



FORESTS ASIA SUMMIT

Background Brief



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Theme 1

Governance and legal frameworks to promote sustainable landscapes

Background and context

The landscapes of Southeast Asia have been transformed and shaped over centuries by land and resource-use by smallholders; historical patterns of maritime trade; recent large-scale land-based investments; and the complex and often overlapping interactions of state, private and civil society actors and institutions linking higher levels of social and political organization (Reid 1988-93; Kathirithamby-Wells 2005). The pace of landscape change has accelerated in recent years and local communities are increasingly connected to global networks and influences (Rigg and Nattapoolwat 2001). This

has been matched by the growing complexity of 'multilevel governance' as new global, regional, national and subnational institutions emerge, associated with processes of globalization and decentralization; and new transnational regulatory and market-based mechanisms are introduced by regional, state and non-state actors (Mwangi and Wardell 2012). These changes have created opportunities to learn and address local, national and trans-boundary problems, but may also introduce pressures and risks. Decentralization and regional autonomy have meant that subnational authorities often have far-reaching powers to design legal and institutional frameworks for investment, and a lot of

latitude in allocating land for commercial purposes. Altering the scale, and the style of governance has inevitable consequences for power structures, institutions, livelihoods and physical landscapes (Batterbury and Fernando 2006). The critical role of civil society organizations and the social media have helped to increase consumer awareness and have led to growing demands for accountability by governments.

Globalized trade and investment and increasing market and financial integration are changing the ways in which economic growth and development planning in Southeast Asia is implemented. The disappearance of trade barriers and easier access to international finance creates opportunities for countries or regions that had been economically peripheral to quickly become part of the global economy. In Southeast Asia, this process has led to the formation of special economic zones, free trade areas, economic development corridors, and accelerated development master plans (e.g. MP3EI in Indonesia, GMS Economic corridors and ASEAN-China FTA). Several countries in the region are developing explicit strategies to promote “bio-based” economic transitions, in order to reduce their dependency on non-renewable (e.g. energy) resources, and to enhance sustainability (Beringer

et al. 2011; UNEP 2011; Kircher 2012). The bio or “green” economy is seen as an opportunity to meet the growing global demand for food, fuel, fiber and other biomass uses, whilst reducing the impact of economic development on the environment. Biomass, i.e. plants and plant-based materials, are a key commodity in the global bioeconomy (Lamers et al. 2014).

The Cha-am Hua Hin Declaration on the *Roadmap for an ASEAN Community 2009-2015* was adopted by member states of the Association of Southeast Asian Nations (ASEAN) in March 2009. This encompasses the *ASEAN Political-Security Community Blueprint* with broad aims to strengthen the rule of law and judiciary systems, promote good governance, prevent and combat corruption and combat transnational crimes and other trans-boundary challenges (ASEAN 2009, 8-16). The *ASEAN Economic Community Blueprint* sets ambitions to transform ASEAN into a region with free movement of goods, services, investment, skilled labor and freer flow of capital fully integrated into the global economy. It aims to develop a regional reference framework on a phased approach to forest certification by 2015, and to strengthen efforts to combat illegal logging and its associated trade (ASEAN 2009, 21-31; ASEAN 2013). Furthermore, the *ASEAN Socio-Cultural*



Community Blueprint is committed to enhance the well-being and livelihoods of the peoples of the region through: poverty alleviation: facilitating access to applied science and technology: promoting corporate social responsibility: and ensuring environmental sustainability, including sustainable forest management (ASEAN 2009, 67-87).

Governing access to and use of natural resources

The extent to which political commitments by ASEAN member states have been met varies both across the region, and within countries. Significant progress has been made, and one commentator has recently suggested this represents “a new chapter in the move toward sustainability and transparency” (Traavik 2014). For example, the increased transparency and access to information on forest licensing procedures in Indonesia (KPK 2010); the devolution of authority to community forestry groups in Cambodia (Poffenberger 2012); the logging ban introduced in Myanmar on 1 April 2014 (Ferrie 2014); the ‘Zero Deforestation’, High Conservation Value Forest and procurement policies adopted by several large corporations such as Wilmar, APP, Unilever and Univanich (Zulfahmi 2014); the Forest Law Enforcement, Governance and Trade (FLEGT) processes in five ASEAN member states; the growing importance of voluntary market measures such as forests certification (Marx and Cuypers 2010); the Norwegian Sovereign Wealth Fund decision to sell its US\$ 314 million stakes in 23 of the world’s largest oil palm companies (Gnych 2013); commitments to sustainable business by central clearing banks and commercial banks (e.g. Bank of Indonesia and Rabobank; see also HSBC 2014); forest land-use planning and monitoring in Vietnam has become more integrated and decentralized whilst being nested within national planning processes; and the role of collective action by small and medium enterprises (SMEs) in Jepara to secure SVLK licenses to export furniture products to the European Union (Purnomo et al. 2014).

Nevertheless, several threats and challenges remain. Illegal resource use and associated corruption represent key governance challenges in many countries in Southeast Asia. The forestry sector is particularly vulnerable to illegality and corruption, given the financial incentives associated with illegal resource use. The increasing value of forests – as a result of growing demand for timber, pulp, minerals



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and agricultural products and the monetary valuation of forest carbon – may have further increased the incentives for illegal activities in the forestry sector (Dermawan et al. 2011). Illegal activities in other sectors continue to impact forests, including illegal mining and agricultural expansion into protected forested land. This results in the loss of government revenues, notably lost revenue from timber extraction, and other losses including environmental impacts (e.g. loss of ecosystem services), diminished public trust and cultural losses. Strengthening law enforcement – particularly initiatives that target the financiers and intellectual actors of environmental crime, including politically exposed persons and beneficial owners – have the potential to serve as powerful future disincentives for illegality (Goncalves et al. 2012; Downs 2013).

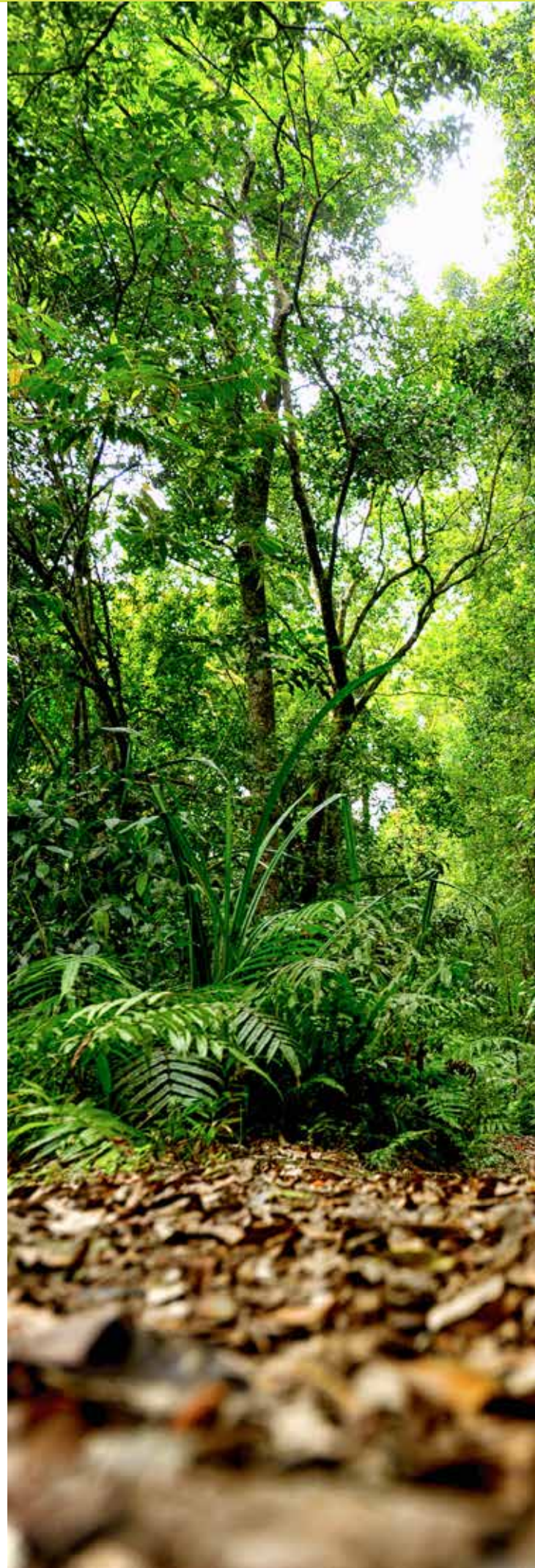
Patterns of globalized trade and investment continue to drive large-scale land-use and land-cover

changes in the region, notably those associated with the expansion of oil palm; rubber; pulp and paper plantations; mining; and food and energy estates. Despite opportunities for both economic development and the environment, research has also highlighted important potential trade offs associated with such transitions, and the continued exclusion of trade-based emissions in business models and UNFCCC negotiations (Peters et al. 2011). The diversion of agricultural land from food to energy crops or forest plantations will affect food supply and smallholder livelihoods. Expanding agriculture further into natural ecosystems may compromise their multiple ecological functions, such as biodiversity conservation and carbon fixation (Havlik et al. 2011; Bringezu et al. 2012). Deforestation and forest degradation continue to be displaced to neighboring countries in some parts of the region (Meyfroidt and Lambin 2009). Land governance and mechanisms for integrating rural smallholders have been proposed as key entry points for policy action towards achieving a sustainable long-term balance between the socioeconomic costs and benefits of a global bio-economy transformation (Deininger 2013).

This Summit theme will explore the complex patchwork of institutions, decision-making processes and formal and informal rules that shape how access to, and use of, land and forest resources are actually governed at different levels. Laws, regulations, and policies do not determine access and use of resources as such, but erect a structure of opportunities for negotiation of these rights. Government agencies do not necessarily operate in unison but often constitute complementary and competing actors. Central government policy and directives may be used to bolster authority locally or can be undermined by local power relations or knowledge. This results in incoherent policy implementation. The discretionary and capricious enforcement of laws and regulations continue to provide opportunities for monetary and political rent seeking.

Exploring the effectiveness of trans-boundary regulations

New trans-boundary forms of regulation have emerged in Southeast Asia as elsewhere, to address key land and resource challenges such as illegal logging, and the more recent fire-haze complex. These represent a clear shift from earlier failures associated with traditional, largely public





regulations to address such complex problems. Voluntary forest certification is one such approach. It has been promoted by environmental and social groups, and by businesses and governments alike and emerged in the mid-1990s as a market-based response to the failure of intergovernmental processes to establish a global convention on forests. Certification systems assume that the market will reward companies producing timber according to rigorous, comprehensive, and independently audited standards of forest certification. As of May 2012, the global area of certified forest was 394 million ha, with only 2% certified in the tropics (UNECE/FAO 2012). Recent CIFOR research has shown a strong association between FSC certification and improved working and living conditions in, and around certified forest management units in three Congo Basin countries (Cerruti et al. 2014).

A parallel process to support legality compliance and greater sustainability in tropical forestry is the EU Forest Law Enforcement, Governance and Trade (FLEGT) Action Plan, initiated in 2003. The FLEGT Action Plan includes a range of initiatives and actions targeting both consumer countries (e.g. supporting the development of private and public sector timber procurement policies, financial regulations and market regulations, such as the European Union Timber Regulation) and producer countries through the definition of timber legality assurance systems (TLAS) and negotiation of legally-binding bilateral trade agreements known as voluntary partnership agreements (VPAs). TLAS comprises five key elements: legality definition; wood tracking system; verification; issuance of licenses; and independent auditing. The TLAS essentially identifies, monitors and provides FLEGT licenses for legally-produced timber, ensuring that only legal timber is exported to the European Union (EU). A related EU Union Timber Regulation entered into force in March 2013, and applies to a broad range of primary and processed wood products. The EUTR compared with the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), is not a border control measure, meaning that compliance with the requirements is not policed at the EU border, but rather through enforcement agencies that scrutinize the business of any company or individual whose timber trading activities make them subject to the legislation. Another fundamental difference is that, while CITES establishes a global licensing system for controlling trade in listed species, the EUTR is based on ruling out illegal products rather than licensing legal ones (Saunders and Reeve 2014). No country that has signed a VPA has yet finalized



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the system development and implementation phase and thus, to date, no FLEGT licenses have been issued. However, Indonesia is ahead of most other countries engaged in VPAs, and has successfully completed the system development phase. However, the audit process does not guarantee that permits were issued by the government on land without pre-existing land claims or that concessionaires actually compensated communities for lost land (Human Rights Watch 2013).

For forest certification and legality verification systems to be effective, the forest governance system in which the policies, legal framework and institutional architecture exist, must function in a coherent manner. Although these schemes have overarching objectives to promote sustainable forest management and mitigate the trade in illegal and unsustainable timber, they were not designed to address unsustainable harvesting or resolve illegal logging issues globally. For example the schemes must operate within country frameworks to meet international requirements and do not seek to

address governance across the forest sector as a whole. The focus is on individual forest management units (FMU, as in the case of FSC certification) or supply chains. Although there are examples of price premiums for some products that are FSC-certified, price premiums have not been widely accessible. Recent research challenges the current international and national emphasis on law enforcement as a means of tackling illegal logging and suggests that policy would be better founded on a more holistic and nuanced understanding of the socio-political relationships that characterize and perpetuate corruption across multiple scales (To et al. 2014).

The key barriers to certification and legality verification systems for tropical forests include the high costs associated with establishing the new governance 'architecture'; lack of, and costs associated with specialized forestry experts to train operational staff on environmental and social issues (e.g. high conservation value forests (HCVF), reduced impact logging (RIL), participatory planning); high costs associated with reaching the 'certifiable' level, annual surveillance costs and five-yearly audits often resulting in the exclusion of SMEs; increasingly complex standards that often include complex social, ecological and economic criteria and indicators; weak governance and law enforcement often compounded by an ineffective judiciary in many timber producing countries; and the absence of a robust economic business case, sometimes resulting in continued dependence on donor or philanthropic funding.

Governing access, and securing rights to land and resources

Secure land tenure and resource rights are as essential to food security and protecting the environment as are sustainable economic development and good governance. Secure land tenure access and control and rights over forests and tree resources is broadly recognized as a necessary condition for reducing poverty, increasing food security and ensuring sustainable forest management. Forest and tree tenure is, however, often unclear, contested and in many cases, of insufficient security to induce improved investment and management of trees and forests by communities or to improve incomes and enhance livelihoods. Where tenure is unclear, "open access" can lead to overuse of forest resources and uncontrolled forest conversion.

Insecure titles over land and unclear land and forest use rights continue to hamper the efforts of the rural poor to secure their livelihoods throughout Southeast Asia. Agricultural expansion, illegal logging, new road infrastructure and settlements, mining concessions and increasing demands for land for food, fodder, fiber and bio-energy crops continue to result in the loss of forests and the increased vulnerability of communities who depend on land and natural resources. The exclusion of women and other marginalized groups from decision-making, rights and access to forest resources and benefits, especially where the value of land and forests has increased, continue to pose distinct governance challenges in many countries with weak implementation capacity. Recent tenure reforms provide greater legal recognition of customary and local authorities, indigenous territorial rights, and women's rights. However, implementation of these reforms has been uneven and has led to mixed results, including increasing tenure insecurity.

Although interdependent resource-users might individually face temptations to act opportunistically, they are often able to develop a shared perspective of the resource system and organize themselves in order to obtain mutually-beneficial outcomes, including sustainable resource use. Elinor Ostrom's seminal research (Ostrom 1990) challenged three dominant models of collective behavior (the tragedy of the commons, the prisoner's dilemma, and the logic of collective action) in identifying design principles that successful, small-scale, long-enduring common resource institutions all seem to share. These include clearly defined boundaries determining who has rights to withdraw a resource, internal monitoring, and a graduated system of sanctions. When boundary, authority, monitoring and sanctioning rules are defined and enforced internally, the outcomes achieved are likely to be more effective than those achieved when the rules are imposed externally.

At present, the access of rural communities to forest and trees is often based on customary rather than on formal forest tenure (Sunderlin et al. 2008). Customary rights have often been sufficient to grant secure tenure through locally legitimate social institutions – sometimes even more secure than formal forest tenure. Nevertheless, even customary rights that appear to be very secure can be threatened by new pressures, as has been witnessed with the emergence of new claims, and new contests associated with REDD+ and large-scale land acquisitions. Additional challenges to land tenure and secure rights include: poor coordination and information-sharing within

and across agencies mandated with land tenure implementation; obstacles and foot-dragging by those opposed to reforms; and limited opportunities for local stakeholders to contribute to reform planning and implementation. This results in land tenure systems where political and economic elites continue to largely reap economic benefits.

Tree tenure – the ownership and use rights of trees – is often differentiated along gender lines, and men usually have overall authority over high-value tree products. However, the gendered nature of access to and control of trees, tree products and related resources is often highly complex, depending on social and ecological conditions and factors such as space, time, specific species, products and uses (Rocheleau and Edmunds 1997; Janudianto et al. 2011). In many settings, women's rights are actually substantial due to the informal (and often negotiable) nature of customary laws and, in certain cases, the complementarity of women's and men's productive roles. Women's rights, however, may easily become marginalized or may not be recognized, especially in the context of efforts to introduce statutory laws and formal administrative procedures (Quisumbing et al. 2001).

Jurisdictional approaches to green development

Efforts to govern natural resource use have long wrestled with the interactions between a variety of local interests on the one hand, and the pervasive if uneven reach of faraway actors and processes. It is thus important to consider jurisdictional approaches to planning, decision-making and governing land-based investments and how these may affect a shift to more sustainable, or green development.

Traditional approaches to governance have tended toward a combination of sectoral and hierarchical responsibilities, which generally operate – when they work – through a mix of formal and informal rules and conflict-adjudication mechanisms. Recent efforts to propose and cultivate “jurisdictional” approaches to governance in the natural resources sector represent efforts to tweak the balance of sectoral and spatial-hierarchical powers in ways that generally favor the latter over the former.

Many references to “jurisdictional approaches” to governance emerge from the climate change world, and specifically from proposals to develop

“nested” and “jurisdictional” ways of scaling nascent REDD+ efforts from project-scale interventions to national-scale emissions accounting. These efforts represent two related but importantly distinct considerations, both of which have implications for efforts to generalize jurisdictional approaches to resource governance beyond the REDD arena. First, jurisdictional REDD approaches represent an effort to be pragmatic when it comes to change. It allows local-scale change to proceed quickly and, frequently, using investment from risk-averse actors such as donors, NGOs and corporations, while offering the time and political space for more systemic policy changes at the national scale. Hence, jurisdictional approaches can be framed as an intermediate or “step-wise” (incremental) approach to creating change (TNC 2010; Forest Trends and Climate Focus 2011). Efforts to combat deforestation have long suffered from problems of displacement or leakage. Hence, jurisdictional REDD represents an effort to address the fundamental nature of the problem – deforestation and forest degradation – through the creation of what might be called “scale-matching” (Eickhoff 2012).

Outside the particularities of REDD, *all* approaches to natural resource governance are forced to address the dynamics of power and interest that exist in their respective domains. Here, there has long been a tension between the acknowledged need to adapt to local circumstances and contingencies on the one hand (many of which represent local forms of authority), and variations on policy language, which sees power as essentially formal and top-down. Efforts to develop jurisdictional approaches to resource governance represent an effort to ameliorate this tension. By recognizing explicitly the rights, powers, capacities and interests that exist within local or intermediate (e.g. state or provincial) governments, jurisdictional approaches provide a legitimate language through which to address struggles over power and authority that can otherwise be seen as touchy or sensitive. In contexts (e.g. Indonesia or Myanmar) where policy and history have combined to make decentralized power structures a recognized “fact on the ground”, two distinct aspects of jurisdiction – measurement or accounting on the one hand, and administrative authority/control on the other hand – may coincide and mesh easily. In other contexts, where local authority is acknowledged but not so formally embraced (e.g. Cambodia or Laos), jurisdictional approaches will likely require that the “devil in the details” be worked out so as to distinguish measurement (e.g. of emissions or other



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environmental (dis)benefits) from decision-making authority by various levels and lines.

Ultimately, jurisdictions represent important regulatory institutions, and it is essential that efforts to evaluate various possible approaches consider their positive and negative dimensions. Do jurisdictional approaches allow sustainability-oriented market signals to “pass through” their regulatory “walls” and influence change on the ground? Conversely, do they help to mitigate the influence of unsustainable market signals (e.g. demand for cheap commodities at any cost) through various local institutions? More generally, what forms of regulation – in both the positive/enabling and negative/restrictive sense – do various jurisdictional approaches facilitate, and with what reconfigurations of productivity, equity and sustainability? As with earlier concepts such as good governance and participation, the importance of jurisdictional approaches lies in their capacities to open up space to debate the possibilities for win-win forms of development, along with the trade offs. Working with jurisdictions must achieve a high degree of public policy alignment, institutional coordination, stakeholder engagement and field-level practice. Jurisdictional approaches must find appropriate ways to align (i) locally driven reforms in economic development and natural resource management, (ii) external incentives such as REDD+ and (iii) sustainability requirements and incentive

mechanisms related to forest and agricultural commodity production.

Looking forward

Policymakers have several options to improve governance and legal frameworks to promote sustainable landscapes. These include

- policies targeting a specific land-use sector (agriculture, forestry, built-up land – the latter including settlements, infrastructure and mining areas);
- crosscutting policies that are directed at specific environmental goods (climate, biodiversity, soil, water);
- crosscutting policies comprising several sectors, environmental goods, policy fields etc. (sustainability, land tenure, resource efficiency, spatial and land-use planning);
- policies within a specific policy field with an impact on different land-use sectors (energy, trade, development, investment, corruption)
- crosscutting issues with a (current) lack of (effective) policies (diets, food waste, population dynamics, public goods/internalizing externalities including trade-based emissions, environmental liability, gender) (Wunder et al. 2013).

The following issues merit further research to adequately inform future policymaking processes in Southeast Asia:

We need to describe the conditions shaping the interaction between large-scale investments and agricultural and forested land-uses to target degraded and genuinely available land. Large-scale investments often disproportionately impact forest landscapes when population densities are comparatively low; where weak governance systems prevail; where access to finance is unconditional; and where incentives exist for capturing economic rents from the sale of forest products to finance project development.

We need to explore the conditions under which large-scale investments and government interventions can contribute to equitable smallholder participation. Due to market failures, power asymmetries and insecure and constrained access to resources and assets, marginalized smallholders and vulnerable groups, including women, are often excluded from engaging in international agricultural commodity chains.

We need to find feasible national policy options and provision of public goods that generate optimal long-term environmental and developmental outcomes. Improved insights are needed into the manner in which socio-ecological interactions shape the outcomes of large-scale investments.

We need feasible international policy and regulatory options to reconcile environment and trade to engender optimal long-term environmental and developmental outcomes. Most environmental assessments are based on area-based and causal chain frameworks building on the pressure-state-response concept, and preclude a better understanding of the complexity of total environmental costs associated with production and trade. Additional research is needed to better understand, and internalize the environmental costs associated with transnational production and trade, changing consumption patterns and their associated disproportionalities.

We should develop governance architectures for enhancing the effectiveness, efficiency, and equity of different international sustainability initiatives. The effectiveness of international sustainability initiatives can be undermined by displacement effects, failure to achieve critical mass, and lack of compatibility between different initiatives across scales and sectors and with different objectives; the efficiency by excessive complexity; and the equity by technical barriers to smallholder participation. Innovations in governance architectures will be required to address these issues.

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For more information please contact Adinda Hasan: a.hasan@cgiar.org; +62 (0) 8118609338



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