

COP15 on biological diversity

Key takeaways for
in-house legal

Grow | Protect | Operate | Finance

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Introduction



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In mid-December the Parties to the UN Convention on Biological Diversity met to complete their 15th conference, or COP15. You could be forgiven for missing this one. We had all just about digested COP27 (the more famous climate equivalent), the conference had suffered multiple postponements due to coronavirus, and the press were uncharacteristically quiet on news emerging from Montreal. However, turning a blind eye to the consequences of biodiversity destruction is not an option.

The Global Risks Report that the World Economic Forum released annually at Davos was instructive this year. This report ranks the top 10 risks over a 2 year and a 10 year period. In last month's 2023 report, 5 of the top 10 risks over a 2 year period were environmental. This was up from 2 in both 2022 and 2021. Not featuring in the 5 though was biodiversity loss and ecosystem collapse. This remained a 10 year risk as it had been in those previous two reports. For me, this illustrates the risk facing business and legal teams; biodiversity feels like a can we kick down the road, but unlike global warming and adverse weather, you cannot pull back from extinction. In the absence of a coherent and near term global governmental response that guides transition away from destructive practices, we will see other stakeholders holding business to account. Anticipate reputation damage, supply chain interruption, and litigation risk in the near term where your business has an interface with biodiversity



damage. Given the immediacy of the issue, these legal risks will manifest at a greater pace than we have witnessed with climate exposure and litigation, and so risk planning and managed business transition needs to start as soon as possible.

As with our broader programme of ESG thought leadership, our aim is to illuminate legal liability risks arising from environmental and social impacts to enable our clients to evaluate their contribution to the damage and manage their exposure. We feel the disconnect between the gravity of impact and general lack of awareness about the legal liability risk that businesses currently carry for biodiversity damage, underscores the importance of raising the profile of this issue. Adding to our climate series, this 'Key takeaways for in-house legal' is your guide to COP15 and the risks that we see on the horizon arising from biodiversity degradation.

Much like decarbonisation, meeting the biodiversity challenge will drive transition in your business. We suspect that civil society will drive this transition through media campaigns and litigation before regulatory frameworks provide the support for new approaches and products that business will need to adopt. Positioning your business to succeed in this dynamic requires foresight of the liabilities and making informed choices that are well placed to align with future regulatory frameworks. As in-house counsel you have a critical role to play.

What is biodiversity?

Biodiversity is the variety within species of animals, plants, fungi and microorganisms like bacteria, making up our natural world¹. This variety is critical for our survival.

All the interactions between plants, fungi and animals lead to the food we eat and the medicines we rely on. They underpin our health and wellbeing, ensuring we have clean water and oxygen. Plants and fungi also regulate the climate, protect communities from natural disasters like hurricane damage, and counteract the pollution in the air by carbon-sequestering.²

“Goods and Services” provided by these ecosystems include:³



Food, fuel and fibre



Stabilization and moderation of the Earth's climate



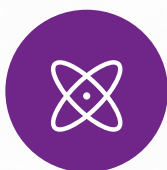
Control of pests and diseases



Shelter and building materials



Moderation of floods, droughts, temperature extremes and the forces of wind



Maintenance of genetic resources as key inputs to crop varieties and livestock breeds, medicines, and other products



Purification of air and water



Generation and renewal of soil fertility, including nutrient cycling



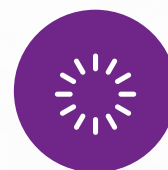
Cultural and aesthetic benefits



Detoxification and decomposition of wastes



Pollination of plants, including many crops



Ability to adapt to change



What does the science say?

Scientists assert the extent of current biodiversity loss represents the beginning of the sixth mass extinction in geological history. The pace of extinction has accelerated dramatically as a result of human activity. Ecosystems are being fragmented or eliminated, and innumerable species are in decline or already extinct.

Our demands on the world's natural resources are also growing faster than population growth. Since 1950, the population has more than doubled, but the global economy has quintupled resulting in huge biodiversity loss. In addition, most of the economic growth has occurred in relatively few industrialized countries.⁴

The biggest threats to biodiversity

01

Land-use and sea-use change

Habitat conversion (e.g. deforestation), habitat fragmentation, and degradation through overintensive use of ecosystems.

02

Direct overexploitation

Overexploitation of animals, plants, and ecosystems in general (e.g. from poaching, unsustainable logging or overfishing).

03

Climate change

Shifts in temperature, precipitation, and wind flows caused by increased levels of greenhouse gases in the atmosphere.

04

Pollution of soil, water and air

Release of harmful substances (e.g. through excessive chemical use) into ecosystems; also light and noise pollution.

05

Spread of invasive species

Plants, animals or other non-native organisms entering or expanding their presence in a given habitat.

Source: IPBES, *Global Assessment Report on Biodiversity and Ecosystem Services of the Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Services* (2019).

Earth's wildlife populations have plunged by 69% between 1970 and 2018.⁵ Unlike changes to the climate, which could be reversible even if it takes thousands of years, extinctions are permanent.

The five biggest threats to biodiversity are: changes in land and sea use; direct exploitation of natural resources; the climate crisis; pollution and invasive species.⁶

The underlying drivers of these threats are unsustainable consumption, damaging supply chains and overconsumption by wealthy countries. Given our dependence on food crops, medicines and other biological resources, this poses a threat to our well-being. It includes disruptions to food supplies, forced migration, and continued biodiversity loss and extinction.⁷ For example, 95% of the food we eat is produced in the soil.⁸ Yet 20-40% of the world's land is severely degraded by unsustainable agricultural practices, according to the UN.⁹ Many scientists agree that biodiversity is at a tipping point, and decisions made at COP15 may have been our last chance to help species and ecosystems recover from the stresses that are depleting them.¹⁰

What are the proposed solutions?

Scientists say that protecting 30% of Earth's surface by 2030 (and eventually 50% by 2050) will help species and ecosystems recover from the stresses that are depleting them. It also will conserve valuable services that nature provides to humans, such as buffering coasts from storms and filtering drinking water.¹¹ The first step is to ensure that countries will prioritise action in places that are most important for human well-being. That includes areas of the world that contain vast carbon reserves and places that are particularly important for food and water.

Countries such as Brazil, Colombia, Indonesia and China in particular have incredible concentrations of plants, mammals, fungi and amphibians in their vast and unique ecosystems.¹² However, although protected area coverage targets are controversial, they have driven international and national policy and collective action to increase conservation. Government and private sector solutions need to align and support this change. For example capital could be diverted away from businesses that deplete natural resources or cause adverse biodiversity impacts.

In terms of limitations, climate change and biodiversity targets go hand in hand. Even though we know how to protect species, if the planet's conditions are too harsh for them to survive, it won't matter. So, it's only by knowing how to protect animals and natural places AND stopping our contributions to climate change that we will be able to protect the planet.

How does biodiversity impact business?

Biodiversity is the foundation of our global economy. At least 40% of the world's economy and 80% of the needs of the poor are derived from biological resources.¹³ More than half of global GDP, equal to \$41.7 trillion (£34.6 trillion) is dependent on the healthy functioning of the natural world.¹⁴ Nature is key to reaching net zero and providing solutions for challenges we face (i.e. drought, land use, food security).

Biodiversity-related risks facing businesses

01

Physical impact on your business processes.

02

Liability exposure for practices negatively impacting biodiversity.

03

Misalignment of your transition with subsequent regulation.

Businesses face three main biodiversity-related risks. The first business risk is the physical impact on your business processes¹⁵. The decline of natural ecosystems threatens to disrupt supply chains. Sectors reliant on natural resources are in danger of incurring increased input costs as biodiversity declines. For example, the food, commercial forestry and ecotourism industries could lose US\$338 billion per year if the loss of biodiversity continues at its

current pace.¹⁶ Approximately 75% of global food crops rely on animals and insects such as bees to pollinate them, but many of these pollinator populations are in decline.¹⁷ This could put more than US\$235 billion of agricultural products at risk.¹⁸

The impact will also be felt well beyond industries that rely on natural inputs. For example if the Amazon ecosystem collapses, enormous amounts of carbon will be released into the atmosphere, causing a devastating rise in global temperatures. Overall, few companies are aware of the magnitude of the physical risks that biodiversity loss poses, whether those risks relate to society as a whole or to their business directly.

The second business risk is liability exposure for practices that cause adverse impacts on biodiversity. We see civil society acting before governments are able to shape regulation, creating exposure for business through media campaigns and biodiversity-related litigation. The nature of this legal liability risk is a feature of the broader ESG dynamic, where an absence of regulatory mechanisms to support transition creates greater uncertainty and risk for business.

The third business risk is that governments will catch up, regulating after the transition has commenced. The investments that business makes to address pressure from civil society risk being out of step with subsequent regulation. So understanding the regulatory options and skilfully positioning your transition in alignment with likely future regulatory frameworks will be key. This will be a delicate balancing act.

Of course for those companies taking the lead in this area, there are significant opportunities. Developing new products, services, and business models will create opportunities to enter profitable new markets. Taking the lead from a biodiversity perspective will also improve the organization's overall value proposition and brand by responding to public demand for sustainability. Finally, organizations will see cost benefits from better access to capital and potential operational synergies as investors increasingly integrate ESG performance into their decision making. Market valuations will move positively to reflect that practice.

COP15 decisions and outcomes

The Kunming-Montreal Global Biodiversity Framework (**KMGBF**), agreed at COP15, is our most decisive step towards globally addressing the degradation of biodiversity. Countries, investors and civil society are slowly waking up to the rising risks to our wellbeing and to business from a decline in natural resources. The agreement itself has not turned many heads. Much of it is well intentioned but lacks detail, rather than requiring the more specific investment and obligations non-governmental organizations (NGOs) hoped for. For instance, there is a suggestion that large and transnational companies disclose “their risks, dependencies and impacts on biodiversity” with no mandatory requirement to do so. Given the total eclipse of climate change over issues of biodiversity to date, the main success of COP15 should be seen as raising awareness around the extent of degradation and the need to act. There are a few high-profile targets, such as the goal to ensure 30% of the Earth’s land and water are preserved by 2030 (30x30 Target). These targets are most likely to shape policy in the immediate future. We will now explore these in more detail. Overall, there is clearly a growing need to factor nature into financial and business decisions.

The KMGBF begins by introducing the framework’s 4 long term goals and subsequently 23 targets towards the implementation of these goals. The goals are geared towards restoration, maintenance, and

resource sharing by 2050. The targets are broken down into three categories: (1) reducing threats to biodiversity; (2) meeting people’s needs through sustainable use and benefit sharing; and (3) tools and solutions for implementation and mainstreaming.

Key takeaways

Here are some of the key takeaways:

30x30 Target

KMGBF commits governments to conserving 30% of the planet by the end of the decade in order to halt biodiversity loss. Like the 1.5°C target for climate change, 30x30 is set to be biodiversity’s North Star. The first step will be for nations to identify areas of particular importance. For example, places where animals come to breed or where we know there are important migrating sites in a network. This is phase one in achieving the framework’s long term goal to protect 50% of the planet by 2050.

Indigenous rights

According to a UN report on forest governance by indigenous peoples, indigenous and tribal territories protect deforestation as well or better than other protected areas. Such territories in Latin America and the Caribbean store 30% of the carbon of the region’s forests and 14% of the carbon in tropical forests worldwide – this is more than all the forests



in Indonesia and the Democratic Republic of Congo.¹⁹ The KMGBF references indigenous peoples and local communities throughout, noting that all actions towards restoring biodiversity should involve promotion and respect for these peoples. We are getting increasingly more visibility of indigenous peoples' defence of their territories and way of life through climate litigation (i.e. the Torres Strait Islanders successful claim against Australia) so the KMGF is likely to provide more grounding for these claims.

Reform of harmful subsidies

More than US\$1.8 trillion in annual subsidies go to industries connected to biodiversity loss (i.e. fossil fuels, unsustainable agriculture, water depletion and unsustainable forest management²⁰). Agreeing to reform self-defeating subsidies was a priority at COP15 and Target 18 states those harmful for biodiversity must be phased out or reformed; initially they must be reduced by at least US\$500 billion per year by 2030. This would encourage redirection of subsidies to farmers practicing sustainable agriculture away from unsustainable practices like cattle farming, which can involve vast swathes of land being cleared for grazing. These kinds of changes, although welcome in theory, will be difficult to implement and the agricultural sector will need a lot of support to adapt. A number of developing countries

(particularly India) were against this target as many of their economies are reliant on agriculture and do not currently have the finance to implement this kind of reform.

Next steps

Before the next COP in 2024 (unlike the climate COPs, these conferences are held every 2 years), all countries must prepare updated National Biodiversity Strategies and Action Plans as well as National Biodiversity Finance Strategies. The next COPs will consider if the cumulative impact of the national actions is sufficient to reach the global goals and targets for 2030 and 2050. COP16 will be held in Turkey.

There is a lot of heavy lifting to do to reach the goals and targets set out in the agreement from investment to cooperation with business. The KMGBF is a good start, but will not be anywhere near enough on its own. In addition, the nature negotiations (much like the climate COPs) have been marred by a deep divide between wealthy and developing countries. At one point, discussions escalated so far that Global South leaders walked out of COP15 talks following a deadlock on financing biodiversity protection. Most of the Earth's biodiversity exists in the Global South and most of its degradation globally has been driven by over-consumption in developed countries. So resolving issues of just transition will also be critical.



Recent case law and litigation risk for your business

Biodiversity litigation has been overshadowed by climate change litigation in recent years, however, we must understand the trends in litigation and apply this to claimants' and activists' approaches to holding business to account for adverse impacts on biodiversity.

We are seeing several key implications emerging from global climate change litigation that can be applied to biodiversity:

- NGOs are using the obligations set out in domestic law to challenge the decarbonisation commitments of licensed businesses such as in **ClientEarth v Polska Grupa Energetyczna**. Consider the application of developing obligations related to biodiversity net gain and enhancements.
- An alternative course of action to challenge decarbonisation strategies is based in human rights and the duty of care, such as in **Millieudefensie et al v Royal Dutch Shell**. The same basis of claim could lie against a business whose activities can be shown to cause biodiversity degradation.
- We are seeing, as illustrated by **Luciano Lliuya v RWE**, an action being taken by a claimant suffering property damage (or imminent damage) as a result of global warming against a business for its proportionate contribution to overall global greenhouse gas emissions. Consider proportionate contribution to species extinction.
- Shareholders are arguing in **Client Earth v Shell** that the Board should be responsible for ensuring continued profitability through the inevitable energy transition. This brings into focus the responsibility of the Board to manage transition away from practices that damage biodiversity.
- Several actions are being brought against businesses for falsely projecting a position that frustrates understanding and redress of environmental harms including a shareholder suit vs **Exxon** and **Minnesota State v API**. With the scientific knowledge now available, how are businesses using this to underpin transition rather than advocate for the status quo?

Corporates will increasingly become the target of these actions, as is the case with climate change litigation. This is because society is becoming progressively more aware of the extent of biodiversity degradation and the devastation it causes, as well as the role they should now play in exacerbating this crisis and should now play in mitigating it.

Additionally, many governments around the world are starting to introduce legislation requiring corporates to carry out enhanced due diligence across their whole supply chain: this will oblige companies to assess the impact they are having on biodiversity and implement strategies to transition to more sustainable practices. This, as well as technological developments which will make it easier to prove the correlation between the actions or inactions of specific persons or corporates and biodiversity degradation, have therefore set the groundwork for an onslaught of biodiversity-based lawsuits. This is demonstrated by the 2021 **Casino** case in which Casino was sued under French Duty of Vigilance Law because the claimants argued that their annual due diligence plans lacked substance and applicability in respect of their involvement in the deforestation of the Amazon via the cattle farming of their subsidiary.

Being the subject of one of these lawsuits could be hugely costly and create irreparable reputational damage for corporates who may then be liable to compensate affected areas, communities and persons and/or be required to stop, or reverse, their business-critical actions or activities. We're seeing a number of corporates take robust and proactive approaches to assessing and monitoring case law and regulatory change in this area. The ability to predict, anticipate and quantify material impacts on your business is key to managing and mitigating your legal risk.

General Counsel discussion themes

When it comes to biodiversity, in addition to proactively tracking relevant case law and regulatory changes, the following key areas should be high on the priority list for General Counsel and in-house legal teams.

Biodiversity and plastic pollution

There is an inextricable link between plastic pollution and the biodiversity crisis we are facing. The severe and persistent presence of plastic waste in the natural environment has direct and significant negative consequences on biodiversity. The world has also, up until now, been largely blind to both the magnitude of plastic pollution and the extent of biodiversity degradation. Fortunately, the tide is turning and there is a growing focus on the need to end plastic pollution, in turn helping slow down the destruction of our planet's biodiversity.

The final COP15 agreement was largely silent on the issue of plastics, only including a vague mention in one of the targets to 'eliminate the discharge of plastic waste'. This is likely because of the ongoing work of the Intergovernmental Negotiating Committee (INC) to develop an international legally binding instrument on plastic pollution, which should come into force in 2024. The first session of the INC (INC-1) (which finished on 2 December 2022) did not result in any policy decisions but did help progress the conversation around the Treaty's future structure and content and decide the priorities for the next stage of the process which will take place in Paris in May 2023.

The perspective on who is responsible for plastic pollution, how plastic waste should be dealt with, and who should pay for the clean-up is shifting. Previously, and as identified in Coca Cola's 2021 World Without Waste Report, the emphasis was on cleaning up plastic waste, driving the circular economy and furthering consumer responsibility (i.e. through recycling and reusing). This is becoming an outdated view as NGOs, such as Minderoo, argue that we need to take action to address upstream production sources as well as downstream waste management. This will involve actions such as: limiting the amount of plastic we introduce into the environment, reducing our dependency on virgin plastic, re-imagining plastic waste as a valuable commodity and fixing our infrastructure to further enable the collection, sorting and recycling of plastic.

This increased societal awareness, NGO focus and incoming regulation will bring significant and new legal risk for companies which use plastic anywhere in their supply chain. It is vital that these companies carry out enhanced due diligence on their operations and their supply chain (as is now commonplace in relation to a company's greenhouse gas emissions) to ensure that they are proactively managing this risk. The failure to do so will make them a target for biodiversity and environmental harm litigation, greenwashing claims and shareholder action.

Biodiversity and supply chain due diligence

The focus on supply chain due diligence and reporting at COP15 evidenced the increasing pressure on businesses to identify, address and mitigate adverse impacts on biodiversity throughout their supply chains.

Emerging law worldwide

Supply chain law requiring due diligence of nature resource risk is emerging across the world, showing that regulators are willing to hold businesses accountable for biodiversity loss, just as they are for climate change.

Some examples include the German Supply Chain Duty of Care Act, the US Federal Supplier Climate Risks and Resilience Rule (covering climate impacts as a driver of biodiversity loss), the French Duty of Vigilance Law and the proposed EU Corporate Sustainability Due Diligence Directive (**CSDD**) (likely requiring entire value chain due diligence on actual or potential biodiversity impacts). Broadly speaking, the legal duty is often expressed as a positive obligation to undertake due diligence to identify, prevent or mitigate and account for actual and potential impacts in your supply chain. The OECD's Guidelines for Responsible Business Conduct – whilst in themselves non legally binding – underpin the majority of supply chain law regulatory regimes and cite ecosystem degradation and destruction of biodiversity as examples of adverse impacts.

As well as the emergence of generalised supply chain due diligence law, the proposed EU regulation on deforestation-free products will make it obligatory for companies to verify that specific commodities (including cattle, cocoa, coffee, oil palm, soya and wood) and products containing such commodities sold in the EU are produced on land that is free from deforestation or degradation activities. Similarly, the UK Forest Risk law will prohibit forest-risk products with supply chains that have a linkage to any form of illegal deforestation.

Regardless of the jurisdictions your business operates in, these laws are likely to require increased transparency beyond the territories where the legislation is in force due to the extraterritorial nature of complex supply chains, as well as stakeholders

requiring information from you for their own compliance needs. Therefore, even if the regulation does not capture your primary business operations, best practice indicates a need to begin maintaining data relating to your supply chain impacts on biodiversity and ensure alignment with the OECD Guidelines, in readiness for compliance over the next two years.

At EU-level

It is important to consider the whole package of sustainable finance legislation when considering your obligations or your stakeholders' obligations under the draft EU Corporate Sustainability Due Diligence Directive.

The CSDD is likely to require EU companies and non-EU companies with operations in the EU to conduct supply chain due diligence on both actual and potential biodiversity impacts. It will require in scope companies to minimise actual adverse impacts through corrective action plans, among other measures, and requires directors to take into account sustainability matters when fulfilling their duty to act in the best interest of the company. The Taxonomy Regulation – whilst it does not, on its own, impose substantive duties on companies or act as an enforcement mechanism – forms the basis for the CSDD by defining the environmental objectives and, through this, the elements of nature-related risk that businesses should diligence in their supply chains. It may also serve as a guiding tool for companies to attract sustainable financing for the corrective action plans they are required to implement under the CSDD.

Aligning with the Taxonomy is complex. Businesses need to ensure substantial contribution to and - at the same time - do no harm to, each of the biodiversity objectives. Relevant objectives for supply chain due diligence are likely to include water and marine, pollution prevention, sustainable water use and biodiversity and ecosystems. In March 2022, the EU Platform on Sustainable Finance published recommendations for the implementation of Taxonomy-aligned reporting in relation to a number of these objectives. The guidance covers more than 60 economic activities in sectors including agriculture, construction, manufacturing, textiles and transport. It proposes specific biodiversity criteria for crop production, circular economy

criteria for building developments, pollution prevention criteria for textiles and water criteria for wastewater treatment. Further guidance is expected, including in relation to forestry. We expect the EU Commission to publish Delegate Acts based on these recommendations, under the Corporate Sustainability Reporting Directive. These will be important to consider for businesses to adequately assess their supply chains and to develop sufficient traceability systems in compliance with the CSDD.

Biodiversity and carbon offsets

It's been a tough year for carbon offsets. They have had their value in fighting climate change repeatedly questioned, not least by a UN expert's report released at COP27. Concerns have also been raised around emitters based in the Global North buying up land in the Global South to make way for offset projects, resulting in local communities being displaced and denied access to their livelihoods. There is now a growing risk of legal action against companies engaging in such practices against both parent and subsidiary organisations.

However, the use of some types of carbon offsets can be a differential where they can show the projects on which they are based recognise the value of local communities and contribute to protecting or enhancing biodiversity. These offsets often trade at a premium, and when retired to meet net-zero or carbon neutral targets can minimise the risk of greenwashing accusations. Some carbon offsetting bodies offer additional certifications that meet these targets, such as VERRA's Climate, Community and Biodiversity (CCB) Standard for agriculture, forestry, and land-use projects. Gold Standard carbon credits issued in relation to projects in Australia can be blended with Australian Biodiversity Units (ABUs) that represent 1.5m² of protected land delivering biodiversity outcomes for Australian species. ABUs are also accredited by the Australian government.

These types of carbon offsets enter the realm of biodiversity offsets and biodiversity credits, two instruments directly referenced in the text of the COP15 Agreement. Target 19 addresses the need to mobilise international, public and private sector finance in order to implement national biodiversity strategies and action plans, including via schemes such as biodiversity offsets and credits.



However, the COP15 text does not define biodiversity offsets or credits. From a legal perspective, there is an important distinction between the two concepts. Understanding this distinction is crucial to managing legal and reputational risks associated with biodiversity and habitat loss, and when designing and implementing an ESG strategy.

Biodiversity offsets are already recognised within many legal systems and will likely be familiar to companies in the infrastructure, real estate and agriculture sectors in the UK. They require a person (or company) that has damaged or destroyed a habitat to create compensatory habitat measures on a new site to “offset” the damage caused. Often, the compensatory enhancement measures must represent a net gain, i.e. an overall improvement on the habitat that was originally lost. The concept of offsetting is captured within an existing legal framework and is therefore a regulatory requirement.

Biodiversity credits are a more novel concept. They represent the voluntary purchase of a credit linked to a biodiversity protection/enhancement project by a company, where there is no legal requirement to do so. Companies might wish to purchase biodiversity credits to support their ESG strategies and demonstrate they are aligned with the goals of COP15. The biodiversity credit market is currently in a nascent stage, similar to where the voluntary carbon credit market was a few years ago. This means it has the opportunity to avoid the mistakes made by the carbon market, in particular how to verify that the credits have achieved what they claim to, whether that be removing 1 tonne of CO₂ from the atmosphere, or protecting a certain area of habitat.

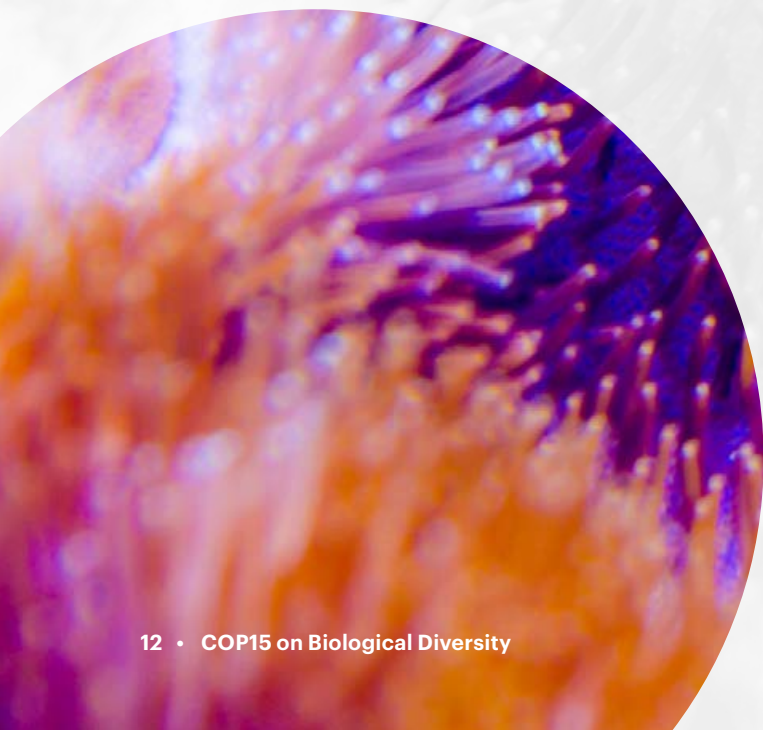
The challenge for the biodiversity offset market is coming up with a simple, verifiable and comparative metric for quantifying the value of a biodiversity credit. This arguably represents a more difficult challenge than for carbon credits, which are always measured in tCO₂e. Suggestions at this stage include area of land protected, volume of biomass increased or even the amount of personnel and monitoring systems used to safeguard a particular habitat. It is likely several metrics will become standard within the market.

This is understandable, given the complexities associated with measuring the value of biodiversity and how it varies between different countries and continents. However, competing metrics make it difficult for companies to assess the value of biodiversity credits, and for General Counsel to evaluate any legal liability or greenwashing risks associated with them. As was the case with the voluntary carbon credit market a few years ago, it may take a while for legal liability to crystallise in relation to biodiversity offsets. For now, General Counsel should be aware of the ESG risks associated with the biodiversity credits market, and ensure they purchase credits from projects that respect the role of local and indigenous communities in conserving biodiversity, and retain the right to audit the projects themselves.

Biodiversity and nature-related reporting and disclosure

COP15 hosted several events in relation to the reporting recommendations of the Taskforce on Nature-related Financial Disclosures (TNFD), which is closely aligned with the Convention on Biological Diversity and other key global biodiversity organisations.

Since the development of the TCFD – its climate related counterpart - we have seen the analysis of climate-change risk increase in priority on corporate agendas. It has become necessary for large businesses to consider climate change risk in their strategy, governance, and risk management decisions, and to publish measurable targets against common benchmarks to manage climate-related risks and dependencies throughout their supply chain. Reporting in line with the TCFD recommendations is a requirement for all large companies in the UK and is due to extend to small and medium companies in the near future. What is more, even if you are not captured directly



by TCFD-implementing regulation, it is likely that your investors will be, and will require data in relation to your business for their own reporting.

Recently, corporations have become more aware that the value created by their business is not only inextricably linked to climate change, but also to the natural world on which it depends, extending beyond climate change to biodiversity-related issues, such as soil degradation, decreased pollination, water supply, and species extinction. The TNFD reflects this movement and is now in its third draft, published just before COP15. If it follows the same trajectory as the TCFD, we could expect nature-related reporting in line with the TNFD to become a legal obligation for at least the financial sector and other large companies by 2026, if not before under existing regulation, such as those that enshrine the OECD Guidelines.

The TNFD aims to develop and deliver a risk management and disclosure framework for organisations to report and act on evolving nature-related risks and opportunities. As with the TCFD on climate, the TNFD is driven by the need to shift global financial flow away from nature-negative outcomes and towards nature-positive outcomes. One of the benefits of the TNFD is its introduction of nature-related definitions; agreeing a common taxonomy for businesses to report against for nature-related issues. One key definition is “nature-positive” which, underpinning the TNFD, describes the overall goal for attaining a future state of nature which is greater than the current state. At COP15, the discourse around this definition emulated that of “net-zero”, the climate equivalent. However, the term did not make it into the Global Biodiversity Framework. Though it was included in earlier iterations, it was removed during later negotiations, arguably weakening several of the framework’s commitments. Should the TNFD follow in the footsteps of the TCFD and become a legal obligation for corporations of all sizes (as with the TCFD in the UK) the TNFD will therefore go further than the Global Biodiversity Framework by requiring businesses to meet a nature-positive status.

Whilst a parallel can be drawn between “net-zero” and “nature positive”, the TNFD also goes a step further than the TCFD in a number of ways. Firstly, by its nature, biodiversity-related reporting is much more complex than climate-related risk reporting. Biodiversity risk cannot be quantified in

the same way across the world; it is geo-specific. Your business may have a supply chain that spans several geographies and be impacted by biodiversity loss in a different way in each territory. To be able to quantify this risk and then mitigate the risk through strategy and governance throughout your supply chain, as the TNFD requires, you will need mature data-capturing systems that are sensitive to each geography in order to report the risk accurately and develop your strategy accordingly. Due to this complexity, the TNFD provides a new approach known as “LEAP”, to help businesses (1) locate the organisation’s interface with nature, (2) evaluate its dependencies and impacts on nature, (3) assess material risk and opportunity and (4) prepare to respond and report.

As well as requiring sophisticated data capture and analysis, the TNFD, in its current iteration, commits to aligning with the International Sustainability Standards Board (ISSB)’s approach to materiality. The TCFD requires businesses to focus on climate-related risk to the enterprise value of the business, also known as “single materiality” reporting. However, the ISSB, as well as other EU regulation on non-financial reporting, requires “double-materiality” and “dynamic-materiality” reporting. This means you will need to incorporate a focus on the impact of your organisation on nature rather than just consider the impact of nature degradation on your business from an enterprise value perspective – i.e., the organisation’s dependence on natural resources. The TNFD therefore requires businesses to not only look at risks associated with dependencies, but also on what impact its business activities have on nature throughout the supply chain and consider how these dependencies and impacts are dynamic and are likely to change over time.

Now that TCFD-aligned reporting is well underway, we would not be surprised to see businesses already extending their analysis from climate-related risk to nature-related risk, at least by developing more sophisticated data capture capabilities. Not only to prepare for when TNFD-reporting becomes a legal obligation for their organisation, but also to remain attractive to investors who are likely to be refining their portfolios in line with “nature-positive” commitments, just as they have done in the journey to “net-zero”. Whether driven by a direct reporting obligation or competition and market position against your peers, it is certain that the TNFD will soon have a significant impact on your business.

How we can support your ESG journey?

Irrespective of the maturity of your ESG journey, the underlying fundamentals of your business model or the stage of development of the regulatory environment in the jurisdictions in which you operate, your business faces biodiversity risk. An ESG materiality assessment and proactive monitoring of case law and regulatory change across the key biodiversity impact areas for your business, is critical to manage and monitor risk in this area.

To discuss what these risks and opportunities mean for your organization, get in contact with us at any point via esgprogram@dentons.com



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