

ACET

ANALYTICAL CENTER
OF EXCELLENCE
ON TRAFFICKING



Making Wildlife Traffickers Finance Wildlife Recovery

The Case for Creating
Conservation Restitution
Funds From Asset Forfeitures
and Seizures

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LIST OF ABBREVIATIONS USED IN THIS REPORT

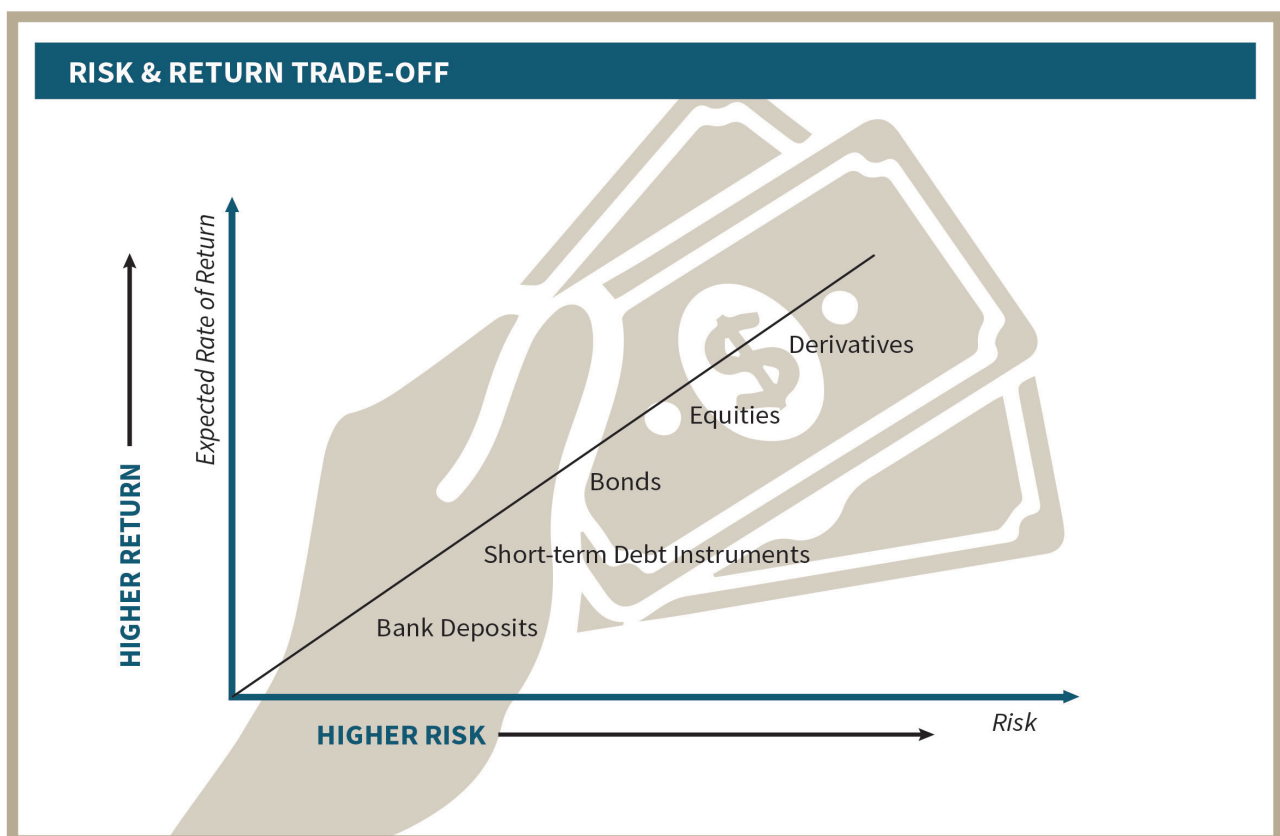
ASEAN	Association of Southeast Asian Nations
CIR.	Circa
COVID-19	Coronavirus Disease-2019
DSD	District of South Dakota
LAK	Lewis A. Kaplan
NSW	New South Wales
POEO ACT 1997 (Australia)	Protection of the Environment Operations Act 1997
THB	Thai Baht
US	United States
USAID	United States Agency for International Development
USC	United States Code
USD	United States Dollars
USDNY	United States District Court Southern District of New York

Executive Summary

Wildlife trafficking has become one of the most lucrative illicit trades in the world today. Valued at \$20 billion or more per year, its devastating impact has resulted in: (a) the fastest rate of species loss in history; (b) growing corruption in enforcement chains across the world; and (c) zoonotic outbreaks like COVID-19 that threaten human health and global security. In spite of its devastating impact on wildlife and people, wildlife trafficking is not yet treated as a serious crime, as reflected by the low penalties applied in most countries, and the lack of attention paid to it by enforcement and security-related agencies. Wildlife protection also remains a woefully underfunded sector, wrought with constant cash flow challenges and weak wildlife laws that put traffickers at a distinct advantage.

Traffickers pay on delivery of services (performance-based), and they pay well. The counter-trafficking community generally gets paid much less, late, and not always commensurate with performance. This black-market business is therefore characterized as **HIGH REWARD, low risk**. Large scale poaching and trafficking will continue so long as this equation persists.

To prevent this trade from causing further extinctions, weakened ecosystems, and sparking additional pandemics, we need to reverse this equation to making wildlife trafficking **HIGH RISK, low reward**, and by making counter-trafficking more rewarding. One way to do this is by seizing profits derived from trafficking and reprogramming them to reward high perform-



Wildlife crime in contemporary society continues to be a low-risk, high return venture for organized crime.

ing wildlife protectors, and to finance wildlife protection and recovery efforts.

By targeting the financial infrastructure of wildlife traffickers and using the perpetrators' ill-gotten gains to finance wildlife conservation, we can:

- Financially cripple wildlife trafficking operations;
- Deter future offenses; and
- Help targeted wildlife populations, habitats and affected communities recover.

Governments and organizations have considered and initiated different strategies aimed at addressing these issues. This report focuses on using **restitution and supplementary sentencing measures** to require wildlife offenders to pay for the harm they have inflicted on wildlife, ecosystems, and local communities. Funds can be channeled through government-civil society partnerships to implement recovery.

Challenges

- **Legal framework:** In order to be accessible as a remedy, any Court requires a legal basis to impose restitution or supplementary sentencing measures on an offender.
- **Identifying victim(s) and gaining standing:** As direct victims of wildlife trafficking (i.e., the animals) are not likely to be afforded legal rights themselves, parties that have suffered indirect harm (the government, members of the public or organizations) will need to represent the victims.
- **Tailoring a meaningful remedy:** Quantifying intangible harm (such as the harm caused to the environment or a species) is complicated and may require sophisticated economic analysis. Once quantified, the court will need to select a proper remedy that appropriately redresses the actual harm in a proportionate manner.
- **Carrying out the sentence:** When payments are made to organizations to implement specific programs to redress the harm caused, care will have to be taken to ensure impartiality on the part of the court. Measures and protections must also be in place to ensure that the sentence imposed is carried out in line with the Court's order.

Opportunities

- **Additional deterrent:** To ensure that the objectives of deterrence, restitution and rehabilitation are met, it is important that **supplementary sentences are always imposed in addition to (and not in lieu of) other statutory sanctions** (such as fines, imprisonment). Thus, these measures serve as an additional deterrent.
- **Additional funding:** When supplementary sentences are imposed in addition to fines, they serve both as a further financial deterrent for the offender and an additional source of funding that can be used by the government to redress harm or protect species.
- **Victim elevation:** While traditional sanctions focus on punishing the defendant, restitution and supplementary sentences are intended to elevate the role of the victim and seek to address the specific harm caused using a more restorative justice approach.
- **Public participation:** The guidelines for supplementary sentencing measures can be drafted to allow further transparency in the judicial process and to encourage public participation in determining the sentence (i.e. identifying the harm caused and determining the remedy needed).

The purpose of this report is to encourage further discussions on restitution and supplementary sentencing measures, specifically: on how they can be applied to attack the financial infrastructure of wildlife crime by providing government stakeholders useful background on the experiences of other jurisdictions to make these practices more tangible and attainable. In turn, these discussions may prompt government stakeholders to consider implementing new, or modifying existing, programs in their own jurisdictions to target the wealth and financial infrastructure of wildlife trafficking offenders.

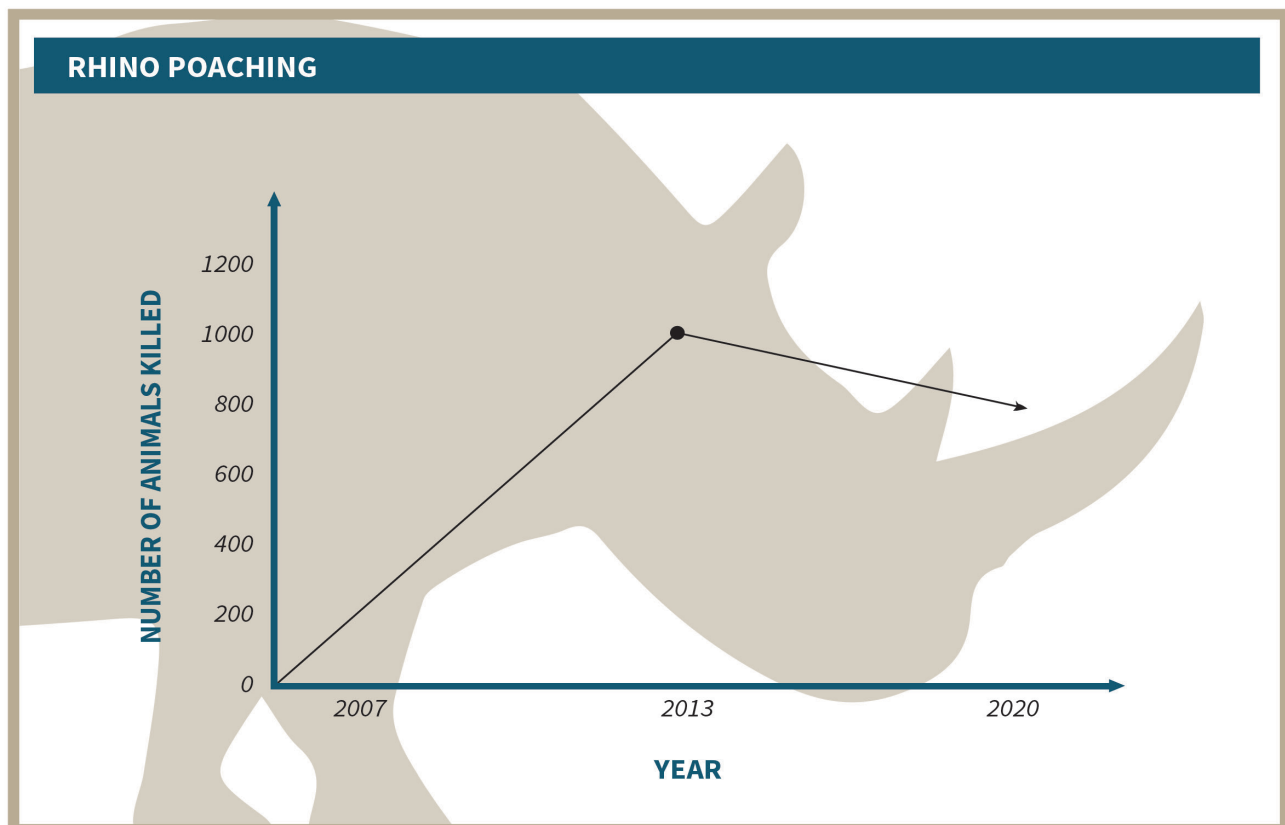
Rationale for Using Restitution and Supplementary Sentencing Measures to Disrupt the Financial Infrastructure of Wildlife Traffickers

At the time of this report's publishing, the impact of wildlife crime is visibly devastating. For example, last year 30,000 elephants were poached for their tusks; today just 4% of wild tigers remain compared to a century ago; an African rhino is poached every eight hours; and more than 1 million pangolins have been sold illegally since 2000, making them the most trafficked wild mammal in the world.¹

Wildlife trafficking is on the rise, threatening wildlife populations, ecosystems, and, as we have seen with Coronavirus, people too. The trade and threat grows despite increased consumer awareness of the significant harm caused by the trade and greater support for, and enforcement of, anti-wildlife trafficking laws and initiatives. A major issue for wildlife trafficking investigators

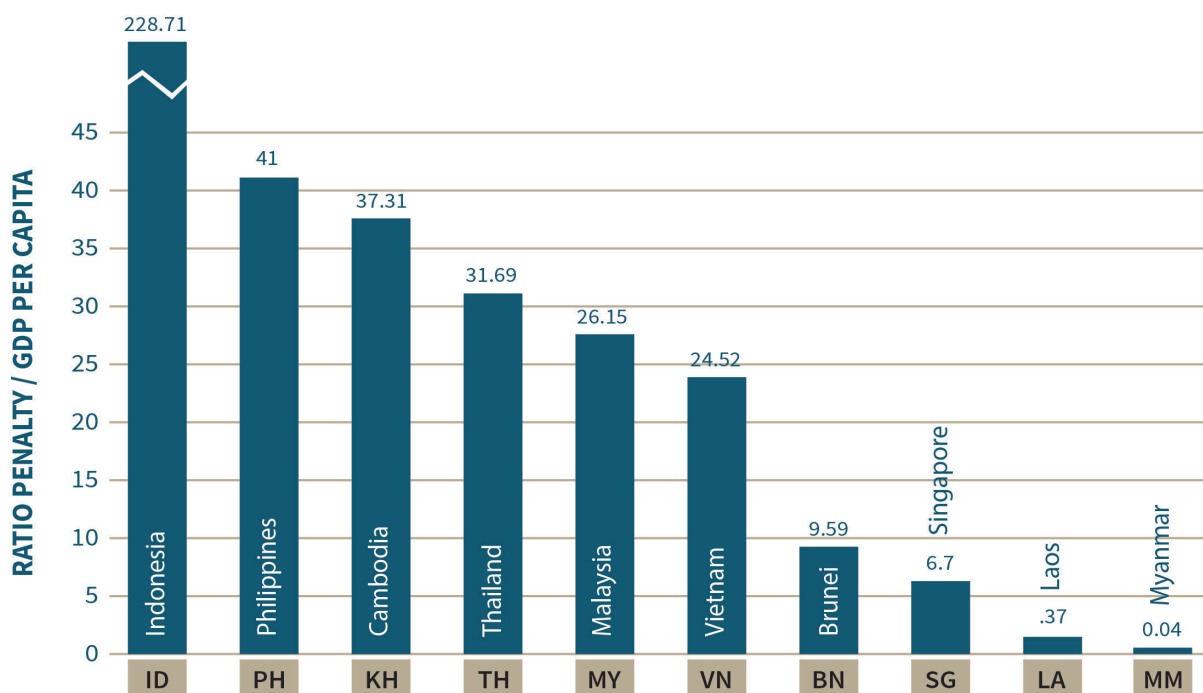
and enforcers is lack of funding and systems to combat wildlife trafficking. Conversely, a major incentive for wildlife traffickers is that the business is one of the most lucrative in the world. In particular, “[k]nown for its porous borders, weak laws and patchy enforcement, Southeast Asia is a global hotspot for the poaching, trafficking and consumption of illegal wildlife and their parts.”²

In order to sustainably disrupt and deter wildlife trafficking, we need to focus on attacking its profitability to dis-incentivize traffickers from engaging in the trade in the first phase. However, to date, programs aimed at combating wildlife trafficking have been unable to financially impact wildlife traffickers. Several issues can be attributed to this challenge:



Rhino poaching incidents in South Africa soared dramatically from 13 animals killed in 2007 up to nearly 1,000 in 2013.

MAXIMUM FINE FOR INDIVIDUALS ON GDP PER CAPITA



Ratio between the maximum penalty for wildlife and forest crimes and the GDP per capita in ASEAN countries. It shows a striking difference between how seriously each country fines wildlife criminals. World Bank, Data, GDP

- A. Wildlife trafficking is increasingly profitable;
- B. Counter wildlife trafficking programs are severely underfunded;
- C. Penalties applied are low and disproportionate to the impact caused.; and
- D. Law enforcement capacity remains low, due to insufficient knowledge and training

In order to address these issues, we need to increase the financial risks for wildlife traffickers and increase rewards for wildlife protectors. This can be done by imposing penalties that are proportional to the harm caused and deliver justice to the victims harmed, i.e. imposing restitution and supplementary sentencing measures. An overview of these concepts is discussed in detail in the next section (section II) of this report.

A. Wildlife Trafficking is Increasingly Profitable

As species of wildlife become increasingly rare, trafficking in wildlife will only continue to become more profitable. The retail value of ivory

alone increased from \$5.77/kilogram in 1976 to over \$3,000/kilogram in 2014 and it finally stabilized at around \$730/kilogram in 2017 mostly due to China imposing an ivory ban.^{3,4}

B. Counter Wildlife Trafficking Programs are Severely Underfunded

Programs aimed at countering wildlife trafficking tend to be treated as low priority and are severely underfunded. “The attention paid by policymakers to illegal economies and resource expenditures to combat them are shaped by the perceived threat those economies pose. That is why funding to suppress drug trafficking is far greater than funding to suppress wildlife trafficking.”⁶ A further factor that contributes to the underfunding of these programs is that many of the countries where wildlife trafficking occurs are still developing economically. As a result, other crimes are prioritized over wildlife crime. “When a country is either struggling to survive, or developing its economic competence, protection of the country’s environment and wildlife seldom take priority. This is a fundamental issue for the training of staff, setting up of enforce-

ment networks, monitoring and evaluation systems, as these all require funding.”⁷

However, an important issue for developing countries to consider in funding their programs are the costs of the externalities levied by wildlife trafficking. “Wildlife crimes are notorious for resulting in negative environmental externalities, including the destruction of wildlife and forest and the costs of housing and caring for rescued animals, rehabilitation and/or restoration of wildlife, and/or damaged forest habitats. The costs incurred impact the government: money for rescue centers, for the citizens who may have lost crops or income, and for society as a whole as it is affected by the changed ecosystem—by disease outbreaks, for example.”⁸ These externalities ought to be considered both in terms of determining appropriate penalties for wildlife criminals but also in allocating funding for wildlife protection and recovery.

C. Penalties Applied are Low and Disproportionate to the Impact Caused

In most cases, countries impose limited to negligible economic punishment for wildlife crimes, and the suspects brought to justice are often low-level poachers or couriers, not the leaders or financiers of the criminal network.⁹ Relatively small fines are considered by trafficking syndicates as merely the ‘cost of doing business’, a cost they can pass on to the consumer, and only serve as a temporary setback (if at all). This is because the wildlife and related assets forfeited by the government are usually quickly replaced, and the value of the fines are often significantly less than the profits that the offenders generate.¹⁰

“To date, there has been little or no economic impact on those involved on the supply and demand sides of wildlife trafficking. Nations that have legislated economic punishment in connection with these crimes have limited the sanctions to the seizure and forfeiture of wildlife and derivative parts—not the financial proceeds of the crimes. As experience has shown with drug trafficking, the seizure of drugs while a setback to these organizations, is temporary and quickly replaced. However, an attack on the wealth and financial infrastructure of these organizations causes disruption to their ability to carry on their illicit operations, and weakens and exposes them to law enforcement actions.”¹¹



A Rhino horn seized during Operation Cobra (2013). Fines imposed on traffickers are minuscule compared to the value of the horn, and therefore have no deterrent value. Photo: Freeland.

Law Enforcement Capacity

The work of law enforcement officers is critical to all stages of an investigation— “from the initial investigation, that is, securing a crime scene or making a seizure, to development of investigative leads, and continuing through to proper case management, adjudication in a court room, sentencing, and potentially asset recovery.”¹² However, over the years, wildlife traffickers have evolved into sophisticated organized crime syndicates which are able to take advantage of gaps in legislation, weak law enforcement and vulnerable criminal justice systems.¹³ “Employing a complex web of poachers, illegal loggers, middlemen, networks of traffickers, transporters, and traders, these criminal groups [have managed to] stay one step ahead of the law.”¹⁴

In practice, “law enforcement officials and those responsible for protecting borders from the smuggling of wildlife and criminal proceeds are often unaware of the methods and techniques being used by criminals, and lack the skills and resources needed to conduct financial investigations.”¹⁵ Consequently, a global focus in recent years has been on training local law enforcement agencies, information sharing between agencies and between jurisdictions, and enhancing investigative and analytical capabilities, in an effort to secure arrests and prosecutions of not only those directly implicated, but also to pursue convictions of the high-level criminals as well.

D. Increasing the Financial Risks for Wildlife Traffickers

Wildlife crime causes widespread harm to the environment and threatens the health and safety of the surrounding community. Yet, identifying an appropriate ‘victim’ (with rights under law) can be challenging and the resulting impact or harm caused can be difficult to quantify. As a result, the harm caused is not remedied by traditional sanctions of fines or imprisonment. Without more meaningful penalties, the incentives for criminals to engage in wildlife trafficking continue to be high and the risks, low.

We need to increase the risks of wildlife trafficking by imposing stricter penalties that are proportionate to the harm caused. The money/assets recovered from trafficker’s ill-gotten wealth can then be used to fund wildlife protection and recovery, thereby making wildlife traffickers finance wildlife protection.

New Strategies to Disrupt the Financial Infrastructure of Wildlife Criminals: Restitution

In recent years, governments and counter-wildlife trafficking groups have considered or initiated a number of different strategies aimed to simultaneously address two major concerns in countering wildlife trafficking: (i) implementing penalties that cause more severe economic harm to wildlife trafficking offenders; and (ii) utilizing the funds or assets recovered to support or subsidize the costs incurred for wildlife protection and recovery. One strategy that addresses both concerns and has had some success in a few jurisdictions is implementing a restitution program for wildlife crime, in addition to other traditional sanctions.

A. Introducing Restitution

Restitution is generally used as a civil remedy

designed to prevent a wrongdoer from “retaining any benefits illegally obtained from a victim; and to make the victim whole through damages.”¹⁶ In the case of environmental or wildlife crime, restitution may be appropriate as a mechanism to: (i) require the defendant to reimburse a third party for costs incurred in remediating the harm caused by the defendant’s illegal act; or (ii) require the defendant to restore parts of the environment actually damaged by the offense.¹⁷

The law of restitution is intended to address the unjust enrichment of the defendant at the expense of the claimant, by restoring the relevant benefit or enrichment to the claimant.¹⁸

In broad terms, a claimant who asserts a claim in restitution must establish three elements:



Government Stockpiles of Ivory. Investors in illegal wildlife are looking at keeping ivory and rhino horn as well as many other related products as futures investments. They bank on the extinction of a species in an effort to capitalize on their investment. Photo: Freeland



Officers of Royal Thai Police at press conference at Bangkok's Suvarnabhumi Airport, January 2018, announcing the arrest of suspected wildlife trafficking ring leader, Boonchai Bach.Freeland.

- The defendant has been enriched, or has received a benefit;
- The enrichment of the defendant is unjust; and
- The enrichment of the defendant was at the expense of the claimant.¹⁹

In contrast to fines, which are generally imposed for the purpose of punishing the defendant for a violation of law, restitution is considered an equitable remedy and may be imposed to restore the victim to the *status quo ante*, that is, restoring the victim to his/her state prior to the offense and making him/her whole.²⁰ For that reason, restitution is commonly applied in cases of theft or fraud, where the remedy to the victim is clear – the defendant returns the amount stolen and the remedy to the State/public is in the conviction (and potentially other sanctions).

However, restitution has also been used to redress environmental crime and in some rare cases, wildlife trafficking crime. In these cases, the environmental criminals or wildlife traffickers are required to redress the harm caused by their unjust enrichment, usually by financing environmental or wildlife protection and recovery.

The rationale behind this is that “the harm caused to the environment by the commission of the offence might not be able to be fully compensated by restoration of the environment affected. The environment might be so badly damaged that it is not practically feasible to restore it to the condition it was in before the commission of the offence. These types of environmental harm may need to be compensated by the offender carrying out, or paying for others to carry out, a project for the restoration or enhancement of the environment elsewhere, such as to provide compensatory habitat.”²¹ A similar approach can be taken with respect to wildlife trafficking, where the restitution goes toward restoring or protecting a habitat used by the trafficked species.

Restitution is intended to be applied in addition to, and not in lieu, of other traditional sanctions. According to the U.S. Department of Justice internal sentencing guidelines, “As long as the payment of the fine does not impair the defendant from providing restitution to the victim(s) of the violation, prosecutors should always seek the payment of fines commensurate with the severity of the offense and other factors.”²²

Given our recent struggle with the COVID-19 pandemic and the established connections between the consumption of trafficked wildlife and human loss,²⁸ it may be easier than ever to trace wildlife trafficking harm to human victims and quantify such harm based on the number of human losses, business losses, disruptions to industries and billions spent in medical care caused by COVID-19.

B. Legal Issues

In most jurisdictions, restitution is not currently a typical form of redress applied in wildlife trafficking or environmental cases. There are several legal issues in applying this form of remedy:

(1) Legal basis

In order to be legally applicable, restitution may need to be specifically contemplated in the legal framework as a possible remedy for the relevant offense. This means that the penal legislation and/or relevant sentencing guidelines may need to be updated to contemplate restitution as a measure to be imposed against the defendant. For wildlife trafficking crimes, in most jurisdictions, this is unlikely to be the case at present.

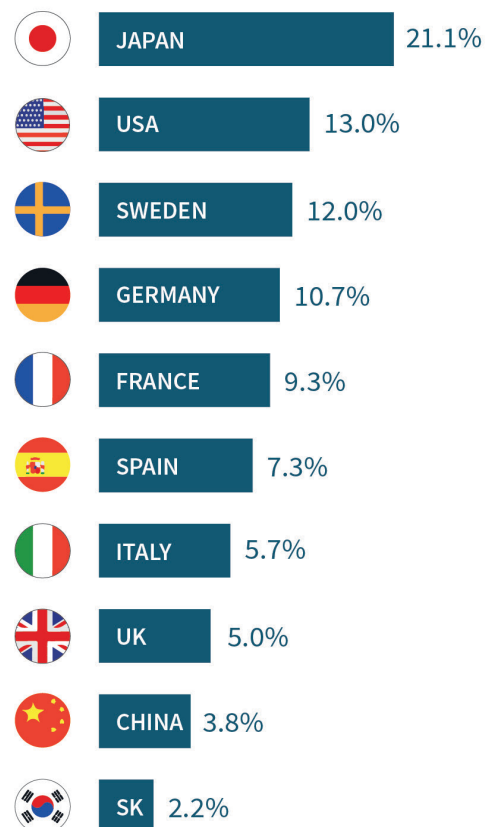
(2) Identifying an appropriate victim

Restitution is about making the victim whole but who is the 'victim' in wildlife trafficking cases and does such 'person' or party have the legal right to receive the remedy? The most logical consideration may be that the victim is the wildlife itself, but even if such wildlife is alive, it would be incapable of receiving any type of restitution payment directly. As a result, when restitution is applied in wildlife crime cases, parties who can demonstrate harm but are more indirectly affected, tend to be considered the victims.²³ For example, in a wildlife trafficking case brought by the justice department (or administrative equivalent) of a government:

- the national (or local) government where the trafficked wildlife was discovered may claim that the restitution belongs to them on the basis that such government spent resources in investigating and prosecuting the case;
- the foreign government or foreign citizens in the country where the wildlife was originally

GLOBAL CORONAVIRUS STIMULUS PACKAGES COMPARED

Financial response to the COVID-19 pandemic as a shared of GDP (selected countries)*



* As of May 10, 2020 Source: Ceyhun Elgin

Global bailout payments made by countries. The costs of Covid-19 to governments have been massive. Some of the funds can be re-allocated to projects which aim to end pandemics as opposed to fix temporary solutions. May 10, 2020 Ceyhun Elgin.

taken may claim the restitution belongs to them, on the basis that the taking of the wildlife harmed their environmental, cultural or heritage resources;

- a wildlife organization working on wildlife protection, may claim the restitution on the basis that such organization will need to expend additional resources to rehabilitate the population of the species harmed;
- civil society organizations that assist law enforcement, may claim restitution compensation on the basis that the organization has expended resources to assist in the investigation and prosecution of a wildlife trafficking offense; or
- a State may claim the restitution on behalf of the public, the wildlife, or future generations, on the basis that it acts as the trustee of such parties.

The party that can actually claim the restitution will depend on the relevant legal framework,



A rock lobster (*Jasus edwardsii*). *United States v. Bengis*, was the largest restitution order ever obtained under the U.S. Lacey Act. Three men carried out a scheme in South Africa and the U.S. wherein they overharvested South African rock lobsters in excess of the quotas, massively under reported the catch, bribed officials to turn a blind eye, and then exported and sold them in the eastern United States for considerable profits.

sentencing guidelines or the discretion of the court (as applicable). According to the United Nations Office on Drugs and Crime, in the context of wildlife offences, “restitution would be paid to the State on behalf of the wildlife or forest and not to a specific victim”.²⁴ However, the community that benefits from the wildlife, and the wildlife which were the victims, can also be represented by a governmental or non-governmental organisation responsible for or engaged in the protection or rehabilitating of wildlife.²⁵

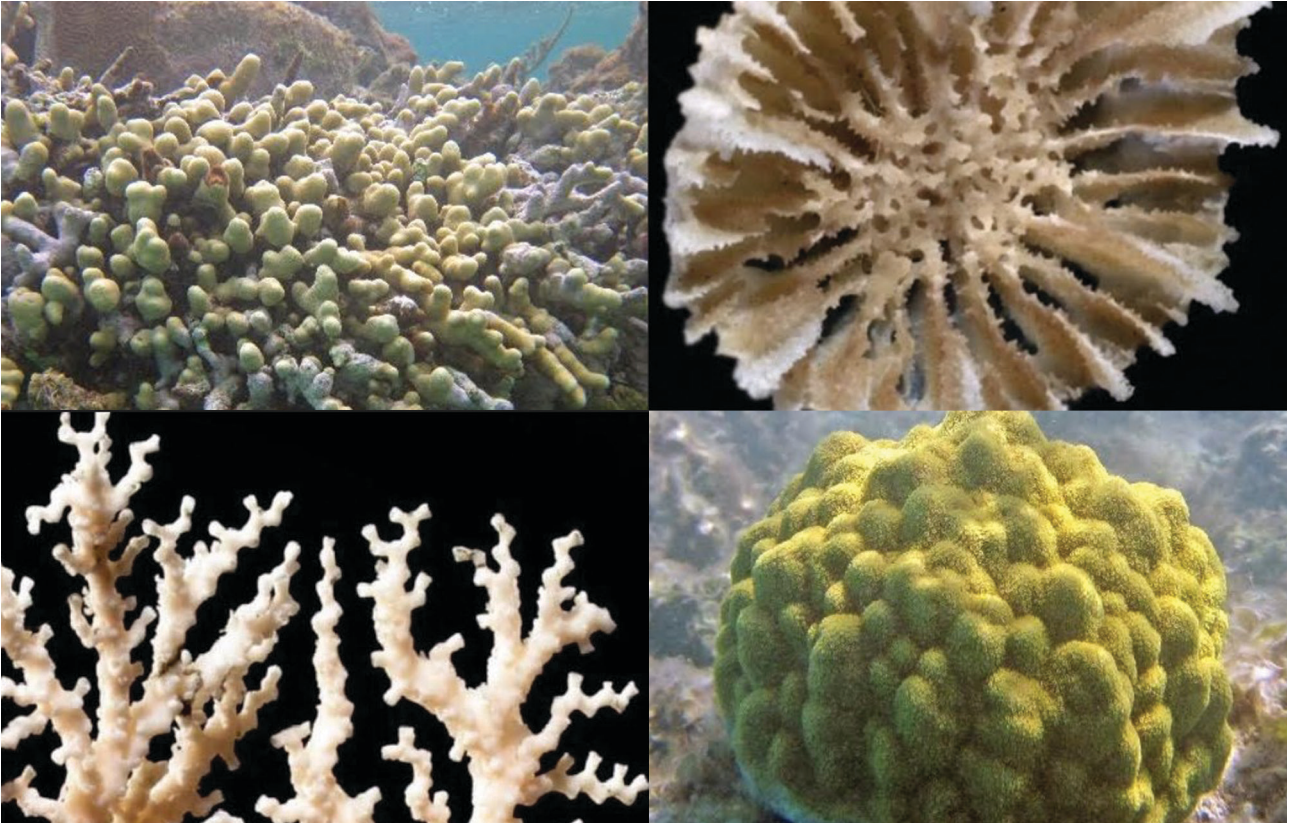
(3) Tailoring a meaningful remedy

Once an appropriate victim is selected, the next issue will be how to tailor a suitable and meaningful remedy that can make such victim whole. According to the United National Office on Drugs and Crime’s Wildlife Toolkit, “restitution should include the return of property or payment for the harm or loss caused, the reimbursement of expenses incurred as a result of the victimization, the provision of services and the restoration of rights.”²⁶ Depending on the state of the wildlife trafficked, the costs may include: medical treatment or rehabilitation of wildlife, the housing of confiscated live animals or plants, and repatriation of live animals to their countries of origin.²⁷ However, some of these costs are extremely difficult to quantify. For example, when a suitcase full of South African rhino horn is confiscated at a Customs entry / exit point, we can easily determine the costs for the transport/return of the property (if applicable), the costs expended for the investigation, and any whistle-blower awards that may be relevant. However, how do we quantify the “payment for the harm or loss caused” (i.e. the loss of the rhino or the loss of one of the last remaining individuals of an endangered species)? And how do we quantify the costs necessary to “restore the rights” (of the victim), i.e. what action or amount of money is needed to make the victim whole (i.e. help restore the species to its population to levels prior to the taking).

C. Case Study: United States

In the United States:

- **Legal basis:** The legal basis for applying restitution in wildlife trafficking cases already exists under 16 U.S.C. §§ 3371–3378, the Lacey Act, which makes it unlawful for any person to “import, export, transport, sell, receive, acquire or purchase in interstate or foreign commerce any fish or wildlife taken,



Pursuant to Article 96 of the Fisheries Code in the Philippines, illegal exploitation or exportation of coral may result in fines, forfeiture and compensation for restoration. This framework could be tweaked to specifically allow similar remedies to be applied with respect to other types of wildlife which are exploited or exported in violation of the law. (Collage of different CITES listed endangered coral). Photo Licence CC-BY-SA 2.0

possessed, transported or sold in violation of any law or regulation of any State or in violation of any foreign law.”²⁹ Restitution is also authorized in the U.S. with respect to criminal violations of environmental statutes under 18 U.S.C. § 3563 but in those cases, the restitution is discretionary, not mandatory and it must be made as a condition of probation.

- **Victim:** The victim must be “a person directly and proximately harmed.”³⁰ However, “[U.S.] courts have repeatedly held that the Federal Government and its agencies, states, and foreign governments qualify as victims entitled to restitution.”³¹ Additionally, the courts have awarded remedies to congressionally chartered foundations, funds, organizations, and/or corporations that are usually (but not always) statutorily authorized to accept donations.
- **Remedies:** Remedies are varied but a sufficient nexus must be established between the criminal offense and the remedy to be provided. However, because restitution is based on the unjust enrichment of the

defendant(s) and repairing the harm caused to the injured party, in the U.S. the remedy awarded often far exceeds the statutory penalties prescribed by law and sometimes includes non-monetary remedies as well.³⁴

(1) BENGIS Case

One case that often serves as an example of how restitution can be successfully applied in wildlife trafficking cases is *United States v. Bengis*, S1 03 Crim. 0308 (LAK) (S.D.N.Y. Jun. 14, 2013), which was the largest restitution order ever obtained under the U.S. Lacey Act.³⁵ In *Bengis*, three men carried out a scheme in South Africa and the U.S. wherein they overharvested South African rock lobsters in excess of the quotas, massively under reported the catch, bribed officials to turn a blind eye and then exported and sold them in the eastern United States for considerable profits.³⁶

This case is especially unique because the U.S. Second Circuit ruled that the **South African government** was entitled to restitution for the defendants’ extensive overharvesting of rock lobster in violation of South African fishing laws.



Hoi An, Vietnam. Coral reef harvesting in this part of the world remains largely unregulated. Photo: Freeland.

“Crucial in the Second Circuit’s ruling was the way that South African law dealt with the lobsters. When lobsters are fished in excess of their quota, South African law allows the government to seize the excess lobsters and significantly, sell them itself. The Second Circuit held that this constitutes a property interest.... The defendants’ actions therefore, deprived the South African government of its property interest and accordingly, inflicted direct harm upon it. Accordingly, the South African government fit the definition of a victim under [U.S. law].”³⁷

After more than \$7 million was paid to South Africa as part of a separate criminal case an additional \$5.9 million was forfeited to the U.S. government, the defendants in the U.S. were ordered to pay **\$22.5 million in restitution damages to the South African government**.³⁸ Manhattan U.S. Attorney Preet Bharara said: “As today’s order demonstrates, those who violate the environmental laws of another country by illegally taking fish, wildlife, or plants and then import these items into the U.S. will be required to pay back the victims of their offenses.”³⁹

(2) Limitations of Bengis

While *Bengis* is often lauded as a victory in the prosecution of wildlife trafficking cases, the ultimate ruling was quite narrow – the Second

Circuit held that South Africa was a victim not because it had an ownership right in the lobster in general; but because South Africa had a statutory right to sell any fish that had been illegally taken out of the water, it had been damaged and was a victim under federal law.⁴⁰ The prosecution in *Bengis* actually submitted two calculations for determination of the restitution award: (i) the first was based on the costs for remediation to the environment and repopulation of the lobsters; and (ii) the second was based on the market value of the lobsters taken.⁴¹ The court accepted the latter calculation only.

(3) Extensions

- In *United States v. Butler*, 694 F.3d 1177, 1182 (10th Cir. 2012), the U.S. Tenth Circuit further extended the concept of a ‘victim’ in awarding restitution to the State of Kansas where defendants’ were convicted for conspiring to sell and transport deer in violation of the Lacey Act. “The *Butler* court found that the State of Kansas had a property interest in illegally untagged deer carcasses, relying on the fact that the several **states own animals within their boundaries in a sovereign capacity**”, and, thus, **‘harm against the wildlife in a state is tantamount to committing harm against that state’s property for purposes of [U.S. law].’**⁴²

- The court in *United States v. Ross*, No. 11-30101, 2012 WL 4848876, at *5 (D.S.D. Oct. 10, 2012) took the argument further in determining the “restitution value for 16 hawks that were illegally killed by a commercial hunting lodge owner and his staff.”⁴³ The court found that “the Government had a legitimate and substantial interest in preserving and protecting hawks in its airspace, [which] derived not from any ownership of the resources, but rather from the duty the Government owed to the people. **The duty of the Government to protect the public interest in the natural wildlife resources was directly and proximately harmed by the defendant’s conduct and supported an order of restitution.**”⁴⁴

There is a potential for other jurisdictions to follow the example of *Bengis* and use the ‘property interest’ argument as a legal basis to make the claim that restitution is owed to them due to illegal actions of American citizens or companies implicated in trafficking wildlife or environmental crime. For example, foreign governments may claim that they have a property interest in a particular species that has been trafficked by asserting that (local and international) tourists visit their countries in order to see these animals in the wild and with their disappearance, the relevant community will suffer economic harm (the specific amount of estimated harm would need to be quantified). Similar arguments could be made in terms of tax revenue being lost.

Alternatively, foreign governments may be able to more directly make a claim for restitution in U.S. wildlife trafficking cases if there is a law on the books that specifically provides the government, or its citizens, a particular property interest or right in the wildlife within its borders. In that way and similar to how the Second Circuit arrived at the conclusion for *Bengis*, U.S. courts may be more willing to consider any wildlife improperly taken to be a violation of the property interest of such government (or its people).

D. Application of Restitution in Other Jurisdictions

(1) Thailand

Restitution as a remedy is not currently contemplated under the current wildlife laws and regulations in the Kingdom of Thailand. However, restitution as a concept exists within the larger legal framework and courts in Thailand have

specifically ordered restitution to be paid to victims of human trafficking. According to the United States Department of State’s 2018 Trafficking in Persons Report, in 2016 the “the government amended the Human Trafficking Criminal Procedures Act to allow judges to award compensation or restitution to victims, including in the absence of a victim request for these funds.”⁴⁵ In total, “courts ordered more than THB 18.4 million (USD 565,640) in restitution from traffickers to 151 victims in 2017, an increase from THB 1.7 million (USD 50,610) to 15 victims in 2016.”⁴⁶ While there are allegations that the program is not fully implemented and some awards have not been paid,⁴⁶ the existence of the program demonstrates potential that a similar program could be established for other types of trafficking offenses, such as wildlife trafficking. If established, the main issues to be considered are:

- which party will be permitted to serve as the (indirect) victim; and
- how the restitution payment will be used to redress the relevant harm.

(2) Kenya

While restitution has not been contemplated in the Kenyan framework for wildlife trafficking offenses, the Wildlife Conservation Act does specifically allow a remedy of restitution for victims of pollution. In addition to any sentence that the court may impose, the court may order the defendant to “pay the full cost of cleaning up the polluted wildlife habitat and ecosystem and of removing the pollution to the satisfaction of the Service.”⁴⁸ Aside from these remedies, the court is permitted to “direct the polluter to contribute to a wildlife conservation activity as compensation, restoration and restitution.”⁴⁹ Similar to wildlife trafficking, the harm caused by pollution can be difficult to quantify. It is encouraging that the regulators in Kenya have already created a precedent to allow environmental (or other tangential) harm to be remedied through more general environmental protection and recovery programs. This could be replicated with respect to identifying possible remedies for wildlife trafficking victims.

(3) Philippines

In the Philippines, the Penal Law contemplates restitution as a possible remedy for civil liability cases and there is an obligation for the defendant in a felony case to make restitution if such person “participated gratuitously in the proceeds of a felony” (in the amount equivalent

to the extent of such participation).⁵⁰ The Philippines Fisheries Code, while it does not contemplate 'restitution' as a possible remedy specifically, does recognize the concepts of:

- Treating the government as a trustee for the people and therefore, as a 'victim'; and
- The need for the remedy to such offense to include compensation for the purpose of restoration of the environment harmed.

Pursuant to Article 96 of the Fisheries Code, illegal exploitation or exportation of coral may result in:

- a) a fine which is set at eight times the value of the corals or 500,000 – 10,000,000 pesos, whichever is higher;
- b) forfeiture of the corals; and
- c) payment of compensation for the restoration of the damaged coral reefs (quantified based on available studies and as determined by the relevant Department).⁵¹

As these same concepts are already in place for coral exploitation and exportation, the framework could be tweaked to specifically allow similar remedies to be applied with respect to other types of wildlife which are exploited or exported in violation of the law.

Remedying Wildlife Harm Through Sentencing Measures: Creative Sentencing, Financial Community Service, and Plea Agreements

A. Introduction

While many jurisdictions may not specifically apply “restitution” as a remedy to wildlife trafficking offenses, more and more jurisdictions are starting to apply “supplementary sentencing” (sometimes also called, “creative sentencing”) measures. These measures allow the court discretion to award additional penalties to defendants in certain types of cases at the time of sentencing or as part of a plea agreement. With respect to environmental or wildlife offenses, these measures have the ability to more fully remedy the harm to the environment and the community caused by the violation, provide greater deterrence against criminal behaviour, and encourage better corporate compliance with environmental laws.⁵² As a result, these measures have allowed the court to essentially award restitution as a remedy even where the legal framework does not specifically contemplate restitution for the relevant offense.

The rationale is that an offense which causes harm to the environment, if not addressed, may continue in the future or remain unabated.⁵³ A restorative outcome would be for the offender to take-action to prevent, control, abate or mitigate the harm to the environment caused by the commission of the offence and to make good any resulting environmental damage.⁵⁴

B. Legal Issues

The issues from a legal perspective include the same analysis with respect to identifying an appropriate victim and tailoring a meaningful remedy, as set out in Section II(B)(2) and (3) above. Aside from this, the following additional legal issues need to be considered in adopting supplementary sentencing measures:

(1) Legal basis

In some jurisdictions, the court may be limited to imposing the specific statutory penalties assigned to the particular offense at hand. In



Some jurisdictions have adopted “green courts” to deal specifically with environmental crime (Bangladesh, China, Indonesia, South Korea, Pakistan, the Philippines and Thailand).

order for a jurisdiction to implement supplementary sentencing measures, the sentencing guidelines in the relevant jurisdiction (if any) would need to provide the court legal basis to impose additional sentences on defendants aside from the standard statutory penalties that otherwise apply.

Some jurisdictions (including: Bangladesh, the People’s Republic of China, India, Indonesia, Korea, Pakistan, the Philippines and Thailand, among others) have adopted “green courts” (also known as environmental court tribunals) to deal specifically with environmental cases.⁵⁵ The intent is to have judges with specialized expertise in the area of environmental and natural resource law adjudicate cases with the aim of strengthening environmental implementation, compliance, and enforcement.⁵⁶ In jurisdictions where the courts are limited in their ability to impose additional penalties aside from those statutorily prescribed, the sentencing guidelines of green courts may allow, or may

be adapted to allow, green court judges special authority to impose mandatory supplementary sentences in cases of environmental or wildlife crime. The justification can be that the nature of such crimes levies significant externalities on the surrounding community and therefore, redress can only be meaningfully achieved with specialized remedies that directly address the wrongful action.

(2) Appearance of impropriety

When the supplementary sentence involves providing funding to an organization or specific program with the aim to redress the harm caused or protect wildlife from future harm, the court's selection or approval of funding for specific organizations or particular causes may lead to corruption or at least, the appearance of impropriety.⁵⁷ In designing a supplementary sentencing scheme, the court should consider the specific harm caused by the offense and ensure that there is a sufficient nexus between such harm and the redress awarded.⁵⁸ To mitigate against this risk, in the U.S., Congress has specifically developed or approved certain foundations, funds or organizations as destinations that are statutorily authorized to accept funds for this purpose.⁵⁹

(3) Monitoring the sentence

Once the sentence is ordered, a final issue to consider is the measures or protections that are in place to ensure that the supplementary sentence imposed will be properly carried out – both in terms of the defendant's obligation(s); as well as the obligation on the party receiving the financial benefit to ensure that it goes toward the ordered purpose. The defendant's obligations should be treated in the same way that probationary or parole measures are treated, with the potential for (new or additional) sanctions including imprisonment where the defendant does not completely fulfil such obligations. As for the party receiving the financial benefit (whether this is governmental body or a separate organization), the court may seek to have a portion of the award go toward inspectors or auditors to ensure that the award is being used for the purpose for which it is intended.

C. Case Studies: Canada

Canadian environmental legislation allows the court to impose “creative sentencing” measures on defendants that commit wildlife crime, in addition to any other punishment statutorily imposed.⁶⁰

- **Legal Basis:** Section 16 of Canada's Wildlife Act allows the court to direct the defendant “to take any action that the court considers appropriate to remedy or avoid any harm to any wildlife that resulted or may result from the commission of the offence”. In addition, the Federal Fisheries Act “allows the court to make environmentally friendly orders against anyone convicted of an offense.”⁶¹
- **Redress:** Under the Wildlife Act, creative sentences may include:
 - directing the defendant to compensate for any cost of any remedial or preventative action taken as a result of the defendant's offense;
 - directing the defendant to make a payment designed to promote the conservation or protection of wildlife harmed;
 - directing the defendant to pay an amount to an educational institution for scholarships for students enrolled in studies related to the environment;
 - directing the defendant to make a payment needed to conduct research into the protection of the wildlife or habitat harmed;
 - directing the defendant to carry out, or pay for, environmental effects monitoring; and
 - directing the defendant to perform community service in accordance with any reasonable conditions specified, among many others.⁶²

Case law under the Federal Fisheries Act demonstrates a wide range of creative sentencing orders including: “carrying out habitat restoration according to engineering consultant reports; developing and implementing oil spill awareness and response training for pulp mill employees; constructing a storm water detention facility at a wood treatment plant; and developing an education component on operating a salmon counting fence.”⁶³

- **Victim/Impropriety Issues:** To mitigate against the appearance of impropriety, Canada has established certain foundations which are statutorily permitted to receive funds obtained from defendants that have violated the Wildlife Act. One such foundation, the Habitat Conservation Trust Foundation, received the first award from creative sentencing in 1993.⁶⁴ Since that time and until March 31, 2009, an additional 294

awards were received with a total value in excess of \$2.6 million.⁶⁵

- **Monitoring:** To guarantee the defendant's obligation, the court may also require the defendant to post a bond or provide a suretyship to ensure compliance with any prohibition, direction or requirement, provided as part of the sentence.⁶⁶

D. Case Study: U.S. (“Financial Community Service”)

In the U.S., aside from restitution, and in addition to any other statutory penalties that may be applicable, prosecutors of environmental and wildlife crime offenses may petition the court to impose “financial community service payments” on the defendant.

- **Legal Basis:** A memorandum from the U.S. Assistant Attorney General to Environmental Crime Section Attorneys, dated 16 January 2009, recognizes the authority and practice of U.S. attorneys to seek financial community service in prosecuting environmental crime. The memorandum states that “Restitution focuses upon reimbursing defined losses sustained by specifically identifiable victims of particular crimes, while community service often is aimed at circumstances, such as general environmental degradation, in which individual victims cannot be identified. Community service . . . may provide additional deterrence against criminal behavior, encourage better compliance with environmental laws, and advance important priorities such as pollution prevention, promoting more efficient environmental technologies and improved corporate management practices.”⁶⁷
- **Redress:** Financial community service payments must directly remedy the harm that is sought to be redressed. In a wildlife trafficking case, a third-party payment to directly remedy harm must focus on protection and recovery for the affected species, preferably the affected population of that species where possible. A payment that addresses recovery for a different or unrelated species does not satisfy the “directly remedy” standard.⁶⁸
- **Victim/Impropriety Issues:** If financial community service payments seek to fund an activity that is essentially the same as one for which Congress has already authorized and funded a program, it will be more heavily scrutinized and may not be permitted.⁶⁹ Aside from providing funds to specific organiza-

tions, Section 8B1.2(b) of the U.S. Sentencing Commission Guidelines permits judges to create trust funds to address “expected harm” when the court can “reasonably estimate” the magnitude of the future harm.⁷⁰

- **Monitoring:** Clear monitoring and enforcement provisions must be established to ensure that the relevant project is carried out and “given the complexities that may attend an environmental case, the Probation Office may not be well-equipped to evaluate compliance with the community service aspect of a sentence.”⁷¹ Some strategies that U.S. courts have imposed include:

- Requiring the organization charged with implementing the environmental project to provide an annual or quarterly accounting of how it has spent the funds;
- For larger community service projects, the employment of an outside auditor or consultant to insure the implementation of the sentence may be appropriate;
- Providing the right of entry, including unannounced entry, onto the site of the community service project for purposes of inspecting physical conditions, taking samples as necessary, interviewing employees, and reviewing relevant documents;
- Permitting the funds to go toward a specific foundation or organization which is Congressionally chartered and statutorily authorized to accept donations for this purpose; and
- Where the payment is made into a trust fund, having a neutral third party, such as local government officials or financial institutions manage the account; or having the money deposited in an escrow account and distributed at regular intervals until the project is completed.⁷²

E. Case Study: Australia

- **Legal Basis:** Under Australia's Protection of the Environment Operations Act 1997 (“POEO Act”), a number of new sentencing options were introduced, which are available in addition to, or in lieu of, any fine or custodial sentence that may be imposed. One or more orders may be made against the offender and the orders are available even where the offence is proven but no conviction is recorded.⁷³

- **Redress:** “The courts have been given the new sentencing options in recognition of the fact that a fine/custodial sentence is not always an adequate or appropriate punishment . . . Their purpose is therefore to attempt to return the environment, and those committing/affected by the offence, to the same position it/they were in prior to the offence and also to ensure that the offender takes steps to guard against future contraventions.”⁷⁴

Under the POEO Act, the court may order the offender as follows:

- To cover investigation costs (section 248(1));
 - To pay a sum up to the amount of the monetary benefit derived from the offence (section 249(1));
 - To publish details of the offence and the orders made by the court in a newspaper and/or in a company’s Annual Report (section 250(1)(a)-(b));
 - To carry out a specified project for the restoration or enhancement of the environment in a public place or for the public benefit (section 250(1)(c));
 - To carry out a specified environmental audit of activities carried on by the offender (section 250(1)(d)); and
 - To cover clean up and compensation costs.⁷⁵
- **Victim/Impropriety Issues:** According to The Honorable Justice Brian J Preston, ‘victims’ for the purpose of remedying environmental or wildlife harm in Australia, may include: aboriginal people, persons whose life or health is affected, persons whose property is affected, members of the community or future generations represented by a governmental or non-governmental organization responsible for or engaged in protection of the relevant environment affected.⁷⁶
 - **Monitoring:** The offender may be ordered to self-report to the court and regulatory agencies may monitor the offender’s compliance and report the findings to the court.⁷⁷ In other cases, guidelines may be adopted into the specific order and there may be a requirement to publish any enforceable undertakings.⁷⁸ This helps ensure transparency, accountability may assist with deterrence.⁷⁹

F. Application of Supplementary Sentencing in Other Jurisdictions

(1) Namibia

In addition to traditional sanctions, in sentencing an offender for a violation of the Wildlife Trade Act in Namibia, the court can impose an additional fine or make a compensation order in favor of the State, for:

- a) all costs relating to the care or medical treatment of live specimens and the disposal thereof, whether incurred before the order or thereafter;
- b) all costs relating to the return of any specimen (whether alive or dead) to its country of origin; and
- c) an amount equivalent to all costs incurred to restore a population of wildlife harmed through unlawful removal from the wild by the person convicted or commensurate with the impact of unlawful removal by the person convicted.⁸⁰

However, “it is unclear however whether these additional penalties are routinely imposed.”⁸¹

(2) Myanmar

In Myanmar, under the Protection of Wildlife and Conservation of Natural Areas Law, dated 8 June 1994, Section 39 of the Protection of Wildlife and Conservation of Natural Areas Law provides that in addition to any statutory penalties that may apply to a wildlife offense, the court also has the right to pass an order to claim “the value of the loss and damage to the Forest Department caused by the offender to be paid by way of compensation.”⁸² Again, it is unclear whether the right to compensation is imposed in practice but it demonstrates the potential for the government to seek compensation for victims of wildlife crime.

G. Plea Agreements

As the damage caused by environmental violations can often be widespread, long lasting, and persistent, and can continue to be a problem long after conventional clean-up activities have ceased, “plea agreements have often included payments to environmental trust funds to monitor, restore, and preserve the environment and natural resources impacted by the violations.”⁸³



Wildlife enforcement officers inspecting seized elephant tusks during Operation Cobra I. In January 2013, the ASEAN Wildlife Enforcement Network (ASEAN-WEN), China, The United States, South Asian, and African countries collaborated under operation COBRA to make numerous seizures and arrests, some of which led to prosecutions. COBRA was financially and technically supported by the US government and Freeland. Photo: Freeland.

Aside from relying on the judge to impose compensation or restitution payments at sentencing, prosecutors may also be able to include the requirement to make such payments as part of a plea deal in negotiating a guilty plea prior to sentencing.

The Exxon Valdez Alaskan oil spill prosecution is one well known example in the U.S., where pursuant to a plea agreement, the court fined the two entities a total of USD 150 million, for which:

- (i) USD 125 million was remitted based on factors including Exxon’s clean-up costs for the oil spill and payments to injured parties; and
- (ii) USD 12 million was paid into the North American Wetlands Conservation Fund, a Congressionally created trust fund.⁸⁴

In addition, “the defendants paid USD 100 million in remedial and compensatory payments, which were to be used exclusively for restoration projects, within the State of Alaska.”⁸⁵

In using plea agreements to impose supplementary sentences, prosecutors should be cautious to ensure that the defendant cannot merely negotiate (and pay) its way out of more severe penalties such as imprisonment and a

conviction. In order for the penalties prescribed to uphold their objectives of maintaining an effective deterrent, restoring harm and ensuring an appropriate punishment, extra-statutory penalties, such as restitution and compensation payments, should only be made in conjunction with other traditional sanctions and not in lieu of such sanctions.⁸⁶

Additional Considerations and Challenges

Aside from the legal issues identified in Sections II(B) and III(B) above, in implementing a restitution or supplementary sentencing program, lawmakers should consider the following:

- The current legal framework and how these measures can be imposed without requiring significant amendment of existing laws;
- The offender's financial capability and the ability to confiscate the proceeds of crime;
- Seeking compensation from a foreign government when harm occurs locally but the offender is prosecuted in a foreign jurisdiction;
- Permitting the public to participate in quantifying and assessing the harm caused; and
- Enabling victims to seek separate redress through public interest (civil) litigation.

A. Updating or Amending the Current Legal Framework

1. If an existing legal basis does not exist which allows the court to impose (or the prosecution to offer as part of a plea bargain) restitution or other supplementary sentencing measures, in order to incorporate such measures into the existing framework, the relevant penal legislation and/or sentencing guidelines may require update or amendment. This will likely be the current case for most jurisdictions.
2. The process for amending laws is very cumbersome, usually requires authorization from the top level of government and can take years to effect. For that reason, it may be more worthwhile to consider how these measures can be implemented without the need for legislative amendment. Some possibilities may include:
 - **Discretionary authority:** While good governance should require courts to adhere to specific rules in imposing sentences on

offenders, until such rules or guidelines are promulgated or issued, lawmakers may consider the extent to which courts already have discretionary authority to impose supplementary sentences under the current framework.

- **Updating sentencing guidelines:** As these are sentencing measures, one way to incorporate them into the framework without legislative amendment may be to update the sentencing guidelines to either specifically consider the supplementary measures or (at least preliminarily, while further amendment is being considered) to provide discretion for the court to consider imposing such supplementary measures on defendants. While updating sentencing guidelines may still require several level of approvals, it may be more time efficient and still less cumbersome, than amending laws or decrees.
- **Plea bargains:** Lawmakers may consider the regulations surrounding plea bargains to determine the extent to which supplementary sentencing measures can be included in plea bargains under the existing framework and where not, if small tweaks to such framework can be incorporated by way of a lower-level authorization or instruction (at the ministry or department level).
- **Environmental or specialized courts:** Where the general sentencing guidelines cannot be easily updated or adapted without a burdensome process (or while such process is being undertaken), governments which have already developed environmental or other similar types of specialized courts, may have space within the sentencing guidelines of those courts to allow supplementary sentencing measures to be imposed or may be able to more easily update the sentencing guidelines of such specialized courts, by way of a lower level authorization or instruction.

B. The Offender's Financial Capability & Confiscating Proceeds of Crime

The success of any type of restitution or compensation program will depend on the defendant's financial capability (i.e. his/her/its ability to pay) and more importantly, the court/authorities' ability to reach the defendant's finances and assets.

In investigating and prosecuting wildlife crime cases, authorities are usually vested with the authority to confiscate the illegal wildlife itself and the assets which were used in the commission of the crime. Depending on the rules applied in the relevant jurisdiction, this may include not only the guns, traps, nets, equipment, cages or vehicles used in committing the offense, but if a connection can be made to the underlying or a related crime, could potentially be extended to include:

- the offender's real property,
- gold or jewelry,
- bank accounts,
- aircraft
- stocks, or
- shares.

However, "[o]nce the proceeds of crime have been traced and identified, prompt preservation of identified proceeds of a crime is essential. Given the speed with which assets can be transferred from one State to another, the importance of taking steps to quickly seize and freeze assets, prior to the finalisation of any final forfeiture orders, cannot be overemphasized."

⁸⁷ Since most wildlife trafficking cases initially involve arrests or prosecutions of only the low-level players, the investigation and confiscation process is especially critical to establishing sufficient links to hold the leaders and financiers of the syndicates accountable for their crimes.⁸⁸

When the proceeds of a wildlife trafficking offense are identified, properly traced and confiscated, those assets become the property of the State through the regular criminal or civil procedures relevant to the offense. This process can take years before the defendant has exhausted all of his/her defenses and appeals. In that time, the defendant's assets and wealth may dissipate. As a result, the success of the process is largely dependent on the initial and supplementary investigations into the proceeds

of the defendant's crime. If a clear nexus is not established between the defendant's ill-gotten wealth and the crime at hand, the evidence may be determined to be inadmissible.

When the State is unable to obtain a timely order for forfeiture or seizure or when the assets or wealth of the defendant have dissipated, restitution and supplementary sentencing programs may be key to nevertheless, being able to access the defendant's ill-gotten profits, as explained below:

- (1) Plea Bargain: Where the evidence is sufficiently substantial, the State may consider offering restitution or other supplementary sentencing measures (where the defendant is required to provide monetary compensation or funding to victims or programs) as part of a plea bargain, which should (still) include a conviction and a lesser (yet still adequate) traditional sentence of imprisonment and/or fines. In this situation, we are able to use the evidence at hand to hold the defendant accountable, potentially obtain useful information on accomplices and higher level criminals, and obtain compensation/restitution for the victims, without enduring the process of an entire trial and risking the dissipation of assets and witnesses in the process.
- (2) Where a court has the legal right to impose restitution or supplementary sentencing measures (involving compensation or funding) on a convicted defendant at sentencing, the court's ability to actually impose such sentence is not necessarily dependent on the current existence of such assets to pay for the restitution/compensation. Depending on how the relevant sentencing laws are framed, it can be argued that because restitution is about the 'unjust enrichment' of the defendant, the court should be able to impose such sentence on a defendant where the prosecution has been able to successfully demonstrate that the defendant profited from the crime under prosecution, regardless of whether the defendant still retains such profits. If this argument is successful, it would allow the prosecution to effectively reach not only ill-gotten assets which have been hidden or dissipated, but also the defendant's 'clean' assets.

In this way, asset forfeiture and restitution should be seen as penalties to be used congruently, rather than separately.

In the U.S., “[c]ourts have found no conflict where a sentence involved both an order of restitution and an order of forfeiture, noting the distinct purposes served by restitution and forfeiture in supporting such sentences. While forfeiture acts to disgorge unfair proceeds and is considered punitive, restitution is intended to make the victim of the crime whole, and is considered remedial.”⁸⁹

C. Seeking Compensation from Foreign Governments

Foreign governments that can demonstrate harm from a wildlife trafficking offense in another jurisdiction may seek asset confiscation, compensatory damages or restitution from the offender in the prosecuting jurisdiction. This may be achieved through the protocols established under a mutual legal assistance treaty where such treaty covers wildlife offenses. “Mutual legal assistance is a mechanism that allows one State to provide another State with assistance during an investigation or a prosecution. The types of assistance that may be provided through mutual legal assistance are subject to applicable treaties and domestic laws, and may include compulsory or coercive measures.”⁹⁰ Where a mutual legal assistance

treaty covers wildlife offenses, States may have protocols already established in terms of how assets can be confiscated in the different jurisdictions, how proceeds of the related offenses will be handled and whether restitution or compensation may be sought for the victims of the offense.⁹¹

D. Public Involvement in Quantifying and Assessing Harm

Members of the public and relevant public interest organizations could have a significant role in helping the court to assess the damage/harm caused by the defendant and to calculate the costs to remedy the harm (through restoration and protection efforts). Some jurisdictions allow the assistance of an amicus curiae (Latin for “friend of the court”) whose role is “to inform and advise the judge as to matters of fact or law that might otherwise escape consideration so as to minimize the risk of error in judgment.”⁹² This relinquishes the burden on the court to undertake the assessment on the harm directly, which may be both time intensive and expensive and allows experts in the relevant field to conduct the relevant analysis based on their expertise and experience. It would also help to



Photograph shows Dali market in China where illegal wildlife is traded openly. Freeland encourages the general public to share information on illegal wildlife trade through our website or Wildscan photoapp. Photo: Shutterstock

increase public participation in the process and transparency of the case.

E. Public Interest Litigation

Aside from the government seeking restitution on behalf of the victims of a wildlife trafficking offense, some jurisdictions enable victims to directly commence civil suits against perpetrators of wildlife and forest offences.⁹³ For example, the Law on Environmental Protection in Mongolia allows citizens, business entities and organizations to “bring claims in court against those who have committed breaches of environmental legislation ‘requiring compensation for expenses incurred in restoring destroyed ecological balance and natural resources, evacuation of people, and moving animals and livestock’ and where successful, the offender is required to “compensate for direct damage caused to the environment and natural resources as a result of their unlawful conduct.” The payment of compensation however, “does not release the offender from criminal or administrative liability arising from the breach.”⁹⁵

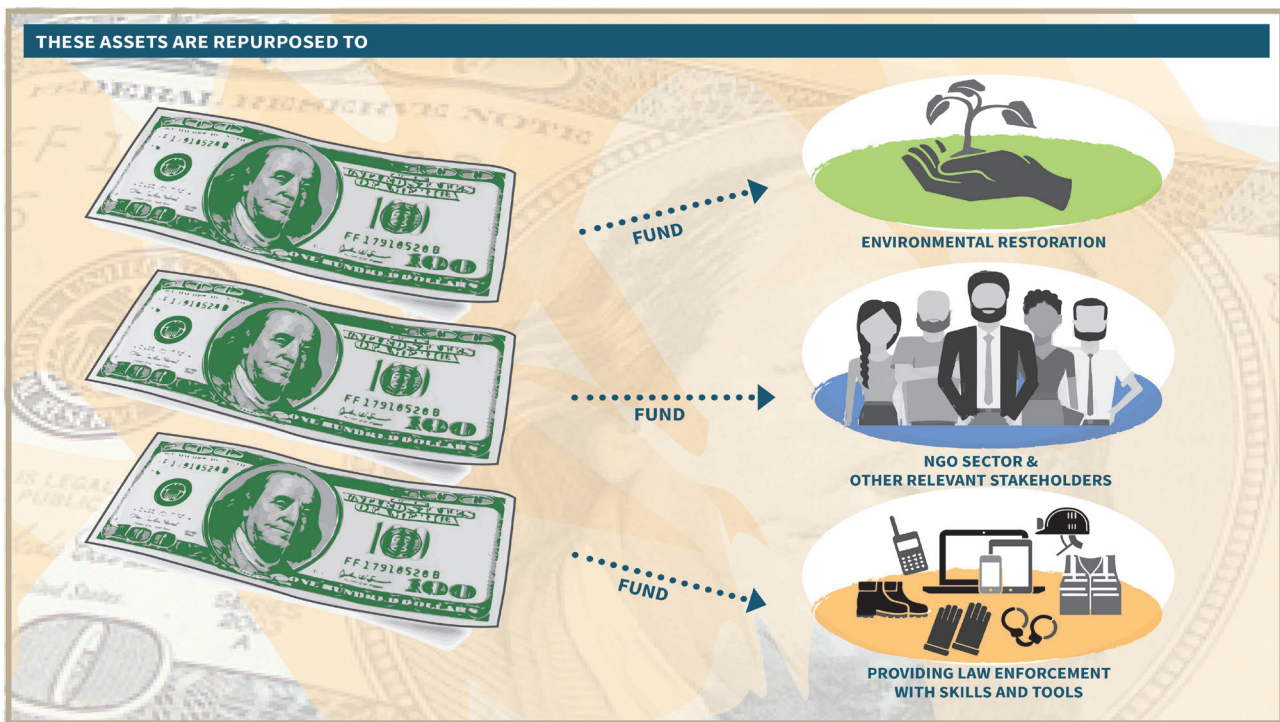
Strategic Recommendations

This section will explore strategic recommendations to consider in implementing restitution and other supplementary sentencing programs.

1. To ensure that the collective objectives of deterrence, restitution and rehabilitation are met, supplementary sentences should always **be imposed in addition to** (and not in lieu of) other statutory sanctions (such as fines, imprisonment).
 - a. By imposing supplementary sentences in lieu of traditional sanctions, it undermines the deterrent effect in using supplementary sentences in the first place as it allows the defendant to essentially buy his/her/ its way out of punishment.
 - b. It may also “give rise to a sense of injustice, not only in those who are the victims of the crimes in question but also in the general public” and may undermine public confidence in the ability of the court to deter the commission of crimes.⁹⁶
 - c. Finally, it is important for the judicial process for the defendant to accept responsibility for the harm caused and therefore, at the very least, **a (civil or criminal) conviction should always accompany any supplementary sentence imposed.**
2. It is also recommended that the **supplementary sentences be mandatory** with respect to serious wildlife offenses and discretionary with respect to less serious offenses.
 - a. If supplementary sentences are left to judicial or prosecutorial discretion, it is likely, especially in more developing jurisdictions, the courts/prosecutors may not seek to take on the added burden of imposing, managing and monitoring such sentences. To ensure public confidence in this process, it is important that a consistent approach be taken toward sentencing and the process be mandatory for certain offenses.
3. With respect to a supplementary sentence involving compensatory or restitution payments, the prosecution will likely need to **demonstrate that the defendant has the financial means** to fulfil the sentence to be imposed.
 - a. From the outset of the investigation phase, the police and prosecution should be working with the relevant financial intelligence units to uncover (and where possible, confiscate and forfeit) the defendant’s proceeds of crime. Any other assets or financial means of the defendant should be considered in the calculation of the payment to be imposed.
4. The relevant sentencing guidelines should be adapted to impose supplementary sentences as mandatory in certain situations and also to **provide details on the process to be followed** to ensure a consistent and justified approach is taken with respect to each case.
 - a. Publication will provide greater transparency to the public and also foster deterrence of future offenses.
5. For a supplementary sentence to be legally justifiable, there must be a reasonably sufficient **nexus between the nature and circumstances of the offense and the proposed remedy or repair that the supplementary sentence seeks to redress.**
 - a. Consideration should be given to allowing the prosecution to use experts to testify as to the harm caused and to help quantify the unjust enrichment of the defendant and the costs necessary to remedy the harm.
 - b. Where the costs for such experts are prohibitively high for the courts, outside organizations (not otherwise involved in the case) may be permitted to conduct the required analysis and calculations and provide these through amicus curiae briefs submitted to the court.

- c. It would also provide further transparency and encourage public participation in the process.
6. Jurisdictions may consider **creating a wildlife conservation fund** specifically designed for wildlife protection and restitution efforts.
 - a. This could assist the court in ensuring that the payments made by defendants are used for the purpose intended (i.e. redress the specific harm caused) by including **sub-programs within the fund which are used for specific objectives** (such as: tiger rehabilitation and recovery projects or hornbill habitat expansion projects).
 - b. The fund could be composed of: proceeds of crime obtained through seizures in wildlife cases; the payment of fines; government funding (if applicable) and supplementary sentence payments.
 7. In order to ensure that the defendant meets its obligation and that the project fulfils its purpose (and does not become a ‘slush fund’ for the relevant organization or government entity), the **court should also take steps to monitor the defendant’s obligation as well as the project’s progress** and oversee its implementation. It will undermine the public’s perception in the judicial system if supplementary sentences once ordered, are not monitored and enforced.
 - a. The **probation/parole authority should be responsible** for ensuring the defendant’s obligations and imposing further and more severe sanctions where such obligations are not timely fulfilled. The defendant can also be required to post a bond equivalent to the supplementary sentence payment to confirm its obligation as a condition of probation or parole.
 - b. A responsible authority will need to be appointed to monitor and report to the court, the progress of any project ordered to be undertaken as part of the remedy imposed.
 8. In addition to holding natural persons liable, entities including **companies, organizations and illegal sanctuaries that are implicated in environmental offenses should be held liable**. Supplementary sentences should be imposed on the directors/officers of these groups whether or not, they were “aware” of the activities being undertaken by the relevant entity.
 - a. **Publication of the sentence** would impact the reputation of the entity and foster deterrence.
 9. Lastly, where wildlife trafficking harms victims outside of the jurisdiction where the trafficker is being prosecuted, such victims should hold the prosecuting government accountable for their harm and petition the court hearing the case, to **provide compensation to the foreign victims**.
 - a. Where the court in the prosecuting jurisdiction declines to accept the petition, the victims may petition their own government to use its diplomatic channels (such as through Mutual Legal Assistance or other bilateral treaties) or informal processes to request assistance.

Conclusion



Even in jurisdictions with more developed legal systems, restitution and supplementary sentencing programs are still in fairly nascent stages when it comes to their application to wildlife trafficking. In order for new jurisdictions to implement such programs, each will have to consider its own unique framework and set of challenges to overcome. Nevertheless, given the current state of wildlife trafficking as being high reward, low risk, the need to disrupt wildlife traffickers' financial wealth cannot be overstated. Traditional penalties such as fines and imprisonment only serve to address the defendant's conduct and have not been sufficient deterrents to curb the 'rewards' of wildlife trafficking.

Restitution and supplementary sentencing programs on the other hand, not only raise the role of the victims of wildlife trafficking, they also can have greater deterrent effect on wildlife trafficking syndicates than traditional penalties because these programs can redress the actual

harm caused and make the victims 'whole'. This means not only addressing direct harm but also the indirect impacts (such as the environmental externalities), which are otherwise, not remedied through traditional sanctions. This can include, for example, converting fines or seized assets into recovery costs. When restitution or supplementary sentencing programs are used in conjunction with traditional sanctions, the financial risks associated with committing wildlife offenses significantly increase. Furthermore, the impact that such offenses have on the environment and the public can then be mitigated through payments imposed on the traffickers themselves to fund on-going and future wildlife protection and recovery. While existing laws and practices provide the basis for exploring restitution and supplementary sentencing measures related to counter-wildlife trafficking, this report is intended to serve as a jumping off point for further research, consideration, dialogue and action.

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