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THE PRINCIPLES OF WILDLIFE CONSERVATION FUNDS AND RESTITUTION – ADDITIONAL REMEDY TO WILDLIFE AND FOREST OFFENSES



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Cover: Coiled Pangolin at the Wildlife Quarantine Center in Nakhon Nayok, Department of National Parks, Wildlife and Plant Conservation (DNP). Photo: Bussara Tirakalyanapan/ USAID Wildlife Asia.

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ABOUT USAID WILDLIFE ASIA

The USAID Wildlife Asia activity works to address wildlife trafficking as a transnational crime. The project aims to reduce consumer demand for wildlife parts and products, strengthen law enforcement, enhance legal and political commitment, and support regional collaboration to reduce wildlife crime in Southeast Asia, particularly Cambodia, China, Laos, Thailand and Vietnam. USAID Wildlife Asia focuses on four species: elephant, rhinoceros, tiger and pangolin. For more information, please visit www.usaidwildlifeasia.org

ABOUT ASEAN INTER-PARLIAMENTARY ASSEMBLY

The ASEAN Inter-Parliamentary Assembly (AIPA) is a regional parliamentary organization originally formed on Sept 2, 1977, as the ASEAN Inter-Parliamentary Organization (AIPO). Its members are Indonesia, Malaysia, Philippines, Singapore, Thailand, Vietnam, Lao PDR, Cambodia, Brunei Darussalam and Myanmar. An assembly of the region's legislators, AIPA's mission is to enhance friendship and mutual cooperation on matters affecting Southeast Asia in order to promote regional peace, stability and prosperity. In 2016 and 2017, AIPA convened specialized Wildlife Protection Working Groups under their AIPA Caucus platform, working towards harmonized and strengthened legislative response to combat wildlife trafficking in the region.

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DISCLAIMER

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ESTABLISHING WILDLIFE CONSERVATION FUND TO COMBAT WILDLIFE CRIME IN ASEAN REGION

INTRODUCTION

In East Asia and the Pacific alone, the estimated value of the illegal trade in wildlife is US\$2.5 billion a year¹ (excluding illegal timber and off-shore fishing). Wildlife and forest crimes have transformed into one of the largest transnational organized criminal activities alongside the trafficking in drugs, arms and humans.

Yet one of the biggest issues faced by many wildlife law enforcement agencies in the region is the lack of prioritization and funding by their governments. This is especially true in ASEAN member states that are developing countries, and where other needs come first: national gross domestic product (“GDP”), infrastructure development, poverty alleviation, safe drinking water and sanitation, education and the list goes on. 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 enforcement networks, monitoring and evaluation systems, as these all require funding.

A possible solution may be for countries to establish a Wildlife Conservation Fund whereby proceeds from confiscated assets of wildlife criminals, as well as fines and damages (or at least a percentage of) can be mandated or ordered to be paid into this fund. The fund can then be used to support the costs of capacity building, enforcement, investigations, awareness raising and behavior change campaigns, handling wildlife seized, reward to informants and other costs toward combatting wildlife crime.

PURPOSE OF ESTABLISHING A WILDLIFE CONSERVATION FUND

FUND LAW ENFORCEMENT

As stated above, many wildlife enforcement agencies in the region lack prioritization and funding by their governments. Remedy: Set up a Wildlife Conservation Fund whereby funds from fines, penalties, and damages imposed upon successful prosecution of wildlife criminals, or other enforcement actions against wildlife traffickers, would go in whole or in part, to the wildlife agencies themselves. Making them more self-sufficient and effective.

REWARD INFORMANTS

Increasingly, government agencies and civil societies are collaborating in the fight wildlife crimes. Many non-governmental organizations (NGOs) have developed investigative capabilities which enable to discovery of vital information critical to law enforcement agencies for action. This requires

¹ UNDOC (2013). "UNODC Transnational Organized Crime Threat Assessment Chapter 7: The illegal wildlife trade in East Asia and Pacific." p86.

collaboration and funding. Besides examining the adequacy of laws regarding rewards to informants, the establishment of a conservation fund could provide a funding source for more effective intelligence.

COMPENSATION TO VICTIMS (INCLUDING LAW ENFORCERS WHO ARE INJURED OR KILLED WHILE ON DUTY)

A Wildlife Conservation Fund can be used to provide compensation to victims of wildlife crimes. An example would be the law enforcers injured or killed in the line of duty. Very often, little or no compensation is afforded in such cases due to a lack of funds.

FUND COSTS OF CONFISCATION AND REPATRIATION

The preservation of evidence (confiscated illegal wildlife) is crucial to the successful prosecution of an offense. Regarding live wildlife, a proper holding facility with relevant expertise- whether government run or privately operated- is necessary to ensure proper care of seized wildlife. Furthermore, in the case of non-native wildlife, authorities should repatriate wildlife to their country of origin. It must be noted that sometimes seemingly prohibitive costs are encountered. Without the funds either to set up a proper holding facility or hire private sources, confiscated wildlife may be euthanized as a cheaper alternative, a counterproductive measure in preserving wildlife.

FUND REHABILITATION OF WILDLIFE

For native wildlife confiscated or surrendered, there is a need for adequate permanent facilities to rehabilitate them before releasing them into the wild, or in cases where releasing is not possible (such as wildlife that have been kept as pets or permanently handicapped, and are not likely to survive on their own). Currently, many are managed by NGOs, which depend on independent funding to keep the facilities going. With the Wildlife Conservation Fund, the wildlife agencies can support such facilities.

FUNDING SOURCES

PAYMENT OF FINES AND PENALTIES

There is no wildlife-specific fund in the region except in the Philippines. Most payment of fines, penalties and damages go to the national treasury or the relevant ministry. Policies and laws will have to be implemented to ensure a portion goes to the Wildlife Conservation Fund.

RESTITUTION AND COMPENSATION

In many countries, the courts are empowered to order restitution in addition to other criminal sanctions such as fines and imprisonment. This stems from the notion that fines and imprisonment do not contribute directly to compensate the loss suffered by the victims of crimes, which in this case would include the State, law enforcement agencies, nature and wildlife.

In the context of wildlife and forest offenses, the actual costs and loss suffered as consequences of such offenses can be addressed by empowering the courts to order all proceeds from the restitution order (and/or fines and other financial penalties derived from the offense) to be paid into the Wildlife Conservation Fund. This in turn may be used for conservation and enforcement purposes, including rehabilitation and/or restoration of damages caused by wildlife and forest offenses, compensation of victims, and rewards to informants.

For a more detailed discussion on the remedy of restitution, please refer to section 2 of this paper.

PROCEEDS FROM CONFISCATED ASSETS OF WILDLIFE CRIMINALS²

While many wildlife laws in the region have provisions empowering law enforcers to confiscate assets of wildlife criminals, these are restricted to assets used in the perpetration of the wildlife crime. Other laws, such as the anti-money laundering laws, may have enhanced powers to confiscate and liquidate assets of criminals. It is interesting to note in Brunei, a fund has been established called the Criminal Assets Confiscation Fund that derives part of its fund from proceeds forfeited/confiscated/recovered from criminals³. Such fund is to be applied (inter-alia) to “enable the law enforcement agencies to continue their fight against money laundering, serious offenses or unlawful activity”⁴ and “any matters that, in his opinion may assist in preventing, suppressing or otherwise dealing with criminal conduct”⁵. The United Kingdom⁶ and Australia⁷ have robust legal framework for such mechanism under the Proceeds of Crime Act, both promulgated in 2002.

The additional source of fund could arise from successful collaboration between wildlife law enforcers and anti-money laundering agencies, where an element of wildlife crime is present. A good example is the Chaiyamat case in Thailand⁸. In May 2014, following the arrest of Kampanart Chaiyamat by the Thai Royal Police, Thailand’s Anti-Money Laundering Office (AMLO) seized over 1 billion Thai baht (\$36.5 million USD) from a wildlife trafficking syndicate. If a Wildlife Conservation Fund existed, it could receive a portion of such proceeds.

APPROPRIATION

In some countries such as Kenya, Tanzania and the US, part of the funding mechanism are from appropriation⁹ While the source of financing for this fund is from appropriation, it is nevertheless an interesting model to study in terms of the structure and mechanism.

EXAMPLES OF CONSERVATION FUNDS

Establishing a national or regional wildlife conservation fund is a novel concept with the potential for significant success. Through funnelling income accrued from fines or forfeitures of wildlife crimes amongst other sources, a self-funding fund can be employed to redirect money into creating wildlife rescue centres, diminishing corruption, rewarding informants, funding anti-poaching campaigns and operations to dismantle wildlife syndicates. Table I provides examples of existing legislation in different jurisdictions that provide differing models for the fund which can be employed for the establishment of a wildlife conservation fund.

² Many ASEAN member states already have provisions in their wildlife laws that allow the sales of confiscated assets. We just need to ensure that the proceeds are channeled into the Wildlife Conservation Fund

³ Criminal Asset Recovery Order, 2012.

⁴ Article 123(5)(c) Criminal Asset Recovery Order, 2012.

⁵ Article 123(5)(e) Criminal Asset Recovery Order, 2012.

⁶ United Kingdom Proceeds of Crime Act 2002

⁷ Proceeds of Crime Act 2002 No. 85, 2002. Australian Federal Register of Legislation.

⁸ <http://www.freeland.org/#!/wildlife-trafficking-gang-floored-by-maj/czys>

⁹ See Table I below.

TABLE I: EXAMPLES OF EXISTING LEGISLATION ON CONSERVATION FUND

EXISTING LEGISLATION	SOURCES OF INCOME	RESPONSIBILITY OF FUND	PURPOSE OF FUND
<p>Philippines– Republic Act No. 9147 ¹⁰</p> <p>SECTION 29.</p>	<p>The Fund shall derive from fines imposed and damages awarded, fees, charges, donations, endowments, administrative fees or grants in the form of contributions.</p>	<p>DENR: Department of Environment and Natural Resources.</p> <p>DA: Department of Agriculture.</p> <p>PCSD: Philippine Council for Sustainable Development. Each department creates their own funds.</p>	<p>To finance rehabilitation or restoration of habitats affected by acts committed in violation of this Act and support scientific research, enforcement and monitoring activities, as well as enhancement of capabilities of relevant agencies.</p>
<p>Kenya¹¹- The Wildlife Conservation and Management Act, 2013 Part V- establishment of wildlife endowment fund.</p>	<p>Wildlife Endowment Fund shall include moneys appropriated by Parliament for purposes of the Endowment Fund; a proportion of such moneys as may be levied for payment of environmental services by beneficiaries in productive and service sectors as a contribution toward the Endowment Fund.</p> <p>Income from investments made by the Board of Trustees, and such grants, donations, bequests or other gifts as may be made to the Endowment Fund.</p>	<p>Kenya Wildlife Service appoints a Board of Trustees to monitor and take responsibility of the Wildlife Endowment Fund.</p>	<p>Functions of the Wildlife Endowment Fund shall be to develop wildlife conservation initiatives, manage and restore protected areas and conservancies, protect endangered species, habitats and ecosystems. Support wildlife security operations; facilitate community based wildlife initiatives; and such other purposes as may be provided for by rules made under this Act.</p>

¹⁰ Philippines Republic Act No. 9147, Section 29. Available at: <http://extwprlegs1.fao.org/docs/pdf/phi41009.pdf>

¹¹ Kenya Wildlife Conservation and Management Act 2013. Part V - establishment of wildlife endowment fund. Available at: <http://extwprlegs1.fao.org/docs/pdf/ken134375.pdf>

<p>Province of Nova Scotia¹² - An Act to Provide for the Protection, Management and Conservation of Wildlife and Wildlife Habitats Chapter 504 of the revised statutes, 1989</p>	<p>There shall be paid into the Habitat Conservation Fund money acquired by gift, donation and bequest or by disposition of any land acquired for the purposes of the Fund; income accruing to the Fund, and in accordance with the <i>Finance Act</i>, money that accrues from any programs of the Province, including programs conducted under agreements with other governments, entered into for any of the purposes for which the Fund is established.</p>	<p>Department of Natural Resources.</p>	<p>The Habitat Conservation Fund is for the purpose of funding programs for the protection and enhancement of wildlife and wildlife habitats.</p>
<p>Philippines – Fisheries Code of 1998 (Republic Act No. 8550) as amended by Republic Act 10654 – Article NO. 142¹³</p>	<p>It shall be funded from administrative fines and penalties imposed under this Code, from the proceeds of the sale of forfeited fish, fishing gears, paraphernalia and fishing vessels, and contributions in the form of endowments, grants and donations to the fund, which shall be exempted from donor and other taxes, charges or fees imposed by the government.</p>	<p>Department of Agriculture.</p>	<p>The fund shall be exclusively utilized as follows:</p> <ul style="list-style-type: none"> a. Fifteen percent for the purchase, upgrade and maintenance of vessels, communication and other equipment used for the monitoring, control and surveillance of Philippine waters and distant water fishing; b. Five percent for the payment of litigation expenses, cost of conveyance of witnesses and others costs due to cases filed by or against the republic of the Philippines in international Courts arising from the implementation of this Code or where apprehending party or parties become respondents or defendants in any tribunal court of law; c. Twenty five percent for the operating costs and capability building of the NFARMC, INFARMCs and C/MFARMCs and payment for the cost of rehabilitation, medical expenses for injury, or indemnity for death of law enforcement officers, including deputized volunteers, distributed as follows: five percent to all C/MFARMCs and

¹² Province of Nova Scotia, Wildlife Act Chapter 504 of the revised statutes, 1989. Available at <https://nslegislature.ca/sites/default/files/legc/statutes/wildlife.pdf>

¹³ Philippines Fisheries Code of 1998 (Republic Act No. 8550) as amended by Republic Act 10654, Article No. 142. Available at: <http://www.officialgazette.gov.ph/2015/02/27/republic-act-no-10654/>

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- ten percent to C/MFARMCs for the apprehension and successful prosecution of a fisheries offense;
 - d. five percent for the continued upgrading of laboratory facilities and equipment;
 - e. five percent for the research and development activities of the NFRDI;
 - f. five percent for the capability development of BFAR personnel, deputized law enforcement agencies and volunteers and stakeholders;
 - g. ten percent for scholarship grants for children of fisher-folks and fish workers in fish catch, aquaculture, fishing and fish processing;
 - h. fifteen percent for live hood programs for production enhancement and poverty alleviation; and
- fifteen percent for fishermen in facilities”¹⁴

Tanzania-The Wildlife Conservation Act, 2009 ¹⁵

Tanzania Wildlife Protection Fund (TWPF) sources of the Fund shall consist of such sums of money as may be appropriated by the Parliament; twenty- five percentum of the proceeds of the sale of every animal, trophy, weapon vehicle, vessel, aircraft, tent or other article which is forfeited and sold or disposed of in

There is established a Board to be known as the Board of Trustees of the Tanzania Wildlife Protection Fund which shall have perpetual succession and common seal, in its corporate name capable of suing and being sued. Be capable of purchasing or acquiring

Objectives of the Tanzania Wildlife Protection Fund shall be to facilitate and support wildlife conservation, inside and outside protected areas particularly in anti-poaching operations and law enforcement; Operations of the Wildlife Protection Unit; The conservation of wildlife; the development of communities living in rural areas adjacent to wildlife protected areas; conservation education, training and awareness creation in wildlife matters.

¹⁴ ASEAN Handbook on legal cooperation to combat wildlife crime, Philippines, 4.16 Establishment of conservation fund where proceeds from seized assets of wildlife offenses go to a dedicated fund, which can be used by enforcement agencies of wens, p 44.

¹⁵ Tanzania The Wildlife Conservation Act, 2009. Online. Found at <http://extwprlegs1.fao.org/docs/pdf/tan97858.pdf>

	any manner for money including proceeds accrued from non-consumptive use of wildlife outside national parks Conservation Areas. Any sum or property which may in any manner become payable into the fund; and any sum payable or donation, bequest, gift or grant made or given.	and managing in any manner and alienating any movable and immovable property.	Capacity building in wildlife management; wildlife management research; and any other activity related to the conservation of wildlife.
United States – Multinational Species Conservation Fund Semipostal Stamp Act of 2009 ¹⁶	Multinational Species Conservation Funds Semipostal Stamp shall be offered at a cost equal to the cost of mailing a letter weighing 1 ounce or less at the non-automation single-piece first-ounce letter rate, in effect at the time of purchase, plus a differential of not less than 25 percent. Payments to the fish and wildlife service shall be made twice a year.	United States Postal Service	The proceeds to be divided equally among the African Elephant Conservation Fund, the Asian Elephant Conservation Fund, the Great Ape Conservation Fund, the Marine Turtle Conservation Fund, and the Rhinoceros and Tiger Conservation Fund.
United States - The Endangered Species Act of 1973 (“ESA”) ¹⁷	Administered by the Secretary, an amount equal to 5 percent of the combined amounts covered each fiscal year into the Federal aid to wildlife restoration fund.	Respective State agency.	To assist in the development of programs for the conservation of endangered and threatened species, or to assist in monitoring the status of candidate species and recovered species.

¹⁶ United States Multinational Species Conservation Fund Semi Postal Stamp Act of 2009 <https://www.govtrack.us/congress/bills/111/s1567/text>

¹⁷ United States Endangered Species Act of 1973 (“ESA”). Available at: <http://www.nmfs.noaa.gov/pr/pdfs/laws/esa.pdf>

STATUS OF ASEAN REGION

As can be seen above, the Philippines is the only ASEAN member state to have specific laws on the establishment of a conservation fund within its wildlife laws¹⁸. In the Philippines, section 29 of the Wildlife Resources Conservation and Protection Act (Republic Act No. 9147) provides for the establishment of a Wildlife Management Fund for the financing of rehabilitation or restoration of habitats affected by acts committed in violation of this Act. This is funded by fines imposed and damages awarded (amongst other contributions).

While the other ASEAN member states do not have such provisions in their wildlife laws, a number of ASEAN Member States do have the basic legal framework in their forestry/ national park/ environment protection laws for the development of a wildlife conservation fund¹⁹.

ASEAN member states would also have provisions in their wildlife laws and/or criminal or penal code that provide for:

1. Rewards to informant
2. Compensation to victims
3. Order to pay damages

It is therefore timely for ASEAN member states to consider establishing a Wildlife Conservation Fund (whether national or regional) for wildlife law enforcement agencies to be more effective and self-sufficient.

RECOMMENDATIONS

National Parliaments, should lead national consultations to explore concepts and applicability of the following:

1. Purpose and need for a Wildlife Conservation Fund, specifically designed for wildlife protection and restitution efforts²⁰ (nationally and regionally)
2. Current national legal and policy framework in the ASEAN countries for the establishment of a Wildlife Conservation Fund by reviewing the laws for existing provisions²¹ that:
 - i. Can serve as a platform for wildlife conservation fund;
 - ii. Deal with award of damages and sentencing guidelines;

¹⁸ Section 29, Wildlife Resources Conservation and Protection Act (Republic Act No. 9147), the Philippines.

¹⁹ For example Brunei: Article 22M-P Forestry Act Chapter 46; Cambodia: Article 51 Law on Forestry: Forest Development Fund; Article 32, Protected Areas Law 2008: Protected Areas Fund; Malaysia: section 41 of the International Trade in Endangered Species Act: "All money received under this Act by a Management Authority shall be paid into and form part of- (a) where the Management Authority is under the jurisdiction of the Federal Government, the Consolidated Fund; (b) where the Management Authority is under the jurisdiction of the State Government, the State Consolidated Fund; or (c) where the Management Authority is a statutory body, the fund of the statutory body.". If DWNP is considered as a statutory board, then the funds will go into DVWNP funds.; Vietnam: Article 17 of Decree on Management of Export, Import, Re-export and introduction from the sea, Transit, Breeding and Artificial Propagation of Rare, Endangered and Precious Wild Fauna and Flora (Decree 82/2006/ND-CP) (10/08/2006).

²⁰ Issues that can be considered (i) What is a conservation fund?; (ii) How is a conservation fund typically managed?; (iii) Who are the key players and who gets involved?; (iv) What are the challenges in setting-up and managing a conservation fund?

- iii. Allow informants to be rewarded; and
 - iv. Provide for restitution and compensation.
- 3. Funding sources for the Wildlife Conservation Fund and its implementing rules and regulations;
- 4. Form and scope of Wildlife Conservation Fund appropriate for implementation in each ASEAN member state;
- 5. Likely challenges to implementation and operation of a Wildlife Conservation Fund;
- 6. Sharing results and best practices from partners who have implemented Wildlife Conservation Funds (E.g.: The U.S. Model: John Webb, Esq., Member of the Advisory Committee to the Presidential Task Force to Combat Wildlife Trafficking and former U.S. Department of Justice prosecutor specializing in prosecuting wildlife crime) and the Philippines model;
- 7. The stakeholders and interfaces for consultation and implementation, including agencies that wildlife agencies can collaborate with (e.g. the judiciary, prosecution, anti-money laundering agency, tax department etc.);
- 8. Form an ASEAN platform to share country specific results from within and without ASEAN to devise an ASEAN-wide model legislation to implement a Wildlife Conservation Fund, including good practices to advance successful development and use.



Parliamentary session “talk show” of the U.N. Africa-Asia Pacific Symposium on Strengthening Legal Frameworks to Combat Wildlife Crime - Bangkok, Thailand, July 4-5, 2017, Photo: Hal Lipper/USAID

“Wildlife trafficking is a multi-billion dollar trade. The parliament of Thailand is seeking to revisit the Wildlife Protection Act (WARPA) which will be submitted for our deliberation in the very near future with the hope to set up a **“Wildlife Conservation and Restitution Fund”** which will be a key to increase and sustain adequate enforcement budget and also a key to increase the incentives for informants and frontline law enforcers. A percentage of seized assets could be legislated to fund more wildlife enforcement as well as protection and repair programs. This way, wildlife criminals pay for wildlife conservation.”

The Honorable Lt. Gen. Chaiyuth Promsook, Chairman of the Standing Committee on Environment and Natural Resources of the National Legislative Assembly of Thailand at the USAID Wildlife Asia-hosted Parliamentary Perspectives Session of the U.N. Africa-Asia Pacific Symposium

THE PRINCIPLES OF RESTITUTION - ADDITIONAL REMEDY TO WILDLIFE OFFENSES

INTRODUCTION

Wildlife and forest offenses are often viewed by many, especially perpetrators, as a high-profit low-risk activity due to the relative leniency in penalties imposed for such crimes.

Further, most laws seek to punish and deter offenders, through imposing penalties such as the confiscation of illegally acquired property and assets, suspension/revocation of licenses or permits, and the payment of fines and damages. In more serious cases, imprisonment might be imposed.

However, such penalties and sanctions do not address the actual costs and losses suffered as consequences of such offenses: the destruction of wildlife and forests, costs of housing, caring for, rehabilitation, restoration of wildlife and/or damaged forest habitat, as the case may be.

RESTITUTION

Restitution has its origins in civil remedy, designed to prevent a wrong doer from retaining any benefits illegally obtained from another, and to make the victim whole for damages.

In many countries, the courts are empowered to order restitution in addition to other criminal sanctions such as fines and imprisonment. This stems from the notion that fines and imprisonment do not contribute directly to compensating the loss suffered by the victims of wildlife crimes, including nature and wildlife. One economic approach termed 'weak sustainability' attempts to explain the reasons why little importance is placed on wildlife, it suggests that wildlife and natural resources are perceived as unlimited since the demands of the market would always insure innovation to replace the necessary functions of the resource. However, this theory has been contradicted with the fact that natural resources, such as air, water, animals and other, cannot be substituted, thus more awareness needs to be placed on highlighting the limited nature of wildlife. More efforts need to be paid to restitution and conservation, rather than substitution²².

Under the United Nation Convention against Transnational Organized Crime ("UNTOC")²³, it is mandated that "Each State Party shall establish appropriate procedures to provide access to compensation and **restitution** for victims of offenses covered by this Convention."²⁴

²² Borowy, I. (2012). Global Health and Development: Conceptualizing Health between Economic Growth and Environmental Sustainability. *Journal of the History of Medicine and Allied Sciences*, 68(3), 451-485. <http://dx.doi.org/10.1093/jhmas/jrr076>, p464.

²³ The United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000, is the main international instrument in the fight against transnational organized crime. It opened for signature by Member States at a High-level Political Conference convened for that purpose in Palermo, Italy, on 12-15 December 2000 and entered into force on 29 September 2003.

²⁴ Article 25.2 - Assistance to and protection of victims, UNTOC.

The actual loss suffered by consequence of wildlife offenses can be addressed through empowering the courts to order restitution as a remedy to the victims of such crimes.

The victims could be:

1. The State (being the owner of wildlife and state resources) or the relevant agency;
2. The wildlife/environment itself; or
3. Private owners (in the case of privately owned/managed wildlife reserve or forest)

Restitution is not a replacement of the criminal penalties and sanctions, but rather additional remedy. The purpose is to combine punishment (forfeiture of property, fines and imprisonment) with environmental protection and funding of victim compensation and assistance program (the remedy of restitution).

IMPLEMENTATION AND EFFECTIVENESS OF RESTITUTION

Restitution can be implemented in many ways. The courts can be empowered to order:

1. Direct monetary compensation to the victims for loss suffered as a result of the offense;
2. Rehabilitation and restoration of damaged wildlife and/or habitats;
3. Payment of costs incurred as a result of the offense, including the cost of remediating harm caused by the illegal act (for example, the cost of housing, caring and/or repatriation of seized wildlife; or acquisition of compensatory habitat for habitat destroyed or degraded;
4. Payment of market value of wildlife poached/ forest destroyed;
5. Establishment of a conservation fund in which all proceeds from the restitution order (and/or fines and other financial penalties derived from the offense) shall be paid into and used for rehabilitation and/or restoration of damages caused by wildlife and forest offenses, compensation of victims and reward of informants²⁵.

To ensure effectiveness of the restitution order, the following points should be considered²⁶:

- The aim for restitution is to compensate the victim for loss suffered or make good the damage;
- The restitution order should be in addition to any forfeiture, fines or penalty imposed by the court;
- There are legal sanctions and consequences of not complying with restitution order;
- It is not applied in lieu of criminal conviction or sanction (especially a corporate entity);

²⁵ Discussed in Section I of this paper.

²⁶ The points are not exhaustive. Reference can be made to pp. 138-139 Wildlife and Forest Crime Analytic Toolkit published by United Nations Office on Drugs and Crime (UNODC), when considering restitution as a sentencing policy.

- The offender should not be allowed to claim for tax exemption (in the case of an order to pay to a charitable organization).

EXAMPLES OF IMPLEMENTATION OF RESTITUTION

Below are some examples in which the principles of restitution have been incorporated as part of the legal and judicial process:

THE UNITED STATES

The legislation in the United States is a useful model for the implementation of restitution in wildlife crimes as its laws recognize violation of foreign laws and victims in wildlife trafficking under the Lacey Act²⁷ and the eligibility for restitution falls under the Mandatory Victims Restitution Act²⁸ (“MVRA”) and Victim and Witness Protection Act²⁹ (“VWPA”).

The *United States v Bengis* case³⁰ is an interesting case study on the principles of restitution, including the basis of entitlement to restitution, what constitutes a victim and the evaluation of such restitution in the United States.

The *Bengis* case approved awarding restitution to state or foreign governments as victims for the value of the resources they lost through the commission of the defendant’s environmental crimes³¹. Also see, *United States v. Bengis*, 631 F.3d 33 (2nd Cir. 2011) (initially awarding South African government millions of dollars in restitution for poached marine resources) and *United States v. Bengis*, 783 F3d 407 (2nd Cir. 2015) (affirming negotiated restitution order of more than \$22 million).

Finally, in environmental crimes, prosecutors are authorized to seek financial community service, directing funds to non-victims for the benefit of the resources harmed and remediation³².

CANADA

In Canada, the British Columbia Wildlife Act (“Wildlife Act”) contains a provision entitled “Creative sentencing”³³ whereby in addition to any punishment imposed under the act, the court has the power to direct the offender to take actions in remedying any harm done to the environment or wildlife as a result of the offense, pay compensation to the government for the costs of remedial or preventive action, or pay an appropriate amount into a designated trust funds.

RECOMMENDATION

The use of Restitution as an additional remedy and source of funding for the Conservation Fund to be included in the discussion in section I of this paper.

²⁷ Lacey Act (16 U.S.C. §§ 3371–3378)

²⁸ Mandatory Victims Restitution Act, 18 U.S.C. §3663A

²⁹ Victim and Witness Protection Act, 18 U.S.C. §3663

³⁰ *United States v. Bengis*, 43 ELR 20133 No. 1-03-cf-00308, (S.D.N.Y., 06/14/2013) (Kaplan, J.)

³¹ See *Restitution in Wildlife Cases*, U.S. Attorneys’ Bulletin, Vol. 63, No. 3, May 2015, pp. 82-3

³² See *United States Attorneys’ Manual (USAM)* 5-11.115B.

³³ Section 84.1, *Wildlife Act* [RSBC 1996] Chapter 488.