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Strengthening the Legal and Institutional Effectiveness of Transboundary Biodiversity Conservation in the ‘Heart of Borneo’

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Abstract

The Heart of Borneo (‘HoB’) transboundary initiative spans the territory of Malaysia, Indonesia and Brunei. In this article I evaluate the HoB against governance criteria for effective transboundary conservation. This approach provides the framework for proposing what complementary reforms may be needed to improve the effectiveness of the initiative. Governance issues and the lack of political buy-in are identified as the most significant impediments to successful transboundary biodiversity conservation in the HoB. A further limitation stems from the failure to develop meaningful legal instruments and supporting institutions. This article recommends improvements to legal instruments and the evaluation and design of a more effective transboundary legal governance regime. The article illustrates the need to tailor approaches to existing systems. The interventions recommended emphasise the importance of oversight and clear and simple rules that consider the operating context and are backed by appropriate institutional support. The examination of the HoB within the ASEAN context suggests that the same governance criteria could be a valuable tool for the evaluation of transboundary biodiversity conservation in the wider ASEAN region.

I Introduction

Worldwide patterns of increased vertebrate extinction risk are most obvious in Southeast Asia (‘SEA’).¹ Commercial hardwood timber operations, the planting of perennial export crops such as oil palm, agricultural conversion to rice paddies, and unsustainable hunting have been detrimental to species in the region. These activities are driving change in species composition at an

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¹ Michael Hoffmann et al, ‘The Impact of Conservation on the Status of the World’s Vertebrates’ (2010) 330 *Science* 1503, 1507.

accelerating rate.² Less than 10 per cent of SEA's forests have protected status, and protected forests are being degraded by illegal logging.³

Southeast Asian countries share many important transboundary areas rich in biodiversity and natural resources.⁴ The fragmentation of habitats in SEA could, however, mean that many of the region's indigenous species are destined for extinction due to a loss of habitat connectivity.⁵ The major impediments to mitigating the threats to SEA's biodiversity include population growth, poor natural resource governance, poverty, a chronic shortage of conservation expertise and funding, corruption, and community apathy.⁶ Threats to biodiversity, such as the overexploitation of habitats and trade in species, cannot be addressed by one country alone. Regional and transboundary approaches are therefore essential.

The Association of Southeast Asian Nations ('ASEAN') now includes all 10 Southeast Asian countries. ASEAN was established to facilitate regional cooperation among the countries of SEA.⁷ ASEAN's purposes include: enhancing and maintaining regional peace and security; promoting political, security, economic and social-cultural cooperation; alleviating poverty and narrowing the development gap among ASEAN nations; and responding effectively to transboundary challenges.⁸

The Heart of Borneo ('HoB') transboundary project initiated by the Worldwide Fund for Nature ('WWF') involves three ASEAN countries: Malaysia, Indonesia, and Brunei. In February 2007, the three Bornean countries signed the *Declaration on the Heart of Borneo Initiative*. In the Declaration, country parties pledged to 'cooperate in ensuring the effective management of forest resources and conservation of a network of protected areas, productive forests and other sustainable land-uses' within the HoB.⁹

Located in the south-eastern part of SEA, the island of Borneo has one of the world's highest deforestation rates.¹⁰ In the decade from 2000 to 2010 the

² Ibid.

³ Navjot S Sodhi et al, 'The State and Conservation of Southeast Asian Biodiversity' (2010) 19 *Biodiversity and Conservation* 317, 320.

⁴ Fitriani Ardiansyah and Desak Putu Adhityani Putri, 'Risk and Resilience in Three Southeast Asian Cross-Border Areas: The Greater Mekong Subregion, the Heart of Borneo and the Coral Triangle', Asia Security Initiative Policy Series (RSIS Centre for Non-Traditional Security (NTS) Studies, 2011) 6.

⁵ Navjot S Sodhi et al, 'Southeast Asian Biodiversity: an Impending Disaster' (2004) 19 *Trends in Ecology and Evolution* 654, 654.

⁶ Ibid 658; Sodhi et al, above n 3, 318.

⁷ *The ASEAN Declaration* (Bangkok, 8 August 1967) <<http://www.asean.org/news/item/the-asean-declaration-bangkok-declaration>>.

⁸ *Charter of the Association of Southeast Asian Nations*, opened for signature 20 November 2007 (entered into force 15 December 2008) art 1(1)–(2), (6), (8) <<http://www.asean.org/asean/asean-charter/asean-charter>> ('ASEAN Charter').

⁹ *Declaration on the Heart of Borneo Initiative* (Brunei Darussalam—Republic of Indonesia—Malaysia, 12 February 2007) <http://wwf.panda.org/what_we_do/where_we_work/borneo_forests/about_borneo_forests/declaration.cfm> ('HoB Declaration').

¹⁰ Andreas Langner, Jukka Miettinen and Florian Siegert, 'Land Cover Change 2002–2005 in Borneo and the Role of Fire Derived from MODIS Imagery' (2007) 13 *Global Change Biology* 2329, 2330.

largest absolute area of forest loss in insular SEA occurred in Borneo.¹¹ The annual deforestation rate in Borneo between 2002 and 2005 was almost double that of the whole SEA region. The annual rate of deforestation in SEA is higher than corresponding figures in Africa or Latin America.¹² Until the 1950s, almost the whole of Borneo was covered by tropical evergreen forests.¹³ Between 1985 and 2005, Borneo lost an average of 850 000 ha of forest area annually, amounting to roughly one-third of the island's rainforest. This was due to indiscriminate logging or forests being cleared for oil palm plantations.¹⁴ Less than half of Borneo's original rainforests remain,¹⁵ of these, most are situated in the HoB.¹⁶

The management of shared natural resources is a focal point for regional environmental cooperation within ASEAN.¹⁷ Regional cooperation within SEA occurs within the framework of the so-called 'ASEAN way'. The ASEAN way is the approach to diplomacy of ASEAN states that emphasises non-interference in the domestic affairs of ASEAN countries, demonstrates a preference for step-by-step, consensus-based non-confrontational diplomacy, and prioritises national sovereignty. Adherence to the ASEAN way is reflected in the ASEAN preference for non-binding agreements and a reluctance to interfere in, or to direct in any authoritative way, the practices of member states.¹⁸ The lack of concrete instruments for translating ASEAN commitments into national-level action has hindered progress on environmental issues.¹⁹ This brings into question the suitability of the ASEAN way to address the environmental challenges of the region that are increasingly common and transnational.²⁰

Legal arrangements, such as international agreements, conventions, statutes, or coordinating mechanisms, are pivotal to effective transboundary conservation. Effective law for complex environmental issues such as transboundary biodiversity conservation requires, however, far more than good instruments. The combination of sound legal, institutional and policy elements that fit the social and economic context creates the basis for effective legal governance. The evaluation criteria used for this article integrate legal, political, social, governance and environmental management knowledge. This approach provides the framework for determining what complementary reforms may be

¹¹ Jukka Miettinen, Chenghua Shi and Soo Chin Liew, 'Deforestation Rates in Insular Southeast Asia between 2000 and 2010' (2011) 17 *Global Change Biology* 2261, 2264.

¹² Langner, Miettinen and Siegert, above n 10, 2337.

¹³ Ibid 2330.

¹⁴ Ibid 2329, 2337.

¹⁵ Mario Rautner, 'Borneo: Treasure Island at Risk—Status of Forest, Wildlife and Related Threats on the Island of Borneo' (WWF, 2005) 7.

¹⁶ Ardiansyah and Putri, above n 4.

¹⁷ Kheng-Lian Koh and Nicholas A Robinson, 'Regional Environmental Governance: Examining the Association of Southeast Asian Nations (ASEAN) Model' in Daniel C Esty and Maria H Ivanova (eds), *Global Environmental Governance: Options and Opportunities* (Yale School of Forestry, 2002) 7.

¹⁸ Lorraine Elliott, 'ASEAN and Environmental Governance: Rethinking Networked Regionalism in Southeast Asia' (2011) 14 *Procedia—Social and Behavioral Sciences* 61, 62.

¹⁹ Koh and Robinson, above n 17.

²⁰ Elliott, above n 18, 62.

needed, in addition to suitable legal instruments, for the evaluation and design of effective transboundary legal governance regimes.

This article illustrates the need to tailor approaches to existing legal and institutional systems. Incorporating the realities of the ASEAN context, the evaluation of the HoB identifies issues that will need to be taken into account to achieve effective transboundary conservation. The article concludes with recommendations for addressing the limitations identified in the assessment.

II Evaluation of the HoB against the Lim Criteria for Effective Transboundary Biodiversity Conservation

In previous work²¹ I developed a set of 12 criteria (see Table 1) that provide a framework for determining the legal and governance requirements for effective transboundary biodiversity conservation. I describe each criterion below.

Table 1: Criteria for effective transboundary biodiversity conservation

Threshold Issue: Net Benefits of ‘Going Transboundary’ Considered
12 CRITERIA
1 Engages each level of political organisation
2 Has political buy-in
3 Costs and benefits equitably distributed
4 Integrated ecosystem approach applied
5 Objective of conservation explicit
6 Good governance practised
7 Adaptive management practised with clear success indicators
8 Rules and legal instruments exist
9 Institutions with vertical and horizontal linkages exist
10 Capacity
11 Complexity recognised and appropriate resources secured
12 Dispute resolution mechanisms exist

²¹ Michelle Lim, ‘Is Water Different from Biodiversity? Governance Criteria for the Effective Management of Transboundary Resources’ (2014) 23 *Review of European Comparative and International Environmental Law* 96; Michelle Lim, ‘Transboundary Conservation of Mountain Biodiversity in a Climate Change Impacted World—Governance Perspectives from Central Asia and the Island of Borneo’ in Frank Maes et al (eds), *Biodiversity and Climate Change: Linkages at International, National and Local Levels* (Edward Elgar, 2013) 268.

Threshold issue: Net benefits of ‘going transboundary’ considered

‘Going transboundary’ must be a value-added approach that goes beyond intra-state action and increases the efficiency of natural resource management.²² The decision to engage in transboundary management should be made following an assessment of the costs and benefits of doing so.

Criterion 1: Engages each level of political organisation

The transboundary context creates an additional layer of institutional complexity and a unique power structure. The principle of sovereignty means that transboundary-level authority is dependent on the endorsement of national-level powers. Several levels of political organisation may govern transboundary management. These levels generally include transboundary, national and local governments. Often there are additional levels of authority that will need to be taken into account. Although transboundary initiatives need not operate from every level of political organisation, the involvement of each level is desirable.

Caution should be exercised so that contemporary efforts to formalise transboundary cooperation do not constrain communities that have evolved organic forms of transboundary collaboration.²³ Initiatives should actively involve stakeholders at every level. ‘Best fit’ counterpart authorities should be coordinated across all levels of political organisation. The location of decision-making is an important element of designing effective environmental legislation in developing countries,²⁴ particularly where power structures are not democratically constituted, corruption is entrenched, and there is a large disparity between the powerful and powerless.

Criterion 2: Has political buy-in

Sustaining political commitment for transboundary initiatives at each level of political organisation is important in determining the success of initiatives. The economic value of natural ecosystems is increasingly recognised by scientists and policymakers.²⁵ The importance of transboundary collaboration for protecting or enhancing this value needs to be highlighted. To develop support for transboundary initiatives, the creation and recognition of economic and other values and a sense of ownership are essential. The existence of multiple stakeholders and competing interests makes this a challenging goal.

²² Harry van der Linde et al, *Beyond Boundaries: Transboundary Natural Resource Management in Sub-Saharan Africa* (Biodiversity Support Program 2001) 105–6, xix–xx.

²³ Yemi Katerere, Ryan Hill and Sam Moyo, *A Critique of Transboundary Natural Resource Management in Southern Africa* (IUCN, 2001) 13, 18.

²⁴ Michael Faure, Morag Goodwin and Franziska Weber, ‘Bucking the Kuznets Curve: Designing Effective Environmental Regulation in Developing Countries’ (2010) 51 *Virginia Journal of International Law* 95, 123.

²⁵ National Academy of Sciences, *Valuing Ecosystem Services: Towards Better Environmental Decision-Making* (National Academies Press, 2005) cited in Robin Naidoo, Trent Malcolm and Adam Tomasek, ‘Economic Benefits of Standing Forests in Highland Areas of Borneo: Quantification and Policy Impacts’ (2009) 2 *Conservation Letters* 35, 35.

Criterion 3: Costs and benefits are equitably distributed

People are likely to manage the environment when the benefits of management are perceived to exceed its costs and if they have the means to meet these costs.²⁶ The direct and indirect causes of biodiversity declines are complex and rarely exclusively local.²⁷ The benefits of conservation projects based on global priorities are, however, often reaped globally.²⁸ Conflicts can exist between the sovereign interests of nation states and the welfare of local communities who straddle borders. Pooling common transboundary resources while privatising associated benefits risks further isolating the poor.²⁹

The inequitable distribution of benefits between countries and shareholders has been identified as a major hindrance to transboundary initiatives.³⁰ Transboundary initiatives should offer genuine opportunities for tangible benefits for stakeholders at all levels of political organisation. Unequal partnerships at the transboundary level can undermine the spirit of the partnership if the dominance of one country partner is not applied positively. Systems that ensure the equitable sharing of benefits and costs are needed.³¹

Criterion 4: Integrated ecosystem approach is applied

Landscape and ecosystem scale biodiversity conservation is desirable where ecological structures at such a scale could significantly affect species abundance and distribution. This need for larger scales of management can require conservation beyond protected area boundaries.³² Many protected areas are not large enough to preserve biodiversity and species can become extinct even when they exist in protected areas.³³

The Fifth Conference of the Parties to the *Convention on Biological Diversity* defined the ecosystem approach as ‘a strategy for the integrated

²⁶ Marshall W Murphree, *Communities as Resource Management Institutions* (International Institute for Environment and Development, 1993).

²⁷ Monique Borgerhoff Mulder and Peter Coppolillo, *Conservation: Linking Ecology, Economics, and Culture* (Princeton University Press, 2004).

²⁸ Sonja Vermeulen, *Biodiversity Planning: Why and How Should Local Opinions Matter?* (International Institute for Environment and Development, 2004).

²⁹ Trevor Sandwith and Charles Besançon, *Trade-offs among Multiple Goals for Transboundary Conservation* (2005), 2 <http://www.wilsoncenter.org/events/docs/Besancon_Sandwith.pdf>.

³⁰ Jaidev (‘Jay’) Singh, *Study on the Development of Transboundary Natural Resource Management Areas in Southern Africa—Global Review: Lessons Learned* (Biodiversity Support Program, 1999) 25.

³¹ Katerere, Hill and Moyo, above n 23, 119.

³² Leonore Fahrig, ‘When Is a Landscape Perspective Important?’ in John Wiens and Michael Moss (eds), *Issues and Perspectives in Landscape Ecology* (Cambridge University Press, 2005) 3; Kimberly With, ‘Landscape Conservation: A New Paradigm for the Conservation of Biodiversity’ in John Wiens and Michael Moss (eds), *Issues and Perspectives in Landscape Ecology* (Cambridge University Press, 2005) 238; Adrian Martin et al, ‘Understanding the Co-existence of Conflict and Cooperation: Transboundary Ecosystem Management in the Virunga Massif’ (2011) 48 *Journal of Peace Research* 621, 623.

³³ David S Wilkie, William M Adams and Kent H Redford, ‘Protected Areas, Ecological Scale and Governance: A Framing Paper’ in Kent H Redford and Catherine Grippo (eds), *Protected Areas, Governance and Scale* (Wildlife Conservation Society, Working Paper No 36, 2008) 1; Martin et al, above n 32, 623.

management of land, water and living resources that promotes conservation and sustainable use in an equitable way'.³⁴ This decision encouraged parties to promote regional cooperation and the application of the ecosystem approach across national borders.³⁵ The ecosystem approach recognises that the best way to tackle biodiversity conservation is to ensure that the ecological system in question continues to have the same overall structure and function.³⁶ To implement the ecosystem approach across international boundaries, transboundary conservation must occur in the wider landscape beyond protected areas and take into account the various sectors that impact biodiversity. To achieve biodiversity conservation over the long term, policies in all sectors should consider the implications for biodiversity and integrate appropriate measures into management strategies.³⁷

The effective translation of scientific findings into policy and practice is a significant challenge.³⁸ Holistic approaches to environmental protection also pose considerable legal difficulties. Integrated action is more difficult to achieve than narrower sectoral or source-based approaches.³⁹

Criterion 5: The objective of conservation is explicit

Biodiversity conservation and poverty alleviation objectives often conflict and are highly complex. I highlighted the importance of an integrated approach in Criterion 4. The objective of conservation, however, must not be overlooked in the incorporation of multiple values and sectors.

Criterion 6: Good governance is practised

Good governance is essential for successful application of the ecosystem approach.⁴⁰ 'Governance' is defined here as the interactions among structures, processes and traditions that determine how power and responsibilities are exercised, how decisions are taken, and how citizens or other stakeholders have their say.⁴¹ Successful transboundary management requires good governance at all levels. Corruption and lack of transparency are the key impediments to

³⁴ Fifth Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 5, Nairobi, 15–26 May 2000) UNEP/CBD/COP/5/6 (2000), [2] <<http://www.cbd.int/doc/?meeting=cop-05>>.

³⁵ Ibid [7].

³⁶ Brian Walker, 'Conserving Biological Diversity through Ecosystem Resilience' (1995) 9 *Conservation Biology* 747, 748.

³⁷ I Thompson and T Christophersen (eds), *Cross-Sectoral Toolkit for the Conservation and Sustainable Management of Forest Biodiversity* (Secretariat of the Convention on Biological Diversity, CBD Technical Series No 39, 2008) 5.

³⁸ Darren S Ryder et al, 'Defining and Using "Best Available Science": A Policy Conundrum for the Management of Aquatic Ecosystems' (2010) 61 *Marine & Freshwater Research*, 821, 821.

³⁹ Dinah Shelton, 'International Cooperation on Shared Natural Resources' in Shelle Hart (ed), *Shared Resources: Issues of Governance* (Island Press, 2009) 12.

⁴⁰ Seventh Ordinary Meeting of the Conference of the Parties to the Convention on Biological Diversity (COP 7, Kuala Lumpur, 9–20 February 2004) UNEP/CBD/COP/7/11 (2004), [18] <<https://www.cbd.int/doc/?meeting=cop-07>>.

⁴¹ John Graham, Bruce Amos and Tim Plumptre, 'Governance Principles for Protected Areas in the 21st Century' (Paper presented at the 5th World Parks Congress, Durban, 30 June 2003) ii.

concrete and effective action.⁴² Faure et al point to the time and effort that international organisations have spent tackling corruption in developing countries. These efforts have not demonstrated noticeable reductions in corruption.⁴³ Faure et al indicate that imprecise standard-based systems provide ample space for discretionary decisions and hence opportunistic behaviour. They recommend the formulation of precise rules that can reduce the potential for corrupt behaviour by bureaucrats.⁴⁴

Criterion 7: Adaptive management is practised with clear success indicators

Value-based standards are essential for the delivery of good natural resource governance.⁴⁵ Ongoing monitoring and evaluation is crucial. Often the unintended impacts of the cross-sectoral linkages referred to in Criterion 4 only become apparent after implementation.⁴⁶ One of the benefits of policy evaluation is the learning that results from past experience.⁴⁷

Reporting and publicising objective data can reduce duplication of effort and enhance information sharing.⁴⁸ Where data on conservation and development impacts is lacking this minimises opportunities to adapt.⁴⁹

Criterion 8: Rules and legal instruments exist

Legal instruments create the framework within which stakeholders interact. The *Brundtland Report* emphasised that management based on equitable and enforceable rules and incentives is key to ensuring sustainable and equitable use of the global commons.⁵⁰ Effective transboundary biodiversity conservation requires more than transboundary agreements and corresponding national rules. Resources should be allocated to the development of legal instruments at each level of the transboundary process.

⁴² OECD, *Paris Declaration on Aid Effectiveness* (2005), [4](iv) <<http://www.oecd.org/dac/effectiveness/34428351.pdf>>.

⁴³ Faure, Goodwin and Weber, above n 24, 116, citing Jeff Hunter and Shah Anwar, *Anti-Corruption Policies and Programs: A Framework for Evaluation* 7 (World Bank, Working Paper No 2501, 2001) 7.

⁴⁴ *Ibid* 116.

⁴⁵ Michael Lockwood et al, 'Governance Principles for Natural Resource Management' (2010) *Society & Natural Resources* 986, 987.

⁴⁶ Thompson and Christophersen, above n 37, 6.

⁴⁷ Jeffrey L Pressman and Aaron B Wildavsky, *Implementation: How Great Expectations in Washington are Dashed in Oakland* (University of California Press, 3rd ed, 1984) 177.

⁴⁸ BirdLife International, *Instituting Standardised Sustainable Biodiversity Monitoring in the Eastern Arc Mountains and Coastal Forests of Kenya and Tanzania Region* (BirdLife Africa Partnership Secretariat, 2005).

⁴⁹ Dilys Roe et al, *Local Action, Global Aspirations: The Role of Community Conservation in Achieving International Goals for Environment and Development* (Natural Resource Issues Series No 4, Earthprint 2006).

⁵⁰ *Report of the World Commission on Environment and Development: Our Common Future*, UN Doc A/42/427 (20 March 1987), 258 <<http://www.un-documents.net/our-common-future.pdf>> ('*Brundtland Report*').

International law lacks the means of ensuring compliance.⁵¹ Unless the aspirations of a treaty are incorporated into national policies and decision-making, the treaty will not translate into tangible environmental outcomes. National governments therefore play a key role in facilitating the effective management of transboundary resources.⁵²

Transboundary cooperation can be hampered by conflicting laws, lack of parity in the ratification of international protocols, and different degrees of commitment from state parties, as well as different levels of economic development and professional standards.⁵³ In most cases, it will be necessary to amend each state party's laws or regulations to incorporate principles from the transboundary agreements and to harmonise area-based rules.⁵⁴

Criterion 9: Institutions with vertical and horizontal linkages exist

The optimum result occurs when instruments work in concert and are supported by credible institutions with appropriate resources.⁵⁵ It is important to develop institutional systems that link transboundary planning to planning at national and local levels.⁵⁶

The management of a single ecosystem unit by different institutions in accordance with different legal rules can lead to duplication of effort, conflicting management policies, wasted socio-economic opportunities and weak or non-existent law enforcement.⁵⁷ However, the establishment of a single authority may be politically unacceptable, particularly in the early stages of transboundary cooperation. Shine therefore recommends working with existing agencies to establish regular coordination between the lead agency in each participating country.⁵⁸

Criterion 10: Capacity

This criterion stresses the importance of evaluating existing capacity from the outset and designing transboundary initiatives and legal instruments and

⁵¹ John Charles Kunich, 'Fiddling around While the Hotspots Burn Out' (2001) 14 *Georgetown International Environmental Law Review* 179, 260.

⁵² Katerere, Hill and Moyo, above n 23, 18, 29.

⁵³ L S Hamilton, 'Transborder Protected Area Co-operation' in J Cеровský (ed), *Biodiversity Conservation in Transboundary Protected Areas in Europe* (Ecopoint, 1996) 9, cited in Trevor Sandwith et al, *Transboundary Protected Areas for Peace and Co-operation* (IUCN Best Practice Protected Area Guidelines Series No 7, 2001) 14.

⁵⁴ Clare Shine, 'Legal Mechanisms to Strengthen and Safeguard Transboundary Protected Areas' (Paper presented at the Parks for Peace International Conference on Transboundary Protected Areas as a Vehicle for International Cooperation, Somerset West, South Africa, 16–18 September 1997) 1.

⁵⁵ Paul V Martin et al, *Developing a Good Regulatory Practice Model for Environmental Regulations Impacting on Farmers* (Land and Water Australia, 2007) ix.

⁵⁶ Jennifer Mohamed-Katerere, *Review of the Legal and Policy Framework for Transboundary Natural Resource Management in Southern Africa* (IUCN Regional Office for Southern Africa, 2001) 113.

⁵⁷ Shine, above n 54, 38; Faure, Goodwin and Weber, above n 24, 106.

⁵⁸ Shine, above n 54, 41.

institutions with consideration of capacity. Implementation strategies should match available resources at each level of authority.

In countries where administrative structures suffer from limited governance capacities, it is misguided to develop an environmental legal system that depends on strong administrative systems. Where a participating country (or countries) lacks the capacity or will to issue executive orders, Faure et al recommend structuring environmental legislation to be as independent as possible from such orders. Institutional and instrumental design should be based upon an assessment of the level of institutional development as well as of the particular environmental problems.⁵⁹

Disparities in economic power and levels of development between states can create challenges for transboundary management.⁶⁰ Enhanced capacity within weaker State parties may therefore be needed to facilitate equitable participation. It is important to develop the capacity of governments to provide support for local level initiatives.⁶¹

Criterion 11: Complexity is recognised and appropriate resources are secured

Many transboundary initiatives are aimed at the management of complex resources such as biodiversity, watersheds or tracts of land.⁶² The management of multiple resources is complicated in the transboundary context. In recognition of this, it is essential that transboundary biodiversity conservation initiatives are resourced appropriately.

Often insufficient resources are allocated for developing, adapting and maintaining the legal and institutional components of transboundary initiatives. Laws and institutions are fundamental to the effective function of transboundary initiatives. Ongoing and long-term financial commitment to facilitate the evolution and maintenance of these components is essential.

Criterion 12: Dispute resolution mechanisms exist

Dispute resolution is important at all political levels from the international to the local. Dispute resolution mechanisms need to be specific and have the necessary political commitment and financial support to ensure their implementation and enforcement.

⁵⁹ Michael Faure, 'Environmental Rules Versus Standards for Developing Countries; Learning from Schäfer' in Thomas Eger et al (eds), *Internationalisierung des Rechts und seine Ökonomische Analyse/Internationalisation of the Law and its Economic Analysis* (Gabler, 2008) 735, 743.

⁶⁰ Mohamed-Katerere, above n 56, 118.

⁶¹ Julian Prior and Richard Holt, 'Tools for International Landcare—Lessons Learnt from South Africa and Australia' (Paper presented at Landscapes, Lifestyles, Livelihoods, International Landcare Conference, Melbourne, 8–11 October 2006).

⁶² Katerere, Hill and Moyo, above n 23, 18.

III *Assessment of the HoB Initiative*

The HoB initiative is assessed here against the above criteria. The conclusions are reached through a combination of desk research and field visits to the HoB area.

Threshold issue: Net benefits

This threshold issue does not appear to have been considered in the design of the HoB. The project was launched by WWF in 2004.⁶³ WWF promotes the HoB area as the last remaining place in Southeast Asia where tropical forests can be conserved on a grand scale⁶⁴ and describes the HoB as ‘a network of protected areas and sustainably-managed forests’, which operates by ‘international cooperation by Bornean governments, supported by global effort’.⁶⁵

Meaningful cooperation between HoB country parties on conservation issues is essential for the conservation of Borneo’s unique biodiversity. Transboundary management is included in the Strategic Plan of Action of the HoB.⁶⁶ However, government action is restricted to respective jurisdictions. Project documents stress the ‘voluntary’ nature of the project. HoB parties raise sovereignty concerns as a reason against engaging in extensive transboundary activities such as joint management or law enforcement.⁶⁷

Interviews conducted by the author and visits to project sites indicate that, although it has proven to be an effective publicity tool, the project has yet to live up to its claims of transboundary conservation in the true sense. The initiative has, however, brought the need for landscape-level thinking to the attention of country parties and has highlighted the conservation issues of Borneo at an international level.

Criterion 1: Is there political engagement at each level of political organisation?

The HoB consists of Brunei, the Malaysian states of Sabah and Sarawak, and the province of Kalimantan in Indonesian Borneo. Differing levels of decision-making and the different levels of autonomy of these jurisdictions add to the complexity of the HoB. When Sabah and Sarawak joined the Federation of

⁶³ Gerard A Persoon and Manon Osseweijer (eds), *Reflections on the Heart of Borneo* (Tropenbos International, 2008) 18.

⁶⁴ WWF, ‘Partnership Approach to Economic Sustainability—Financing the Heart of Borneo’ (2011), 11 <http://awsassets.panda.org/downloads/financing_the_heart_of_borneo_pdf.pdf>.

⁶⁵ *Ibid* 2.

⁶⁶ ‘Heart of Borneo—Strategic Plan of Action’ (2008) <http://wwf.panda.org/what_we_do/where_we_work/borneo_forests/resources/report_2/?204407/Heart-of-Borneo-3-Countries---Strategic-Plan-of-Actions>.

⁶⁷ See, eg, *HoB Declaration*, above n 7; ‘Paper from Malaysia: Institutional Arrangement for HoB’ Agenda Item 7: Consideration of Institutional Arrangement and Modalities for HoB, Proceedings “Heart of Borneo: Three Countries, One Conservation Vision” Workshop (Brunei Darussalam, 5–6 April 2005), 82 <assets.panda.org/downloads/prosedinghobbruneiworkshop.pdf>. Similar sentiment was also expressed in interviews with government departments conducted by the author.

Malaya to form Malaysia in 1963, the two Bornean states negotiated conditions that would allow them to maintain a degree of autonomy. This relative independence can, however, be used by State governments to avoid national rules for personal gain.

Oil palm plantations for example pose a significant threat to forests and biodiversity in the HoB. Despite a federal ban on logging in order to establish oil palm plantations the Sarawakian Chief Minister has declared that the ban does not apply to Sarawak. This highlights the challenges Malaysia's federal system creates for transboundary conservation in the HoB.⁶⁸

West Kalimantan in Indonesian Borneo has a long history of cross-border interactions with the Malaysian state of Sarawak. One of the largest ethnic groups in West Kalimantan is the Iban, a dominant indigenous community in Sarawak. The movement of goods and people between the communities has a long history that continues today.⁶⁹ Attempts by country parties to engage border communities appear to be superficial and only involve the exchange of information and collaboration on issues that are not politically sensitive, such as cultural exchange and handicraft-making. Government agencies responsible for the HoB have, however, been designated at the national and sub-national (state) levels.

Several areas within the HoB are remote from administrative and commercial centres. Many border communities experience lower standards of living and development than inhabitants of urban areas. Communities in the Indonesian part of the HoB are among the poorest in Indonesia. The priorities of border communities vary greatly from those of the state and national governments. Persoon and Osseweijer observe that while the concept of the HoB has been accepted by the three governments, the communities living in the area did not have an active role in this process. Community participation has yet to be given much attention. It is potentially the most complicated and time-consuming challenge in the project.⁷⁰

Criterion 2: Is there political buy-in?

Others have recognised the need for high-level political commitment from all participating governments and the involvement of all stakeholders to ensure the successful implementation of the HoB initiative.⁷¹ Yet the lack of political buy-in remains one of the main impediments to effective transboundary cooperation in the HoB. Brunei, Indonesia and the Malaysian states of Sabah and Sarawak are responsible for allocating land within their jurisdictions for inclusion in the HoB.

⁶⁸ Sarah L Hitchner, 'Heart of Borneo as a "Jalan Tikus": Exploring the Links between Indigenous Rights, Extractive and Exploitative Industries, and Conservation at the World Congress 2008' (2010) 8 *Conservation & Society* 320, 323.

⁶⁹ K Obidzinski, A Andrianto and C Wijaya, 'Cross-border Timber Trade in Indonesia: Critical or Overstated Problem? Forest Governance Lessons from Kalimantan' (2007) 9 *International Forestry Review* 526, 530.

⁷⁰ Persoon and Osseweijer, above n 63, 22.

⁷¹ Paul P K Chai and Penguang Manggil, 'Thinking Outside the Box' (2003) 13 *Tropical Forest Update* 15, 17; Hitchner, above n 68, 326.

Sarawak, for example, has allocated only five per cent of the state's land area. This consists largely of the existing transboundary projects established by the International Tropical Timber Organization ('ITTO') and adjacent protected areas.⁷² Further, although Sarawak initially pledged 6.1 million hectares, this was first reduced to 4 million hectares and then to 2.2 million in May 2009.⁷³

Hitchner's 2010 study suggests that the reason the three governments are willing to agree to the HoB is because the initiative does not actually 'do' anything. Malaysia and Indonesia are particularly supportive of this approach because it enhances their environmental image internationally without requiring the countries actually to engage in conservation. The lack of sincere commitment is especially acute in the Malaysian state of Sarawak.⁷⁴

Greater political interest for transboundary biodiversity conservation could be developed by demonstrating the value of biodiversity conservation. Sustaining political support for conservation where revenues from timber concessions and oil palm plantations are so significant will, however, require more than demonstrating the dollar value of conservation.

Naidoo, Malcolm and Tomasek demonstrate that a rapid assessment of the benefits of standing forests in the highlands of Borneo can provide useful and timely information for conservation policy.⁷⁵ They assessed the economic value of standing forests in areas proposed as oil palm plantations in the HoB area. The forests of the HoB provide ecosystem goods and services, such as carbon storage, watershed protection, and non-timber forest products. Forest clearance would result in environmental damage, including erosion and chemical runoff from the plantations, and the ecological, social and economic costs of increased fire frequency in the region.⁷⁶

Even given these 'public-good' benefits, support for the HoB at each level may depend on the extent to which decision-makers benefit personally. Corruption and nepotism is common among the highest levels of government within many jurisdictions of the HoB. Substantial short-term economic benefits are reaped from deforestation caused by logging and clearing for oil palm plantations. This means that, despite demonstrating the dollar-value of conserving the forests of the HoB, developing genuine high-level political commitment for biodiversity conservation remains an arduous challenge.

⁷² The Lanjak Entimau Wildlife Sanctuary ('LEWS') IUCN Category IV, (168 758 ha) and Betung Kerihun National Park ('BKNP') (800 000 ha) are adjacent protected areas that have been included as part of the HoB: see Sarawak Forest Department and ITTO, 'Lanjak Entimau Wildlife Sanctuary, Sarawak, Malaysia, A Conservation Project Supported by International Tropical Timber Organization' (September 2001) 28. Batang Ai National Park was included in 2002: see Paul P K Chai, *Development of Lanjak Entimau Wildlife Sanctuary as a Totally Protected Area—Project Completion Report* (ITTO and Sarawak Forest Department, March 2004) 2.

⁷³ Hitchner, above n 68, 325.

⁷⁴ Ibid 325–6.

⁷⁵ Naidoo, Malcolm and Tomasek, above n 25, 35.

⁷⁶ Ibid.

Criterion 3: Are costs and benefits equitably distributed?

The inequitable distribution of costs and benefits associated with the HoB is a significant challenge to the success of the initiative. Oil palm development is a significant contributor to deforestation within the HoB. The public benefits of not converting forests to oil palm are high due to their carbon storage values.⁷⁷ The benefits of carbon storage, however, accrue globally. In addition, most of the increased fire effects of oil palm plantations in Kalimantan will be felt in Sarawak and Brunei, due to the plantations' location along the northern Kalimantan border and the direction of prevailing winds in the dry season. The value of timber felled to create the plantations is also suspected to be a major impetus for developing Borneo, regardless of the questionable long-term profitability of oil palm cultivation. There is little incentive for the few major beneficiaries of oil palm development to consider the costs to regional stakeholders.⁷⁸

Concern that participating countries may not benefit equally from funding from multilateral agencies is a further reason for hesitation in engaging in joint management. Many agencies are assisting Indonesia, but the stronger economies of Malaysia and Brunei mean that similar aid is not available to them.⁷⁹

Criterion 4: Is the ecosystem approach applied?

Although ecosystem/landscape-based approaches are often the rationale for transboundary initiatives, this wisdom appears to be lost in the HoB. Many protected areas included in the HoB were gazetted prior to the introduction of the transboundary initiative. Each jurisdiction is responsible for designating areas to be included in the HoB and, in many cases, they have allocated existing protected areas. The result is a group of unconnected protected areas under the HoB banner.

The *HoB Declaration* expresses the willingness of the parties to cooperate to ensure the effective management of forest resources and the conservation of a network of protected areas, productive forests and other sustainable land-uses in the area of the HoB.⁸⁰ The HoB Strategic Plan proposes joint spatial planning in the HoB area. However, there do not appear to be concrete plans to facilitate connectivity between the protected areas of the HoB, nor strategies to implement meaningful conservation outside protected areas. Even in adjacent protected areas there are no concerted efforts to facilitate connectivity.

Protected areas in Sarawak and Kalimantan have become increasingly isolated and deforested. Kalimantan's protected lowland forests declined by more than 56 per cent in the period from 1985 to 2001. Even uninhabited border

⁷⁷ David Pearce, 'Global Environmental Value and the Tropical Forests: Demonstration and Capture' in W L Adamowicz et al (eds), *Forestry, Economics and the Environment* (CABI, 1995) 11; Naidoo, Malcolm and Tomasek, above n 25, 42.

⁷⁸ Naidoo, Malcolm and Tomasek, above n 25, 41–2.

⁷⁹ WWF, 'A Partnership Approach to Economic Sustainability—Financing the Heart of Borneo' (2011) <http://awsassets.panda.org/downloads/financing_the_heart_of_borneo_pdf.pdf>15.

⁸⁰ *HoB Declaration*, above n 7.

parks are logged to supply international markets.⁸¹ Between 1996 and 2002, 2.37 million ha of the 3 million ha of forest lost in Kalimantan occurred within the boundaries of designated and proposed protected areas. This suggests that loggers disregard land-use status and that most protected areas exist as ‘paper parks’.⁸²

The expansion of the illegal timber trade in West Kalimantan appears to be facilitated by the development of cross-border roads. In addition to illegal timber traffic at official border crossings, there have also been instances of cross-border intrusions into West Kalimantan from logging concessions on the Sarawakian side. In 2003, there were 81 points in West Kalimantan where roads from Sarawak entered Indonesian territory, including five roads intruding into Betung Kerihun National Park.⁸³

In 2004, only 16 of West Kalimantan’s remaining protected lowland forest fragments were considered large enough to support intact vertebrate fauna. ‘Protected’ forests have become increasingly isolated and deforested and their buffer zones degraded.⁸⁴ Transmigration, uncontrolled, shifting cultivation and poorly planned development projects also contribute to the loss of natural ecosystems and have resulted in increased fire activity.⁸⁵ Curran et al stress that preserving the ecological integrity of Kalimantan’s rainforests requires immediate transnational management.⁸⁶

Sodhi et al highlight the importance of integrating social issues such as rural employment into conservation planning. They indicate that conservation efforts in human-dominated landscapes must intensify and include public education, sustaining livelihoods and finding ways to enhance the sustainability of agriculture and strengthening of the capacity of conservation institutions. Reforestation, reintroductions and re-establishing severed habitat connections should also be attempted.⁸⁷ Similarly, Obidzinski et al point out that restructuring the timber processing sector, in combination with simultaneous and significant developments in sustainable timber plantations, is required to address rapid deforestation. Such steps will, however, require political commitment and sustained effort from a range of government agencies.⁸⁸ Effective conservation in the HoB will also require identification of the many sectors and causes of deforestation.

Criterion 5: Is the conservation objective explicit?

The HoB was initiated by WWF with the aim of conservation. The HoB has the advantage of being first and foremost a conservation initiative. On the surface,

⁸¹ L M Curran et al, ‘Lowland Forest Loss in Protected Areas of Indonesian Borneo’ (2004) 303 *Science* 1000, 1000.

⁸² D O Fuller, T C Jessup and A Salim, ‘Loss of Forest Cover in Kalimantan, Indonesia, Since the 1997–1998 El Niño’ (2004) 18 *Conservation Biology* 249, 252–3.

⁸³ Obidzinski et al, above n 69, 531.

⁸⁴ Curran et al, above n 81, 1000–1.

⁸⁵ Langner, Miettinen and Siegert, above n 10, 2329.

⁸⁶ Curran et al, above n 81, 1000.

⁸⁷ Sodhi et al, above n 3, 326.

⁸⁸ Obidzinski et al, above n 69, 533.

the conservation component should be central to the project. Caution still needs to be exercised so that livelihood and economic concerns—while essential considerations—do not divert attention from conservation priorities. Transboundary collaboration within the HoB appears to be limited to non-contentious ‘community development projects’, such as joint training in local handicraft-making and ecotourism promotion. While economic development is often a necessary component of developing country conservation, these activities are inadequate for achieving the stated objective of transboundary conservation.

Criterion 6: Is good governance practised?

The lack of a separate governance structure for the HoB initiative and the governance issues of in-country systems are major impediments to the implementation of the initiative. Governance challenges are most pronounced in Kalimantan and Sarawak.

Lawlessness is acute in Kalimantan. Law enforcement in national parks was not entirely effective during Indonesia’s Suharto era. Military policing activities, however, meant that the situation was much better than it is today.⁸⁹ As the Suharto regime collapsed, collusive corruption rose sharply. Illegal logging has far outstripped sustainable timber supplies. The area of forest logged has grossly exceeded that authorised, and logging in national parks has become rampant. Timber entrepreneurs bribe local authorities, the military and police, provincial forestry officials, district government officers, and local tribal leaders. Border patrols and Malaysian officials are also bribed to allow illegal log exports into Malaysian Borneo.⁹⁰

In the past decade, Sarawak has lost 55 per cent of its peat swamp forests at an average yearly decrease of 7.7 per cent.⁹¹ The state government has been linked to extensive deforestation through logging and land clearing without adequate (or any) compensation. Timber and mining concessions are distributed as political favours. This has led to rapid and haphazard cut-and-run logging practices as there is no incentive to invest in the sustainability of forest resources.⁹²

Criterion 7: Is adaptive management practised?

The importance of data collection is acknowledged in HoB project documents, but there is a clear failure to incorporate ecological data sufficiently into decision-making. The HoB project would benefit from articulating how the collected data and the results of evaluation will inform adaptive management. An iterative process of data-collection and project evaluation should be developed.

⁸⁹ Joyatee Smith et al, ‘Illegal Logging, Collusive Corruption and Fragmented Governments in Kalimantan, Indonesia’ (2003) 5 *International Forestry Review* 293, 298.

⁹⁰ R J Smith et al, *Governance and the Loss of Biodiversity* (2003) 426 *Nature* 67; William F Laurance, ‘The Perils of Payoff: Corruption as a Threat to Global Biodiversity’ (2004) 19 *Trends in Ecology and Evolution* 399, 400.

⁹¹ Miettinen et al, above n 11, 2265.

⁹² Hitchner, above n 68, 322.

The governance issues raised above illustrate the importance of monitoring and evaluation measures that go beyond ecological data collection. Project oversight and auditing by independent parties would be valuable for enhancing governance in the HoB. The challenge is to get states to consent to or cooperate with such measures.

Criterion 8: Do enabling rules and legal instruments exist?

The signing of the *HoB Declaration*,⁹³ a three-paragraph, non-binding declaration that stresses the voluntary nature of cooperation, was deemed by country parties and project implementers to be a success in itself. The conclusion of any agreement should, however, be seen as a starting point. The content of the agreement and its appropriateness for the given situation are the real indicators of the potential usefulness of such instruments.

There is also a lack of parity between the laws of each of the countries involved within the project. The harmonisation of laws would facilitate cooperation among the authorities in each of the three countries and help ensure that offenders do not escape prosecution. Harmonised laws would also assist transboundary management and the implementation of conservation measures.

One of the actions of the Strategic Action Plan of the HoB is to ‘develop and review the master plan and to consider the HoB initiative to be in line with the country’s constitution and legislation’.⁹⁴ A literal reading would suggest that the primary concern is to ensure that the HoB does not contravene national instruments rather than to establish a common or at least non-contradictory set of laws across the project area. A judiciary workshop for the HoB has recommended the harmonisation of laws and the development of a system of uniform penalties among the parties to the HoB.⁹⁵ It is unclear how, and to what extent, these recommendations will be incorporated into the initiative.

Criterion 9: Are institutions identified and linkages established?

National agencies, as well as state agencies in the Malaysian states of Sabah and Sarawak, have been designated in each of the HoB countries. These agencies are responsible for project implementation within their respective jurisdictions. Local-level involvement is not articulated and to date no transboundary

⁹³ *HoB Declaration*, above n 7.

⁹⁴ Program 1 Transboundary Management, Proposed Action No 1, ‘Heart of Borneo—Strategic Plan of Action’ (2008) <http://wwf.panda.org/what_we_do/where_we_work/borneo_forests/resources/report_2/?204407/Heart-of-Borneo-3-Countries---Strategic-Plan-of-Actions>.

⁹⁵ TRAFFIC, ‘Heart of Borneo Judiciary Workshop on Wildlife Crime—Report Summary’ (TRAFFIC—SEA, 2009) 3 (on file with author). A regional judiciary workshop on wildlife crime was held from 18–19 November 2009. It was organised by TRAFFIC Southeast Asia and the Sabah Wildlife Department and involved representatives from the Malaysian, Indonesian and Bruneian Courts and Attorney Generals’ offices. Participants included 11 judges and magistrates, and 12 prosecutors from the HoB countries, who participated in discussions on mutual legal assistance, enforcement, and the prosecution of wildlife crimes, as part of the judiciary’s commitment to tackle organised poaching and trafficking of wild animals and plants in Borneo: *Kota Kinabalu Hosts ‘Heart of Borneo’ Judiciary Workshop*, TRAFFIC <<http://www.traffic.org/home/2009/11/18/kota-kinabalu-hosts-heart-of-borneo-judiciary-workshop.html>>.

institution exists. There is no clear plan for establishing linkages between and across institutions at the various levels of political organisation.

At the 2008 Trilateral Meeting of HoB parties, Malaysia presented a paper on the institutional arrangement for the HoB.⁹⁶ The view was that it was at that point premature to establish a secretariat for the HoB initiative. The paper expressed the need to avoid the ‘proliferation of too many secretariats handling ASEAN matters’, citing the adequacy of the unit responsible for forestry within the ASEAN Secretariat. The so-called ‘forestry unit’ referred to by Malaysia is merely an issue of economic cooperation between ASEAN countries. The body responsible for forestry within the ASEAN Secretariat is the ASEAN Cooperation in Food, Agriculture and Forestry. Most programs and projects under the Cooperation are implemented by a national focal point within each ASEAN country with the use of national funds.⁹⁷ Despite the organisational restructure of the ASEAN Secretariat in 1992, it still lacks the ability to address transnational issues effectively, to enforce commitments by ASEAN countries and to support the functions of other ASEAN bodies.⁹⁸

Malaysia also used the existing transboundary projects between Malaysia and Indonesia, which operate without a dedicated secretariat, to argue against the establishment of an HoB secretariat. Malaysia cites, for example, the ‘successful implementation’ of the ITTO projects where ‘monitoring was done internally through the National Steering Committee and regular reporting during the ITTO Council meetings’.⁹⁹ A joint task force was established between Sarawak and Indonesia in 2001 to plan and implement short- and medium-term activities in an ITTO-supported transboundary project between the adjacent protected areas of Lanjak Entimau/Bentuan Kerihun on the Sarawak-Kalimantan border. This task force has yet to have a strong influence on transboundary management.¹⁰⁰ The formulation of guidelines for collaborative management and mutual assistance in the protection of transboundary resources is among the terms of reference of the task force. The guidelines are not currently implemented and there do not appear to be plans for implementation.

Reasons for the lack of enthusiasm for a specially dedicated institution include the concern that Indonesia would receive the bulk of funding under regional funding rules, the inability of the countries to reach agreement regarding where the secretariat would be based, and concerns about which country would chair the secretariat.

⁹⁶ ‘Paper from Malaysia: Institutional Arrangement for HoB’, Agenda Item 7: Consideration of Institutional Arrangement and Modalities for HoB, Report of the 2nd Heart of Borneo Trilateral Meeting (4–5 April 2008, Pontianak, Indonesia) 82 (on file with author).

⁹⁷ ASEAN, *ASEAN Ministerial Meeting on Agriculture and Forestry* <<http://www.asean.org/communities/asean-economic-community/category/asean-ministerial-meeting-on-agriculture-and-forestry-amaf>>.

⁹⁸ Lin Chun Hung, ‘ASEAN Charter: Deeper Regional Integration under International Law?’ (2010) 9 *Chinese Journal of International Law* 821, 828.

⁹⁹ ‘Paper from Malaysia: Institutional Arrangement for HoB’, above n 96, 82.

¹⁰⁰ Chai and Manggil, above n 71, 15, 17.

Criterion 10: Do the institutions have sufficient capacity?

The capacity for implementation is greater within Brunei and Malaysia. However, Indonesia has by far the largest area of the HoB. It is also the poorest of the three countries and faces the most serious challenges. Local capacity has been affected by governmental and administrative decentralisation policies that have resulted in decreased national government support.¹⁰¹ The lack of capacity of authorities on the Indonesian side facilitates illegal logging activities of Malaysians and others who use Malaysia as a trade route. Consequently, conservation initiatives within the Indonesian part of the HoB rely upon provincial and district governments heavily dependent on local resources with few alternatives to the extraction of natural resources and the conversion of forest land into oil palm plantations.¹⁰²

Malaysians play a major role in illegal logging in Indonesia. The Malaysian government has no intention of assisting with the prosecution of acts that occur outside its borders. Malaysian Borneo is frequently used as a trade route for illegal logging from Indonesian Borneo.¹⁰³

Criterion 11: Is complexity managed?

Although insufficient resources have been committed to legal and institutional development in the HoB, substantial work has commenced on developing financial mechanisms. In 2011, WWF and the three HoB countries completed the scoping phase of an approach aimed at sustainable financing for the HoB.¹⁰⁴

Malaysia had previously expressed concern over an HoB Secretariat stating that financing from NGOs or another third party would ‘impeach on the sovereignty of the three countries’.¹⁰⁵ Nevertheless, in a combined report by WWF and the three HoB countries, a portfolio of sources of finance through suitable mechanisms was recommended.¹⁰⁶ The report identifies the types of financing possibilities from government, market and donor sources.¹⁰⁷ It does not pinpoint specific agencies or mechanisms, nor does it comment on the probability of obtaining support from such sources. The likelihood of securing such resources remains unclear as is the commitment of governments. Appropriate auditing and use of funds remains a critical issue.

¹⁰¹ Persoon and Osseweijer, above n 63 22.

¹⁰² Ibid.

¹⁰³ Rautner, above n 15, 7.

¹⁰⁴ WWF, above n 79, 4.

¹⁰⁵ ‘Paper from Malaysia: Institutional Arrangement for HoB’, Agenda Item 7: Consideration of Institutional Arrangement and Modalities for HoB (Proceedings of the Heart of Borneo: Three Countries, One Conservation Vision Workshop, Brunei Darussalam, 5–6 April 2005) 82.

¹⁰⁶ WWF, above n 79, 7.

¹⁰⁷ The sources of funding identified are: *Government sources*: 1. licensing and royalty fees; 2. special government funds that earmark the collection and use of fees from resource extractive companies; 3. direct and indirect subsidies; 4. debt for nature swaps; *Market sources*: 1. payment for water catchment services; 2. carbon financing; 3. mitigation banking and biodiversity offset payments; 4. tourism payments, fees and taxes; 5. bioprospecting; 6. the use of favourable equity, credit and microfinance to promote environmental sustainability; *Donor sources*: 1. corporate donors and corporate social responsibility; 2. philanthropic foundations and NGOs; 3. individuals; 4. in-situ and ex-situ conservation partnerships: ibid 8–15.

Criterion 12: Do dispute resolution mechanisms exist?

The potential for disputes at various levels in the HoB is high. The Indonesian government has been at odds with Malaysia over Malaysia's perceived lack of cooperation in stemming the illegal flow of Indonesian timber across the border. On the other hand, Malaysia often questions the lack of political will of the Indonesia government in controlling fires.¹⁰⁸ Deforestation and associated illegal logging in Indonesia and Malaysia, especially along the Bornean borders of these two countries, have also created conflicts within communities, between communities and large-scale companies, and between communities and the state. These conflicts arise because the state (and holders of timber or oil palm concessions) and local and indigenous communities have overlapping claims over forest land zoned for logging or cultivation.¹⁰⁹

The potential for conflict from the international to the local level in the HoB means that dispute resolution mechanisms are of high importance. To date, dispute resolution mechanisms for the HoB are unclear and are not addressed in the *HoB Declaration*.

IV Possible Ways Forward

The HoB is as ambitious as it is ambiguous. The HoB area covers three countries and numerous state and local jurisdictions. The project aims to conserve tropical forests across a large area where logging and forest conversion to oil palm plantations is widespread. However, the precise objectives of the HoB and the roles of communities and NGOs have not been articulated. At the same time, neither joint nor individual responsibilities of governments, nor the actions required to achieve the overall goal of the project, have been clearly stated. There is also no consensus over who will bear the costs or reap the benefits. Multiple decisions are being made about the HoB by many different actors. Trade-offs are negotiated at various geographic, political and institutional scales, adding to the confusion.¹¹⁰

Many of the issues in the HoB stem from the lack of political support for conservation due to the short-term but substantial economic gains from logging and clearing for oil palm plantations. Within this context I discuss the types of interventions that could address current practices. These recommendations viewed as a whole provide a much-needed framework for effective conservation in the HoB.

Political buy-in and governance limitations

The main issues for the HoB are caused by the lack of high-level political buy-in and the failure to implement good governance. Transboundary collaboration in the HoB occurs within the wider 'ASEAN way' approach to inter-country relations. ASEAN countries argue that the non-interference, consensus-building

¹⁰⁸ Obidzinski et al, above n 69, 527, 531.

¹⁰⁹ Ardiansyah and Putri, above n 4, 15.

¹¹⁰ Hitchner, above n 68, 324.

approach of the ASEAN way—emphasising national implementation—minimises tensions and avoids unnecessary conflicts.¹¹¹ The ASEAN way also allows states to engage in rhetoric without actually doing anything.

The HoB is a ‘transboundary’ initiative in name only. The avoidance of actual transboundary action highlights the lack of political support for meaningful transboundary conservation. Implementation responsibilities are left to individual jurisdictions without coordinating approaches across the HoB.

Corruption in Sarawak and Kalimantan poses a significant challenge to improved governance. Governments and officials who benefit from the conversion of forests have little motivation to implement policy and institutional change and prevent changes that challenge their interests.¹¹²

Addressing the challenges

Meeting other criteria would go a long way towards addressing the identified shortcomings in the HoB. The discussion below discusses ways to tailor approaches to take the realities of the HoB into account.

Evaluation and indicators of success

When discussing Criterion 7, I highlighted the lack of project oversight and indicators in the HoB. I also emphasised the importance of these components for affecting adaptive management and promoting good governance and the challenge of getting government support in some jurisdictions.

The HoB has brought extensive international attention to conservation in Borneo. As the main governance and corruption issues occur at sub-national levels, the introduction of monitoring and evaluation against objective indicators is likely to have most success if led by WWF or its equivalents with the involvement of governments at the national level. By setting out clear objectives and standards against which the performance of country parties can be evaluated, national governments should be able to exert greater influence on other country parties and sub-national jurisdictions within their own territory.

There is the potential for opposition to such an approach, particularly from sub-national jurisdictions, which are likely to cite infringements on their autonomy. As national governments are keen to promote their environmental records internationally, the greater transparency brought about by evaluations based on objective standards could play an important role in enhancing governance.

It is particularly important that the issue of corruption is addressed. The design of legal instruments and institutions that are less corruptible is important. Explicit reference to monitoring and evaluation within legal and institutional frameworks could play an enabling role.

¹¹¹ Koh and Robinson, above n 17, 4.

¹¹² Smith et al, above n 89, 293.

Laws, institutions and capacity

There is a clear preference among ASEAN states for cooperative and consensual discussions, rather than binding obligations. An example of this is the *1985 ASEAN Agreement on the Conservation of Nature and Natural Resources*, which has yet to be ratified by enough states to enter into force.¹¹³ Similarly, since environmental issues were first included on the ASEAN agenda in 1997, the institutionalisation of environmental governance arrangements has been slow.¹¹⁴ ASEAN states recognise and welcome the benefits of comprehensive regional cooperation. They guard their sovereignty, however, and are unwilling to delegate sufficient authority to supranational institutions even if doing so would enhance benefits from cooperation.¹¹⁵ The design of legal and institutional instruments for the HoB must take this into account.

In considering illegal logging in Kalimantan, Smith et al argue that a strong government capable of enforcing the rule of law is required to control widespread corruption. They concede that this will require wider, sustained reform and institutional strengthening.¹¹⁶ Faure et al acknowledge that enforcement remains a cornerstone of effective environmental policy. Improving an enforcement system is not enough in itself. To have an impact it is important that rules suited to the particular situation are developed.¹¹⁷ It is essential that implementation capacity is taken into account.

Faure et al argue persuasively that rule-based systems with a limited number of environmental obligations articulated in a very precise way should form the main approach of legal and administrative systems with low enforcement capacities. Such an approach would minimise the need for reliance on administrative authorities.¹¹⁸ Faure et al refer for example to the case of environmental regulation in Indonesia, where two environmental management Acts remain largely unimplemented because the necessary executive orders were never promulgated.¹¹⁹ The lack of capacity or political will to issue the required secondary legislation highlights the importance, particularly in the context of the HoB, to structure environmental legislation so that it has minimal reliance on the existence of other instruments

The ASEAN context identified above foreshadows the challenge of getting HoB countries to consent to an agreement with binding obligations.

¹¹³ Koh and Robinson, above n 17, 9.

¹¹⁴ Elliott, above n 18, 61.

¹¹⁵ Geoffrey B Cockerham, 'Regional Integration in ASEAN: Institutional Design and the ASEAN Way' (2010) *27 East Asia* 165, 181.

¹¹⁶ Smith et al, above n 89, 301.

¹¹⁷ Faure, Goodwin and Weber, above n 24, 124.

¹¹⁸ They cite, eg, Anthony Ogus, 'Regulatory Arrangements in Developing Countries' in Thomas Eger, Jochen Bigus, Claus Ott and Georg von Wangenheim (eds), *Internationalisierung des Rechts und seine Ökonomische Analyse/Internationalisation of the Law and its Economic Analysis* (Gabler, 2008) 721, 723–4; Kenneth W Dam, *The Law-Growth Nexus: The Rule of Law and Economic Development* (Brookings Institution Press, 2006) 37; Richard A Posner, 'Creating a Legal Framework for Economic Development' (1998) 13(1) *The World Bank Research Observer* 1, 5 cited in Faure, Goodwin and Weber, above n 24, 111, 124.

¹¹⁹ Faure, Goodwin and Weber, above n 24, 111.

Despite this, there is merit in developing a legal framework with minimal but clearly articulated rules that identify enforcement institutions. This would help overcome the ambiguities surrounding the HoB, facilitate the allocation of resources and create a framework of accountability.

As with the development of evaluation indicators, the development of the legal and institutional framework is likely to have the greatest chance of success by further convincing national parties of its public relations value. Country parties are aware of the positive international exposure and support that transboundary collaboration in the HoB can bring. Binding legal obligations, whereby parties pledge financial and institutional support, could be marketed as a groundbreaking success that will lead to the conservation of Borneo's remaining biodiversity. Such a framework would not only enhance the environmental image of HoB countries, but also improve access to funding.

HoB countries have the opportunity to create a model legal framework for transboundary cooperation, not only for the ASEAN region, but also for the rest of the world. Getting at least one country party on board and drawing international attention to a draft agreement could influence other countries. Creating awareness—internationally and within HoB countries—of the real reasons for hesitation in establishing transboundary conservation could create further impetus for HoB countries to consent to binding obligations. In reality, however, this seems unlikely.

If country parties find the thought of a binding instrument unpalatable, similar rules could be included as principles or guidelines in the text of a memorandum of understanding or similar aspirational instrument. This would be more precise than the current *HoB Declaration* and would ideally set out time-bound actions. Such an instrument could be used as a rallying point for local communities, national and international NGOs, and the international community, to apply pressure on the governments to follow through on their environmental promises. Hitchner, for example, found that even the *HoB Declaration*, which has limited content, has been used by Malaysian NGOs to remind the Malaysian government of its commitment to conservation in the HoB.¹²⁰

Dispute resolution

A comprehensive dispute resolution system, particularly if combined with a robust legal and institutional framework, could enhance other governance elements by setting out requirements of national parties and stakeholders. It would help articulate the purposes of the HoB and highlight acceptable activities.

Inter-ASEAN disputes have historically been resolved through diplomatic, rather than legal, processes.¹²¹ The use of international venues for dispute resolution since the 1990s is, however, reason for optimism that formal dispute resolution mechanisms could be developed in the HoB. The trend demonstrates that ASEAN states are becoming more open to legalistic

¹²⁰ Hitchner, above n 68, 325.

¹²¹ Lin, above n 98, 833.

procedures. ASEAN states have, for example, used the International Court of Justice, rather than ASEAN mechanisms, to resolve disputes.¹²² This movement toward legalism is also evident in the *Protocol on Enhanced Dispute Settlement Mechanism*¹²³ and the *ASEAN Charter*.¹²⁴ The Enhanced Dispute Settlement Mechanism is very similar to the World Trade Organization's dispute settlement mechanism, with its establishment of ad hoc panels to resolve disputes and the suspension of concessions to retaliate for non-compliance.¹²⁵ This gradual shift in ASEAN approaches is also cause to be hopeful of the development of more effective legal and institutional frameworks, not only in the HoB, but in the wider SEA region.

V Conclusions

The assessment of the HoB against the 12 criteria indicates that the HoB has not lived up to the hype. Governance issues and the lack of political buy-in are the most significant impediments to successful transboundary biodiversity conservation in the HoB. A further limitation stems from the failure to develop meaningful legal instruments and supporting institutions.

Transboundary natural resource governance for conservation purposes has the potential to deliver numerous benefits. Without acknowledgment of, and planning for, the immensity of the multifaceted nature of transboundary conservation, transboundary conservation initiatives risk failure. Legal instruments and institutions are insufficient to bring about effective transboundary conservation if other governance components are not in place. Despite this, the assessment of the HoB illustrates the importance of a legal framework to define objectives. The absence of a meaningful legal and institutional framework in the HoB means that the objectives of the project are unclear. If the issues identified in the assessment are not addressed, the future of biodiversity in the HoB is bleak.

The interventions I recommend emphasise the importance of independent oversight in combination with clear and simple rules that consider the operating context and are backed up by appropriate institutional support. The recommended entry point for such interventions in the HoB is the national level, as the degree of vested interests of governments at this level is less than at other levels. The progressive shift in the ASEAN approach to cooperation among states—which is increasingly supportive of legal approaches—is reason for optimism that effective legal instruments could be developed in the HoB and more widely in the ASEAN region.

¹²² Examples include the 1998 territorial dispute between Indonesia and Malaysia over Pulau Ligitan and Pulau Sipadan, and the 2003 dispute between Malaysia and Singapore over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge: Cockerham, above n 114, 183.

¹²³ Association of South East Asian Nations (ASEAN), *ASEAN Protocol on Enhanced Dispute Mechanisms*, entered into force 29 November 2004 <<http://www.asean.org/news/item/asean-protocol-on-enhanced-dispute-settlement-mechanism>>.

¹²⁴ *ASEAN Charter*, above n 8.

¹²⁵ Cockerham, above n 114, 183.

Biodiversity conservation and the management of shared natural resources is an issue of significant interest to ASEAN countries. The same governance criteria therefore has potential as a valuable tool for achieving effective transboundary biodiversity conservation in the wider ASEAN region.