Biodiversity Litigation:

Review of Trends and Challenges

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In the chapters of this book, we have learned a great deal about biodiversity litigation in all its forms. We have seen cases arising in all continents except Antarctica. We have seen jurisdictions where International Biodiversity Law (IBL) significantly shapes litigation and jurisdictions where the very existence of IBL seems irrelevant in resolving biodiversity disputes. We have seen jurisprudential practices in different legal traditions, common law, or civil law. We have seen disputes in federal states and in unitary ones. Yet, it is fair to say that we still only know a fraction of what the topic entails. This synthesis gathers the key insights from our case-studies and aims to answer the questions we raised in the introduction to this volume.[1]

The results of this investigation will be presented here in three steps. First, we will discuss what we learned about the nature of biodiversity litigation, in other words what it covers and where it takes place. We will then analyze the different forms of influence international biodiversity law has on this litigation. After having done so, we will present the different trends of biodiversity litigation we have identified through the case studies and in the literature. To take a step back, we will discuss the concept of biodiversity litigation in a broader context of environmental litigation and climate change litigation. As a conclusion, we will briefly summarize our main findings and the leads for further research.

Before we start this synthesis, a few preliminary comments are in order.

First, given the source material, this synthesis cannot claim to give an exhaustive account of biodiversity litigation. Our case studies should be seen as a first step in a broader investigation that will incorporate many more jurisdictions. As it stands, what this synthesis will provide are trends that need further confirmation with additional studies. Nevertheless, we believe that this first step in a broader understanding of biodiversity litigation will be a fruitful one, and one that will gain from future research.

Second, the source material for this synthesis is predominantly from the Global North. This may distort the findings and the reader should be aware of this. Future research, with a stronger focus on the Global South will allow us to confirm or infirm the findings of the synthesis.

1. The Characteristics of Biodiversity Litigation

Through the analysis of our contributors, some central features of biodiversity litigation have emerged. We will discuss them along the following lines. We will first address the legal nature of biodiversity litigation (2.1) before diving into the many themes covered by biodiversity litigation (2.2). The third paragraph (2.3) will highlight the scope of biodiversity litigation, i.e. its national, international or transnational reach. Overall, this section will illustrate that while biodiversity litigation is inherently plural it does seem to follow certain patterns.

1.1. The Different Legal Natures of Biodiversity Litigation

[1] See Introduction.

In the chapters of this book, we have seen cases involving states, public institutions, private organizations, and individuals. However, because notions like "public", "private" may vary depending on the legal system of States,[2] it is difficult to use them as umbrella terms here. Rather, we will categorize cases based on their purpose: remedial or punitive. Within each of these categories we will highlight the configuration of litigants to understand the dynamic of biodiversity litigation.

1.1.1. Remedial biodiversity litigation

Remedial biodiversity litigation is understood here as litigation that aims at correcting breaches to biodiversity law. The actual remedies, either preventative or reparative, that can be issued in those cases will be addressed in section 3.3 of this synthesis. We have identified three possible configurations: public v. public, which mostly take place at the international level; private v. public where private actors act as applicants against public institutions; and private v. private.

1.1.1.1. Strictly public litigation

By strictly public, we refer to the cases where only public actors are involved. These cases are commonly found in federal states and at the international level. Although, possible in federal states,[3] the case studies for this volume have not highlighted these types of biodiversity related disputes. In Australia, Brazil, Canada, the UK or the US, biodiversity litigation has always involved private and public actors.

Strictly public biodiversity litigation is a logical feature of international disputes. The chapter on international biodiversity litigation has highlighted that biodiversity related disputes, although rare, are nevertheless a distinct trend in international environmental litigation.[4] The past decade has even seen a rise of such disputes, with well-known examples such as the *Whaling* case[5] or the *Pulp Mill* case[6] before the International Court of Justice. The future may hold more interstate cases on biodiversity as the crisis worsens.

Quantitatively, the most flagrant illustration of strictly public biodiversity litigation is at the European Union (EU) level. In the chapter on EU biodiversity, we have seen a wealth of cases, with often innovative approaches concerning scientific considerations and the precautionary approach.[7] Most of these cases were initiated by the European Commission against member States to implement the numerous rules adopted by the EU institutions.

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[2] Elisabeth Zoller, *Introduction to Public Law: A Comparative Study* (Martinus Nijhoff 2008); Mark Elliott, Jason NE Varuhas, Shona Wilson Stark (eds), *The Unity of Public Law Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018).

[3] The US Supreme Court for instance, has jurisdiction over interstate disputes in accordance with Article III Section 2 of the US Constitution.

[4] See Chapter on International Biodiversity Litigation.

[5] Whaling in the Antarctic *(Australia v Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226.

[6] Pulp Mills on the River Uruguay (*Argentina v Uruguay*) (Judgment) [2010] ICJ Rep 14.

[7] See Chapter on EU.

1.1.1.2. Private actors against public actors

In this sub-section, we refer to disputes where States' actions regarding biodiversity are contested by private actors (individuals or NGOs) on several grounds. The first, and most common grounds, is when the action are contested because of their alleged illegality with regards to biodiversity related laws. Such examples are abundant in our case studies, each chapter containing at least one example of a case where the State or its institutions have been sanctioned[8] for their actions that were deemed illegal.

For instance, in South Africa, the Ministry of Agriculture, Forestry and Fisheries saw its decision on total allowable catch declared illegal as it was not based on the best scientific evidence available.[9] In France, hunting permits were cancelled as they were non-compliant with the relevant laws.[10] In Australia, the Bulga case saw an association challenge the decision of the Minister for Planning and Infrastructure regarding a large mining project.[11] Similarly, at the international level, the African Network for Animal Welfare sought to suspend a road project in Tanzania before the East African Court of Justice[12] as it breached the 1999 Treaty for the Establishment of the East African Community.[13]

The other types of action of private actors against States or public institutions are rights based. These actions can fall into two categories: the first one concerning the violation of human rights contained in national constitutions or international instruments, the second concerning the violation of rights and obligations contained in contracts.

The first category contains numerous examples of cases, both national and international, where plaintiffs seek to establish the responsibility of States for having breached human rights.[14] These types of disputes were less frequent in our case studies, but their impacts were resonant. [15] For

[8] Here we refer to the notion of sanction in a loose sense to convey the idea that a court intervened to halt the activities of public institutions or to impose reparations.
[9] See Chapter on South Africa.
[10] See Chapter on France.
[11] See Chapter on Australia.
[12] *African Network for Animal Welfare (ANAW) v The Attorney General of the United Republic of Tanzania*, East African Court of Justice Ref n.09 of 2010, June 20, 2014. For an analysis of this case, see James Thuo Gathii, 'Saving the Serengenti: Africa's New International Judicial Environmentalism' (2014) 16 Chicago Journal of International Law 386.
[13] Treaty for the Establishment of the East African Community, signed 30 November 1999, entered in force 7 July 2000, 2144 UNTS 255.
[14] We discuss this trend in more details in section 3.
[15] See Chapter on International Biodiversity Litigation, particularly Inter-American Court of Human Rights (IACtHR), Case of the *Saramaka People v Suriname*, (Judgment) (Interpretation of the Judgment on Preliminary Objections, Merits, Reparations and Costs) 12 August 2008. The link between human rights and environment is the topic of numerous publications. See, *inter alia*, Donald K Anton and Dinah L Shelton (eds), *Environmental Protection and Human Rights* (CUP 2012); John H Knox and Ramin Pejan (eds), *The Human Right to a Healthy Environment* (CUP 2018).

instance, rights-based disputes are particularly relevant in cases involving indigenous peoples and local communities (IPLC).[16]

The second category manifests itself in investment related disputes. For instance, this covers cases where actions of States in favour of conservation or sustainable use may hinder the contractual rights of investors. In such configurations, the rights are not used as tool for environmental protection but rather as a means to hinder environmental policies.[17]

1.1.1.3. Disputes between private actors

Several chapters have highlighted cases where disputes took place between private actors, often NGOs against larger corporations the context of infrastructure projects. The Green Peafowl Case, in China, showcases a dispute between a local NGO and a larger corporation, the China Hydropower Engineering Consulting Group.[18] In Brazil, a liability case involved a company for its use of endangered species in its advertising.[19]

However, it seems that, in our case-studies, strictly private cases are less frequent than the ones involving at least one public actor. Also, though private in nature, these disputes could be described as vertical as the contested actions are often from larger corporations. In contrast, horizontal disputes, between individuals for instance, are not common in biodiversity litigation. Nevertheless, it seems that civil biodiversity litigation, as an additional means of protection of the environment, could gain traction in the upcoming years and is an emerging legal phenomenon that warrants more studies.[20]

1.1.2 Punitive biodiversity litigation

Punitive biodiversity litigation refers to cases where a breach of biodiversity law is sanctioned through court. The purpose of such litigation is to punish a behaviour rather than re-establishing legality. It is therefore the realm of criminal law where the state or its institutions will act as prosecutor against other actors, mostly private.

[16] See Chapter on Canada.
[17] For instance, *David Aven and others v Republic of Costa Rica* ICSID Case No UNCT/15/3, (Award) (18 September 2018); as a counter example, see *Peter Allard v Barbado*s, PCA Case No. 2012-06, Final Award (27 June 2016). On this topic, see Mariel Dimsey, 'Arbitration and Natural resource Protection' in Shawkat Alam and others (eds) International Natural Resources Law, Investment and Sustainability (Routledge 2018) 132; Antony Crockett, 'The Integration Principle in ICSID Awards' in Marie-Claire Cordonier Segger, H.E. Judge C G Weeramantry (eds), *Sustainable Development Principles in the Decisions of International Courts and Tribunals* (Routledge 2017) 539. On the potential of investor-state disputes as a tool for sustainable development, see Godwin Tan, Andrea Chong, 'The Future of Environmental Counterclaims in ICSID Arbitration: Challenges, Treaties and Interpretation' (2020) 9 Cambridge Journal of International Law 176.
[18] See Chapter on China.
[19] See Chapter on Brazil.
[20] See Chapters on France and China.

Criminal biodiversity litigation is closely linked to the protection of species. As such, poaching and illegal logging is the main type of criminal litigation we witness.[21] Pollution of protected areas is also a recurring theme. In the UK chapter, we saw an example of criminal fines for acts of illegal sewage discharges in Southeast England.[22] In the South Africa chapter, we saw cases on Rhino poaching.[23] Criminal biodiversity litigation, though not systematically addressed in the chapters of this volume, appears to be the most common form of litigation across all jurisdictions as criminal laws on wildlife are quite common among States, be they developed, developing or least developed.[24]

To sum up on the legal nature of biodiversity litigation, it appears that there is no fundamental difference with environmental litigation. The same patterns repeat, and unsurprisingly so since biodiversity litigation is a subset of environmental litigation.[25] Also, although not dealt in our case studies, some jurisdictions leave room for legal pluralism in biodiversity litigation. This is the case for instance in Madagascar where custom based dispute settlement-mechanisms exist and may involve biodiversity related matters.[26] Further research in other States may shed light on the place of legal pluralism in biodiversity litigation.

1.2. The Themes of Biodiversity Litigation

Given the encompassing nature of biodiversity, biodiversity litigation is unsurprisingly heterogeneous. However, we can discern some trends in this vast ensemble. Firstly, it appears that protected species and areas are common topics in all jurisdictions when it comes to biodiversity litigation. Secondly, the theme of genetic resources and access and benefit sharing (ABS) is also present, but its existence is highly state dependent. The theme is abundantly litigated in some states and completely absent in others. Thirdly, numerous cases sit at the outer limit of biodiversity litigation, thus challenging the conceptualization of this litigation trend.

[21] For a recent overview of wildlife crimes and their impact, see United Nation Office on Drugs and Crime, *World Wildlife Crime Report* (UNODC 2020). See also, Giovanni. Broussard, 'Building an Effective Criminal Justice Response to Wildlife Trafficking: Experiences from the ASEAN Region' (2017) 26 (2) Review of European Comparative & International Environmental Law 118-127; Melanie Wellsmith, 'Wildlife Crime: The Problems of Enforcement' (2011) 17 European Journal of Criminal Policy and Research 125; Margit Hellwig-Bötte, *Wildlife Crime in Africa - A Global Challenge: Successful Countermeasures Must Involve Local Populations* (Stiftung Wissenschaft und Politik 2014).

[22] See Chapter on UK.

[23] See Chapter on South Africa.

[24] As a tool to combat wildlife crimes, these laws are monitored at the international and guidelines are often produced to enhance them. See United Nation Office on Drugs and Crime, *Guide on Drafting Legislation to Combat Wildlife Crime* (UNODC 2018).

[25] We discuss the conceptual implications of biodiversity litigation in section 4.

[26] On this topic, see Ianjatiana Randrianandrasana, *Le droit de la protection de la nature à Madagascar. Entre centralisme et consensualisme* (L'Harmattan, 2018) 331. We wish to thank Randianina Radilofe, who participated in the preparatory workshops for this project, for her insights on this topic.

It is worth noting that even though aquatic biodiversity litigation is observable in many jurisdictions[27] and at the international level,[28] most contributors in this volume have focused mainly on terrestrial biodiversity litigation. This may indicate an unconscious bias toward a more terrestrial understanding of biodiversity amongst lawyers. This warrants more research and case studies to determine whether this is only a bias in our case studies or an actual trend in biodiversity litigation.

1.2.1. Protecting species and ecosystems: a common thread in all jurisdictions

All the chapters in this volume have addressed the topic of endangered species or protected areas. This is evidently because most States have older laws on these matters. In France or in the US, such law can be found in the first half of the 20th century.[29] European countries, through colonialism, have exported their legal system for environmental protection in other states.[30] As recalled in the case study on India, many rules pertaining to the management of forests are linked to the regulations imposed by the UK as a former colonial power.[31]

In other words, biodiversity litigation often comprises cases on species and areas because these themes are well established elements of environmental law in many countries. therefore, litigation on such aspects has had ample time to develop over the decades. However, as we will see in the next sections of this synthesis, the way in which such cases are dealt with has evolved over time.

A common thread in biodiversity litigation, as made apparent by most case studies, are cases linked to large infrastructure projects, particularly roads,[32] energy infrastructures[33] and mines.[34] These are illustrations of the inherent friction that human development brings with regards to habitats and species.

In contrast, the question of genetic resources and of access and benefit sharing is a much recent trend in biodiversity law. Accordingly, its presence in biodiversity litigation is not as widespread.

1.2.2. Genetic resources and access and benefit sharing: a State dependent trend

[27] See Chapters on South Africa, Australia, Brazil.
[28] See Chapter on International Biodiversity Litigation.
[29] See Chapters on France and the US (Lacey Act).
[30] Richard Grove, *Green Imperialism. Colonial Expansion, Tropical Island Edens and the Origins of Environmentalism*, 1600–1860 (OUP 1996); Bhupinder S Chimni, 'International Institutions Today: An Imperial Global State in the Making' (2004) 15 European Journal International Law 1; M Rafiqul Islam, 'History of the North-South Divide in International Law: Colonial Discourses, Sovereignty, and Self-Determination' in Shawkat Alam, Sumudu Atapattu, Carmen G Gonzalez and others (eds) *International Environmental Law and the Global South* (CUP 2015) 23-49. On the African continent, national laws were influenced by international agreements adopted by colonial powers. For instance, the Convention on the Preservation of Wild Animals, Birds and Fish in Africa, 19 May 1900, and the Convention Relative to the Preservation of Fauna and Flora in their Natural State, 8 November 1933.
[31] See Chapter on India.
[32] See Chapter on France.
[33] See Chapter on China.
[34] See Chapter on Australia.

Disputes over genetic resources and access and benefit sharing are relatively less common than ones on protected species and protected areas.[35] As we have seen in the chapters, these disputes can concern the use of GMOs and their potential impact on human health and biodiversity and the benefits drawn from the exploitation of biodiversity.

On this topic, it appears that the presence of ABS related disputes is a logical feature of countries where the biodiversity is exploited for commercial purposes.[36] This is the case in India where pharmaceutical companies were compelled by the Uttarakhand High Court to share the benefits of ayurvedic medicine with local communities who initially had this knowledge.[37] In Brazil, the question of access to genetic resources was dealt with from a procedural point of view, with a least one case where the court called for a facilitation of such procedures.[38] Interestingly, in this volume, countries with operators that may exploit biodiversity abroad do not showcase ABS related disputes.[39]

1.2.3. Other themes: the outer limits of biodiversity litigation

With a broad definition of biodiversity litigation,[40] most contributors addressed similar issues. But some explored the limits of what could be considered as biodiversity litigation. For instance, some cases on animal welfare were mentioned in the chapters. (e.g., Brazil, South Africa). Animal welfare and animal rights are gaining traction both politically and legally, with more and more laws, cases, and articles appearing every day.[41]

Other approaches can be found in the case studies. The Brazilian case on the illegal use of wildlife images in advertising[42] is not what could be spontaneously described as biodiversity litigation in comparison to the many examples on the impact of infrastructures, but nevertheless it shows that the topic can be far reaching in unsuspected ways.

[35] On the broader topic of access and benefit sharing, see Charles Lawson, Kamalesh Adhikari (eds), *Biodiversity, Genetic Resources and Intellectual Property: Developments in Access and Benefit Sharing* (Routledge 2018); Pia Marchegiani, Elisa Morgera, Louisa Parks, 'Indigenous Peoples' Rights to Natural Resources in Argentina: The Challenges of Impact Assessment, Consent and Fair and Equitable Benefit-sharing in Cases of Lithium Mining' (2019) 24 International Journal of Human Rights 224-240.
[36] Daniel Robinson, *Confronting Biopiracy: Challenges, Cases and International Debates* (Routledge 2010).
[37] *Divya Pharmacy v Union of India (Writ Petition)* (M/S) No. 3437 of 2016. More generally, see Chapter on India.
[38] See Chapter on Brazil, AI 559568 (TRF3, 21 October 2015) and SLS 1438 (STJ, 9 May 2011).
[39] A case was mentioned in the Chapter on France; it was however dealt at the EU level in front of the European Patent Office.
[40] See Introduction, "Any legal dispute at the national, regional or international level that concerns conservation of sustainable use of and access and benefit-sharing to genetic resources, species, ecosystems and their relations."
[41] On February the 4th 2022, the Constitutional Court of Ecuador admitted that a writ of habeas corpus could have been possible for a Wooly Monkey. However, the monkey being deceased, the writ was not possible. On this case, see Andreas Gutman, 'Monkeys in their Own Right The Estrellita Judgement of the Ecuadorian Constitutional Court (Verfassungsblog, 22 February 2022).
[42] REsp 1549459 (STJ, 9 May 2017).

The examples of tax related cases in the US also show that biodiversity litigation can also take on an "immaterial" form, where cases do not directly discuss an impact, or expected impact, on elements of biodiversity.[43]

1.3 The Scope of Biodiversity Litigation: Cases that Stay within their National Borders

Even though biodiversity related disputes may have international implications – with cases concerning migratory species for instance[44] - it appeared that biodiversity litigation was mainly conceptualized as a local litigation. The implications of these cases were often considered within a restricted geographical scope. This of course does not apply to inter-state international disputes, which, by definition, concern cross border ecosystems or high sea biodiversity.[45]

Though not mentioned in our case studies, some biodiversity disputes can have legal impact beyond their national borders. This was the case for the Gibson company, which was found responsible for participating in illegal logging in Madagascar through purchase and importation. The company avoided trial by entering into a criminal enforcement agreement with the US department of justice.[46] In France, a civil case was filed in 2021 against the Casino group, specialized in retail, for its contribution to deforestation in Latin America.[47] In Sweden, a court ruled that a company importing teak from Myanmar was in breach of the EU's Timber Regulation.[48] These cases reflect the deterrent role litigation can play in preventing human and environmental rights violations by multinational companies in the Global South .[49] With more and more laws being passed or proposed at the national,[50] regional[51] and international level[52] to ensure the due diligence of multinational companies– both on the matter of human rights and on

[43] See Chapter on US.
[44] For instance, an airport project in Portugal is currently being contested on those grounds. The NGO Client Earth is taking part in the campaign. See <https://www.clientearth.org/latest/latest-updates/news/portugal-s-proposed-new-airport-would-threaten-thousands-of-protected-birds/> accessed 23 March 2022.
[45] See Chapter on International Biodiversity Litigation.
[46] See <https://www.justice.gov/opa/pr/gibson-guitar-corp-agrees-resolve-investigation-lacey-act-violations> accessed 31 March 2022.
[47] See <https://notreaffaireatous.org/actions/action-en-justice-contre-casino/> accessed 31 March 2022. The complaint was based on the 2017 law on the duty of vigilance of corporations. See Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[48] Forest Trends, 'Swedish Court Rules Myanmar Timber Documentation Inadequate for EU Importers', 15 November 2016 <https://www.forest-trends.org/wp-content/uploads/imported/swedish-court-myanmar-timber-pr_final-pdf.pdf> accessed 22 March 2022.
[49] Richard Meeran and Jahan Meeran (eds) *Human Rights Litigation against Multinationals in Practice* (Oxford University Press 2021).
[50] For instance, in France, see Loi n° 2017-399 du 27 mars 2017 relative au devoir de vigilance des sociétés mères et des entreprises donneuses d'ordre.
[51] European Commission, 2022, COM (2022) 71 final, Proposal for a Directive of the European Parliament and of the Council on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937).
[52] UN Human Rights Council, 'Legally Binding Instrument to Regulate, in International Human Rights Law, the Activities of Transnational Corporations and other Business Enterprises.' Third draft, 2021.

environmental considerations –, it is likely that the future of biodiversity litigation will be transnational.[53]

Having discussed the different natures of biodiversity litigation, we can now turn to one of the main questions of the project: what is the influence of international biodiversity law on biodiversity litigation?

2. The Influence of International Biodiversity Law

The chapters in this volume have given widely different portraits of the influence of IBL, with jurisdictions where IBL could be deemed as totally irrelevant[54] and other jurisdictions where IBL has been crucial in the context of disputes.[55]

The influence of international law on domestic courts is a well-documented topic.[56] Within this field, there also several analyses on international environmental law and courts.[57] For this project, we wanted to narrow the focus to a specific subset of International Environmental Law (IEL), namely IBL, to better understand its influence. Also, our focus was not only on national courts, but on all courts, national, regional, and international.

Through this analysis, we have observed three types of influence for IBL. The first type of influence is legislative (2.2). These are cases involving laws that have been adopted to implement IBL at the international level. The second influence is interpretative. These are cases where laws are interpreted in light of IBL (2.3). Finally, the third form of influence is technical and scientific (2.4). These are cases where IBL is used as an element to assess facts in the context of a biodiversity related dispute. As a preliminary observation, we will explain why direct influence of IBL, through implementation, is limited (2.1).

Before engaging in the analysis, it is worth mentioning the fact that two IBL instruments stood out particularly in the case studies: the CITES[58] and the CBD[59]. Other global conventions were

[53] This perspective is already prompting debates amongst practitioners, Zaneta Sedilekova, Nigel Brook and Wynne Lawrence, *Biodiversity Liability and Value Chain Risk* (Clyde & Co 2022).
[54] See Chapter on US.
[55] See Chapter on India.
[56] For recent studies on the topic, see André Nollkaemper, August Reinisch, Raplh Janik, Florentina Simlinger (eds), *International Law in Domestic Courts A Casebook* (OUP 2018).
[57] Louis J Kotzé, Caiphas B Soyapi, 'African Courts and Principle of International Environmental Law: A Kenyan and South African Case Study' (2021) 33 Journal of Environmental Law 257; Carl Bruch, 'Is International Environmental Law Really Law?: An Analysis of Application in Domestic Courts' (2006) 23 Pace Environmental Law Review 423; Daniel Bodansky and Jutta Brunée, 'The Role of National Courts in the Field of International Environmental Law' (1998) 7 Review of European Comparative & International Environmental Law 11; Alan Igleson, *Environment in the Court Room* (University of Calgary Press 2019).
[58] Convention on International Trade in Endangered Species of Wild Fauna and Flora (opened for signature 3 March 1973, entered into force 1 July 1975) 993 UNTS 243.
[59] Convention on Biological Diversity (opened for signature 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79.

mentioned, such as the Ramsar Convention,[60] the Bonn Convention,[61] the UNESCO Convention[62] or the UNCLOS,[63] but it seemed as if the bulk of IBL in disputes were linked to these two instruments.

The CITES may be so often referred to because of its relevance to wildlife crimes, which are a frequent topic of litigation, and also because of its clarity as a legal instrument. Indeed, the CITES appendices system is straightforward, with specific obligations for the species that are listed. The listing system also provides decision makers with information on the status of species.[64] This clarity seems to be favoured by judges who are more comfortable in using this international instrument to complement national laws. With regards to the CBD, its influence may be explained by its place as the conceptual compass of IBL.[65]As a purveyor of principles and concepts for biodiversity law, it can often be used as interpretative tool for other biodiversity related norms.

2.1. The Limited Direct influence of International Biodiversity Law

The direct influence of IBL on biodiversity related disputes –*i.e.* its implementation by judges – is inherently linked to two fundamental aspects. First, the monist or dualist nature of the States bound by international biodiversity law, and second, the characteristics of IBL itself. In this respect, the question of the influence of IBL is no different from the question of the domestic influence of international law in general. On both these aspects, it seems that direct influence of IBL is mostly limited.

The distinction between monism and dualism is a tenuous one,[66] but it does bear on whether IBL will have to be translated into national law to have an effect within the legal system. In this volume, monist countries were less represented, but it appeared that IBL was not strikingly more influential in those countries than in dualist ones. For instance, in France, the direct influence of IBL was deemed minimal.

The reason for this lack of direct applicability is due to the way in which IBL was designed. Indeed, at the national level, in monist contexts, IBL is often seen as not being directly applicable since it does not confer rights or obligations to individuals. It is described as a system of obligations that only binds states and is therefore irrelevant to individuals.[67] This diagnostic can be seen in France,

[60] Convention on Wetlands of International Importance Especially as Waterfowl Habitat (opened for signature 2 February 1971, entered into force 21 December 1975) 996 UNTS 245.
[61] Convention on the Conservation of Migratory Species of Wild Animals (opened for signature 23 June 1979, entered into force 1 November 1983) 1651 UNTS 333.
[62] Convention for the Protection of the World Natural Heritage (opened for signature 16 November 1972, entered into force 17 December 1975) 1037 UNTS 152.
[63] United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1994) 1833 UNTS 3.
[64] For instance, see Chapter on China.
[65] See Introduction.
[66] For instance, some countries cannot be categorized in one or another frame. See Chapter on China. For a critique of these concepts, see, *inter alia*, Hisashi Owada, 'Problems of Interaction between the International and Domestic Legal Orders' (2015) 5 Asian Journal of International Law 246.
[67] See Chapter on France.

but also at the EU level where the examination of international law in disputes is similar.[68] In this context, instruments such as CITES or the Aarhus Convention[69] stand out particularly as they are among the few instruments of IBL that may be directly applicable[70] in the context of disputes.

It would seem at this point that IBL may be more relevant at the international level. But even then, the wording of IBL instruments is fraught with vague, ambiguous, or open textured terms. Moreover, obligations may sometime be modulated, with expressions such as "in accordance with its particular conditions and capabilities", or "as far as possible and as appropriate" that are frequent in the text of the CBD, for instance. In turn, the vagueness of IBL instruments may simply prevent them from having any effect in interstate disputes, as highlighted before the ICJ in the *Road* case between Costa Rica and Nicaragua.[71]

To sum up, the fact that IBL is not generally-meant to confer rights and duties to individuals, and is often vague and weekly normative, prevents it from having a significant direct effect on biodiversity litigation. However, as the discussion below indicates, a lack of direct effect does not imply the irrelevance of IBL in biodiversity related disputes.

2.2. Influence Through Legislation

The rapid development of IBL has played a major role in raising awareness about the importance of protecting nature, wildlife and finally biodiversity. The evolution of IBL has accompanied changes in national laws. Be it in monist or in dualist States, IBL is frequently transposed to have its full effect at the national level. Most case studies in this volume mentioned legislation that was intended to ensure the transposition of IBL at the national level. India has the 2002 Biodiversity Act, South Africa has the 1998 National Environmental Management Act, France has the 2016 law on biodiversity. The list could go on. This illustrates that IBL has, at the very least, an obvious legislative impact, which in turn has repercussion on legal disputes. In our case studies, the United States offered a stark contrast as being one of the most reluctant countries to sign or incorporate IBL into its national legislation (notwithstanding CITES).

More than a simple legislative transposition, the case studies in this volume show that the implementation of the CBD has marked a shift in the understanding of biodiversity-related topics. In Canada, the ratification of the CBD has come with a growing awareness of its globally important role in protecting biodiversity and "is a reality about which Canadian courts and tribunals are becoming increasingly well informed".[72] In Australia, the ratification of the CBD can be seen as

[68] See Chapter on France, and Chapter on EU.
[69] Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (adopted 25 June 1998, entry into force 30 October 2001) 2161 UNTS 447. The Aarhus Convention falls into the broader category of IEL rather than strictly IBL, it is nevertheless crucial for the effectiveness of IBL.
[70] See Chapters on France and China.
[71] Certain Activities Carried Out by Nicaragua in the Border Area (*Costa Rica v Nicaragua*) and Construction of a Road in Costa Rica along the San Juan River (*Nicaragua v Costa Rica*), (Judgment) [2015] ICJ Rep para 48, 665. See Chapter on International Biodiversity Litigation.
[72] See Chapter on Canada.

"an appropriate starting point for considering the development of biodiversity law".[73] On its side, to implement its international obligations, the EU has developed, an extensive and ambitious body of legislation aimed at protecting species and habitats, creating a system of protected areas, improving ecosystems conservation status or integrating environmental considerations into local land use policies, going in many ways beyond international binding standards.[74] In Brazil, international biodiversity law and governance have motivated the establishment of the Plataforma Brasileira de Biodiversidade e Serviços Ecossistêmicos, based on the model of the IPBES.[75] In the UK, IBL has allowed a less myopic approach to environmental law by some judges. In India, it has influenced the discourse on environmentalism and pushed for the recognition of the rights of indigenous communities and the participation rights of local communities in conservation, propelling discussions on approaches to community-based conservation and locally driven biodiversity conservation that are visible in the Biodiversity Act of 2002.[76]

Because of the importance of national laws as a means of indirect influence, the actual content and design of these laws is crucial. This fact is dully considered within the institutions of IBL and several treaty bodies offer "model laws" to their parties as a means to ensure a better transposition at the national level.[77] Through this approach, it can be said that IBL regimes are attempting to manage their indirect influence at the national level.

2.3. Influence Through Interpretation

Indirect influence of IBL through the interpretation of other legal rules is one of the most striking elements we have observed in the case studies.

Several cases show that the consequence of the interpretive influence can be significant on the outcomes of biodiversity related disputes. In the *Shrimp-Turtle* case in front of the WTO dispute settlement body,[78] the use of IBL was decisive in shaping the arguments of the judges. Had turtles not been considered as an exhaustible resource, the possibility of invoking the exceptions listed in article XX of the General Agreement for Tariffs and Trade[79] for this species would have been closed off. The impact of IBL as an interpretative tool is also significant before human rights courts.[80] At the national level, we saw examples of national laws being interpreted in light of IBL

[73] See Chapter on Australia.
[74] See Chapter on EU.
[75] See Chapter on Brazil.
[76] See Chapter on UK.
[77] See for instance, for the Convention on Migratory Species, Resolution 12 September 2017), Establishment of a Review Mechanism and a National Legislation Programme. For CITES, see Resolution Conf. 8.4 (Rev. CoP15), National laws for implementation of the Convention.
[78] WTO, *United States – Import Prohibition of Certain Shrimp and Shrimp Products* – AB-1998-4 – Report of the Appellate Body [1998] WT/DS58/AB/R. For more detail, see Chapter on International Biodiversity Litigation.
[79] General Agreement on Tariffs and Trade (opened for signature 30 October 1947, entered in force 1 January 1948) 55 UNTS 187.
[80] IACtHR, *Case of Kaliña and Lokono Peoples v Suriname*, Judgment (Merits, Reparations and Costs), 25 November 201. See Chapter on International Biodiversity Litigation.

instruments in order to annul administrative acts.[81] IBL was essential to the outcomes of these different cases, even though it was not directly implemented.

This interpretative influence of IBL opens the gate to all IBL and not only treaty-based norms or customs. In several examples, we have seen soft law instruments, which are abundant in IBL, take an important place in the arguments of litigants.[82]. As mentioned by the WTO Appellate Body, when searching the "ordinary meaning" of a word, the judge can refer to dictionaries, but also to "relevant rules of international law" which may aid a treaty interpreter in establishing, or confirming, the ordinary meaning of treaty terms in the specific context in which they are used." This opens up the selection of instruments and rules that can be considered relevant. This can include a political declaration or even a treaty that is not binding to the disputing Parties. This flexibility is due to the fact that, in interpretation, external rules are no longer required "because they are legal rules, but rather because they may provide evidence of the ordinary meaning of terms in the same way that dictionaries do." What matters here is more the "informative character" of a rule than its binding nature.[83]

Climate litigation also exhibits these patterns of indirect influence for international climate law. Indeed, in climate trials, international law is rarely applied directly, as a source of positive law. This is either because the legal system is dualist, or because the obligations in question are not viewed as self-executing and therefore cannot be directly invoked by individuals.[84] However, the Paris Agreement, alone or in combination with other international obligations, has been successfully used in many cases to interpret domestic rules.[85] In climate related cases, the courts carried out several forms of interpretations. Systemic, where domestic law is interpreted "in the light of" all relevant legal elements, but also factual or even moral elements and teleological, where laws are interpreted in consideration of the goal of the climate regime.[86] In doing so, the courts have more discretion in their assessments as to whether it is appropriate to use international law, as well as in the choice of sources relied on, which may include unratified treaties or soft law instruments. As interpretative sources, international norm becomes subsidiary, as it is not the implementation of the Paris Agreement that the claimants are asking for. They ask that national policies actually implement the country's international commitments or conform to a consensual standard of conduct.[87]

From this point of view, it is interesting to note that in our case studies, judges have not been asked to scrutinize whether the national laws are meeting the Aichi Targets. In theory, NBSAPS and

[81] See Chapter on France.
[82] See Chapters on India, France, and International Biodiversity Litigation.
[83] See Chapter on International Biodiversity Litigation (Biotech case).
[84] Lennart Wegener, 'Can the Paris Agreement Help Climate Change Litigation and Vice Versa?' (2020) 9 Transnational Environmental Law 24.
[85] Kim Bouwer, 'The Unsexy Future of Climate Change Litigation' (2018) 30 (3) Journal of Environmental Law 492.
[86] See for instance the judgment of the Paris Administrative Court, cases Nos 1904967, 1904968, 1904972, 1904976/4-1, Association Oxfam France, Association Notre Affaire à Tous, Fondation pour la Nature et L'homme, Association Greenpeace France, "L'Affaire du siècle", Decision dated 14 October 2021.
[87] Bouwer (n 85).

national legislation should be aligned with the Aichi Targets and the Strategic Plan for biodiversity 2011-2020. In practice, however, national targets are generally poorly aligned with the Aichi Targets, in terms of scope and level of ambition. Of course, the Targets have been adopted by a COP decision, which as such is not legally binding. As a soft law element, the Aichi Targets could nevertheless have been used as an interpretative tool. But that was not the case in any of the case studies, except in India where the NBSAP is seen as a guiding document for executive decision-making. It "functions more like a soft law instrument" where the Biodiversity Act is seen as the harder law for the regulation of biodiversity conservation.

To conclude, it appears that the interpretative influence of IBL is far more impactful than the direct application of IBL. This is due to the fact that indirect influence both eschews monist/dualist distinctions and allows for all norms of IBL to be taken into considerations, both hard and soft ones. However, in the end, this influence is dependent on the willingness of judges to rely on IBL as an interpretative tool.[88]

2.4. Influence Through Evidence

International biodiversity law is also used by judges as a tool to assess the vulnerability of species or habitats. For instance, in China, the Supreme Court judicial policy requires judges to refer to lists formulated by international institutions when determining whether a species is "precious" or "endangered," and in particular to Appendices I and II of the CITES which is one of the most cited international treaties before Chinese court, alongside the Red List of the International Union for Conservation of Nature (IUCN).[89] In the *South China Sea* arbitration, the Arbitral Tribunal also relied upon the fact that some species were listed in CITES appendix I and II to assert that they were threatened with extinction (case of all of the sea turtles found on board Chinese fishing vessels, listed under CITES Appendix I) or threatened (case of giant clams, listed in Appendix II to CITES and thus "unequivocally threatened" according to the Tribunal). The Tribunal explained that "CITES is the subject of nearly universal adherence, including by the Philippines and China, and in the Tribunal's view forms part of the general corpus of international law that informs the content of Article 192 and 194(5) of the Convention" on the law of the sea."[90]

Regarding habitats, French case law gives a good illustration. Here, the listing of an area under the Ramsar Convention on wetlands or the UNESCO World Heritage Convention is indicative of its "environmental quality" and justifies special protection. This is also the case before international courts. For instance, in the *Road* case, the International Court of Justice considered that the fact that a Costa Rican wetland is on the list of wetlands of international importance of the Ramsar Convention "heightens the risk of significant damage because it denotes that the receiving environment is particularly sensitive." Consequently, it found "that the construction of the road by

[88] As a counter example, see Chapter on US.
[89] See Chapter on China.
[90] See Chapter on International Biodiversity Litigation.

Costa Rica carried a risk of significant transboundary harm. Therefore, the threshold for triggering the obligation to evaluate the environmental impact of the road project was met."[91]

Over time, the IPBES reports could be relied on by plaintiffs and judges, as it is the case for the IPCC reports.[92] This is another lesson from the development of climate litigation. Although the IPCC reports have no legal value, as scientific reports, they have the advantage of reflecting the global consensus of scientists on the subject, a sort of "international truth".[93] The summaries for policymakers that accompany the reports – and which are the parts relied upon in court – also carry a particular weight since they are co-approved by scientists and representatives of States. In the New-Zealand Thomson case, the court thus noted that "The IPCC reports provide a factual basis on which decisions can be made".[94] Furthermore, it held that the government should review its long-term objective every time the IPCC publishes a new report, viewing it as a "mandatory relevant consideration".[95]

To conclude on the influence of IBL, it can be said that its influence is greater when not seen as a direct legal tool of immediate application but rather as a catalyst for the evolution, interpretation of other laws, biodiversity related or not.

Now that the influence of IBL on biodiversity litigation has been explored, we can turn to the trends of biodiversity litigation.

3. The Characteristics of Biodiversity Litigation

The trends identified in the different chapters will be analyzed in three steps. First, we will present the actors of biodiversity litigation. Second, we will discuss the role of rights discourses in biodiversity litigation. Third, we will question the impacts of biodiversity litigation.

3. 1 Actors

The case studies in this volume have highlighted how the role of judges and civil society has evolved regarding biodiversity related disputes.

3.1.1. The evolving role of judges

The implementation of biodiversity laws at the national level needs to be complemented by an efficient judiciary that people can rely on to resolve disputes. The role of the judiciary to promote environmental conservation was recognized by Agenda 21 (1992) and more recently in the Sustainable Development Goals (Goal 16).[96] The functions of a court of law are of great

[91] *Road* case (n 71) [155-156].
[92] For instance, the Urgenda case, Supreme Court of the Netherlands, Judgment19/00135 of 20 December 2019.
[93] Guillaume Futhazar, 'More Than Just a Scientific Report: The Global Assessment on Biodiversity and Ecosystem Services as Scientific and Political Tool' Völkerrechtsblog 9 October 2019.
[94] For instance, *Thomson v Minister for Climate Change Issues* [2017] New Zealand High Court 733, para 134.
[95] Ibid para 94.
[96] Para 8.18 of Agenda 21 (1992); Sustainable Development Goal, Goal 16 (Peace, justice and strong institutions).

importance to biodiversity conservation – this is not only as a guardian of rule of law.[97] Our case studies underline that the judiciary's role in protecting and interpreting constitutional rights (e.g., rights of nature, collective rights) is also relevant in upholding conservation values. The following discussion focuses on role of judges in applying environmental principles and concepts, their potential role in filling legal gaps, their willingness to engage with scientific expertise, and the role of specialized environmental courts in resolving biodiversity disputes.

3.1.1.1 Judges as innovative problem solvers

A national court's decision can promote the application of environmental principles within the context of IBL in several ways.

By applying an internationally recognized environmental principle, national courts do not only implement it in individual cases. Rather, if implemented with sufficient regularity, these decisions can also have a deterrent effect on or help shape the future conduct of the legislator.[98] Moreover, through their decisions, national courts can introduce those environmental principles into national law, thereby supplementing or even correcting the work of legislatures. In instances where international biodiversity law has not been implemented adequately through national legislation or administrative rulemaking, these court decisions can play a significant role in improving the national legal system. For example, the Indian courts have considered some commonly recognized principles, such as the precautionary principle, the polluter pays principle, the public trust doctrine and sustainable development, directly applicable.[99] Although there is no direct application of international law, courts in Australia, for instance, have made reference to principles of CBD and CITES (e.g., precautionary principle).[100] In Canada, courts have interpreted the habitat designation obligation as reflecting and embodying the precautionary principle,[101] In cases related to the interpretation of the precautionary principle in Brazil, it is quite common to see reports from different international bodies being used as parameters to the court's decision.[102] Within the EU, the CJEU has also used the precautionary principle in relation to habitat creation, restoration measures or to assess the viability of biodiversity offsetting.[103] The ITLOS plays a similar role and referred to the precautionary principle in settling marine wildlife disputes arising from UNCLOS.[104]

[97] Denise Meyerson, 'What is a Court of Law?' (2019) 42 University of New South Wales Journal 65.
[98] See Chapter on India (Godavarnam judgement).
[99] See Chapter on India. Lavanya Rajamani, 'Public Interest Environmental Litigation in India: Issues of Access, Participation, Equity, Effectiveness and Sustainability' (2007) 19 (3) Journal of Environmental Law 293; Jona Razzaque, 'Linking Human Rights, Development and Environment: Experiences from Litigation in South Asia' (2007) 18 (3) Fordham Environmental Law Review, 587.
[100] See Chapter on Australia.
[101] See Chapter on Canada.
[102] See Chapter on Brazil.
[103] See Chapter on EU.
[104] See Chapter on International Biodiversity Litigation.

National judges can also offer guidance for the evolution of judicial practices. In China, this was done through interpreting 'environmental protection' to include biodiversity conservation.[105] However, such guidance may not always benefit biodiversity conservation. While interpreting ecological integrity, we find examples of cases where the courts either take a conservative (in Canada) or a liberal (in the EU) approach. The progressive stance taken by the CJEU underscores that small scale interventions, when accumulated, can threaten the ecological integrity of an EU protected site and would be deemed unacceptable.[106] In contrast, according to the Canadian courts, the ecological integrity of national parks may be traded away where other considerations are perceived to be more important. Cases against degradation of national parks through small encroachments have met with little success, with courts deferring to the administrative jurisdiction of relevant Ministers and park authorities.[107]

3.1.1.2 Judges to fill legal gaps

Courts are focused on applying and interpreting the law and, if necessary, on filling legislative or regulatory gaps through their decisions. Nevertheless, the courts in democratic states continue to respect the separation of powers and thus do not allow themselves to exert legislative powers through their decisions.[108] Separation of powers ensures that power is not abused in such a way that curtails an individual's liberty. One important aspect of the separation of powers is the role of the judiciary to ensure that the legislators or the executives do not exceed their authority. Courts come into play in this area when, for example, existing laws need to be reinterpreted and applied, or when they are deemed unfair in their application to specific cases.[109] For instance in China, the Supreme People's Court exercises 'semi-legislative power' and refers directly to lists formulated by international institutions, such as the application of appendices of CITES in criminal cases that concern endangered species and the Red List of the IUCN.[110] It is to be noted that, in China, the Penal Code includes reference to such direct application of CITES appendices, while the IUCN Red List is not referred to in any regulation. The judges' willingness to protect endangered species was seen in the Alexandrine parakeet case when the species was not technically protected under Chinese Criminal law.[111]

It is argued that there is nothing unconstitutional for judges to put a check on the executives and fill democratic deficits. However, it could also be argued that such invasion would be unwise or

[105] See Chapter on China.
[106] See Chapter on EU (Sweetman case).
[107] See Chapter on Canada.
[108] Curtis A Bradley and Trevor W Morrison, 'Historical Gloss and the Separation of Powers' (2012) 26 (2) Harvard Law Review 412-485; Jeremy Waldron, 'Separation of Powers in Thought and Practice?' (2013) 54 Boston College Law Review 433; Jasmina Nedevska, 'An Attack on the Separation of Powers? Strategic Climate Litigation in the Eyes of U.S. Judges' (2021) Sustainability 13 8335; Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) Transnational Environmental Law 55.
[109] See Chapters on South Africa, India, Canada.
[110] See Chapter on China.
[111] Ibid.

politically undesirable and might lead to partisan decisions.[112] An important but still unresolved question remains concerning the extent to which judges may go. They are supposed to be bound by statutes and precedents, but societal, political and economic aspects also play a role in their decisions. Depending on jurisdictions, there are also limits on the authority of the judges, their role in upholding the rule of law, and how they perceive their duty to interpret and enforce the applicable law. For some critics, judges are ill equipped to deal with increasingly political arguments put before them and to come to informed judgments.[113] Judges are allegedly not accountable and not well qualified to take political decisions and may misinterpret the political purpose of the policy expressed in the statute. Then again, the tension between economic growth and environmental protection, and the political and business influence on development decisions, explored in this volume, exacerbate the need for a robust judiciary.

3.1.1.3 Judges' willingness to engage with scientific expertise

The collection and synthesis of scientific data and the supporting of scientists in presenting such data is central in biodiversity related disputes. Experts are more than ever central players for the creation of the necessary link between knowledge and decision making. We also witness a shift in the attitude of judges with regard to scientific and technical elements in biodiversity related disputes. For instance, at the international level, the ICJ has shown a persistent reluctance to engage with scientific and technical aspects of cases.[114] Its more recent decisions, starting with the Danube Dam case, show a shift in attitude, later confirmed with the *Pulp Mill* case or the *Whaling* case.[115]

At the national level, the judiciary has been actively seeking and accepting scientific reports to support the claims before the courts.[116] Available scientific reports provide a crucial service that allows litigants to design a litigation strategy, and the courts to offer their opinion supported by scientific studies. Such reports can lead to new sets of scientific data, shape future biodiversity strategy and can be considered as an indirect impact of biodiversity litigation. Considering the rise in number of such reports at the international level (IPCC, IPBES, Global Biodiversity Outlook, Local Biodiversity Outlook), we may witness in the future a strong influence of such global scientific syntheses on national legal disputes.

National expertise is also crucial, and the judiciary can call upon scientists with data on national and local biodiversity impacts that present a detailed assessment. For example, judges in China use scientific evidence and consult scientists to identify which species of plants or animals had been captured, killed or traded. This has become more crucial since the link between biosecurity and the COVID 19 outbreak has shown the growing need to have scientific data linking ecological

[112] See Chapter on USA.
[113] Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process: Constitutional Process and Limitations* (Hart 2009).
[114] Katalin Sulyok, *Science and Judicial Reasoning: The Legitimacy of International Environmental Adjudication* (Cambridge University Press 2020) 69-117.
[115] See Chapter on International Biodiversity Law.
[116] See Chapter on France, China, Canada.

security and public health.[117] Similarly, the critical nature of scientific evidence is reinforced in Canada[118] and cases dealing with genetically modified organisms or oil exploration hydraulic fracturing (fracking) in Brazil.[119] Apart from officially appointed experts (panels, witnesses), the practice of amicus briefs[120] is another route to assist the judiciary in dealing with complex biodiversity litigation.

Despite its growing importance in biodiversity related disputes, expertise may not always have the influence expected. Indeed, the Brazilian chapter showed that the judiciary may not always base its decisions on scientific evidence.

3.1.1.4 Judges' role in specialized environmental courts

Specialized environmental courts are emerging in several jurisdictions, as seen in India, China or Australia. These courts illustrate the growing awareness of the inherent complexity of environmental disputes and of the centrality of experts (e.g., environmental scientists, expert witnesses).[121] For instance, in Australia and India, the advantages of a specialized environment court are that it brings together both judges and non-lawyer specialists who act as internal experts.[122] Such scientific evidence has been crucial to many cases in Australia – in relation to the application of precautionary principles, or to set aside development consent. On the other hand, in Brazil, there is a lack of expertise from judges since there are few specialized sections on environmental issues in the courts.[123] The necessity for specialized environmental courts lies in the fact that such courts and tribunals can act as a 'one-stop hub' for environmental disputes with availability of technical and scientific expertise, open standing, and effective remedies and enforcement.[124] Our case studies underscore the need for training and dialogue among judges enabling them to share ideas and techniques in view of the diversity and complexity of biodiversity litigation and the limitations of national biodiversity laws. Training in biodiversity related topics tailored for judges is available, for example, through various programmes run by UNEP and the European Commission.[125] However, bespoke training programmes for judges dealing with complex legal issues surrounding biodiversity conservation is lacking.

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[117] See Chapter on China.
[118] For example, Chapter on Canada (*Alberta Wilderness Association v Canada (Environment* case).
[119] See Chapter on Brazil.
[120] See Chapter on Brazil, South Africa, China.
[121] Brian J Preston, 'Characteristics of Successful Environmental Courts and Tribunals' (2014) 26 (3) Journal of Environmental Law 365.
[122] See Chapters on Australia, India.
[123] See Chapter on Brazil.
[124] George (Rock) Pring & Catherine (Kitty) Pring, *Environmental Courts & Tribunals: A Guide for Policy Makers* (UNEP 2016).
[125] Academy of European Law and European Commission, Cooperation with National Judges in the field of EU Environmental Law, <https://ec.europa.eu/environment/legal/law/judges.html> accessed 22 March 2022. UNEP Training Curriculum on Environmental Law for Judges and Magistrates in Africa: A Guide for Judicial Training Institutions', <https://www.unep.org/resources/toolkits-manuals-and-guides/training-curriculum-environmental-law-judges-and-magistrates> accessed 22 March 2022.

3.1.2. The evolving role of civil society

Several elements are relevant to initiate biodiversity litigation: the procedures for going to the courts, the requirements for being a petitioner, and the standing rules. Indeed, standing remains a key issue in allowing petitioners to bring a claim to court. In most biodiversity cases, the litigants/petitioners do not act for personal gain and do not generally have a financial stake in the outcome of the litigation. Rather, the litigants seek to uphold the law, fill gaps in the law or ensure that the government system functions properly. The litigants thus act as 'watchdog' to keep a check on executive agencies. It is here that civil society plays a significant role.[126] Our case studies show that, apart from designated public bodies,[127] individuals, groups and NGOs regularly bring before the lower as well as in the higher courts at the national level.

In China, the rising number of NGOs initiating biodiversity litigation has led to public awareness of biodiversity loss.[128] In Australia, NGOs are involved in bringing cases such as the Environmental Defenders Offices and Environment Centre to protect the intrinsic value of biodiversity.[129] Similar examples of NGOs involved in initiating biodiversity cases are found in France, UK, and South Africa, among others. In the UK, public bodies are responsible for protecting, maintaining and enhancing biodiversity and have the power to pursue legal action to that end. Individuals and NGOs such as the Royal Society for the Protection of Birds can bring actions to challenge public decision-making by judicial review or by pursuing private prosecutions of wildlife crime.[130] In contrast, biodiversity litigation has become more challenging in the US as courts have raised standing hurdles.[131] Similar standing related hurdles in the EU stop environmental NGOs from bringing strategic lawsuits in the field of IBL directly before the CJEU, thus leaving the "quasi-exclusivity" of biodiversity litigation to the EU Commission.

While the Constitution or national laws may determine standing rules, the courts' intention and interpretation may widen these. There are arguments in favour of and against a liberal approach to standing.[132] Liberal standing rules allow legal activists to initiate a claim. This is helpful when the victims are not aware of the violation of their rights and may not have access to adequate information – especially in the Global South.[133] More so if the public bodies are not willing to take action (e.g., to stop a large infrastructure, mining or oil exploration project). However, to protect themselves from the multitude of claims, courts are required to be cautious as to who should be

[126] Civil society includes citizens, consumers, community groups, farmers and NGOs.
[127] At the same time, national laws may allow government agencies to bring an action (e.g., Australia, South Africa, China, Brazil).
[128] In China, NGOs such as Wild China and Friends of Nature Institute brought cases. See Chapter on China.
[129] See Chapter on Australia.
[130] See Chapter on UK.
[131] See Chapter on USA.
[132] George (Rock) Pring and Catherine (Kitty) Pring, 'Specialized Environmental Courts and Tribunals at the Confluence of Human Rights and the Environment' (2009) 11 Oregon Review of International Law 301.
[133] Jona Razzaque, 'Information, Public Participation and Access to Justice in Environmental Matters' Erika Techera, Jade Lindley, Karen N Scott, Anastasia Telesetsky (eds) *Routledge Research Handbook on International Environmental Law* (Routledge 2020) 58-72.

granted standing. For example, abuse of standing is not uncommon in the field of public interest litigation[134] and strategy such as 'green lawfare' in Australia has the potential to delay development projects.[135]

The discussion on standing rules emphasizes the importance of procedural rights such as access to justice. Strong substantive rights (e.g., right to a healthy environment, discussed in section 3.2.1) supported by procedural rights – right to information, participation and access to justice - can help the civil society to engage in biodiversity conservation. Procedural rights promote fairness by allowing civil society to be part of the decision-making process, and empowerment by enabling them to take an active role in decisions affecting biodiversity. The CBD and its protocols underscore the importance of public participation in biodiversity decisions.[136] Since the 1992 Rio Declaration, there has been a tremendous development of procedural rights at the international, regional and national level.[137] For example, the Aarhus Convention and the Escazu Convention[138] – both regional treaties - elaborate on the procedural rights in environmental matters. Our case studies show that the Aarhus Convention is relevant in biodiversity litigation dealing with access to environmental justice and EIA.[139]

Many deficiencies in–public participation processes can be traced to weaknesses in legal and institutional frameworks – for example, weak EIA laws, restricted access to information on biodiversity decisions, lack of meaningful consultation and expensive court process.[140] For example, biosafety laws in many countries of the Global South do not include any provision on access to information or participation.[141] Such legal deficiencies lead to limited civil society engagement in the biodiversity related decision-making process. Moreover, many energy, mining and large infrastructures projects are often planned and implemented without free, prior and informed consent, and such lack of access to information and consultation with affected IPLC results in more resource conflicts[142] and litigation.

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[134] Michael G Faure and Angara V Raja, 'Effectiveness of Environmental Public Interest Litigation in India: Determining the Key Variables' (2010) Fordham Environmental Law Review 21 (2) 239-293.

[135] Similar examples can be found in India. Though the actual negative impact of green lawfare might sometimes be exaggerated. On this matter, see Chapter on Australia.

[136] Article 14(1) (a) of the CBD. Article 23 of the Cartagena Protocol. Article 12(2) of Nagoya Protocol.

[137] Human Rights Council, *Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, A/HRC/25/53, 30 December 2013.

[138] Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (opened to signature 4 March 2018, entered into force 22 April 2021) <https://www.cepal.org/en/escazuagreement> accessed 9 March 2022.

[139] See Chapters on EU, UK and France.

[140] Razzaque (n 133).

[141] Lalanath de Silva, 'Public Participation in Biodiversity Conservation' in Elisa Morgera and Jona Razzaque (eds) *Biodiversity and Nature Protection law* (Edward Elgar 2017) 468.

[142] Chapter on India (Niyamgiri case). Examples of such conflicts are found in Environmental Justice Atlas (2018), <https://ejatlas.org/> accessed 21 March 2022.

Even with weaknesses in procedural rights, civil societies are actively engaged in biodiversity negotiations, and playing a major role in sharing knowledge and information, designing litigation strategies and suggesting remedies.[143] The scale of global biodiversity degradation has led to the proliferation of regulations at all levels of governance and challenges traditional accounts of law as a state-centred and cohesive concept. Law is no longer the privilege of a single actor – the state. Instead, we witness the transformation to a new plural setting that involves a wide range of non-state actors. In the context of biodiversity litigation, the collaboration between local communities, NGOs, scientists and academics is invaluable, especially in the context of overfishing, hunting, terrestrial and marine protected areas, and wildlife crime.

3.2. Rights Discourses in Biodiversity Litigation

In this subsection, we will explore how the language of rights has been used in biodiversity litigation and has been framed in different contexts. More specifically, we intend to understand the place of humans, nature, and rights in the disputes that relate to biodiversity. We will first examine the human right to a healthy environment before turning to non-human rights.

3.2.1. Human rights

Here, we will consider cases where damages (likely to occur or those that have already occurred) to biodiversity or breaches of biodiversity law were considered as a breach to human rights.

Human rights can be a tool for the conservation, sustainable use of biodiversity and equitable sharing of benefits.[144] Numerous cases show how damage to the environment has been reconceptualized as an infringement of human rights.[145] These cases tend to multiply as the right to a healthy environment becomes more a more widespread, the culmination of this trend being in October 2021 with a formal recognition at the UN Level.[146] For instance, the Regional Courts for Human Rights all have examples of cases linking the environment with human health.[147] However, at the national level, the connection between human rights and the environment is not systematic. For instance, in Australia or France, biodiversity litigation seems to be disconnected from any discourses on rights.

From this multitude of cases, different conceptions of the connection between human rights and the environment appear. For instance, before the European Court of Human Right, the protection of biodiversity will have to be linked directly to (potential) harm to humans.[148] Contrastingly, the

[143] See examples in Canada, India, UK Chapters.
[144] UN Human Rights Council, 2017, A/HRC/34/49, Report of the Special Rapporteur on the issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment.
[145] See Chapter on Canada, Chapter on India.
[146] Resolution of the UN Human Rights Council 48/13, *The Human Right to a Safe, Clean, Healthy and Sustainable Environment*, 5 November 2021.
[147] See Chapter on International Biodiversity Litigation.
[148] The ECHR provides a fact sheet with a summary of all relevant cases on environmental matters. See ECHR Press Unit, Environment and the European Convention on Human Rights (fact sheet, January 2022).

Inter-American Court of Human Rights considers that the protection of the environment in its own right, irrespective of a potential human damage, is entailed in the right to a healthy environment.[149]

Within the categories of human rights, the rights of IPLC are worth mentioning for their impact on biodiversity litigation.[150] As recalled by the IPBES in its Global Assessment, "at least a quarter of the global land area is traditionally owned, managed, used or occupied by indigenous peoples". Within those areas "nature is generally declining less rapidly in indigenous peoples".[151] Moreover, the socio-cultural diversity of IPLC is correlated to their surrounding biodiversity. These elements highlight the specific link that exists between IPLC and biodiversity and warrants a dedicated regime for the protection of their rights. Several countries thus acknowledge a specific legal status to IPLC. We can mention for instance, the Plurinational State of Bolivia which has a strong constitutional emphasis on IPLC.[152]

The recognition of IPLC specific rights can influence the outcomes of biodiversity related disputes. For instance, in Canada, a road project was contested on several legal basis, for environmental reasons and for its potential impact on sacred grounds.[153] In this case, the impact on sacred land had a greater effect in halting the project than environmental considerations. In the chapters of this volume, we have seen that the rights of IPLC had a particular place in the legal system set up for the conservation and sustainable use of biodiversity.[154]

But human rights are not only conservation tools. It is worth mentioning that they can also hinder biodiversity conservation measures. For instance, in the chapter on France, we saw that hunters have claimed an alleged right to hunt to protest administrative decisions for the management of game.[155] The UK chapter also highlighted the fact that human rights are often invoked before court to challenge biodiversity conservation measures.[156]

3.2.2. Non-human rights

Non-human rights, understood here as the recognition of the rights of nature as a whole, some of its components, or individual animals, has gained considerable traction over the past decade.[157]

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[149] Inter-American Court, Advisory Opinion Oc-23/17 of November 15, 2017, Requested by the Republic of Colombia: The Environment and Human Rights 134.

[150] Sandra Díaz and others (eds), *Summary for Policymakers of the Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (IPBES 2019).

[151] Ibid 14.

[152] Bolivia (Plurinational State of)'s Constitution of 2009, Articles 30, 31, 32).

[153] See Chapter on Canada.

[154] See Chapters on India, International Biodiversity Litigation.

[155] See Chapter on France.

[156] See Chapter on UK.

[157] Guillaume Chapron, Yaffa Epstein, Jose Vicente Lopez-Bao, 'A Rights Revolution for Nature: Introduction of Legal Rights for Nature could Protect Natural Systems from Destruction' (2016) 363 Science 1392; David R Boyd, *The Rights of Nature: A Legal Revolution that Could Save the World* (ECW Press 2017); Christopher Rodgers, 'A New Approach to Protecting Ecosystems: The Te Awa Tupua (Whanganui River Claims Settlement) Act 2017' (2017) 19 Environmental Law Review 266; Anne Peters, 'Liberté, Égalité, Animalité: Human–Animal Comparisons in Law'

The idea of conferring rights on nature or its elements in order to better protect it or them, to reinforce the effectiveness of environmental law, has been seen as a remedy for many of the difficulties in implementing environmental law.[158] Originally very controversial,[159] this idea is beginning to be translated into positive law with the recognition of the rights of non-human living entities, individually (an animal) or more often collectively (an ecosystem).[160] Interestingly, these recent developments are strictly national and are spreading in a horizontal manner. On this topic, international law is mostly silent, a spectator so to speak.[161] With regards to animals, international law is far more concerned with welfare.[162]

None of our case studies directly addressed biodiversity litigation that involved non-human rights. However, such cases are carefully monitored, and numerous examples can be mentioned. For instance, in India, several rulings acknowledged the legal personality of rivers, or even of the entire animal kingdom.[163] In Latin America, cases on the legal personality of rivers can be found,[164] and the legal personality of nature as a whole is even explicitly recognized in the constitution of Ecuador.[165] Similarly, in New Zealand, the Whanganui River is considered as a legal person since March 2017.[166] In its 2017 Advisory Opinion, the Inter-American Court of Human Rights took

(2016) 5 Transnational Environmental Law 25; Saskia Stucki, 'Towards a Theory of Legal Animal Rights : Simple and Fundamental Rights' (2020) 40 Oxford Journal of Legal Studies 533.

[158] See (n 157).

[159] Christopher D Stone, 'Should Trees have Standing? Towards Legal Rights for Natural Objects' (1972) 45 Southern California Law Review 450; Marina Brilman, 'Environmental Rights and the Legal Personality of the Amazon Region,' European Journal of International Law: Talk, Blog of the European Society of International Law (2018) April 24.

[160] Nathalie Rühs and Aled Jones, 'The Implementation of Earth Jurisprudence Through Substantive Constitutional Rights of Nature' (2016) 8(2) Sustainability 174.

[161] Though authors are calling for a strengthened role of international law in order to promote non-human rights, see Anne Peters, *Animal in International Law* (Brill 2021) 421-531.

[162] See for instance the work of World Organization for Animal Health.

[163] On rivers, see High Court of Uttarakhand at Nainital, *Mohammed Salim v State of Uttarakhand & others* Writ Petition (PIL) No. 126 of 2014, March 20 201. On animals, see High Court of Punjab and Haryana at Chandigarh, CRR-553-2013, 31 May 2019, para 29, 'The entire animal kingdom including avian and aquatic are declared as legal entities having a distinct persona with corresponding rights, duties and liabilities of a living person. All the citizens throughout the State of Haryana are hereby declared persons in loco parentis as the human face for the welfare/protection of animals.' This judgment follows the path established in Supreme Court of India, *Animal Welfare Board of India v A Nagaraja & others*, Civil Appeal N°5387of 2014, 7 May 2014.

[164] Corte constitucional, República de Colombia, Sala Sexta de Revision, T-622, 10 November 2016; Corte Suprema de Justicia, Sala de Casacion Civil, STC 4360-2018, Radicacion No. 1101-22-03-000-2018-00319-01, Bogotá, April 5, 2018.

[165] See Constitucion De La Republica Del Ecuador Decreto Legislativo 0, Registro Oficial 449 de 20 October 2008, Ultima modificación: 13 July 2011, Article 71 recognizes the rights of Pacha Mama. This article has had repercussions in disputes, see Wheeler c. Director de la Procuraduria General Del Estado de Loja, Juicio No. 11121- 2011-0010; and República del Ecuador Asamblea Nacional, Comisión de la Biodiversidad Recursos Naturales, Acta de Sesión No. 66; Louis J Kotzé and Paola Villavicencio Calzadilla, 'Somewhere between Rhetoric and Reality: Environmental Constitutionalism and the Rights of Nature in Ecuador' (2017) 6(3) Transnational Environmental Law 401-433.

[166] Te Awa Tupua (Whanganui Claims Settlement) Act 2017, Public Act n°17, 20 March 2017.

note of the current trend of recognizing a legal personality for nature and rights to nature, not only in court decisions, but also in constitutional provisions.[167]

It may very well be that the topic of non-human rights is what sets biodiversity litigation apart from other forms of environmental litigation as it highlights a mix between philosophical, political and scientific considerations in our understanding of the environment. However, even though these cases attract their fair share of attention, this might create a distortion in how we envision biodiversity litigation. In most countries, and at the international level, the very notion of non-human rights remains foreign. This does not prevent biodiversity litigation from taking place and from innovative approaches to sprout.

3.3. Impacts

The biodiversity regime broadly aims at conservation, sustainable use and access and benefit sharing. To reach its goals, this regime relies on national policies and laws, which are supposed to be designed and implemented in accordance with NBSAP. However, it is clear that these goals are far from being reached. For instance, most of the Aichi Target have not been met, and the future prospects for biodiversity are pessimistic.[168] In this context, where both international and national initiatives seem to be unfit for purpose, it is likely that more cases will be initiated in the courts. This opens up a space to assess the impacts of such litigation at various levels of governance. This also begs the question: can biodiversity litigation meaningfully contribute to the effectiveness of biodiversity law?[169] In reality, biodiversity litigation is often about trade-offs and competing interests. The result of the balancing exercise is however uncertain and will vary from one country to another. Remedies available for courts and how these are implemented also vary widely.

3.3.1 Biodiversity litigation balancing competing interests

Biodiversity litigation recognizes the multiple components of biodiversity protection and underscores their interlinkages. For instance, themes such as protected areas, forest rights and indigenous peoples' rights highlight the obvious ties between conservation and sustainable use. Unsurprisingly, disputes on indigenous peoples' rights will concurrently address conservation issues.[170] In sum, biodiversity litigation often amounts to a balance between several elements or interests, as illustrated by our case studies.

Courts had to balance between different environmental, social and economic interests, and recognize trade-offs. Biodiversity cases in India highlight the marginalization of forest dwellers and indigenous people due to exclusionary conservation practices. Cases on infrastructure

[167] Inter-American Court, Advisory Opinion Oc-23/17 of November 15, 2017, Requested by The Republic Of Colombia: The Environment And Human Rights 134 para 62 (n 149).
[168] Sandra Diaz and others, 'Pervasive Human-driven Decline of Life on Earth Points to the Need for Transformative Change' (2019) 366 (6471) Science.
[169] Here understood as all laws related to biodiversity, at all levels - national, regional, international.
[170] See Chapter on Canada.

development in the UK and France show how the judiciary is balancing such competing interests that can ultimately lead to biodiversity degradation.[171] Cases involving mining in the Great Barrier Reef in Australia and the protection of endangered species and coal mining in the protected areas in South Africa evidence the trade-offs involved in biodiversity conservation decisions.[172] , Yet, it appears that the success of courts in halting large infrastructure projects is uneven. As highlighted in several chapters, economic interests prevail, and the intervention of courts fails to put a stop to such unsustainable projects.[173]

In this context of trade-off, courts' decisions in biodiversity litigation may have varying impacts that are linked to the available remedies or how their decisions may resonate within society.

3.3.2. The remedies of biodiversity litigation

Failure to design a coherent biodiversity law or policy at the national level undermines biodiversity conservation and governance. On this matter, the impacts of biodiversity litigation can be seen, first, in better monitoring and enforcement of national biodiversity laws. For example, in India, the judiciary has asked the legislatures to formulate new strategies, create monitoring committees and demanded periodic reports from public agencies.[174] The effective enforcement of national biodiversity laws is also challenged through cases involving wildlife crime. Despite intense worldwide efforts, the illegal wildlife trade still represents a major threat to endangered species. Pursuing cases involving illegal wildlife trade through criminal justice systems[175] and regular monitoring can lead to more effective law enforcement responses.[176] Second, biodiversity litigations highlight the need for a synergistic link between biodiversity law and other areas of biodiversity response – such as human rights,[177] intellectual property rights,[178] trade law,[179] criminal law,[180] investment law[181] and conservation with transboundary impacts.[182]

At the national level, monetary compensation and injunctive reliefs remain the two most common forms of remedies in biodiversity litigation.[183] For example, in the UK, a wide range of bodies can deal with biodiversity related issues and remedies differ depending on which forums the matter was challenged. It is possible to have compensation, injunction, or reconsideration of the matter

[171] See Chapters on UK and France.
[172] See Chapters on Australia and South Africa.
[173] See Chapters on Australia, France and UK.
[174] See Chapter on India.
[175] See Chapters on UK, China, South Africa, India and Brazil.
[176] UNODC, *World Wildlife Crime Report: Trafficking in Protected Species* (UN2016).
[177] See Chapter on International Biodiversity Law (*Saramaka* case).
[178] See Chapter on India.
[179] See Chapters on US, International Biodiversity Law (e.g., the *Seals* case before WTO).
[180] See Chapters on South Africa, Brazil.
[181] See Chapter on International Biodiversity Law.
[182] See Chapters on US.
[183] See examples in Chapters on Canada, Australia, India, UK, Brazil.

by a lower court with different judges or differently constituted tribunal.[184] In Brazil, fines are applied to companies that have not shared the benefits related to the economic exploitation of genetic resources.[185] In China, public interest litigation cases include the removal of waste and reparation for ecological damage. In the USA**,** while a wide range of remedies including imprisonment, fines, restitution, mitigation, injunction, and property liens are available, the application of such remedies in biodiversity cases is limited. At the international level, the ICJ has confirmed that compensation is an appropriate form of reparation, 'particularly in cases regarding environmental harm where restitution is materially impossible or unduly burdensome'.[186]

In addition, restoration is another option that plays a central role in returning the ecosystem to baseline conditions (e.g., restoration of ecological integrity of national parks in Canada). The UN Decade on Ecosystem Restoration (2021–2030) underscores the urgency of ecosystem restoration to mitigate biodiversity as well as climate crisis. Ecosystem restoration can help to reverse some biodiversity losses and address the societal and cultural goals set in international agreements (e.g., CBD, UNFCCC, UNCCD) and commitments (e.g., Aichi Biodiversity Targets, SDGs). Through ecological restoration, ecological integrity can be reinstated by recovering the structure (e.g., species composition, soil and water properties) and functional properties (e.g., productivity, energy flow, nutrient cycling) of an ecosystem.[187] Ecological restoration often builds upon efforts to remediate and rehabilitate ecosystems.[188] Cases from the Netherlands, France and India reveal the court's willingness to apply restoration-based rationale.[189] For example, following the Erika oil spill case,[190] restoration and clean-up activities WERE explicitly added to the Environmental Code with the 2016 Law on Biodiversity, Nature and Landscape.[191] In Brazil, civil solidary liability[192] is an example whereby priority is given to the complete restoration of the damage. In making a determination of compensation in *Costa Rica v Nicaragua (Compensation)* case, the International Court of Justice stated that "damage to the environment, and the consequent impairment or loss of the ability of the environment to provide goods and services, is compensable under international

[184] See Chapter on UK.
[185] See Chapter on Brazil.
[186] Chapter on International Biodiversity Law.
[187] Afshin Akhtar-Khavari and Benjamin J Richardson, 'Ecological Restoration and the Law: Recovering Nature's Past for the Future' (2017) 26(2) Griffith Law Review 147.
[188] For example, in the EU, the Directive 2004/35/EC on Environmental Liability with Regard to the Prevention and Remedying of Environmental Damage [2004] OJ L143/56.
[189]Chapter on EU. For India, see: *Narmada Khand Swabhiman Sewa v Madhya Pradesh*, Original Application No. 144/2013. NGT Judgment, 1 October 2014.
[190] Danai Papadoupolou, 'The Role of French Environmental Associations in Civil Liability for Environmental Harm: Courtesy of Erika' (2009) 21(1) Journal of Environmental Law 87–112.
[191] Elise Buisson and others, 'Promoting Ecological Restoration in France: Issues and Solutions' (2018) 26 (1) Restoration Ecology 36–44.
[192] Solidary civil liability means that any person, natural or legal, that has caused, directly or indirectly, damage to the environment, will be jointly and severally liable to repair or indemnify the damage. Objective and joint civil liability is provided for in articles 3º, IV and 14, § 1º of Law 6.938/1981.

law."[193] The Court assessed the restoration costs, as well as the value attributed to the impairment of goods and services prior to recovery.[194] However, restoration as a remedy remains complicated in practice as illustrated by the determination of baselines for restoration (e.g. what is the baseline condition?) and the complexity of some restoration activities.[195]

In order to reduce the problem with expenses related to a case, the court can make a cost order that does not inhibit the litigants from enforcing their environmental rights. The purpose of a cost award should not be mainly punitive or compensatory and its primary focus must be to allocate the cost of litigation equitably. This practice is evidenced in public interest environmental litigation, [196] and the same argument can be applied in favour of a general exception for the costs rule in biodiversity litigation. Biodiversity cases are often brought in the broader public interest whereby the case helps to bring clarity in law, thus reducing the need for future litigation. Examples of such cost orders favourable to litigants in biodiversity cases protecting the public interest are found in South Africa and India.[197] In such circumstances, the courts either did not make any cost order, or the cost and the expenses of the cases were ordered to be paid by the respondents (e.g., state as the respondent was asked to pay the cost of the case).

3.3.3 Biodiversity litigation and the public

Lastly, is there any lasting or significant impact of biodiversity litigation on public behaviour? If a court's decision influences peoples' behaviour, this could demonstrate remarkable effectiveness of these decisions in the fight against biodiversity destruction. Although the impact of climate change litigation in the context of social movements is visible,[198] the social influence of biodiversity litigation has not yet been comprehensively assessed. In the context of climate change, the influence of courts on society and politics cannot be denied.[199]Although the direct effects of court decisions on public behaviour are difficult to establish, certain indirect influences of the courts' decisions in climate litigation are evidenced in the increased level of public awareness, media attention and public activism.[200] Collaboration and networking among vulnerable groups can empower them to protect their rights. Indeed, the increasing level of global biodiversity

[193]Certain Activities Carried Out By Nicaragua In the Border Area (*Costa Rica v Nicaragua*) Compensation (Judgement) [2018] ICJ Rep para 42.
[194] Ibid para 53.
[195] James Bullock and others, 'Restoration of Ecosystem Services and Biodiversity: Conflicts and Opportunities' (2011) 26 (10) Trends in Ecology & Evolution 541-549.
[196] Jona Razzaque, *Public Interest Environmental Litigation in India, Pakistan and Bangladesh* (Kluwer 2004), 229-266.
[197] Ibid 246. Also, chapter on South Africa.
[198] Joana Setzer and Rebecca Byrnes, 'Global Trends in Climate Change Litigation: 2020 Snapshot' (2020, Grantham Research Institute on Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science), 13-14.
[199] Laura Burgers, 'Should Judges Make Climate Change Law?' (2020) 9(1) Transnational Environmental Law 63.
[200] Anke Wonneberger and Rens Vliegenthart, 'Agenda-Setting Effects of Climate Change Litigation: Interrelations Across Issue Levels, Media, and Politics in the Case of Urgenda Against the Dutch Government' (2021) 15 (5) Environmental Communication 701.

destruction needs to influence people's behaviour and values.[201] Initiatives such as 'one meat-free day a week'[202] or 'flight shame,'[203] social marketing strategies (e.g., TV ads) coupled with educational campaigns are common strategies to change consumer behaviour,[204] although evidence on the effectiveness of such initiatives is lacking. Therefore, if we take lessons from climate change, socio-political events such as biodiversity summits or protest actions by activists may promote these changes in people's behaviour. Thus, a court decision can have a strong impact on the population, as it is accepted more widely by society as an authoritative interpretation of law.

Finally, beyond the diversity of approaches and cases studied in this book, what could be the added value of this new concept of biodiversity litigation?

4. The Added Value of the Concept of Biodiversity Litigation

With this edited collection, our intention was to explore a sub field of environmental litigation that focuses on biodiversity and to conceptualize it as a distinct field. To this end, it is interesting to observe how climate change litigation has become a theme in its own right and determine whether the same could be said about biodiversity litigation. Moreover, what influence could climate change litigation have on biodiversity litigation?

4.1. Biodiversity Litigation as a Stand-Alone Field. Lessons from Climate Litigation

Recognizing "biodiversity litigation" as a concept could help to bring more attention to an environmental crisis that is overshadowed by climate change. It is well established that climate and biodiversity are interlinked and that climate change will have an impact on biodiversity.[205] However, even if we were to tackle climate change effectively in the near future, it would not necessarily mean that biodiversity would be significantly preserved. Indeed, biodiversity is often on the losing end of environmental effort.[206] In other words, promoting the concept of biodiversity litigation could help to keep this priority afloat while we are also focusing our efforts on climate change mitigation and adaptation.

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201 Liisa Varumo and others, 'Perspectives on Citizen Engagement for the EU Post-2020 Biodiversity Strategy: An Empirical Study' (2020) 12 (4) Sustainability 1532.

202 Ruben Sanchez-Sabate and Joan Sabaté, 'Consumer Attitudes Towards Environmental Concerns of Meat Consumption: A Systematic Review' (2019) 16 (7) International Journal of Environmental Research and Public Health 1220.

[203] The Guardian, 'The Guardian View on 'Flight Shame': Face it- Life Must Change' (Theguardian.com, 17 January 2020) <https://www.theguardian.com/commentisfree/2020/jan/17/the-guardian-view-on-flight-shaming-face-it-life-must-change accessed 22 March 2022.

[204] Matthias Lehner, Oksana Mont and Eva Heiskanen, 'Nudging – A Promising Tool for Sustainable Consumption Behaviour?' (2016) 134 Journal of Cleaner Production 166; Kerry Waylen, Philip McGowan and E J Milner-Gulland, 'Ecotourism Positively Affects Awareness and Attitudes but not Conservation Behaviours: A Case Study at Grande Riviere' (2009) 43 (3) Environmental Science 343.

[205] IPBES, IPBES-IPCC cosponsored workshop Biodiversity and Climate Change Scientific Outcomes (IPBES 2021).

[206] Sandrine Maljean-Dubois, *Le droit international de la biodiversité* (Brill 2021).

As a starting point, we defined "biodiversity litigation" in our introduction as *any legal dispute at the national, regional or international level that concerns conservation of, sustainable use of and access and benefit-sharing to genetic resources, species, ecosystems and their relations.* However, it must be said that biodiversity litigation does not yet have a strong "legal identity". On the one hand, it is basically a relabeling of a part of environmental litigation. On the other hand, it is often difficult to differentiate biodiversity cases from other environmental cases. The biodiversity component is generally only one among many others, like economic development, human rights, indigenous peoples' rights, etc.

We could, however, say the same for climate litigation, which has nevertheless emerged as a specific field of dispute, even if there are still debates on its exact scope.[207] How can we explain this difference? One reason could be that biodiversity litigation has a much longer history and is linked to well established but distinct legal fields: urban planning, waste management, protected areas to name a few. In contrast, climate litigation is a recent trend which has grown exponentially and has been publicized as such. Except for "charismatic megafauna",[208] public awareness is higher for climate issues than for biodiversity. Therefore, it may be harder to promote the use of the concept of biodiversity litigation in a field where legal habits are deeply entrenched.

Additionally, in climate litigation, judges are seen as -and are becoming - key actors in the global effort to tackle climate change. The Paris Agreement is more in the spotlight than the CBD. The international climate regime has given rise to an international network of activist lawyers working for associations and forming, with a committed academic community, an international "epistemic community" at the service of climate. Climate change litigation has initiated an international dialogue of judges, even in legal systems where such an approach might be uncommon. Judges know the worldwide publicity that climate rulings enjoy. They also know that their decisions will be analyzed and commented on well beyond their own national borders and that they may in turn inspire courts in other countries. In comparison, biodiversity cases are, in nearly all cases, framed as local, or sometimes national cases. They have remained "insular". The idea that a threat to biodiversity is a global one is not usually found before the courts.

Measurable in quantitative as well as qualitative terms, the growing role of international law before domestic courts has been confirmed by more general studies They link this development to the normative expansion of international law and to the increasing interdependence of States in the context of globalization.[209] The increased presence of international law is also the direct

[207] Jacqueline Peel and Hari M Osofsky, *Climate Change Litigation: Regulatory Pathways to Cleaner Energy* (CUP 2009).
[208] Andrew C Mergen, 'Lessons from the Polar Bear Listing Litigation,' (2015) 29 (3) Natural Resources & Environment 30; Natalie Klein and Nikolas Hughes, 'National Litigation and International Law, Repercussions for Australia's Protection of Marine Resources' (2009) 33 Melbourne University Law Review 182.
[209] Yuval Shany, *National Courts as International Actors: Jurisdictional Implications* (International Law Forum of the Hebrew University of Jerusalem Law Faculty, Research Paper, N°22-08, 25 Oct. 2008) 5.

consequence of the growing openness of States to international law.[210] All this is leading national courts to think "outside the 'Westphalian' box" marked by the lack of permeability between the international and national spheres.[211] Many academics have called for this, asking national courts to play a much more important role as instruments safeguarding the international legal order, by taking into account "meta-national" considerations, beyond short-term national interests.[212]

Taken as a whole, these phenomena illustrate how the processes of normative and judicial intertwining, very well described as early as 2013 by Mireille Delmas-Marty, are capable of "creating a movement that makes it possible, under certain conditions, to integrate and reconcile the multiple constraints of systems – national and international – which were initially based on different models".[213] National courts thus become 'organizers of clouds', to use her beautiful metaphor.[214]

Vague international law, as is most of the IBL, can gain legal in clarity through the intervention of national courts, which make up for the lack of an international control mechanism. Through their interpretation of States' international commitments, which go well beyond IEL, national courts can connect, harmonize, bring together and even hybridize international and national norms, with the various courts mutually inspiring each other across borders.[215] National courts, through their cascading decisions, could thus be one of the keys to better combine, on the one hand, international commitments and national regulations and on the other hand, international ambition and State action. The urgency is obvious, as shown by the first IPBES report, published in 2019.

To summarize, there is no formal reason why the concept of biodiversity litigation could not be used as a parallel to the concept of climate litigation. This would simply entail a reframing and a relabeling of existing judicial practices. Doing so could open the door to creative legal thinking, by relying on novel concepts and principles. We also believe that such a concept is also relevant for scholarship in environmental law. As highlighted by Elisabeth Fisher, environmental law is characterized by its rapid and continuous growth. This in turns calls for the development of concepts and frames that allow for a more rigorous description of the field.[216] The notion of biodiversity ligation can serve such a purpose by adding more clarity to the quasi-boundless notion of environmental litigation. Moreover, should the notion become more widespread, this would in turn

[210] Jean d'Aspremont, *The Systemic Integration of International Law by Domestic Courts, in The Practice of International and National Courts and the (De-)Fragmentation of International Law* (Hart Publishing 2014) 143.
[211] Stephane Beaulac, *Westphalia, Dualism and Contextual Interpretation: How to Better Engage International Law in Domestic Courts* (EUI Working Paper, MWP 2007/03) 4.
[212] Antonio Cassese, 'Remarks Theory of "Role Splitting" (dédoublement fonctionnel) in International Law,' (1990) European Journal of International Law 230.
[213] Mireille Delmas-Marty, *Le pluralisme ordonné. Les forces imaginantes du droit (II)* 63. [Our translation]
[214] Ibid [Our translation].
[215] Ibid.
[216] Elizabeth. Fisher 'Environmental Law as "Hot" Law' (2013) 25 Journal of Environmental Law 347.

reshape the debates around courts and the environment and lead to other relevant ideas and propositions.[217]

4.2. Climate Litigation, an Inspiration for the Future Development of Biodiversity Litigation?

Climate litigation could be an inspiration for the development of biodiversity litigation, potentially creating new reflexes in both claimants and judges. Various elements point in this direction.

First, strategic biodiversity disputes are more frequent. Following the same patterns at play in the field of climate change, the cases try to address what is perceived as a failure on the part of public authorities or companies. They also encourage public authorities or companies to take stronger measures to protect biodiversity, to implement more ambitious policies, to obtain compensation for damage suffered, to stop a project potentially harmful, etc. Representing this tendency, a new French case initiated by the "Ligue de Protection des Oiseaux," an NGO specialized in the conservation of birds, consists in civil proceedings against Bayer and Nufarm for their alleged responsibility in the decline of field birds due to the effect of the pesticides these companies produce.[218] A similar case has been brought in Costa Rica where the Supreme Court ordered a scientific study that may lead to a ban on pesticides that harm pollinating insects.[219] Furthermore, in the future, biodiversity litigation risks could also become a new concern for companies. Following the model of climate lawsuits, with increasing attention being paid to the impacts of companies on biodiversity, there are "new physical, regulatory, market and reputational risks – all of which are compounded by the hyper-connectivity of global value chains."[220] As with climate, litigation risks can arise from breaches of due diligence along the value chain, or failure to disclose those risks adequately or accurately.[221]

Another factor of mutual influence that could lead to an increasing role of international law, may be that the same NGOs are engaging in climate and biodiversity litigation, with increasing experience in the use of international law and mutual inspiration. For instance, in China, Friends of Nature Institute, the very same NGO that first advocated for climate change litigation, has also sued enterprises over biodiversity causes.[222] Similarly, in France, it is the NGO "Notre affaire à tous", which is involved in several climate cases, that has initiated the above mentioned Pollinis case.[223] Treaties like the Aarhus Convention or the recent Escazu Regional Agreement play, or can play a major role here, in setting procedural obligations on access to information, participation and access to justice and thus having the potential to serve as a catalyst for biodiversity litigation.

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[217] As argued by Daniel Bonilla Maldonado in Ole W Pedersen (ed) *Perspectives on Environmental Law Scholarship* (CUP 2018) 41–59.
[218] See Chapter on France.
[219] Boya Jiang, Emmanuel Ugirashebuja, Dimitri de Boer and Danting Fan, *10 Landmark Cases for Biodiversity* (ClientEarth, 2021) <https://www.clientearth.org/media/upvbjd4p/10-landmark-cases-for-biodiversity.pdf> accessed 25 March 2022, 12-13.
[220] See Sedilekova (n 53) 3; Isabella Kaminski, 'Legal Eagles: How Climate Litigation is Shaping Ambitious Cases for Nature' *The Guardian* (16 March 2022).
[221] Sedilekova, *Biodiversity and Value Chain Risk* (n 53), 4.
[222] See Chapter on China.
[223] See Chapter on France.

Such an inspiration could be reinforced by the future adoption of the Post 2020 Global Biodiversity Framework which could fuel biodiversity litigation in the same way as the Paris agreement has fuelled climate litigation in recent years. Incorporating the reference to the new Strategic Plan on Biodiversity into their legal arguments could be of added value for the plaintiffs and give more weight to their demands, judging by the evolution of climate litigation in which reference to international law is usually a booster. Judges could then work on reconciling the global objectives and targets with – clearly inadequate – national policies, as they do in climate litigation.

Mutual influence could also be favoured by the increasing linkages between biodiversity and climate change issues. If the two topics have been kept separate thus far, we are now witnessing an increasing interplay between climate change claims and biodiversity claims. There are more and more disputes over the consequences of climate policies on biodiversity (development of renewable energy versus habitat conservation, biofuel production versus deforestation). Climate change and biodiversity are not always competing interests.[224] In some cases, biodiversity claims have even strengthened climate change litigation.[225] In others, biodiversity litigation has been influenced by climate change.[226] As nature-based solutions to climate change–come under the spotlight and as climate change drives the biodiversity crisis, climate and biodiversity litigation will undoubtedly become increasingly entangled and difficult to separate either practically or conceptually.[227] In this sense, provided that we recognize the trade-offs and synergies of the co-benefits associated with their implementation, nature-based solutions could potentially contribute to the achievement of several SDGs, "by promoting the delivery of bundles of ecosystem services together generating various social, economic and environmental co-benefits."[228]

For all these reasons, biodiversity litigation could be a growing part of the "conservation law toolkit" in the future, and IBL could become a major tool for a more proactive and creative judiciary. Admittedly, IBL has been criticized as being founded on anthropocentric and utilitarian legal-political ontologies, thereby blocking a path to "a more hopeful system of global ecological law and governance based on the 'rights of nature' that might be able to honour the intrinsic value of the biosphere as a rich, agentic, and communicative whole, fundamental to the Earth's survival."[229] If there is some truth in that assertion, our case studies show that it has to be nuanced. In raising

[224] See for instance in India the case *We the People v Union of India*; Australia with prominent cases involving Australian biodiversity that have been brought to address the impacts of mining

[225] Australia, Brazil (the ADPF 708); Joana Setzer and Lisa C Vanhala, 'Climate Change Litigation: A Review of Research on Courts and Litigants in Climate Governance' (2019) 10 (3) Wiley Interdisciplinary Reviews: Climate Change e580.

[226] Andrew C Mergen, 'Lessons from the Polar Bear Listing Litigation' (2015) 29 (3) Natural Resources & Environment 30.

[227]Arie Trouwborst, 'International Nature Conservation Law and the Adaptation of Biodiversity to Climate Change: a Mismatch?' (2009) 21(3) Journal of Environmental Law 419.

[228] Eulalia Gómez Martín and others, 'Using a System Thinking Approach to Assess the Contribution of Nature-based Solutions to Sustainable Development Goals' (2020) 738 Science of The Total Environment 139693.

[229] Anthony Burke, 'Blue Screen Biosphere: The Absent Presence of Biodiversity in International Law' (2019) 13 (3) International Political Sociology 333–351. See also Usha Natarajan and Kishan Khoday, 'Locating Nature: Making and Unmaking International Law' (2014) 27 (3) Leiden Journal of International Law 573–593.

awareness, as a purveyor of concepts, as an element of evidence, IBL has advanced the cause of biodiversity. Even if it has not actively promoted the "rights of nature" and ecocentric approaches, and must certainly evolve from this point of view, it has not blocked their entry into – at least some – domestic laws.[230]

5. The Way Forward

What have we learned about biodiversity litigation?

First, biodiversity litigation is evidently influenced, in varying degrees, by international biodiversity law. The most important influence of IBL, both in terms of frequency and in terms of impacts, is its indirect influence, particularly as an interpretative tool.

Second, biodiversity litigation has evolved over the years to exhibit certain patterns. It is a form of litigation where the involvement of NGOs and IPLC is crucial and where judges have progressively become more open to science and expertise. Rights discourses have shaped biodiversity litigation in an uneven way, some jurisdictions being open to them and some focusing on environmental law only.

Third, biodiversity litigation can be a tool for the effectiveness of biodiversity law in general. It offers a wealth of remedies and can shape the popular opinion through symbolic cases. This is however highly dependent on non-legal elements, such as the strength of the rule of law in States, or the actual willingness of governments to preserve biodiversity.

Fourth, it appears that "biodiversity litigation" does not yet have an identity as strong as "climate litigation." Nevertheless, the cases studies in this volume and the available literature show that there is some merit in welcoming "biodiversity litigation" as a staple of environmental law. We believe that this will open the door to more creative legal thinking when dealing with biodiversity related disputes and refine the discourses around environmental litigation.

There is, however, so much more left to do on the topic. In this volume we have examined a mere fraction of a vast ensemble of cases. By engaging in more case studies, we hope to participate in making the concept of biodiversity litigation a common notion of environmental law. Indeed, as we conclude this project, we see initiatives and studies springing up around the globe.[231]

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[230] See for instance the Chapter on India.

[231] See, for instance, the website Conservation Litigation <https://www.conservation-litigation.org/> accessed 28 March 2022; Jacob Phelps, Carole Adaire Jones and John A Pendergrass, 'Liability for Environmental Harm as a Response to the Anthropocene' Michelle Lim (ed), *Charting Environmental Law Futures in the Anthropocene*, (Springer 2019); Jacob Phelps and others, 'Environmental Liability Litigation could Remedy Biodiversity Loss' (2021) 14 (6) Conservation Letters e12821; Sedilekova (n 53); Achiba Gargule, *Beyond the Institutional Fix? The Potential of Strategic Litigation to Target Natural Resource Corruption* (Targeting Natural Resource Corruption, Topic Brief, February 2022, U4-CMI, 2022).