



POLICY BRIEF

CIVIL LAWSUITS: A NOVEL RESPONSE TO ILLEGAL WILDLIFE TRADE



KEY MESSAGES

- Civil lawsuits represent a breakthrough in environmental law, and a novelty among efforts to tackle illegal wildlife trade (IWT). Unlike traditional approaches that focus on punishing perpetrators of IWT, this strategy refocuses efforts onto remedying the harm caused by IWT.
- Large-scale commercial IWT cases could be strategically targeted with civil lawsuits, in tandem with traditional enforcement of criminal law. These suits would seek remedies for the diverse social, economic and environmental harms caused by IWT.
- Many countries have enabling legislation that allow civil lawsuits for IWT. However, the approach has not yet been widely used for IWT. Lawsuits face technical challenges and many practitioners are unfamiliar with the legal nuances. Yet, such litigation creates opportunities for governments, NGOs, individuals and communities to undertake novel conservation action.
- This Policy Brief accompanies “Pioneering civil lawsuits for harm to threatened species: A guide to claims with examples from Indonesia”. That guide explains how these lawsuits can be developed, addressing technical and legal challenges, in order to support biodiversity conservation and strengthen access to justice.

INTRODUCTION

Large-scale, commercial illegal wildlife trade (IWT) causes huge harm—not just to individual plants and animals, but also to the environment, society and economy. This includes cascading impacts on species survival, ecosystem services, livelihoods, tax revenues, and NGO budgets and government spending. These impacts are not addressed by the small fines and prison sentences traditionally given by criminal law.

In contrast, civil lawsuits can allow plaintiffs to seek remedies in response to environmental harm, ranging from ordering restoration, to private financial compensation and requesting apologies. For example, in Indonesia civil lawsuits have been used in at least 15 environment cases since 2009, including for harm caused by fires, pollution and mining.¹ Courts have granted remedies such as reforestation and financial compensation for lost ecosystem services.

Similar action could be applied to IWT cases, and is already legally possible in many other countries. The approach represents a breakthrough in environmental law, and a novelty among efforts to tackle IWT: Civil lawsuits offer a path to remedying the environment, rather than a focus only on punishing illegal behavior. They can also send messages to policy-makers and the public about the importance of biodiversity, result in huge burdens on responsible parties, and potentially deter future IWT.

This Policy Brief highlights the types of harm that occur from IWT, and the types of actions that can be used to remedy that harm. It then explains the potential for using civil lawsuits to demand those remedies in court (Figure 1).



What and who was harmed?



What is needed in order to remedy that harm?



Will the law allow us to claim this remedy? How?

Figure 1. Three key questions important to preparing a lawsuit to claim remedies for environmental harm

It presents key concepts from “Pioneering civil lawsuits for harm to threatened species: A guide to claims with examples from Indonesia”. That guide provides step-by-step explanations of how to develop these lawsuits, integrating science, economics and law, and drawing on concrete examples from Indonesia. It seeks to reduce the legal and technical barriers to developing these lawsuits.

WHO AND WHAT IS HARMED?

Biodiversity forms the foundation of all ecosystems, and many species are important for diverse economic, cultural and intrinsic values. As a result, IWT cases often cause tremendous harm that is experienced by stakeholders across society. For example, when a single baby Bornean Orangutan is brought into illegal trade, the impacts are not only on that

1. http://gakkum.menlhk.go.id/assets/info-publik/LAPORAN_TAHUNAN_GAKKUM_LHK_TAHUN_2019.pdf

individual animal. That action also injures the whole species because, as an Critically Endangered species, each remaining individual is important to its survival. The harm can be felt by the broader environment, with impacts on ecosystem services such as seed dispersal. IWT also affects human wellbeing, including due to the many intangible benefits we derive from threatened species (e.g., cultural, bequest and existence values).

WHAT IS NEEDED IN ORDER TO REMEDY THAT HARM?

Civil lawsuits traditionally focus on harm in terms of lost economic value. For example, if someone is injured at work, they may experience lost income that could be remedied via a financial compensation. However, a meaningful remedy must also consider the broader set of actions that need to be undertaken in order to fix the harm that occurred. For example, the person injured at work may also require remedies such as psychological support and retraining to be able to perform an alternative job.

Similar principles can be applied in civil lawsuits for IWT. In these cases, remedies:

- **Can involve many different types of actions.** Remedying the harm caused by IWT is likely to require a number of different actions. For example, remedies can include the rehabilitation and reintroduction of individual plants and animals harmed by IWT. They may also involve actions to increase the populations of the affected species, to replace the individuals removed by IWT. Remedies may also include payments to government agencies for lost taxes, or investments into educational funds to reduce IWT. In order to be accepted by the court, proposed remedies must correspond to different types of purported harm that occurred in the case (Figure 2).
- **Can be financial or non-financial.** Remedies often involve monetary compensation (e.g., reduced income) or payments for others to undertake remedial actions (e.g., paying others to do reforestation). However, non-financial remedies, such as apologies, public prayers and support for educational programmes, can be very important to the affected communities and also help to remedy the many intangible harms caused by IWT.
- **Are not fixed by the law.** Although there are often legal constraints on what remedies can be requested, remedies usually depend on the individual case and on what the plaintiff decides is needed to fix the harm that occurred. For example, Indonesian Ministry of Environment Regulation No. 7/2014 provides suggested approaches for identifying remedies in environmental cases, but these are very broad and plaintiffs are generally allowed to define remedies for themselves. As a result, in response to an IWT case, one plaintiff might ask for an apology for the harm caused to their cultural association with the affected species. Other plaintiffs could ask for financial compensation for a reduction in income from ecotourism. Meanwhile, a government or NGO plaintiff could propose various remedial actions such as habitat restoration to increase the population of the affected species in the wild.
- **Can be undertaken by the defendant or others.** The court can order a defendant to undertake remedies such as apologies or habitat restoration. However, where the defendant lacks relevant capacity to undertake remedies such as species rehabilitation or habitat conservation, they can be ordered to pay for a government agency or NGO to undertake those actions on their behalf.



Example Type of Harm



Example Remedies

Reduced number of individuals of an endangered species in the wild due to IWT	Undertaking actions to increase the number of wild animals to replace individuals removed (e.g., increasing conservation area, better patrolling)
The burdens of caring for and rehabilitating live animals rescued from IWT	Financial payments to the group involved in rescue to cover costs (e.g., food, veterinarian, staff)
Reduced cultural and scientific values associated with harm caused to an endangered species	Public apology Undertaking educational programme about the impact of IWT on culture science

Figure 2. Example types of harm caused by the illegal trade of orangutan and how these correspond to different types of remedies

WHAT WILL THE LAW ALLOW?

Many countries have enabling legislation that allows civil lawsuits for IWT cases. However, these types of lawsuits are still rare, and many conservation and legal practitioners are unfamiliar with the relevant legal nuances. Moreover, differences in national legislation shape what types of cases and remedies are possible. For example, not all cases that result in harm can obtain legal remedies via lawsuits in all countries. Similarly, not all remedies that plaintiffs might like to receive will be recognised by the courtroom. This is where the science, economics, law and the realities of on-the-ground environmental harm intersect.

WHAT TYPES OF CASES CAN GET THESE LEGAL REMEDIES?

Each country has different legal constraints that determine why types of harm can be granted legal remedies. This relates to what types of harm are cognizable under a country’s existing laws, principles and practices. For example, in Indonesia, Law No. 32/2009 is very broad in the types of harm that it will recognise, including harm caused by pollution and forest fires. Other contexts where harm can occur, including IWT, are not specifically mentioned in the Law but are still legally protected. This is confirmed in Environment Ministry Regulation No. 7/2014, which suggests that harm caused to biodiversity can be claimed via lawsuits. There have been several recent successful cases that claimed remedies for harm to biodiversity caused by land fires.

In some countries, in order to obtain legal remedies the harm must have occurred to a protected species or habitat, or have been caused by a specific type of activity (e.g., negligent work). In Indonesia, harm is legally defined by whether the impacts exceeded a threshold. For example, legal thresholds already exist for certain types of pollutants, and Law No. 32/2009 states that the best available science should be used to establish appropriate thresholds where they are missing. For harm to specific species, the IUCN Red List can serve as this standard. The list classifies species into categories based on the level of threat that they face, from “Least Concern” to “Critically Endangered”. As such, in cases where harm occurs to a threatened species, they can be legally considered as having exceeded the threshold, and thus merit legal remedies via civil lawsuits.

From this legal basis, plaintiffs are then able to build a lawsuit, although countries often place further constraints on what types of remedies different plaintiffs can seek. Indonesia grants many different parts of society with these rights (see Box 1). This includes government agencies and environmental NGOs who can represent the interest of the environment, and individuals and community groups who can represent their own private interests.

WHAT TYPES OF REMEDIES DOES THE LAW ALLOW?

Most countries are likely to allow a broad range of remedies for IWT via lawsuits. This is because, in many countries, the law does not state which specific remedies can be proposed in a lawsuit. In many cases - not only environmental cases - courts have demonstrated that they are willing to accept many different types of remedies, based heavily on judges' interpretation. Nevertheless, proposed remedies should:

- **Be based on evidence-based arguments:** Although there is flexibility in terms of what types of remedies can be legally recognised, they need to be based on current science and the most accurate, available evidence. This can involve specific field-based evaluations (e.g., species population counts), but also on ecological principles and the literature. It can also draw from other fields, such as anthropology and economics, as well as evidence from academic experts, local residents and practitioners (e.g., park rangers).
- **Demonstrate redressability:** The proposed remedies must clearly and directly respond to the harm caused by the defendant's actions. Establishing a specific relationship between purported harm and proposed remedy means that courts are more likely to accept claims.
- **Involve specific plans:** Clear plans for the remedial activities, such as site names, budgets and timelines for restoration, rehabilitation or education programmes, are important. They ensure specificity and the ability of the court to order actions that can actually be carried out in the field.

BOX 1. WHO CAN ACT FOR WILDLIFE IN INDONESIA?

Unlike criminal law, which only allows the State to act, in many countries civil lawsuits can be led by environmental non-governmental organisations, communities, individuals. In Indonesia, for example, anyone with a common interest in the environment, and/or with a private loss that resulted from IWT can bring forward a lawsuit.

Environmental Non-Governmental Organisations: Environmental NGOs can bring cases on behalf of the environmental to seek mitigation and restoration actions necessary to remedy environmental harm. They can also seek compensation for their out-of-pocket expenses (e.g., money spent on animal rehabilitation).

Indonesia's MoEF Directorate of Law Enforcement (GAKKUM): GAKKUM has primary responsibility to represent the government in liability cases, seeking mitigation and restoration actions necessary to remedy harm, as well as compensation for (potential) lost of taxes revenues (e.g., tourism on national park), and also to loss that is related to socio-cultural public value of the species.

Local Government Agencies: Agencies responsible for protecting the environment locally who are affected by illegal wildlife trade can propose a claim for remedies that involve compensation for the costs of undertaking actions to remedy this harm especially that related to the cost of immediate action, (e.g. if the harm is related to non forest zone or habitat that is managed by local authority).

Citizens & Community Groups: Where cases cause direct harm to individuals or communities (e.g., impacts on their livelihoods, cultural harm), they can bring forward cases requesting compensation for that harm.

CONCLUSION

Developing civil lawsuits in response to large-scale, commercial IWT is a novel strategy. These lawsuits are legally possible in countries around the world, and have the potential to refocus efforts onto remedies rather than only punishment. This would benefit the environment, send clear signals to society, create new burdens for responsible parties, and deliver potential deterrence effects.

This Policy Brief presents key concepts from “Pioneering civil lawsuits for harm to threatened species: A guide to claims with examples from Indonesia”. The guide addresses key technical and logistical challenges to developing these types of lawsuits. It can help practitioners to build and make decisions about novel lawsuits: It provides the framework for identifying types of harm, proposing corresponding remedies, and translating these into successful lawsuits. It seeks to clarify complex legal proceedings and scientific assessments, in order to facilitate new pathways for justice and improved conservation.

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