

Case Selection Framework

GUIDE FOR PRACTITIONERS

Strategic Environmental Liability Litigation is constantly evolving. Consequently, this is a Living Document and is continuously updated in consultation with our network partners and advisors.

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INTRODUCTION

This resource is to support plaintiffs in the process of selecting an environmental litigation case/legal action that is likely to succeed and likely to prove strategic. Unlike traditional criminal enforcement where, in principle all detected offenders are prosecuted, the types of legal actions pursued by the Conservation-Litigation.org network are targeted and strategic (Box 1). That means that not every case is pursued, and we make deliberate choices about which cases are worth our effort. This resource helps to guide those choices, and we are updating it as we learn more through practice.

Box 1. Three main types of legal action

Depending on domestic legislation and context, cases in the context of this framework could include a number of legal actions in response to environmental harm. Actions against offenders potentially be brought by individuals, government, communities and civil society groups. Legal actions broadly fall into 3 categories:

- Civil litigation, in which a plaintiff brings a case against an offender for the harm they caused
- Joint criminal-civil case, in which a criminal prosecution is brought against an offender, and a plaintiff joins that proceeding as a civil party (this is most common in civil law countries)
- Administrative cases, such as Environmental Restoration Orders to remedy harm that occurred, which are issued by government agencies without requiring a court process. These types of legal processes often also require strategic decisions addressed in the document, although are not the core focus of this framework.

All contexts and jurisdictions have unique characteristics; case development is often opportunistic and driven by demand from plaintiffs, and it is difficult to anticipate which and whether cases will set important legal precedents. Moreover, strategies, risks and priorities vary across contexts and over time. As such, this resource is neither proscriptive nor exhaustive, and instead highlights key considerations that may be valuable in identifying the “right” case. Case selection is also necessarily informed by our [Risk Identification and Mitigation Framework](#) and by our Lessons Learned Document (coming soon). This framework seeks to support case selection by considering two key questions:

1. Is the case likely to succeed in court?

This framework provides a “checklist” of considerations to help guide plaintiffs towards cases that are most likely to succeed. It considers factors such as whether cases are legally possible, have associated risks, can be practically implemented, and align with our principles. Given the effort and risks associated with case development, it is important to evaluate *a priori* whether cases are expected to succeed.

2. Is the case positioned to provide a strategic verdict?

This framework provides examples of types of strategic verdicts that may be a focus on future case selection, at different scales. And, importantly, it encourages plaintiffs and case proponents to articulate *a priori* what strategic benefits they anticipate from their cases, while also recognising that precedent-setting legal actions are also often unpredicted. However, planning ahead is important because a successful outcome from a strategic case relies not merely on a successful verdict, but also on a verdict that has broader impacts on society, in multiple ways and at both local, regional and global scales. Strategic cases can shape jurisprudence, inform the public, and/or have value for future plaintiffs across jurisdictions. Strategic environmental liability litigation is still an emerging field and precedents are few, and one of the primary goals of the case selection process is to set domestic and global precedents that have the potential to drive transformative change to protect biodiversity.

1. IS THE CASE LIKELY TO SUCCEED IN COURT?

Case outcomes are unpredictable, but well-planned case selection can both increase the likelihood of success and reduce the chance of procedural efforts. Table 1, below, sets out a series of questions that plaintiffs should consider when identifying and evaluating a case, answering:

Is the case legally possible?

Liability provisions are also often contained within different pieces of legislation, some of which may be more-or-less familiar to the participating lawyers. This can limit cases in terms of claim formation, procedures, understanding what strategic opportunities can best be advanced through litigation. Moreover, lawyers and conservationists often understand core concepts and processes in different ways. Conservation-Litigation.org [country legal analyses](#) are developed to answer six core questions about what is legally possible in a given country.

Is the case logistically feasible?

Beyond any legal limitations, there are a number of procedural and logistical issues to consider, such as availability of evidence, expert witnesses, budgets and location of the court.

Can the case be effectively argued in court?

Cases are often won or lost on the merits of their argumentation, which is a function not only of legal ability but also evidence and quality for the science. For environmental cases that can involve complex causal chains and concepts with which lawyers are often less familiar, it is especially important to ensure that the science can be well presented.

Are the risks manageable?

We have developed a complementary [Risk Identification and Mitigation Framework](#) that considers a range of risks including those that are somewhat unique to legal action.

Does the case align with our principles?

Given that these cases are driven by a sense of purpose and public interest, it is important to ensure that cases align with our broader principles.

Table 1. Criteria for evaluating whether a case is likely to succeed in court.

Criteria are ranked on a scale of Essential - Desirable - Helpful.

Criteria	Importance
Is the case legally possible?	
Is the planned legal action possible in the jurisdiction in the context of the case Although all states have liability laws, and may include liability provisions for environmental harm, it is important to ensure that the intended type of case is actually legally possible in that jurisdiction. Some countries impose limitations on the types of harm for which liability can apply (e.g. harm caused by pollution, but not harm to biodiversity). Ensuring this is possible in the context of the intended case can be informed by a full baseline legal analysis.	Essential
The legal analysis for the relevant jurisdiction(s) has been completed Legal procedures vary widely, and both public and private lawyers are often unfamiliar with the fine-grain details of environmental liability suits. A baseline legal analysis helps to provide clarity and shared understanding across the legal team.	Desirable
The case meets the legal thresholds required to trigger liability. Most countries prescribe minimum thresholds of harm that trigger liability, and only cases that exceed these thresholds can be accepted in court. It is thus important to check whether the harm caused in the case meets those criteria	Essential
The types of harm correspond to the court jurisdiction The appropriate court (legal forum) with jurisdiction to hear the type of case has been identified. This is determined by factors such as type of harm, scale of harm, and where the harm occurred. Notably, in certain jurisdictions, wildlife cases cannot be heard in all courts.	Essential
There is a plaintiff that has the legal standing to bring the case Countries differ in terms of who has a right to bring a case (legal standing), and via what legal pathway. In some, rights are restricted to government agencies, while in others individuals and organisations can participate, although there are still often rules that determine whether they have standing to bring a case (e.g., minimum number of years of incorporation).	Essential
The remedies sought can be ordered by the court Even where a case can be legally heard, it is critical to also ensure that the types of remedies sought by the plaintiff can be legally granted by the court.	Essential

Is the case logistically feasible?	
The plaintiff/partners are suitable, willing and known/thought to be reliable and trustworthy Beyond their legal right to bring a case, collaborations between plaintiffs (e.g., government agencies, local communities, NGOs) and case proponents (e.g., pro-bono lawyers, Conservation-Litigation.org) rely on quality, long-term collaboration and effort. Ensuring that ways of work, expectations, communication and trust are secured is important to case success. It is also necessary to ensure there are no conflicts of interest on the side of the plaintiff.	Desirable
There are sufficient resources (financial/time/expertise) Legal processes can be protracted, often beyond anticipated timelines, due to factors such as court delays, defendant efforts to evade justice and multiple appeals by plaintiffs and defendants. Indeed, given the lack of precedent in many cases, appeals to Supreme Court level may be likely. As such, it is important to plan ahead, and prepare contingency resources.	Essential
There are no major geographic barriers to bringing the case Logistical barriers are often involved with distance and travel logistics and costs, such as between the litigating lawyers' office and the court where the case is being heard, and whether the plaintiff and experts are able to attend court. This is particularly true in rural areas, where frontier offences (e.g., deforestation) often occur.	Desirable
Evidence to support the case already exists or can be obtained, and meets the procedural/administrative requirements Many prospective cases that seem strong may lack adequate evidence, of the kinds required by the courts. Importantly, prospective plaintiffs may believe that they hold adequate evidence, but this needs to be fully checked by the legal team to ensure it meets the requirements.	Essential
Investigations to collect evidence are legal, possible and not unduly dangerous. Where additional evidence is needed, it is important that this can be done appropriately. This is important because many prospective plaintiffs, particularly non-government plaintiffs, may not be experienced with undertaking investigations legally and safely. (See also Risk Identification and Mitigation Framework)	Essential
The legal team has a clear understanding of the legal process/timeline Legal action often involves specific procedures and strict timelines, and it is important to ensure the legal team has a strong understanding of these, and preferably has experience with them and is able to map them out.	Desirable

The plaintiff/partners have positive relations with the government Even where plaintiffs do not take legal action against the government, litigation may be perceived as an assertive act, and/or the case may have ties to government actors or elites. It is important to consider how the case will be perceived by government agencies.	Helpful
Can the case be effectively argued in court?	
The case has a strong, existing evidence base to support claims	Essential
The case is already subject to a criminal conviction Sometimes liability suits are pursued alongside criminal prosecutions, but in many countries they can also be pursued as separate lawsuits. Where this is the strategy, it may be helpful to first secure a criminal conviction because the burden of proof for criminal proceeding is higher than for civil. As such, this would make for an easier lawsuit, and allow for a case focused on harm-remedies, rather than culpability.	Desirable
There is an ongoing criminal prosecution to which liability claim can be added Sometimes liability suits are pursued alongside criminal prosecutions, as part of an integrated process (e.g., an individual, government agency or NGO can ask the prosecutor to consider their claim within their case). Where this is legally possible and accepted by the prosecutor, it can reduce costs and may increase credibility with the judges. However, the criminal burden of proof is higher than the civil burden, so this also introduces an additional barrier as the fate of the liability claim rests on criminal prosecution.	Desirable
The evidence to support the case is eligible in the relevant court	Desirable
There are established/strongly arguable causal links between the harmful action and the restoration actions sought. There is sufficient understanding of the harm, the evidence, the science and the causal links to develop an effective damage claim	Essential
The evidence to support the case is science-based Although legal cases are won through argumentation, ensuring that cases are based on robust science is important to argumentation, the ethics of the case, as well as to its potential to educate the judiciary and the broader public. Even in cases of scientific uncertainty, this should be addressed, especially as the “precautionary principle” still instructs courts to rule in favour of nature.	Desirable
The evidence to support the case is able to be understood by the court Especially where claims rely on evaluating the science (e.g., where case test new types of claims, describe harm that is unfamiliar to the public), it is important to	Essential

ensure that the related principles and links are made clearly and anticipate a low level of scientific literature among the audience.	
There are willing expert witnesses who have the standing to present scientific evidence in court and are capable of presenting the evidence Not all cases require expert witnesses. However, where a case requires the support of an expert witness to present scientific evidence, it is important to recruit a willing supporter, which can be challenging in many contexts (e.g., due to fear), and to ensure they meet the legal requirements (e.g., qualifications). There is a further need to ensure that they are able to comfortably and clearly present their evidence in a way that will be understood by the court and will strengthen the case, and this can be supported with appropriate preparation. There may also be other sources of evidence that can be used, such as a letter from the relevant government authority.	Essential
The jurisdiction in which the case will be brought is judged to be willing to consider ordering remedies for harm Where there are few/no precedent cases, it can be challenging to anticipate what courts will accept in terms of requested remedies. For example, there is often a strong focus on monetary compensation, rather than ordering remedies that can benefit nature on-the-ground. It is important to understand the socio-legal context of the case, to identify what can be reasonably requested in court, such as through review of case law, interviews with judges and discussions with legal scholars.	Essential
Are the risks manageable? Please review the Risk Identification and Mitigation Framework	
Does the case align with our principles?	
The cases ensures everyone's safety and security Risks must be meaningfully understood by all parties involved in the cases, and fully evaluated and mitigated. There are no serious threats to the safety and security of plaintiffs, defendants, witnesses, experts and other stakeholders in the litigation process	Essential
The case reflects high effectiveness The risk-reward ratio of the case is favourable, meaning that any risks taken are not only reasonable and well-mitigated (see above), but are worth the potential benefits.	Essential
The cases reflects strong ethics and fairness Cases, processes, partners and donors embody a high standard of ethical practices. This includes a strong sense of fairness in the design of damage claims and selection of defendants.	Essential

The case involves meaningful partnerships The collaborations associated with the case are strong and mutually respectful, and the associated risks have been addressed.	Essential
The case promotes robust science The case is premised on science that is robust, values different types of knowledge, and is clearly communicated	Essential

2. IS THE CASE POSITIONED TO PROVIDE A STRATEGIC VERDICT?

Priorities and strategies vary across contexts and over time, but it is important to consider whether a specific case opportunity represents an appropriate effort. And, especially because cases are often collaborative among scientists, investigators, lawyers, funders and plaintiffs, it is important to develop a shared vision of whether the case is strategic. This requires considering implications at different scales (Table 2), to consider:

Is the individual case worth litigating?

An individual case may be legal and viable and arguable in court (as discussed in the previous section), but still not necessarily be worth the investment of time and effort. Determining whether it is worthwhile is a function of factors like the scale and type of harm caused by the case, and who the defendant is.

Is the case national or globally strategic?

Beyond the individual merits of a case, these legal actions are often designed to make broader societal changes – as part of strategic or impact litigation that seeks to shift broader behaviours, change policy, educate the public, and/or set new legal precedents. Below, we also provide examples of the types of instances in which a case may be considered broadly strategic at a national or global scale.

Table 2. Considerations in determining whether a case is strategic.

Criteria are ranked on a scale of Essential - Desirable - Helpful.

Criteria	Importance
Is the individual case worth litigating?	
The proposed defendant is involved in “high-level” environmental offences, (e.g., corporation, organised crime, financing, etc.	Essential
The proposed defendant is the party actually behind the offence (e.g., the kingpin, not the middleman/man on the ground)	Desirable
The proposed defendant likely has significant assets, based on available data	Desirable
The case involves significant environmental harms (e.g. harm to species, ecosystem damage, habitat loss, etc.)	Essential
The case involves significant social harms	Desirable
The case has the potential to receive a compelling/meaningful remedies for biodiversity, local residents and/or government (e.g., on-the-ground conservation actions, financial compensation to poor residents, non-financial remedies associated with human wellbeing)	Essential
The case does not create unreasonable safety, legal and/or financial risks for the plaintiff (see Risk Identification and Mitigation Framework)	Essential
The remedies sought/ordered can effectively be implemented on the ground	Desirable
There are established paths to ensure the funds ordered for remedies are able to reach the body tasked with conducting the restoration	Desirable
Is the case national or globally strategic?	
The case has the potential to set important precedents for environmental restoration	Essential
The case can appeal to a large/global audience	Helpful
The case can be valuable/set an example for future plaintiffs	Desirable
There is community support from domestic NGOs willing to support the plaintiff	Helpful

There are international NGOs with a particular interest in the species/ecosystem and may be willing to lend support	Helpful
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Examples where cases may be considered to have national or global strategic significance

- Using legal provisions that have not been previously well used

Our [country legal analyses](#) show that in many countries, the laws to secure remedies for environmental harm exist, but are poorly, rarely or never used. By understanding what the law actually allows - and not merely how it has been used previously - it may be possible to bring a case that argues for a new, alternative or simply different interpretation of existing environmental provisions.

- Expanding the standing of who has a legal right to bring cases on behalf of nature

Understanding who has the legal right to serve as a plaintiff and bring forward an environmental litigation case is crucial (legal standing); without the appropriate legal standing in the relevant jurisdiction, it doesn't matter how strong the case or evidence may be - the court will not hear it.

- Establishing new causal pathways

Building new understanding of the links between harming nature and the impact on human wellbeing has the potential to set important precedents in environmental liability cases.

- Expanding the scope of harm recognised by courts

- Expanding the scope of remedies that courts can grant

In many countries, there are few established cases and/or courts have been very limited in their recognition of remedies to environmental harm. Where cases exist, they have often focused on monetary compensation as the main way to remedy harm. However, remedying harm caused to biodiversity requires on-the-ground actions rather than simply the payment of a fine. A strategic case may thus seek to expand the scope of remedies recognised by the courts so that these can better reflect the needs of the environment and local communities. Expanded remedies are likely to also attract future cases, as certain increases.

- Asking courts to recognise diverse types of expert witnesses and values

Some countries place strict requirements on who can serve as an expert in court, to help present scientific evidence, such as minimum levels of education or professional qualifications. However, meaningfully understanding environmental harm and appropriate remedies may also

require knowledge from other types of voices, such as from Indigenous People and Local Communities. A strategic case might be to help ensure these types of perspectives can also be legally recognised as experts that can inform the court.

- Legal thresholds for liability

Many countries identify specific thresholds that apply in environment cases and determine when offenders can be held liable for providing remedies. In some countries, these thresholds are clear and well-established, but in other cases and for some types of harm (e.g., harm to biodiversity) are weakly established. In others, no thresholds are established at all, and it is incumbent on the plaintiff to argue their case that harm has occurred. Strategic litigation may help to establish new jurisprudence about thresholds. This would make future cases seeking recognition of harm to biodiversity easier because there would be greater certainty – among plaintiffs, defendants and judges – about what constitutes harm over which the law will act.

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Conservation-Litigation.org is an international network of lawyers, scientists and conservationists. We support strategic liability litigation as a creative legal response to the biodiversity crisis. We do this by providing novel legal analyses to reduce the technical barriers for action, by supporting novel litigation cases around the world, and by empowering others to litigate for biodiversity.

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