

Increased Disclosure Obligations



Rise in mandatory sustainability disclosures



Key litigation risks

Inaccuracies or misrepresentations in sustainability reports.
Failures in meeting disclosure requirements, driving non-compliance-related lawsuits.



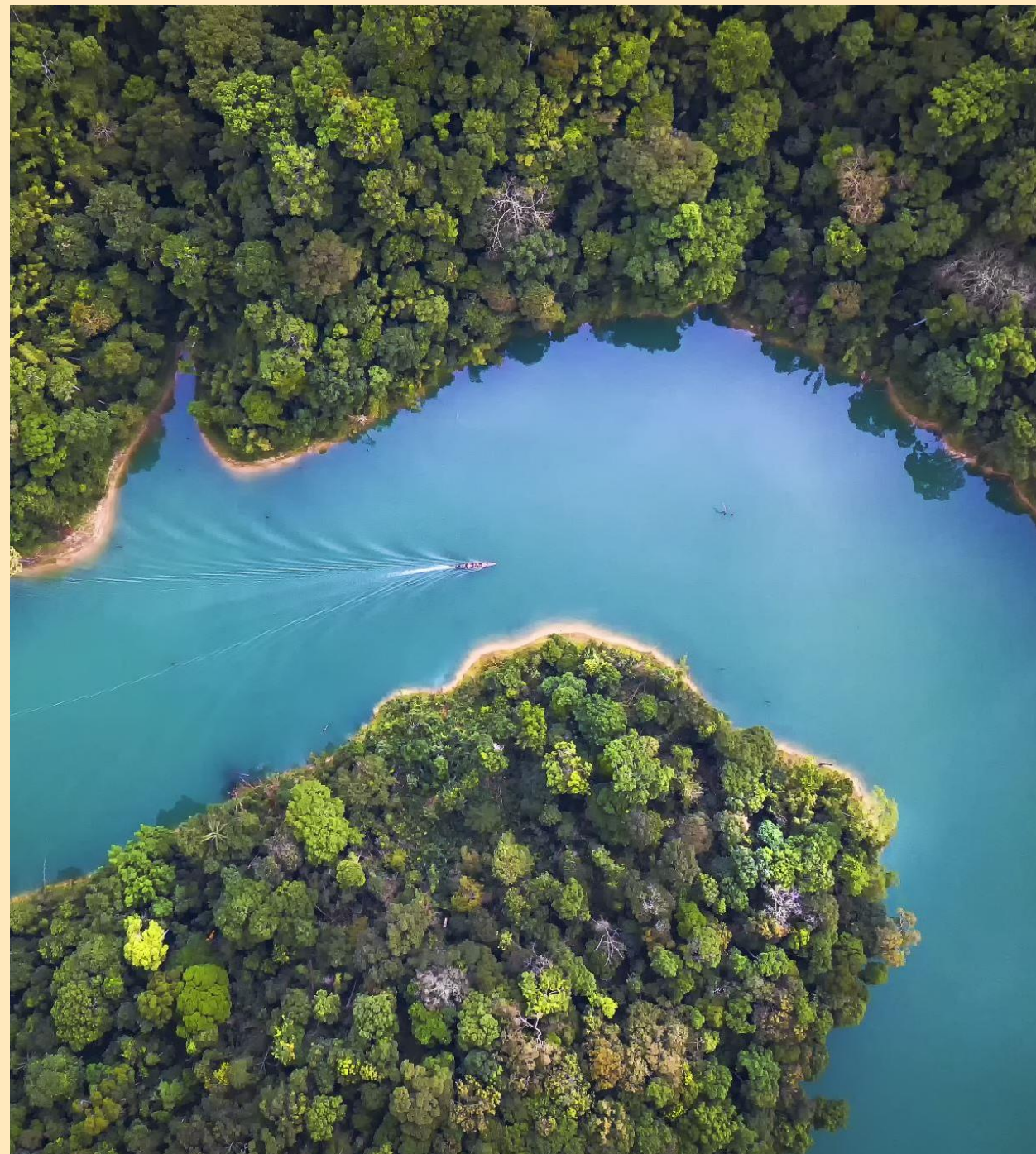
Action: ensure robust systems for monitoring and reporting Sustainability metrics.

‘Litigation Against Public Authorities

Brazil’s Federal Government being taken to court for halting the Amazon Fund and the Climate Fund.

Public civil action - Amazon Studies Institute (Instituto de Estudos Amazônicos) x Federal Government:

- Enforce compliance with GHG emission reduction and deforestation reduction targets outlined in the National Policy on Climate Change.
- Alternatively, the Institute requests the Government to carry out forest restoration of all illegally deforested areas exceeding annual legal limits within one year.



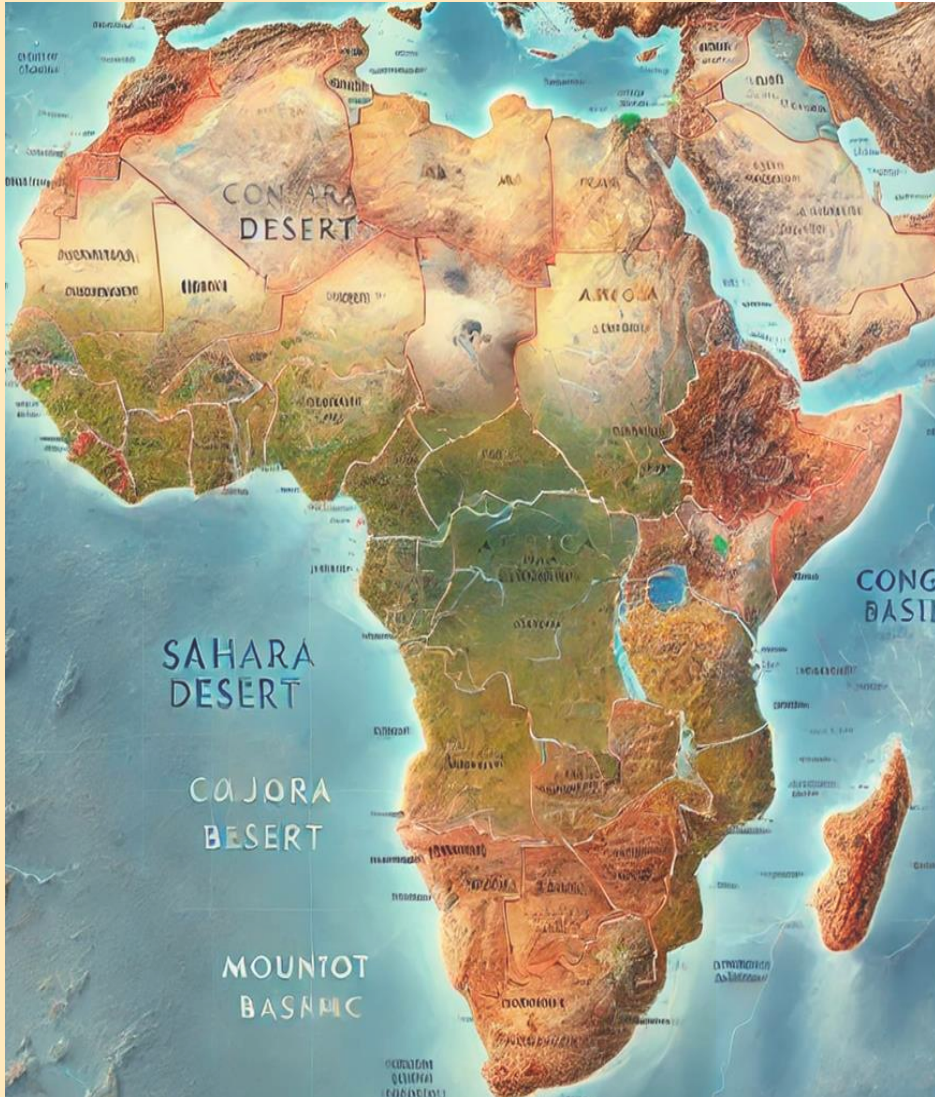


Impact of the CSDDD on Latin American Countries

- Mandatory Due Diligence Obligations
- Rise in biodiversity litigation
- Extraterritorial reach
- Promotion of sustainable practices
- Challenges for small producers

African perspective

Brian Gatuguti, CMS Kenya



Africa is home to 20% of the world's land area and contains approximately 25% of the Earth's biodiversity.

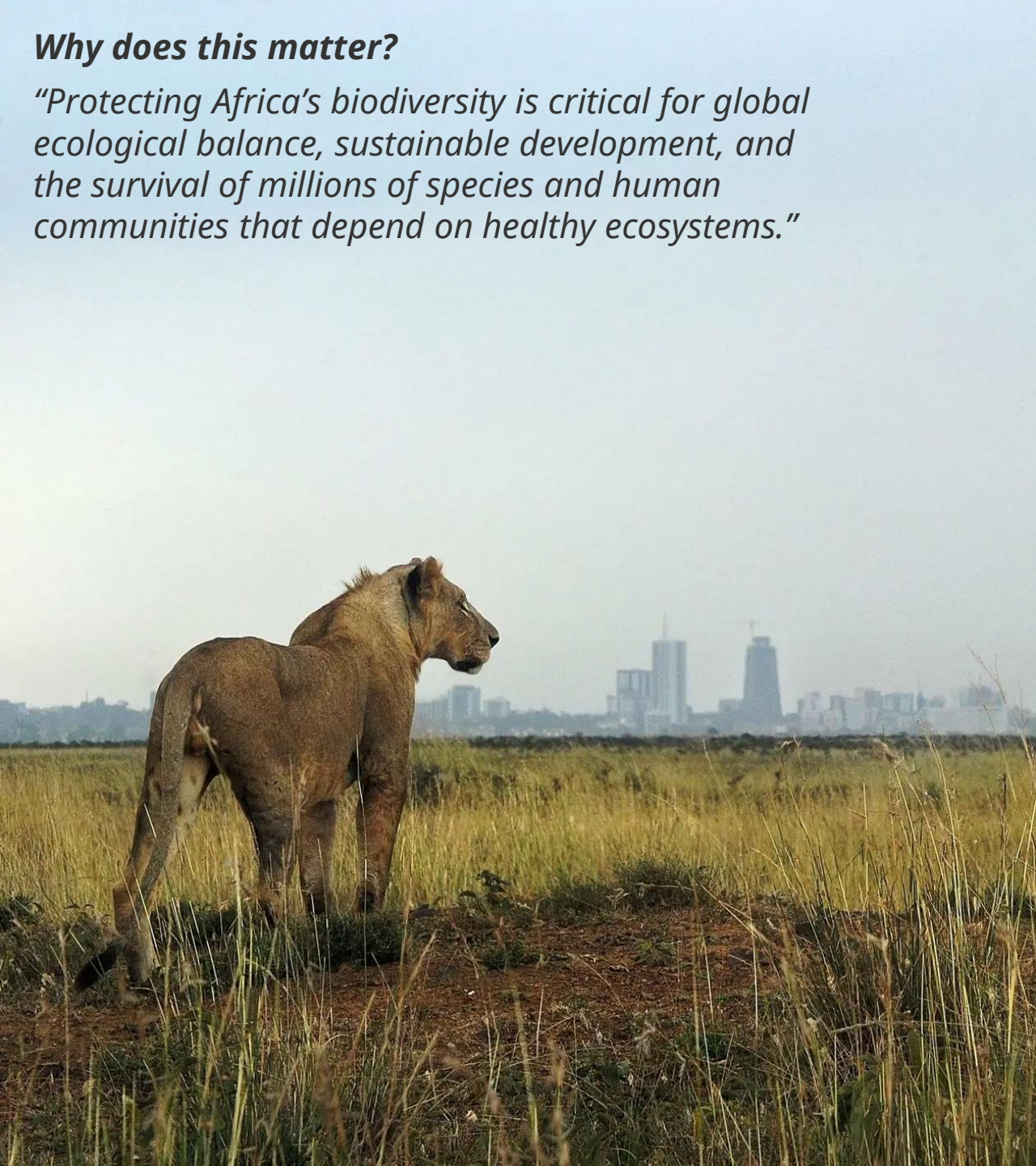
Africa includes several megadiverse countries like South Africa and the Democratic Republic of Congo (DRC), which host a significant portion of the world's plant and animal species.

Africa's ecosystems range from savannas (e.g., the Serengeti), rainforests (e.g., Congo Basin), and deserts (e.g., Sahara), to unique coastal and marine biodiversity hotspots like coral reefs in the Indian Ocean.

Africa hosts over 50,000 known plant species, of which 17% are endemic to the continent. There are over 1,100 mammal species and 2,600 bird species in Africa, with a high degree of endemism.

Why does this matter?

"Protecting Africa's biodiversity is critical for global ecological balance, sustainable development, and the survival of millions of species and human communities that depend on healthy ecosystems."



Key Drivers of Biodiversity Loss in Africa

Habitat destruction

Through: Deforestation, Urbanisation, Land Use Change

Climate change

Through:

- Rising Temperatures as many African species are highly sensitive to temperature changes.
- Shifting Ecosystems as temperatures increase, species are forced to move to cooler areas, disrupting ecosystems and causing imbalances in food chains.
- Ocean Acidification and Coral Bleaching: Climate change leads to ocean warming, impacting coral reefs, which are critical habitats for many species.

Overexploitation

Due to the unsustainable use of natural resources in activities such as poaching and illegal wildlife trade, overfishing and agricultural practices like overgrazing and unsustainable farming methods.

Africa's Biodiversity: A Cornerstone for Development

African Union Biodiversity Strategy and Action Plan (ABSAP)

Africa's biodiversity is integral to its socio-economic stability.

The ABSAP 2023–2030 outlines five strategic pillars:

1. Governance and Practice: Strengthen legal frameworks for biodiversity protection.

2. Sustainable Use and Benefit Sharing: Promote equitable sharing of genetic resource benefits.

3. Sectoral Integration: Mainstream biodiversity in agriculture, infrastructure, and urban development.

4. Innovative Financing: Close funding gaps through mechanisms like the Global Biodiversity Fund.

5. Capacity and Equity: Build institutional capacities while ensuring inclusivity and gender equity.



Linking Biodiversity and Human Rights

Rights-Based Approaches to Biodiversity Conservation

Biodiversity conservation increasingly intersects with human rights. Recognizing biodiversity as essential to life, health, and culture aligns conservation with:

- **Environmental Rights:** Enshrined in instruments like the Aarhus Convention and Kenya's Constitution (Article 42).
- **Indigenous Rights:** Protection of traditional knowledge and equitable participation in decision-making processes

Case Study:

Kenya's Framework for Biodiversity Governance

Kenya has integrated environmental democracy into biodiversity conservation, fostering:

- **Public Participation:** Constitutional guarantees ensure transparency in environmental decision-making.
- **Judicial Engagement:** Courts have upheld rights to information, public participation, and precautionary measures in biodiversity governance



Biodiversity Litigation: A Rights Turn

Global Developments

Litigation has become a vital tool for enforcing biodiversity commitments:

- **Rise of Rights-Based Biodiversity (RBB) Litigation:** Cases increasingly argue that biodiversity loss violates fundamental human rights
- **Lessons from Climate Litigation:** The rights turn in climate litigation (e.g., Urgenda case) provides a blueprint for biodiversity cases

Case Study:

Mwangi & Others v. Attorney General (Kenya, 2024)

- **Issue:** Challenges to lifting a ban on GMO crops, citing public health, ecological sustainability, and rights violations.
- **Court's Findings:** Upheld Kenya's regulatory frameworks, emphasizing the precautionary principle and the need for transparency and public participation

Challenges to Biodiversity Conservation and Litigation

Global Challenges

- **Inadequate Enforcement Mechanisms:** International agreements like the CBD lack strong compliance tools.
- **Corporate Influence:** Industrial agriculture, fossil fuels, and deforestation continue to drive biodiversity loss.

Regional Challenges

- **Economic Pressures:** Development projects often prioritize short-term economic gains over long-term sustainability.
- **Public Awareness:** Limited understanding of biodiversity's value hampers grassroots advocacy

Opportunities for Action

Governance and Legal Frameworks

- Strengthen national and regional frameworks, ensuring alignment with global commitments such as the Kunming-Montreal Global Biodiversity Framework (GBF).
- Foster Environmental Democracy by enhancing transparency, public participation, and accountability mechanisms.

Biodiversity Financing

Mobilize domestic and international resources through innovative mechanisms such as biodiversity offsets and nature-based solutions

Leveraging Litigation

- Use courts to enforce compliance with environmental laws and international treaties.
- Expand RBB litigation, incorporating lessons from HRCC litigation to build strong legal doctrines and precedents



Conclusion

Biodiversity conservation is at a critical juncture, with immense opportunities to integrate rights-based approaches, innovative financing, and strong legal frameworks. The convergence of global frameworks like the GBF and regional strategies such as ABSAP underscores the need for collaborative, multi-stakeholder efforts to protect biodiversity and ensure ecological sustainability.

Developments in Southeast Asia

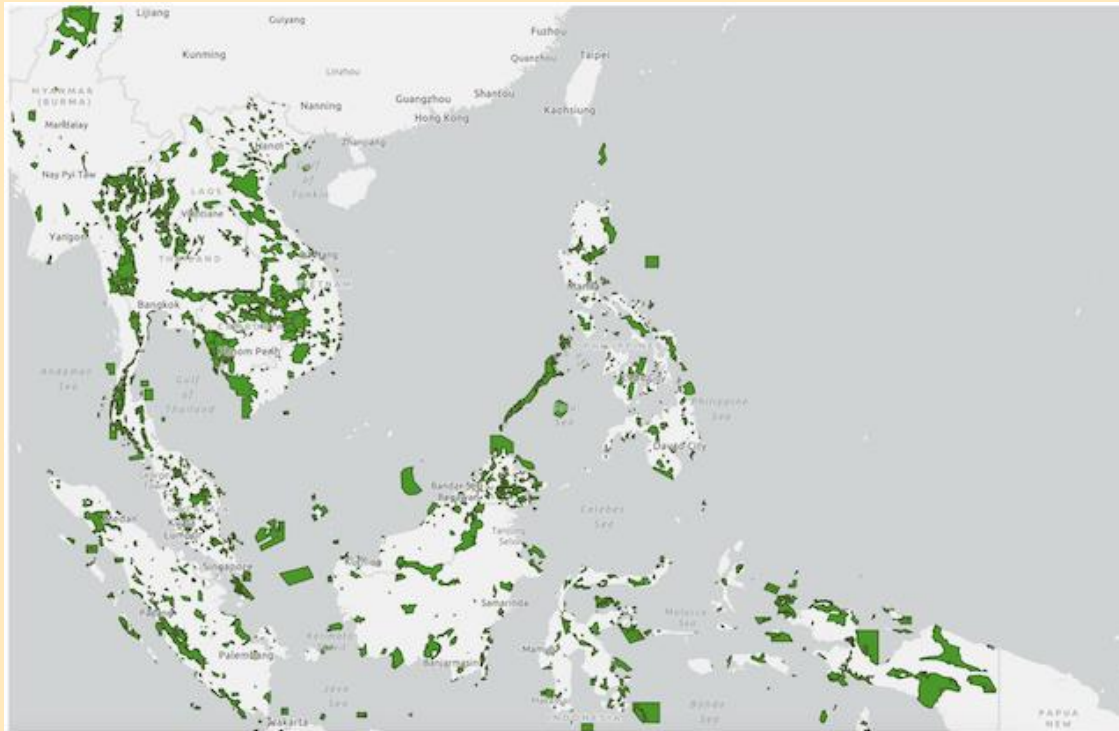
Asya Jamaludin, CMS Singapore

Developments in Asia

AGENDA

- Southeast Asia's Biodiversity - Importance
- Focus on Southeast Asia – Malaysia, Indonesia and Singapore
 - Challenges
 - Legal Framework & Trends
- Concluding Remarks

Protected areas of Southeast Asia



Source: ASEAN Centre for Biodiversity & ASEAN Clearing House Mechanism

Southeast Asia – small land mass. Occupies 3% of planet's total land area

Yet houses:

- 1/5th of the planet's plant and animal species,
- 1/3rd of coastal and marine habitats,
- 1/3rd of the world's coral reef species,
- more than half of tropical peatlands, and
- almost half of the world's mangrove areas

**Three of the world's 17 'megadiverse' countries are in Southeast Asia
– Indonesia, Malaysia, and the Philippines**

Indo-Burma Biodiversity Hotspot



Challenges to Southeast Asia's Biodiversity

More than 660 million people depend on the region's biodiversity for their livelihoods and welfare

Population projected to grow by another 100 million people by 2030

Rapid development and urbanization

Loss of 80,000 sq km of forest cover annually

Unsustainable industrial and agricultural practices

Only **six per cent** of Southeast Asia is under conservation

Malaysia

One of 17 Megadiverse countries

3 major coastal ecosystems – coral reefs, mangroves and seagrass bread

8840km of total coastline

879 islands

4,006 km² of coral reefs

hosts more than 77% of the world's known coral species

Group	Estimated Species
Mammals	306
Birds	742
Reptiles	567
Amphibians	242
Marine Fish	1,619
Freshwater Fish	449
Invertebrates	150,000
Vascular Plants	15,000
Fungi	>4,000
Moss	522
Hard Coral	612



Malaysia – Challenges to Biodiversity

Socio-economic
development – land-use
change

Rapid urbanization and the
accompanying increase
road networks

- Increase in urban population: 2000 - 62%; 2017 – 75%; 2030 – 80%
- Recorded roadkill: 2012-2017 – 2,444 wildlife

Declining coral reef health

Unsustainable wildlife
management

Deforestation

Illegal wildlife trade

Malaysia – Legal Framework & Trends

Local Environmental Laws

- Environmental Quality Act - principal legislation on environmental protection. Prohibits pollution of atmosphere, noise, soil, inland waters and open burning
- Company and company directors criminally liable for environmental pollution

International Treaties

- Signatory to UN Convention on Biological Diversity – ratified 1994
- The National Policy on Biological Diversity 2016-2025 – replaced first National Policy on Biological Diversity 1998
 - Consistently maintained more than 50% of its landmass as forest: voluntary pledge at Earth Summit in 1992
 - In 2019, 18.14 million ha (54.9% of the total land area) under forest cover

State and Federal Legal System

- Environmental Courts established in 2012 (over 100 courts)
- Prosecution of environmental offences e.g. pollution, illegal logging, deforestation & wildlife poaching; Civil claims for bodily injury or damage to property caused by actions that harm/damage the environment; and Interference with a person's quiet enjoyment of his land or disturbance cause noise, air or water pollution
- In 2022, disposed over 800 cases

Strong NGO activity

- Rights of Orang Asli groups
- Environmental groups

Governance

- ESG Reporting
- BNM's Climate Change and Principal based Taxonomy 2021

Indonesia

One of 17
Megadiverse
countries

> 17,500 islands

3.2 million km² of
sea (62% of the total
area),

about 2 million km²
of land area (38% of
the total area),

a shoreline length of
99,000 km

spread out along and
around the Equator

located between two
continents (Asia and
Australia) and two
oceans (Pacific and
Indian)

90 million hectares of
forest cover



Indonesia – Challenges to Biodiversity

Rapid population growth - Over 270 million inhabitants –

10% of population living below poverty line –heavily reliant on environment for food and income

Increased life expectancy

Irresponsible utilisation of natural resources and biodiversity

Deforestation & Forest Fires

Rising Sea Levels

Declining fisheries

Jakarta – poor air quality

Indonesia – Legal Framework & Trends

Treaties

- UNFCCC, Kyoto Protocol, Paris Agreement
- UN Convention on Biological Diversity

Supreme and Constitutional Court system

- Law No. 32 of 2009 on Environmental Protection and Management
- Law No. 41 of 1999 on Forestry
- Law No. 4 the Year 2009 (Mineral and Coal Mining Act),
- Law No.18 the Year 2013 (Avoidance of Deforestation and Forest Degradation Act),
- Law No.39 the Year 2014 (Farming Law),

Increased Awareness

- A majority of cases in court system relate to forest fires and forestry cases (illegal logging)
- 2022 - Complaints To The National Commission On Human Rights Of The Republic Of Indonesia



Singapore

City-state with a land area of about 718.3 km² located within the Sundaland biodiversity hotspot

One main island and 46 smaller offshore islands

one of the most densely populated countries in the world - population of 5.47 million and a population density of 7,615 persons per km²



Singapore – Challenges to biodiversity

Limited available land area

Rapid urbanisation and
development – human-
wildlife conflict

Need to maximise water
catchment area (loss or
changes in habitats due to
damming up of rivers to form
reservoirs or the
canalisation of streams and
waterways)

Shipping - one of the world's
busiest ports with the
maritime industry
contributing 7% of
Singapore's GDP

Invasive alien species/non-
native species

Singapore – Legal Framework & Trends

Strong Environmental Laws

- Environmental Protection and Management Act - primary legislation dealing with the issue of environmental pollution control in the areas of air, water, and noise pollution
- Environmental Public Health Act - primary legislation for the management of waste
- Transboundary Haze Pollution Act - Singapore's responses to the near-annual haze in Southeast Asia

Treaties

- UN Convention on Biological Diversity since 1996

Government Responses

- Environmental Crimes Money Laundering National Risk Assessment



Conclusion

Strong Government commitment

Increased public awareness and participation in legal process

Need to strengthen legal frameworks and enhancing collaboration between governments, NGOs, and communities.

Enforcement remains weak

Key take-aways

- Global rise of biodiversity claims & litigation (due to rise of legislation, proof and case law)
- Next to public enforcement also private enforcement
- For companies it is advisable to have climate transition plan INCLUDING biodiversity
- Biodiversity claims mainly include new project development (administrative/private)
- Tendency to more pro-active approach on restoration-based claims

Thank You!