

# RETHINKING FOREST REGULATIONS

## Overcoming the challenges of regulatory reform



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*Explanatory Note: This brief is directed towards public forest sector policy and decision makers involved with the regulation and oversight of natural and regenerated forests. As such, it speaks to a narrow but extremely critical area of forest governance: forest regulations and regulatory processes as instruments and vehicles for achieving sustainable forest management (SFM)<sup>1</sup> objectives. Many of the drivers and factors that mitigate against SFM lie outside the forest sector, such as forest conversion for agriculture; it is neither the purpose nor the intention of this piece to attempt to address these.<sup>2</sup> Here, the intent is to focus upon issues that normally would lie within the legal mandate of public forest sector agencies and thus, within the possibilities of their leaders to affect change.*

The track record of the forest sector in many parts of the world is disappointing. Unsustainable harvesting, illegal logging and trade in forest products, corruption, and the pursuit of vested interests are just some of the ills that defy regulatory efforts and, still too commonly, lead to deforestation and forest degradation. While many argue that “**better enforcement**” and “**more regulation**”<sup>3</sup> are the appropriate responses, this paper, which is the result of frank discussions held during a series of Rethinking Forest regulations<sup>4</sup> workshops, points to the need for “**more participatory and smarter regulations.**”

Forests cover almost one-third of the world’s total land area. Not only do they have a unique potential to produce multiple ecosystem services like biodiversity conservation, carbon sequestration, and watershed services; they are also essential for the 1.6 billion people who are dependent on forests for their livelihoods.<sup>5</sup> The 1992 Rio Earth Summit brought global attention to the principles of sustainable forest management (SFM) and emphasized its importance to reach social, economic, and environmental goals. However, sustainable management of forests is, as of now, far from the norm.

A recent analysis of global progress towards sustainable forest management<sup>6</sup>—carried out in conjunction with the 2015 Global Forest Resources Assessment (FRA)<sup>7</sup>—concluded that a full set of “enabling conditions” (e.g. legal framework, data availability and reporting, forest

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management planning, stakeholder involvement) for SFM were in place in less than half (41percent) of the approximately 2.2 billion hectares of the world's forest areas that are predicted by governments to remain in permanent forest land use. The FRA and its accompanying analyses provide a clear indication of the magnitude of the challenges that remain to translate these gains in the macro-frameworks into sustainable forest management on the ground. While at the global scale the FRA reports that deforestation slowed and afforestation increased between 1990-2015, these positive gains are primarily accruing at the higher latitudes and in wealthier countries. There are also positive indications among some of the middle income tropical countries—those characterized by reforms to forest management and improvements in agricultural practices—where a transition towards forest gain appears to be occurring. Forest loss, however, continues in poorer countries and in the tropics, thus considerably reducing the goods and services they provide.<sup>8</sup>

How can this situation be explained? It is not a *lack* of regulation on the part of public forest agencies that is contributing to ongoing forest loss or unsustainable forest management, but rather the form and function of the existing regulations. The forest sector generally has been over-regulated, not under-regulated; and yet, our current regulatory approaches are “missing the mark.” Forest regulations are one of the principal tools available to and applied by public sector forest agencies for achieving SFM objectives. But, from a results-based perspective, how those tools have been applied is neither sufficiently effective nor efficient. Systematic discussions and efforts to rethink and reform how we regulate forests are urgently needed. Equally important is *how* the regulations are written; the *process* is at least as important as the *content* of the regulations themselves. By creating more positive, collaborative processes, governments and stakeholders may jointly develop more resilient regulatory frameworks, based upon a common vision of what is important and how to ensure societies' long-term enjoyment and protection of forests.

## Why Do We Regulate Forests?

During the twentieth century, forest regulation was the almost exclusive domain of relatively autonomous forest agencies. The practice of forestry was held to be a “professional, modern science,” with forester practitioners as the prevalent source of knowledge and technical expertise. Public forest agencies defined the production and protection objectives and proposed regulations that would ensure the scientific management and conservation of forests. Underlying this world view were often unspoken biases: only technical foresters have the skills, knowledge and resources to efficiently manage and protect forests, as well as maximize economic returns vital to finance needed forest management. Consequently, regulation was generally so complex and full of technical jargon as to be incomprehensible to outsiders.

Additionally, over the past five decades, societal concerns have intensified, leading to demands from outside traditional forest sectors for increased conservation and protection of the broad array of ecological and social services that forests provide. This in turn led to a proliferation of public agencies and departments with mandates to regulate the use and management of forested areas that spanned several sciences and were often outside the classical realm of *forestry*. This escorted in a wide range of

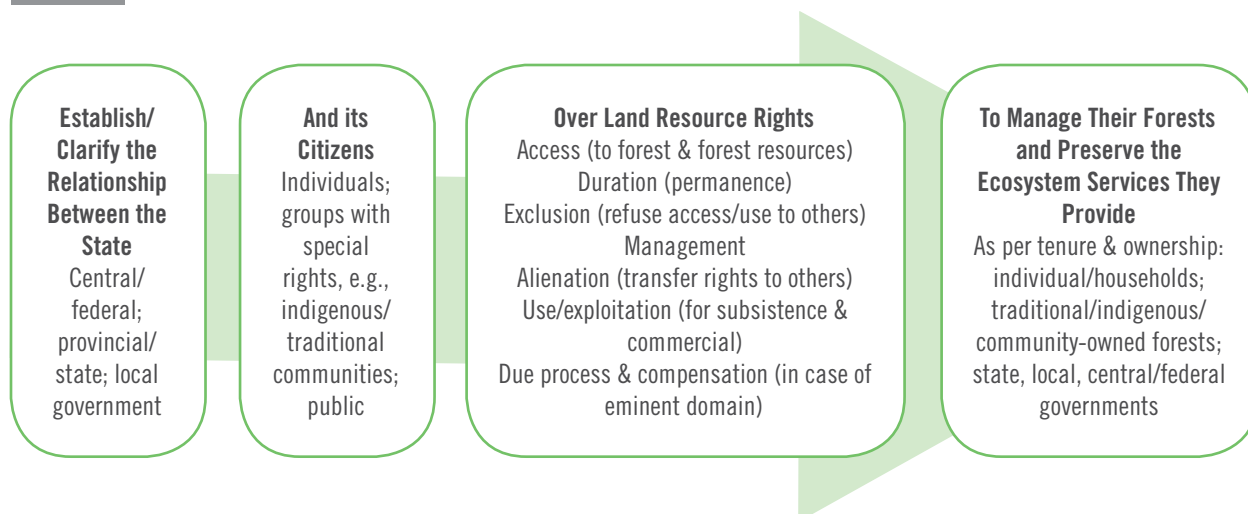
environmental regulations to protect air, water, and biodiversity; reduce greenhouse gas emissions; and avoid or mitigate the environmental impacts of development upon forests. These regulations were not necessarily targeted at forestry *per se*, but to an array of activities that have been and continue to be perceived as causes of environmental degradation.

However, forest and environmental regulations all too often led to perverse outcomes. The costs and complexity of compliance, coupled with widespread lack of control largely driven by both poor budgets and vested interests, not only discouraged sustainable forest management (SFM) initiatives but also became an incentive for illegal logging. The lack of equally robust regulatory concern in other sectors, such as agriculture, further exacerbated forest degradation and deforestation and, ultimately, forest land use conversion.

Today, the imperative to sustainably manage and conserve forests has never been greater. At the same time, our paradigms of scientific management of forests through command-and-control regulatory structures have diminished relevance and dubious efficacy. The fact that we are yet a long way from having conceived, let alone operationalized acceptable alternatives, should be a matter of grave concern and attention by public forest agencies.

In summary, the response to “why do we regulate forests?” has varied significantly and was “forest-” and “timber-centric” for much of the 20<sup>th</sup> century before becoming much broader, moving beyond wood production to valuing forests for their importance to society, cultures, and ecosystems. Today, the response has to do with people, society, and shared values, and might more usefully be answered from a *rights-based* perspective. Forest regulations are, in effect, a way to define how the state and its citizens relate to each other and what rights over lands and natural resources have been granted to enable them to manage their forests. “Their forests” are understood to include all forests: public, private, and communal (see Figure 1). From a “rights-based” viewpoint, collaboration between “the state” and its “citizens” in building and executing regulations is foundational.

**FIGURE 1** Why we regulate forests: A rights-based framework



## Reasons for failure—what have we learned?

In comparison to the forest sector, others are generally less regulated and more profitable (e.g. agriculture, mining, tourism, real estate), and conversion is often a less complex and more financially rewarding option than sustainable forest management. An example of this is the forest management plans (FMPs), which tend to be the principal instruments for regulatory compliance. Typically, FMPs have been (and remain) complex, costly, and difficult to develop, implement, monitor, and enforce<sup>9</sup>. In addition, as they rarely consider traditional or local knowledge in promoting sustainability, they make it even more difficult for forest communities to appropriate them or participate in their execution.

While traditional top-down and command-and-control regulatory approaches are increasingly understood to be structurally flawed, the flaws are magnified and have become acute in these times of government austerity. From a public agency perspective, their effective implementation, monitoring, and enforcement imply institutional capacities and budgetary resources that are simply unrealistic, even in developed countries. From the perspective of those subject to regulation, the transaction and compliance costs are burdensome. Additionally, when they fail to respect customary or statutory land, civil, and/or political rights, they are perceived as unjust and illegitimate and often lead to conflict.

The weak enforceability of complex, prescriptive, top-down regulatory structures has consequences in terms of perverse and unintended outcomes, including:

- a diminished respect for law, judicial systems and forest sector institutions;
- a favoring of entrenched economic and political interests that are able to circumvent or disregard forest regulations with impunity;
- insurmountable obstacles to local peoples' pursuit of legal, sustainable, forest-based livelihoods;
- unacceptable levels of environmental degradation caused by the common practice of circumventing and ignoring cumbersome and unenforceable rules;
- and in some cases, cascading forest charges and fees levied by public forest agencies in order to cover their underfunded mandate, leading to increasing costs imposed on all actors (public, private, communal) and further eroding the potential competitiveness of sustainable forest management.

Additionally, regulatory failures are more prone to occur when:

- the real purpose of the regulation is to raise revenue and/or exercise governmental and/or vested interest control over forest lands;
- there are strong contradictions and inconsistencies between sectoral laws, policies, and regulations (e.g., between mining, agriculture, forestry, and protected areas) that negatively affect forests;
- regulations are inconsistent with property rights or customary practices;
- there is a lack of institutional capacity or political will to monitor and enforce;
- the approach is prescriptive with a focus on enforcement and processes, rather than on the desired outcomes, such as improved wildlife habitat and water quality, or reduced risk of catastrophic fire;

- the rules are poorly adapted to the place and conditions, often a result of “importing” ideas from elsewhere without adjusting them as needed;
- and there is a clear lack of political will to apply the rules and/or to do away with the corruption, cronyism, wealth concentration, rent seeking, etc., that are all too often enabled by the status quo.

## Responses to failure—what are we learning?

Forest ownership has fundamentally changed since conventional concepts about regulation were developed. Globally, the percentage of forested land owned by governments decreased from 72 percent in 2002 to 60 percent in 2015.<sup>10</sup> Forest agencies now must deal with millions of owners who have significant ownership over forested land. As a result, there is now a much more tangible and immediate demand from local actors for their land rights to be recognized and respected, and for full participation and transparency in all aspects of decision making. With this change has come the dual realizations that questions of forest governance and local involvement are key to successful reform. In recent years, among others, this has resulted in increased attention and emerging international frameworks and guidance on issues of forest governance<sup>11</sup> and engendering meaningful participation (e.g. free, prior and informed consent, as stated in the United Nations Declaration on the Rights of Indigenous Peoples<sup>12</sup>).

The void created by the absence of effective, efficient, and implementable regulatory frameworks is now being filled by unprecedented initiatives, such as efforts to halt deforestation and forest degradation (e.g. logging bans in Asia<sup>13</sup> and Africa,<sup>14</sup> concessioning arrangements in Latin America<sup>15</sup> and Sub-Saharan Africa<sup>16</sup>); and globally, the EU’s FLEGT Action Plan with Voluntary Partnership Agreements (VPAs) being negotiated with several timber producing countries,<sup>17</sup> and REDD.<sup>18</sup> Additionally, efforts are being made to utilize trade to improve forest governance, such as the Lacey Act (USA),<sup>19</sup> the Illegal Logging Prohibition Act (Australia),<sup>20</sup> the European Union Timber Regulation,<sup>21</sup> and globally, FLEG-T.<sup>22</sup> While well-intentioned and widely supported, these initiatives ultimately rest and rely upon the very regulatory frameworks that have proven ineffective, and they themselves add new layers of complexity with the attendant risks of unintended consequences.

## Emerging Approaches & Principles for Rethinking Government Regulations

Recent experiences from countries around the world that are engaged in forest regulatory reform processes offer important insight, from which some initial principles can be distilled.

### 1. Forest regulations built through meaningful, effective citizen and stakeholder collaboration are the most enduring.

A growing body of positive experience and evidence (such as the Montana Experience, detailed in the opposite box) strongly suggests that getting regulations right relies on citizen engagement and stakeholder management that begins with (i) understanding who the key stakeholders are and what their rights, interests, vision, and

values are; and (ii) putting in place a process to effectively engage with all stakeholders and key constituencies in a fashion that most people would recognize as legitimate, equitable, and transparent. In so doing, regulations are less likely to be undermined by other forces and more likely to endure the test of time. Citizens and stakeholders' engagement provides the transparency needed to hold all parties, including the government, accountable.

**2. The government should do only what no other party can do: create favorable conditions for all rights holders and facilitate processes that ensure accountability.**

Among the more crucial roles for government are (i) to provide the impetus and the conditions and to act as the convener of a legitimate, equitable, and transparent reform process; (ii) to ensure fairness in the engagement process; and (iii) to develop the policies that flow from these engagements. Regulations must speak to the roles and responsibilities of all legitimate and relevant actors, not just to a few, specific constituencies. Governments should only take it upon themselves to do what no other actor can do. For this, as for the other principles, decentralization and devolvement of forest management and governance in a very broad sense are necessary.

**3. Recognizing and upholding local, customary land rights is critical.**

Where rights to land and forest are unsettled, the recognition of rights by the state will be a critical step toward achieving the ends for which regulations are designed. Indeed, effective management of natural resources is simply not possible without clarity on ownership, rights, and responsibilities, and the enforcement thereof.

While it may be unrealistic to expect that a forest regulatory reform process would be an effective vehicle for resolving forest and land rights, it can contribute to the process. Specifically, reform processes can avoid exacerbating conflicts over rights by recognizing that further fragmentation and forfeiture of rights of individuals, groups, and communities—especially Indigenous Peoples—will contribute to further alienation and poverty, and eventually the need for complex and costly settlement processes to clarify land, water, and other property rights. In addition, they can recognize the rights of local peoples, as citizens, to propose their own collective-choice rules and be allowed to devise and implement their own management rules. In this same vein, reforms should contemplate putting into place or strengthening accountability systems for making local authorities responsive both to their constituents and the legal and political system of their country.

**4. An effective regulation focuses on the most important public outcomes and designs regulations accordingly.**

Smart regulations are the result of design processes that begin with the identification of all legitimate stakeholders and the issues that are crucial to them. Focusing on ways to achieve desirable “outcomes” for these issues then becomes the focus of the regulations. Being outcome-based obliges all stakeholders to identify specific, desired results and prioritize among them. Subsequently, the process can work backwards from the outcome to regulations needed to achieve it. By building consensus on what are the most important, highest priority issues and outcomes and then focusing regulatory efforts on

these, oversight and administration will be less complex and expensive and likely, more effective. In contrast, many regulatory systems have expanded to the point that they attempt to address every potential concern and therefore accomplish too little by seeking to do too much. Additionally, not all outcomes will be relevant to all property types: if multiple-use objectives might be contemplated for public forest lands, those may be more limited to avoiding offsite impacts, such as on water quality, for private forest lands. Regulatory requirements should therefore differ for different property types.

##### 5. Acknowledge and account for the need to continually adapt regulations.

A natural tension exists between regulatory stability and the need for continuous adaptation. New research, for example, will continually bring forward information needed to refresh decisions. Durable regulatory frameworks will be dynamic and adaptive and, therefore, need to include a permanent system for both monitoring performance and stimulating learning. However, recognizing and accounting for the competing goals of providing rights holders with a needed sense of assurance and security for long-term planning and investment while, at the same time, allowing regulations to adapt and change based on experience and learning (as well as on the changing dynamics of forests, markets, and societies) is not necessarily straightforward. But, done in a manner that is transparent, systematic and continuous, it can promote understanding between key actors, diminish conflict and legal challenges, and facilitate collective identification and support for adaptations.

#### Box 1: The Montana Experience

In 1989, forestry in Montana was at a crossroads. The impacts of logging on the state's valued water resources had become a major concern, and the US government, supported by civil society, was threatening action under the federal Clean Water Act. The state's political leadership and the forest industry, fearful of a costly and complex traditional regulatory response, sought an alternative to satisfy both the federal government and concerned citizens.

A solution emerged out of a process that engaged all stakeholders: to adopt a voluntary, non-regulatory approach for private forest lands with water quality as the common uniting outcome. The approach was based not on detailed and costly forest management plans, but on development of **Best Management Practices (BMP)**, a set of guidelines which focuses on technical aspects of forest harvesting and site management practices, such as road construction, stream crossings, disposal of harvest residues, allowable activities in wetlands, etc. Montana's Forest Practices Program oversees development, revision, and publication of these guidelines, while the **Forest Stewardship Program** provides private forest landowners with knowledge to make informed decisions about the management and conservation of their forestlands. The state provided technical one-on-one assistance to landowners and educational outreach through "Forest Stewardship Planning Workshops" where forest owners learned how to develop their own management plans. A logger education program was established by the Montana Logging Association to train and certify loggers in the application of the BMPs. "Accredited Logging Professionals" must take continuing education courses in order to stay current on evolving technical norms and practice. Over time sawmills began to give preference to purchase of timber from private forests harvested by accredited loggers. A low-cost, innovative, and effective monitoring program was developed by the Montana Logging Association. Every two years, multi-disciplinary teams composed of specialists in fisheries, hydrology, soils, and silviculture; loggers; and NGO representatives visit harvest sites to assess compliance with the voluntary BMPs. This approach has proven extremely effective. The latest monitoring data from 2014 showed that compliance with BMPs was at 97 percent.

## Conclusions

The role of forests in society is dynamic and has been undergoing great changes in the last decades. From the almost exclusive domain of technical professionals, centralized government agencies, and certain narrow economic interests, there now exists a very broad constituency with a wide array of demands and expectations as to what values of forests will be recognized, prioritized, exploited, conserved, and protected. While some will argue for government to take a larger role through greater regulation and control, others will argue as persuasively for deregulation and a reduction in government's presence and role. Clearly, as with all such complex issues, the answers for the forest sector will lie somewhere in between.

Finding the right balance at any time or place will only be possible if there is effective engagement of, and participation by, both forest sector stakeholders and interested citizens in the process and dialogue. The challenges in the forest sector are simply too big and too complex for any one actor. They can only be met when all relevant and interested actors are engaged and have the right incentives to actively participate in the governance and administration of forest resources. The Montana Experience is but one example where multiple roles are played by non-government actors and government's main responsibility is to ensure accountability and outcomes, facilitate the regulatory process, and support the implementing actors.

Each society and culture must find its own way forward. However, certain common points and principles can emerge from the experiences of the world's forested countries. Studying failure, one finds a rich history of complex, top-down, technically detailed regulation that focuses on the forest and largely ignores people and rights. Studying success, one finds a growing body of experience demonstrating that the desired outcomes are possible to achieve if and when there is legitimate, transparent, and equitable engagement with the forests' broad constituency. Agencies, by finding the consensus points among the wide array of demands and expectations, see the potential for "smart regulations" emerge. As governments around the world contemplate forest regulatory reform, heeding lessons from successes and failures can not only save time and money, but can also better protect the world's forests and create a framework for citizens to support forest management into the future.

## Endnotes

- <sup>1</sup> A globally agreed definition of sustainable forest management (SFM) is impractical beyond a very general level because of the huge diversity of forest types, conditions, and socioeconomic contexts worldwide. In general, however, SFM can be viewed as the sustainable use and conservation of forests with the aim of maintaining and enhancing multiple forest values through human interventions. People are at the centre of SFM because it aims to contribute to society's diverse needs in perpetuity (FAO, 2014; <http://www.fao.org/forestry/sfm/85084/en/>).
- <sup>2</sup> The primary reason for this is because, for the intended audience, these extra-sectoral challenges are outside their mandate require distinct responses that lie within the broader realm of coordination of public policy and policy implementation. For a discussion of broader governance issues, see the May 2014 MegaForestais editorial Public forest agencies in the twenty-first century – Driving change through transparency, tenure reform, citizen involvement and improved governance. [http://www.rightsandresources.org/wp-content/uploads/MegaForestais\\_Editorial\\_May-20143.pdf](http://www.rightsandresources.org/wp-content/uploads/MegaForestais_Editorial_May-20143.pdf).
- <sup>3</sup> Regulations are defined here as specific rules that enable the implementation and enforcement of a law. They have legal weight and differ from laws (which are sometimes passed but the corresponding regulations are never developed) and policies.
- <sup>4</sup> Rethinking Forest Regulation in the context of the series of workshops and this brief is defined as how to best use the powers of the state to achieve publicly beneficial outcomes (e.g. sustainable forestry, increase or maintenance of environmental services, employment & economic growth, etc.). For more information on the workshops, visit [www.megaforestais.org](http://www.megaforestais.org).
- <sup>5</sup> World Bank. 2001. A Revised Forest Strategy for the World Bank Group. Draft 30 July 2001, World Bank, Washington DC.
- <sup>6</sup> MacDicken, K.G., Sola, P., Hall, J.E., Sabogal, C., Tadoum, M. and, de Wasseige, C. 2015. Global progress toward sustainable forest management. *Forest Ecology and Management* 352 (2015) 47–56. Elsevier. <http://dx.doi.org/10.1016/j.foreco.2015.02.005>.
- <sup>7</sup> FAO, 2015. Global Forest Resources Assessment 2015 – Desk Reference. FAO, Rome. <http://www.fao.org/3/a-i4808e.pdf>.
- <sup>8</sup> Sloan, S. and Sayer, J.A. 2015. Forest Resources Assessment of 2015 shows positive global trends but forest loss and degradation persist in poor tropical countries. *Forest Ecology and Management* 352 (2015) 134–145. Elsevier. <http://www.fao.org/3/a-i4895e/i4895e13.pdf>.
- <sup>9</sup> It is important to keep in mind that forest management plans as we know them today are relatively recent introductions into the developing countries of the tropics and subtropics. As instruments for forest management, they are entirely based on European/Western-centric silviculture and not on local knowledge and traditional practices.
- <sup>10</sup> Rights and Resources Initiative. 2016. Closing the Gap: Strategies and scale needed to secure rights and save forests. Washington, DC: Rights and Resources Initiative.
- <sup>11</sup> For examples, see:
  - Davis, C., Williams, L., Lupberger, S., And F. Daviet. 2013. Assessing Forest Governance – The Governance of Forests Initiative Indicator Framework. World Resources Institute. Washington, DC. November 2013.
  - Kishor, Nalin and Kenneth Rosenbaum (2012). Assessing and monitoring forest governance: A user's guide to a diagnostic tool. Washington DC: Program on Forests (Profor).
  - Profor and FAO. 2011. Framework for Assessing and Monitoring Forest Governance. The Program On Forests (Profor) Food and Agriculture Organization of the United Nations. Rome, 2011.
- <sup>12</sup> [www.un.org/development/desa/indigenouspeoples](http://www.un.org/development/desa/indigenouspeoples).
- <sup>13</sup> PR China, the Philippines, Sri Lanka, Thailand, and Vietnam all adopted logging bans.
- <sup>14</sup> Cameroon, Gabon, Ghana, and other African countries all adopted partial or total logging bans.
- <sup>15</sup> For example, community forestry concessions in the Petén, northern Guatemala.
- <sup>16</sup> For example, community forestry concessions in Cameroon, Gabon, and, more recently, in DRC. Or logging concessions in Cameroon, Gabon, Congo, CAR, and DRC, among others.
- <sup>17</sup> Countries that already signed VPAs are Ghana, Congo, Cameroon, CAR, Indonesia, and Liberia.

<sup>18</sup> Reducing emissions from deforestation and forest degradation (REDD) is a mechanism – under negotiation by the United Nations Framework Convention on Climate Change (UNFCCC) since 2005 – whose objective is to mitigate climate change by reducing carbon emissions through effective management and protection of forests in developing countries.

<sup>19</sup> A conservation law in the USA that prohibits trade in wildlife, fish, and, since 2008, plants that have been illegally taken, possessed, transported, or sold.

<sup>20</sup> The Illegal Logging Prohibition Act 2012 places a prohibition on the importation into Australia, as well as domestic processing, of illegally logged timber and timber products.

<sup>21</sup> The EU Timber Regulation is part of the European Union's policy to fight illegal logging and associated trade, which was defined in 2003 under the Forest Law Enforcement Governance and Trade (FLEGT) Action Plan. Since 2013, it prohibits the first placing of illegally harvested timber and products produced of such timber on the EU market.

<sup>22</sup> Forest Law Enforcement and Governance, or FLEG, is a global program that supports countries to put in place improved forest governance arrangements (e.g., forest agency reform; updating policy, legal, and institutional frameworks; increasing capacity to enforce existing laws).

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