

The Non-legally Binding Instrument on Sustainable Management of All Types of Forests - Towards a Legal Regime for Sustainable Forest Management?

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From 16-27 April 2007, the UN Forum on Forests ("UNFF")¹ gathered in New York for its 7th session ("UNFF7"). After two weeks of intense and difficult negotiations, in the early hours of 28 April, UNFF adopted three documents.² The main document was the "Non-legally binding instrument on sustainable forest management of all types of forests" (the "Instrument"),³ which was adopted by the General Assembly by resolution on 17 December 2007.

The Instrument is the last step of many in the attempt to create a coherent international law regime regarding forests and their uses.⁴ However, as a Resolution of the General Assembly and as set out expressly in its title, it is non-legally binding, a soft law document.⁵

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¹ UNFF is a subsidiary body of ECOSOC which was established by ECOSOC Res. 2000/35 with the main objective to promote the management, conservation and sustainable development of all types of forests; ECOSOC Res. 2000/35 of 17 December 2007 available at [http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=E/2000/99\(SUPP\)&Lang=E](http://daccess-ods.un.org/access.nsf/Get?OpenAgent&DS=E/2000/99(SUPP)&Lang=E), last accessed 28 July 2008.

² These are "Non-legally binding instrument on sustainable forest management of all types of forests", the new Multi-Year Programme of Work (MYPOW) for UNFF until 2015 and the draft Resolution for ECOSOC. This Instrument was submitted to ECOSOC and adopted by the General Assembly in the 62nd session on 17 December 2007; See ECOSOC Supplement No 22, E/2007/42; E/CN.18/2007/8 (2007); ECOSOC Res. 2007/40 of 17 October 2007 and GA Res. 62/98 of 17 December 2007, available at <http://www.un.org/esa/forests/about-resolutions.html>, last accessed 28 July 2008.

³ Non-legally Binding Instrument on Sustainable Forest Management of all Types of Forests, GA/Res/62/98 of 17 December 2007, available at http://www.un.org/esa/forests/pdf/session_documents/unff7/UNFF7_NLBI_draft.pdf, last accessed 28 July 2008.

⁴ See, *infra*, notes 7 - 12.

⁵ See, *supra*, note 3.

The Instrument deals with a wide range of issues regarding forest management, aiming at establishing a coherent regime of sustainable forest management and covering all types of forests. The Instrument was intended to be adopted by consensus and become a comprehensive, concise document giving guidance to all aspects of forest management, including international cooperation. The outcome, however, reflects the different views and expectations as to the possible content and its content lags behind the expectations of nearly every delegation – whether in the field of financial commitments by industrial countries or regarding the commitments to improve good governance and sustainability in managing forests.⁶

A. From Rio to UNFF7

It took the international community nearly 15 years and many steps forward and back to negotiate and conclude a universally accepted, comprehensive legal document governing forest management. This process was characterised by the specifics of international forest policy.

I. General overview

The current state and functions of forests, the threats they are exposed to, as well as some characteristics and concepts of international forest policy influence the preconditions of the forest sector for a legal regime.

1. State and functions of forests

Forests have multiple functions, which are essential for human well-being: They are an indispensable part of people's life sustenance systems. Further, people associate spiritual and cultural values with forests. About 1.6 billion people depend on forests for their immediate livelihoods. Forests also provide a wide range of marketable products such as timber. About 70% of all terrestrial animal and plant species live in forests. In their capacity as water reservoirs and carbon sinks, forests maintain global climate balance, protect soils from degradation and avert desertification.

About 30% of the world's land mass is covered by forests of different types. Whereas in Europe, North America and China, the area of forests in balance is stable or increasing, the net loss of forest cover in other parts of the world continues or even accelerates.⁷ Important factors in the loss of forests are the conversion of

⁶ See, *infra*, note 17.

⁷ Food and Agriculture Organization, *State of the World's Forests 2007*, viii, ix (2007).

forests into agricultural land, driven by the demand e.g. for biofuel, and illegal logging, enabled by weak institutions and lack of governance, as well as the increasing demand for imported wood products by developed countries and those with economies in transition.

2. Forest policy

Forests are natural resources, for which protection and management lie originally exclusively within the territorial State's own sovereignty, according to customary international law and reflected by Principle 2 of the Rio Declaration on Environment and Development.⁸ However, customary international law contains some rules on States behaviour regarding forests, such as the obligation not to cause significant harm to neighbouring States.⁹

The main issue of discussions in international forest policy is the concept of sustainable forest management (SFM), i.e. to manage forests in a way that maintains their ability to provide economic, social (including spiritual and cultural) and ecological benefits for present and future generations. SFM can be achieved by increasing the area of protected forests and the total forest cover and by maintaining the forest functions. In order to evaluate the sustainability of forest management, seven thematic elements have been identified as criteria and indicators, such as forest health and vitality, the extent of forest resources and their biological diversity, but also the legal and institutional framework.¹⁰

II. 1992-1999

First attempts to establish an international legal regime for the protection of forests were made in 1992 at the UNCED Conference in Rio with an emphasis on the tropical rain forests. Yet the envisaged elaboration and adoption of a convention

⁸ Rio Declaration on Environment and Development, Report of the United Nations Conference on the Human Environment, Stockholm, 5-16 June 1972, available at <http://www.unep.org/Documents/Multilingual/Default.asp?DocumentID=78&ArticleID=1163>, last accessed 28 July 2008.

⁹ This is generally accepted since the *Trail Smelter Arbitration*, 35 AMERICAN JOURNAL OF INTERNATIONAL LAW, 684, 716.(1941).

¹⁰ The seven thematic elements are enumerated in para. 6 (b) of the Instrument as : (1.) extent of forest resources, (2.) forest biological diversity, (3.) forest health and vitality, (4.) productive and (5.) protective functions of forest resources, (6.) socio-economic functions of forests, (7.) legal, policy and institutional framework. See, *supra*, note 3.

failed. Instead, the so-called “Forest Principles”¹¹ and Chapter 11 of Agenda 21: “Combating Deforestation” were adopted.

In the following years, two intergovernmental fora for forest policy were established under the UN Commission on Sustainable Development: the Intergovernmental Panel on Forests (IPF) from 1995-1997 and the Intergovernmental Forum on Forests (IFF) from 1997-2000. These fora produced the “IPF/IFF Proposals for Action”¹², more than 270 proposals of a technical, legally non-binding nature.

III. 2000-2007

When UNFF was established in 2000, it constituted a new international arrangement on forests and gave international forest policy a new momentum. UNFF is a forum in which all Member States of the UN are represented, deciding traditionally by consensus. Initially, UNFF met yearly (UNFF1-UNFF7); now, the cycle will be biennial with UNFF8 taking place in 2009.

While every Member State has one vote, the Member States of the European Union coordinate themselves and are represented by one delegation during the negotiations.

Initially, it was foreseen to adopt a legally binding instrument on all types of forests, and invite States to ratify it. Negotiations to that end began in 2000 and failed in 2005. Instead, the four “Global Objectives on Forests” were adopted and ECOSOC in 2006 requested the conclusion and approval of a non-legally binding instrument,¹³ with which UNFF succeeded on 28 April 2007.

IV. Negotiations at UNFF7

The negotiations at UNFF7¹⁴ were based on the Chair’s composite draft text, which itself built upon the results of an ad hoc expert group meeting in December 2006.¹⁵

¹¹ Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, A/CONF.151/26 (Vol. III) available at <http://www.un.org/esa/forests/about-history.html>, last accessed 28 July 2008.

¹² IPF Proposals for Action, available at <http://www.un.org/esa/forests/pdf/ipf-iff-proposalsforaction.pdf>, last accessed 28 July 2008.

¹³ Global Objectives on Forests, ECOSOC Res. 2006/49 of 24 February 2006 para. 3 and 26, available at <http://www.un.org/esa/forests/about-resolutions.html>, last accessed 28 July 2008.

¹⁴ For a detailed report of the course of the negotiations Seventh Session of the United Nations Forum on Forests

The states conducted the negotiations as seriously and carefully as if a legally binding treaty was to be negotiated, confirming thus the importance they attach to the content of the Instrument in spite of its soft law character.¹⁶

Soon it became obvious that the most contentious issues had to be solved as a package. This might have been the main reason as to why no delegation was willing to make substantial concessions before other crucial issues were solved. These most contentious issues were the definition of sustainable forest management, the reference to quantifiable and time bound targets in para. 6(a) of the Instrument¹⁷, a facilitative mechanism and finance.

1. "Material Added Value": Definition, Targets

The European Union and some other countries were hoping and striving for "material added value", i.e. they wanted to have some more and stronger commitments on the protection of forests and regarding the sustainability of forest management. A large part of the Chair's composite draft text simply repeated language that had already been agreed to previously, from the Rio Conference in 1992 to the sixth session of UNFF in 2006,¹⁸ and other international organisations or institutions already cover many of the other topics.¹⁹

United Nations Headquarters, New York, 16-27 April 2007 available at <http://www.iisd.ca/forestry/unff/unff7/>, last accessed 28 July 2008.

¹⁵ The original text of the ad hoc expert group has been shortened and streamlined by the UNFF Secretariat. The Chair of UNFF7 was the Dutch UNFF Bureau member Hans Hoogeveen. United Nations Forum on Forests, Open-ended ad hoc expert group on the consideration of the content of the non-legally binding instrument on all types of forests E/CN.18/AC.1/2006/4 of 28 December 2006, available via <http://www.un.org/esa/forests/documents-unff.html#7>, last accessed 28 July 2008.

¹⁶ For the effects of such a behaviour on the credibility and effects of soft law documents, see Pierre Marie Dupuy, in: Gunther Handl, Michael Reisman, Bruno Simma, Pierre Marie Dupuy, Christine Chinkin, Rachel De La Vega, *A Hard Look at Soft Law*, 82 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 371, 386 (1988).

¹⁷ The final version of para. 6 (a) reads: "To achieve the purpose of this instrument, and taking into account national policies, priorities, conditions and available resources, Member States should:

- (a) Develop, implement, publish and, as necessary, update national forest programmes or other strategies for sustainable forest management which identify actions needed and contain measures, policies or specific goals, taking into account the relevant Intergovernmental Panel on Forests and Intergovernmental Forum on Forests proposals for action and resolutions of the United Nations Forum on Forests; ..." See, *supra*, note 3.

¹⁸ See, *supra*, note 14, Vol. 13, No. 162, 4 quoting the UNFF Secretariat.

¹⁹ Mainly the Collaborative Partnership on Forests (CPF), consisting of 14 organisations: Centre for International Forestry Research (CIFOR), Food and Agriculture Organization of the United Nations

In their opinion, an Instrument with material added value should have included at least the following:

- (a) a full definition of sustainable forest management to be included in a universally accepted and applicable document for the first time;
- (b) the commitment of states to identify quantifiable and time-bound targets in their national forest programmes,²⁰ which would make it possible to assess progress and setbacks in the implementation of this Instrument; and
- (c) the clear commitment towards good governance and legality in the forest sector.

This was opposed mainly by Brazil, the USA and some developing countries. Certain other countries, especially countries with economies in transition, tried to keep commitments towards sustainable forest management as minimal as possible and the nature of the Instrument as vague and non-binding as possible, thereby opposing to anything which could evolve into a new rule of customary international law, such as promoting good governance or legality in the forest sector, or which could affect national sovereignty. Brazil, regularly supported by Venezuela, Colombia and others, was consequently weakening whatever would have added value in the European eyes or went beyond the global objectives of forests agreed to in 2006.

2. *Legal Nature: Facilitative Mechanism, Subscription*

In an attempt to strengthen the Instrument, its implementation and its legal nature, the EU suggested two mechanisms: the facilitative mechanism and the subscription. In order to ease the implementation of this non-binding instrument, the EU suggested establishing something called a “facilitative mechanism”. It was proposed to establish a Committee of Experts, which should assist States in implementing the Instrument and to clarify issues regarding this implementation. Although this process would be initiated only upon the request of a State (or the UNFF), this proposal was rejected by most States, being either deemed to restrict

(FAO), International Tropical Timber Organization (ITTO), International Union of Forestry Research Organizations (IUFRO), Secretariat of the Convention on Biological Diversity (CBD), Secretariat of the Global Environmental Facility (GEF), Secretariat of the United Nations Convention to Combat Desertification (UNCCD), The United Nations Forum on Forests Secretariat (UNFF), Secretariat of the United Nations Framework Convention on Climate Change (UNFCCC), United Nations Development Programme (UNDP), United Nations Environment Programme (UNEP), World Agroforestry Centre (ICRAF), World Bank and World Conservation Union (IUCN). Further information is available at <http://www.fao.org/forestry/site/cpf/en/>

²⁰ See, *supra*, note 3, para. 6(a) - 10.

sovereignty (e.g. by linking the access to financial resources to it) or to duplicate existing processes like those of the International Tropical Timber Organisation (ITTO) or the OECD. Thus, the EU dropped this proposal.

Neither did another contentious issue, the originally envisaged “subscription”, find its way into the final text. It had been proposed by the EU as a high-level political event, which should allow States to replace the ratification with a somewhat more symbolic action, with the objective to increase the credibility and political commitment of the Instrument. However, it had also been controversial from the outset being a precedent and appearing contrary to its expected non-binding nature.

3. Finance

Finance was for many developing countries the most crucial issue and for some States, the only theme where they really wanted the Instrument to have added value as compared to the agreed language. By contrast, most of the donor countries were not prepared to agree on the establishment of a strong financial mechanism promising new and additional financial resources, but considered existing mechanisms and available funds as sufficient and that the available resources should be managed and used more efficiently. This would include the generation of resources by enforcing existing forest and taxation laws and by managing forests sustainably.

It was clear that negotiations would prove difficult, and they did not become easier by a non-paper which was surprisingly distributed by the UNFF Bureau on 17 April, even before the first reading of the text of the Instrument had begun. This paper suggested to establish a new forest fund, though not naming it explicitly, and thus raised respective expectations.

Yet as it became clear that material commitments in the Instrument would remain limited, and that even basic issues such as a definition of sustainable forest management and wording regarding illegal practices in logging and trade or supporting good governance – all being non-legally binding and vaguely formulated – would hardly be agreed on, the less the donor countries were willing to commit themselves to provide new financial resources.

The compromise reached in the end can be found in para. 6 and 7 of the ECOSOC resolution 2007/40.²¹ Para. 4 reads: "ECOSOC decides to develop and consider, with a view to adopting at the eighth session of the Forum, a voluntary global financial mechanism/portfolio approach/forest financing framework for all types of forests, aiming at mobilizing significantly increased, new and additional resources from all sources, based on existing and emerging innovative approaches, also taking into account assessments and reviews of current financial mechanisms, to support the implementation of sustainable forest management, the achievement of the global objectives on forests and the implementation of the non-legally binding instrument on all types of forests."

B. The Content of the Instrument

The Instrument was intended to become a concise and comprehensive document of soft law, which would be understandable to the world outside the forest sector. However, it is neither a self-contained regime nor an exhausting list of commitments, as Member States simply could not agree on a number of issues such as secure land tenure and public procurement policies. Therefore, these issues were left open deliberately in order to allow further development by state practice and discussion as well as the consideration of other legal and non-legal norms outside its content.

I. Legal Nature

First of all, the question of whether to keep the reference to the non-legally binding nature of the document in the title itself remained contentious up to the very end of the negotiations. The reference in the title is neither usual nor necessary, the soft law character follows both from its nature as annex to a GA resolution and from para. 2(a) of the Instrument itself. However, the Rio Forest Principles in their full name, "Non-legally binding authoritative statement..." constitute a precedent regarding the reference to their nature.

Furthermore, although it may just be the standard English wording and no alternative has been discussed, it could be argued that there is a difference between "non-legally binding" and "non legally-binding". The first expression rather stresses the extralegal nature of an existing binding, though purely politically binding, character, and not the mere absence of any legal force.

²¹ ECOSOC Resolution 2007/40, E/2007/INF/2/Add.2 of 17 October 2007, para 2, 4, available at http://www.un.org/esa/forests/pdf/ERes2007_40E.pdf, last accessed on 28 July 2008.

As an Annex to a Resolution of the General Assembly, the Instrument does not create rights and obligations upon those States adhering to it, but has the same implications on all Member States of the UN. It therefore clearly creates no obligation that any other State could invoke in an international forum, other than the political stage of UNFF. Yet the Instrument may reflect customary public international law, and promote the creation and development of new rules in this regard. Whenever States define or implement new policies or legislation affecting the forest sector, they may feel obliged to justify any deviation from the standards pronounced or established by the Instrument. By contrast, any State acting in accordance with the principles and provisions set out in the Instrument, can dismiss any criticisms by reference to the Instrument, thus feeling on the safe side. However, time will show how much influence the Instrument really has on the further development of public international forest law.

II. The Title

The Title “Non-legally binding instrument on sustainable management of all types of forests” is not mentioned in the document itself, but appears in the resolutions of ECOSOC and the General Assembly. It reflects some characteristics of forest policy and of the discussions during the past 15 years.

“Sustainable forest management” as the core element of forest policy is the main purpose of the Instrument. “All types of forests” eventually clarifies that the Instrument covers all forests on a global level (and even in some cases trees outside forests) without limitation to tropical forests or those forests that are declared protected or conservation areas.

The title is rather long. Prior to and during the negotiations, the abbreviation “NLBI” was often used. However, it is expressionless about the content, and another short name would thus be preferable, comparable to the “Rio Forest Principles”. Such a short name could either be “New York Forest Instrument”, which is consistent with the commonly used “Rio Forest Principles”, or “Codex sylvana”, as the US suggested as the title for the Instrument.

III. The Preambular Paragraphs: Savings Clause?

The last preambular paragraph (PP12) reads: “Noting that the provisions of the instrument do not prejudice the rights and obligations of Member States under international law”. This wording replaces a similar clause which was proposed for the operative part of the text, which had been controversial from the outset of the negotiations up to the very last minute.

This formulation could refer to the relationship of the Instrument with the WTO trade rules, as some provisions of the Instrument contain commitments which might affect the international trade e.g. in illegally sourced forest products. By contrast, its meaning also could be limited to emphasizing the non-legally binding character of the text, just as the title does as well.

There is some discussion, mainly in the WTO, as to the relationship between specific trade obligations in Multilateral Environmental Agreements (MEAs) and the WTO trade rules. The WTO negotiates the relationship and the interface problem since the 2001 Doha Ministerial Conference in its Committee on Trade and Environment and limited these negotiations to the relationship among those States members to both WTO and the MEA,²² i.e. those relations where problems are most likely to occur.²³

About 20 out of the over 250 existing MEAs oblige or allow their parties to take action against non-parties.²⁴ This might conflict with the WTO principle of non-discrimination or the most-favoured nation treatment.²⁵ As MEAs regularly contain no or less effective dispute settlement procedures, most trade issues are brought before the WTO Dispute Settlement Body, which would then determine whether the action complies with GATT, respectively whether it is justified under its Art. XX. However, no such proceedings have been initiated under the WTO as yet.²⁶

According to the customary rule *lex specialis derogat legi generali*, the MEA would generally prevail between states being parties to the MEA and the WTO,²⁷ unless there is a specific conflict clause or “subordination” clause in this MEA, which expressly subordinates it to other rules. If the Instrument was legally binding, one could therefore argue that this preambular paragraph intends to subordinate all

²² WTO, Environment: Issues Labelling, available at http://www.wto.org/english/tratop_e/envir_e/labelling_e.htm#ppm; WTO, Environment: Negotiations - The Doha mandate on multilateral environmental agreements (MEAs), available at http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm, last accessed on 28 July 2008.

²³ Center for International Development at Harvard Universtiy, WTO Public Symposium 2003: Relationship between MEAs and the WTO, available at www.cid.harvard.edu/cidtrade/geneva/mea.html, last accessed on 28 July 2008.

²⁴ WTO, Environment: Negotiations - The Doha mandate on multilateral environmental agreements (MEAs), available at http://www.wto.org/english/tratop_e/envir_e/envir_neg_mea_e.htm, last accessed on 28 July 2008.

²⁵ *Id.*

²⁶ *Id.*

²⁷ See, *supra*, note 23.

provisions of the Instrument which relate to trade under the WTO regulations in the sense of Art. 30, para. 2, Vienna Convention on the Law of Treaties (VCT), giving priority to the WTO regulations.

However, as a non-binding document the Instrument can impossibly affect any rights and obligations under the WTO regime, but only serve as a valuable tool for interpreting the WTO rules. Furthermore, as the Instrument is not a multilateral agreement but a GA resolution, it will not have states parties or signatories but universal recognition. Thus, it has the same effect on all states and therefore, there is little scope for a violation of the most-favoured nation treatment rule.

Additionally, such a subordination clause is only meaningful in case an actual conflict in the sense of the VCT occurs. The first step in order to identify whether there is a conflict is the interpretation of both norms. The teleological interpretation, in the light of the mutual influence of the norms, leads to the general assumption that states do not want their obligations to conflict, and therefore aims at interpreting the norms coherently according to Article 31 para. 3 lit. c VCT. For the purpose of teleological interpretation, which is oriented at the will and intention of the states, the GA resolutions furthermore reveal this will as the *opinio juris* which is generally shared by all states.

Furthermore, the beginning of this last Preambular Para. 12, "Noting", does not express any support or intention, but a mere declarative statement, by contrast the beginnings used in the other preambular paragraphs such as "Emphasizing", "Recalling", "Recognizing", "Reaffirming", "Stressing" or even "Welcoming".

The historical interpretation strengthens this result. The formulation of the last preambular paragraph, which originally was proposed for the operative part of the text, was debated from the outset of the negotiations and agreed upon as the very last issue. When negotiating the material commitments of the Instrument, delegations did not know whether such a wording would appear in the final text. However, they agreed on a number of trade related provisions. States thus showed that they did not see any potential conflict between the material commitments in the (non-legally binding) Instrument and their rights and obligations under international law.

Finally, a different interpretation of this paragraph would not be compatible with the history of its drafting for another reason: The EU, a large group of 27 states, would not and could not have agreed upon it if it had been meant to subordinate the Instrument under WTO rules. The EU, which had opposed to this clause from the outset of the negotiations and eventually proposed its introduction at this place, suggested the formulation in the preamble in the conviction that it is neither a

clause precluding the Instrument from influencing the development of international law nor subordinating it under WTO rules nor setting a precedent for other instruments or a change in the EC policy, but as a mere confirmation of the non-legally binding character of the whole Instrument. Given the late moment when the EU abandoned its opposition and accepted the announced Chair's proposal, it would not even have been able to agree on any clause having impact on trade issues. The EU, respectively those delegations still present at that time, decided to accept the clause as preambular paragraph on 28 April at 4.30 am, after all the other contentious issues of the Instrument had been finalised, on the insistence of the Netherlands, which argued that moving the provision to the preamble and removing it from the operative part would change its character substantially. At that moment, most delegations from EU member states as well as the representative of the EC Commission had already left the negotiations. The remaining delegations did not even represent 14 of the 27 EU Member States and hence were neither able to reach a majority, nor did they have the competence to agree to a clause with implications on trade:

The competence for trade issues, according to Art. 133 para. 1, 3 of the EC-Treaty, lies exclusively with the EC Commission. Germany, as the Presidency negotiating on behalf of the EU Member States thus would have acted *ultra vires* had it agreed to such a "savings" or "subordination" clause, and would have been obliged to leave the contentious formulation open, i.e. not to agree to the adoption of the Instrument. As it did not do so it showed clearly that the clause in question was not considered to be a subordination clause.

However, in the event that any commitment of the Instrument reflects or over time evolves into customary international law, it would not be the paragraph of the Instrument but the relevant customary law rule which eventually conflicts with the WTO rights and obligations.

The meaning of this preambular paragraph thus is limited to emphasizing the non-legally binding character of the text, and should not be interpreted as any form of subordination clause in the sense of Article 30 para. 2 of the VCT.

IV. General provisions, para. 1-5

In the following part, some of the most substantial paragraphs will be presented.

1. Purpose, para. 1

The purpose of the Instrument is, according to its para. 1:

“(a) To strengthen political commitment and action at all levels to implement effectively sustainable management of all types of forests and to achieve the shared global objectives on forests;

(b) To enhance the contribution of forests to the achievement of the internationally agreed development goals, including the Millennium Development Goals, in particular with respect to poverty eradication and environmental sustainability;

(c) To provide a framework for national action and international cooperation.”

2. *Sustainable forest management (SFM), para. 1, 4, 6(b) and preamble para. 5*

Para. 4 and preambular para. 5 define the core element of forest policy:

“Sustainable forest management, as a dynamic and evolving concept, aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations.”

Although this definition is incomplete as it fails to describe the process of management and confines itself to the sustainable results of this management, such a definition of management already exists with universal scope in the context of an UN organisation: The FAO in 2005 agreed on a definition of "forest management" as “[...] the formal or informal process of planning and implementing practices aimed at fulfilling relevant environmental, economic, social and/or cultural functions of the forest and meeting defined objectives”.²⁸ This Instrument now adds the objective - the benefit of present and future generations - and the function - to maintain and enhance the relevant values (whereas “social” includes cultural and spiritual functions).

The definition is further completed by the indicators mentioned in para. 6(b), especially the seven thematic elements.²⁹ These refer to a framework outside the Instrument itself, and - with the reference to present and future generations - also to the general definition of sustainability as it was introduced by the Brundtland report in 1987.

²⁸ Food and Agriculture Organization, Proceedings of the Third Expert Meeting on Harmonizing Forest-related Definitions for Use by Various Stakeholders (Rome, 17-19 January 2005),. 6.

²⁹ The seven thematic elements are enumerated above. See, *supra*, note 11.

The question whether or not to include a full and comprehensive definition of SFM had been very controversial³⁰, and para. 4 reflects the compromise, as agreement on defining the process of management could not be reached. However, in the end and building upon the FAO definition, there exists a vague but nearly complete definition of SFM at the UN level now. Regional organisations such as MCPFE³¹ or the ITTO³² use more comprehensive definitions of SFM for quite some time already and there is no reason for them not to continue working on the basis of their respective definitions.

However, the definition still lacks the detailed list contained in the MCPFE definition and stays behind the definitions existing before. Its additional value compared to the definitions existing before is confined to defining the objective of sustainable forest management and further concretising its functions. The discussions on whether and how to define sustainable forest management are thus likely to continue.

3. Financial Resources, subpara. 2(d)

Subpara. 2 (d) reads "achieving sustainable forest management, in particular in developing countries as well as in countries with economies in transition, depends on significantly increased new and additional financial resources from all sources".

The main meaning of the wording "from all sources" at the end of the final text is the inclusion of revenues coming from the forests themselves, because sustainably managed forests generate sufficient financial resources for their further management. These resources may originate from timber and non-timber products,

³⁰ Brazil, the African Group, the US and others opposed any definition, while the EU, Australia, New Zealand, Japan and Mexico insisted in the introduction of a general definition of SFM and in the determination of SFM as the conceptual framework of the instrument.

³¹ Ministerial Conference on the Protection of Forests in Europe, Resolution H1: "Sustainable forest management" means the stewardship and use of forests and forest lands in a way, and at a rate, that maintains their biodiversity, productivity, regeneration capacity, vitality and their potential to fulfil, now and in the future, relevant ecological and social functions, at local, national and global levels, and that does not cause damage to other ecosystems. Ministerial Conference on the Protection of Forests in Europe, Resolution H1 (1993), available at www.mcpfe.org/files/u1/helsinki_resolution_h1.pdf

³² International Tropical Timber Organisation, 2005: SFM is "the process of managing permanent forest land to achieve one or more clearly specified objectives on management with regard to the production of a continuous flow of desired forest products and services without undue reduction in its inherent values and future productivity and without undue undesirable effects on the physical and social environment". Status of Tropical Forest Management, 2005, available at <http://www.itto.or.jp/live/PageDisplayHandler?pageId=270>, last accessed on 28 July 2008.

provided they are logged legally, as well as from payments for environmental services, e.g. clean water supply.

This subparagraph also had been controversial throughout the negotiations. The original proposal read "SFM requires adequate financial resources to ensure its sustainability and competitiveness in the long term". The developed countries were especially opposed to such a wording. The permanent input of financial resources would not be economically sustainable and therefore precludes the achievement of SFM. These concerns are met by the formulation "from all sources," which corresponds to the global objective 4 and refers to all levels including local levels and the forests themselves. In addition, subparagraph 2(e), which states on an equal level that SFM also depends on good governance at all levels, shows that this precondition is as essential as sufficient financial resources.

4. Global Objectives on Forests, para. 5

The global objectives on forests can be considered as the basic understanding of forest policy. Having been agreed upon by UNFF6, they were continuously stressed by many delegations, including those who had initially objected to them. Thus they are now universally accepted as the basic principles and in this regard constitute customary public international law, in spite of their vagueness as mere objectives. Throughout the negotiations, even States that are generally very reluctant with regard to establishing forest rules, like Brazil, referred regularly to these Global Objectives and emphasised their significance.

"The global objectives are:

1. to reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation;
2. to enhance forest-based economic, social and environmental benefits, including by improving the livelihoods of forest dependent people;
3. to increase significantly the area of protected forests worldwide and other areas of sustainably managed forests as well as the proportion of forest products from sustainably managed forests; and
4. to reverse the decline in official development assistance for sustainable forest management and mobilize significantly increased new and additional financial resources from all sources for the implementation of sustainable forest management."

V. National Forest Policy, para. 6

The special provisions are set out in para. 6 and 7. While para. 7 deals with international cooperation and means of implementation, para. 6 contains commitments to be implemented by each Member State at the national level, unilaterally.

It is remarkable that the chapeaus of both paras. 6 and 7 refer simply to the “purpose of this instrument”, thus in first line to sustainable forest management. The chapeau of para. 6 contains an additional reference to national policies, conditions etc. As the Instrument already by definition is non-binding and thus cannot prevail over national policies, this reference adds nothing material to the content. However it shows that in spite of its non-legally binding nature and lack of enforceability, it commits States to implement the Instrument on the national level as far as possible, even if national rules seem to be contrary to it.

Para. 6, “national policies and measures”, contains 25 commitments (subpara. 6(a) through (y)) at the national level, which concretize the actions needed for the achievement of SFM and steps necessary for good governance.³³

³³See, *supra*, note 3. Para. 6 reads: “To achieve the purpose of this instrument, and taking into account national policies, priorities, conditions and available resources, Member States should:

- (a) Develop, implement, publish and, as necessary, update national forest programmes or other strategies for sustainable forest management which identify actions needed and contain measures, policies or specific goals, taking into account the relevant Intergovernmental Panel on Forests and Intergovernmental Forum on Forests proposals for action and resolutions of the United Nations Forum on Forests;
- (b) Consider the seven thematic elements of sustainable forest management, which are drawn from the criteria identified by existing criteria and indicators processes, as a reference framework for sustainable forest management and, in this context, identify, as appropriate, specific environmental and other forest-related aspects within those elements for consideration as criteria and indicators for sustainable forest management [these criteria are: (1.) extent of forest resources, (2.) forest biological diversity, (3.) forest health and vitality, (4.) productive and (5.) protective functions of forest resources, (6.) socio-economic functions of forests, (7.) legal, policy and institutional framework; cf. also note 11];
- (c) Promote the use of management tools to assess impacts on the environment of projects that may significantly affect forests and promote good environmental practices for such projects;
- (d) Develop and implement policies which encourage the sustainable management of forests to provide a wide range of goods and services, and which also contribute to poverty reduction and the development of rural communities;
- (e) Promote efficient production and processing of forest products, inter alia with a view to reducing waste and enhancing recycling;

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- (f) Support the protection and use of traditional forest-related knowledge and practices in sustainable forest management with the approval and the involvement of the holders of such knowledge and promote fair and equitable sharing of benefits out of their utilization, according to national legislation and relevant international agreements;
- (g) Further develop and implement criteria and indicators for sustainable forest management, consistent with national priorities and conditions;
- (h) Create enabling environments to encourage private sector investment, as well as investment by and involvement of local and indigenous communities, other forest users and forest owners and other relevant stakeholders, in sustainable forest management, through a framework of policies, incentives and regulations;
- (i) Develop financial strategies which outline the short, medium and long term financial planning for achieving sustainable forest management taking into account domestic, private sector and foreign funding sources;
- (j) Encourage recognition of the range of values derived from goods and services provided by all types of forests and trees outside forests, as well as ways to reflect such values in the marketplace, consistent with relevant national legislation and policies;
- (k) Identify and implement measures to enhance cooperation and cross-sectoral policy and programme coordination among sectors affecting and affected by forest policies and management, with a view to integrating the forest sector into national decision-making processes, and promoting sustainable forest management, including inter alia addressing the underlying causes of deforestation, forest degradation and promoting forest conservation; (l) Integrate national forest programmes, or other strategies for sustainable forest management, as referred to in paragraph 6 (a) of this instrument into national strategies for sustainable development, relevant national action plans and poverty reduction strategies;
- (m) Establish or strengthen partnerships, including public-private partnerships, and joint programmes with stakeholders to advance implementation of sustainable forest management;
- (n) Review, and as needed, improve forest-related legislation, strengthen forest law enforcement, and promote good governance at all levels in order to support sustainable forest management, to create an enabling environment for forest investment and to combat and eradicate illegal practices according to national legislation, in the forest and other related sectors;
- (o) Analyze the causes of, and address threats to, forest health and vitality from natural disasters and human activities, including threats from fire, pollution, pests, diseases and invasive alien species;
- (p) Create, develop or expand, and maintain networks of protected forest areas, taking into account the importance of conserving representative forests, through a range of conservation mechanisms, applied within and outside protected forest areas;
- (q) Assess the conditions and management effectiveness of existing protected forest areas with a view to identifying improvements needed;
- (r) Strengthen the contribution of science and research in advancing sustainable forest management by incorporating scientific expertise into forest policies and programmes;

1. *National forest programmes, subpara. 6(a)*

The core commitment of the Instrument can be seen in subpara. 6(a). This provision commits States to “develop, implement, publish and, as necessary, update national forest programmes or other strategies for SFM which identify actions needed and contain measures, policies or specific goals”, whereby the IPF/IFF proposals for action and UNFF resolutions are to be taken into account. These national forests programmes are to be integrated into the greater, not the sector specific national action plans. The replacement of the initially proposed term “targets” by “goals” was not intended to change the meaning.

This provision is the core commitment since it serves as the basis for many other provisions dealing with sustainable forest management and it generally links all actions at the national level directly to sustainable forest management. By determining sustainable forest management as the leading objective for national action, this provision attempts to streamline national forest policies into a globally coherent manner, thereby leaving room for the individual structuring of each

(s) Promote the development and application of scientific and technological innovations, including those that can be used by forest owners and local and indigenous communities to advance sustainable forest management;

(t) Promote and strengthen public understanding of the importance of and the benefits provided by forests and sustainable forest management, including through public awareness programmes and education;

(u) Promote and encourage access to formal and informal education, extension and training programmes on the implementation of sustainable forest management;

(v) Support education, training and extension programmes involving local and indigenous communities, forest workers and forest owners, in order to develop resource management approaches that will reduce the pressure on forests, particularly fragile ecosystems;

(w) Promote active and effective participation by major groups, local communities, forest owners and other relevant stakeholders in the development, implementation and assessment of forest-related national policies, measures and programmes;

(x) Encourage the private sector, civil society organizations and forest owners to develop,

promote and implement in a transparent manner voluntary instruments, such as voluntary certification systems or other appropriate mechanisms, to develop and promote forest products from sustainably managed forests harvested according to domestic legislation, and to improve market transparency;

(y) Enhance access by households, small scale forest owners, forest dependent local and indigenous communities, living in and outside forest areas, to forest resources and relevant markets in order to support livelihoods and income diversification from forest management, consistent with sustainable forest management“.

country. As many issues have not been finally addressed in the Instrument; sustainable forest management serves as the only guideline in these regards.

2. *Sustainable forest management, subpara. 6(b), (d), (f), (g), (j), (l), (m) and (o)*

The Instrument pays much attention to sustainable forest management, which is reflected in a number of subparagraphs covering several aspects. The concept itself is treated in para. 4.³⁴ It is elaborated in detail by defining the seven thematic elements as criteria in subpara. 6(b) and by committing States to further develop and implement such criteria, subpara. 6(g). Policies have to be developed and implemented, subpara. 6(d). Traditional practices and knowledge relating to SFM are to be supported and their benefits to be shared, subpara. 6(f).

Subpara. 6(j) incites States to encourage recognition of the range of values derived from goods and services provided by forests and to reflect such values in the marketplace. This refers to the values forests provide e.g. by storing and filtering water into clean drinking water, which for some cities such as New York is of such importance that they use an high amount of their water prices to foster the forests in the drainage basin, thus maintaining high water quality at lower costs than building and operating more sewage facilities.³⁵

3. *Good governance, subpara. 6(c), (e), (h), (i), (j), (k), (l) and (n)*

The mere number of subparagraphs dealing with good governance shows already how important this issue is regarded to be for achieving sustainable forest management by the States. Especially the enforcement of forest laws is crucial due to the damage created by illegal logging both to the environment as to States revenues e.g. through lost taxes, concession fees etc. However, the issue was controversial. One reason for developing countries to oppose to strong commitments might be that good governance can be interpreted in different ways by donor and recipient countries and official development assistance thus might be seen as a means to achieve influence into the internal affairs of the recipient. This also could lead to some sort of trade-off between good governance and development assistance.

³⁴ See, *supra*, note 3.

³⁵ For more information see Mike Dombeck, *The Forgotten Forest Product: Water*, NEW YORK TIMES, 3 January 2003, available at <http://query.nytimes.com/gst/fullpage.html?res=9803E0D9113FF930A35752C0A9659C8B63>; Watershed Agricultural Council, available at <http://www.nycwatershed.org/>, last accessed on 28 July 2008.

For the first time in forest policy history, this Instrument contains in subpara. 6(n) a commitment to combat and eradicate illegal practices, which is supported by subpara. 7(g) - 7(j) regarding trade in forest products.

Subpara. 6(x) acknowledges the benefits of voluntary certification systems (such as the FSC³⁶) and other mechanisms which allow importers and consumers to assess whether forest products originate from sustainably managed forests. However, there was some concern how to certify that these systems are non-discriminatory and transparent in order not to limit international trade in forest products disproportionately.

VI. International Cooperation and Trade, para. 7

Para. 7 contains 19 commitments regarding international cooperation of States and trade in forest products.³⁷

³⁶ Forest Stewardship Council, to give just one example among many.

³⁷ See, *supra*, note 3. Para. 7 reads: "To achieve the purpose of this instrument, Member States should:

- (a) Make concerted efforts to secure sustained high-level political commitment to strengthen the means of implementation for sustainable forest management, including financial resources, to provide support, in particular for developing countries as well as countries with economies in transition, as well as to mobilize and provide significantly increased new and additional financial resources from private, public, domestic and international sources to and within developing countries as well as countries with economies in transition;
- (b) Reverse the decline in official development assistance for sustainable forest management and mobilize significantly increased new and additional financial resources from all sources for the implementation of sustainable forest management;
- (c) Take action to raise the priority of sustainable forest management in national development plans and other plans including poverty reduction strategies in order to facilitate increased allocation of official development assistance and financial resources from other sources for sustainable forest management;
- (d) Develop and establish positive incentives, in particular for developing countries as well as countries with economies in transition, to reduce the loss of forests, to promote reforestation, afforestation, and rehabilitation of degraded forests, to implement sustainable forest management and to increase the area of protected forests;
- (e) Support the efforts of countries, particularly in developing countries as well as countries with economies in transition, to develop and implement economically, socially and environmentally sound measures that act as incentives for the sustainable management of forests;
- (f) Strengthen the capacity of countries, in particular developing countries, to significantly increase the production of forest products from sustainably managed forests;

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- (g) Enhance bilateral, regional and international cooperation, with a view to promoting international trade in forest products from sustainably managed forests harvested according to domestic legislation;
- (h) Enhance bilateral, regional and international cooperation to address illicit international trafficking in forest products through the promotion of forest law enforcement and good governance at all levels;
- (i) Strengthen, through enhanced bilateral, regional and international cooperation, the capacity of countries to effectively combat illicit international trafficking in forest products, including timber, wildlife and other forest biological resources;
- (j) Strengthen the capacity of countries to address forest-related illegal practices according to domestic legislation, including wildlife poaching, through enhanced public awareness, education, institutional capacity-building, technological transfer and technical cooperation, law enforcement and information networks;
- (k) Enhance and facilitate access to, and transfer of, appropriate, environmentally sound and innovative technologies and corresponding know how relevant to sustainable forest management and to efficient value added processing of forest products, in particular to developing countries for the benefit of local and indigenous communities;
- (l) Strengthen mechanisms that enhance sharing among countries, and use of, best practices in sustainable forest management, including through freeware-based information and communication technologies;
- (m) Strengthen national and local capacity in keeping with their conditions for the development and adaptation of forest-related technologies, including technologies for the use of fuelwood;
- (n) Promote international technical and scientific cooperation, including South-South cooperation and triangular cooperation in the field of sustainable forest management, through the appropriate international, regional and national institutions and processes;
- (o) Enhance the research and scientific forest-related capacities of developing countries as well as countries with economies in transition, particularly the capacity of research organizations to generate and access forest-related data and information, and promote and support integrated and interdisciplinary research on forest-related issues, and disseminate research results;
- (p) Strengthen forestry research and development in all regions, particularly in developing countries as well as countries with economies in transition, through relevant organizations, institutions and centres of excellence, as well as through global, regional and subregional networks;
- (q) Strengthen cooperation and partnerships at the regional and subregional levels to promote sustainable forest management;
- (r) As members of the governing bodies of the organisations that form the Collaborative Partnership on Forests, help ensure that the forest-related priorities and programmes of members of the Collaborative Partnership on Forests are integrated and mutually supportive, consistent with their mandates, taking into account relevant policy recommendations of the United Nations Forum on Forests;
- (s) Support the efforts of the CPF to develop and implement joint initiatives“.

1. *Financial resources and ODA, subpara. 7(b)*

Subpara. 7(b) concretises the global objective 4 by committing States to reverse the decline in official development assistance (ODA) for sustainable forest management and to mobilize financial resources from all sources for the implementation of sustainable forest management. Thus, donor countries should not decrease the amount of ODA assigned to the forest sector, while nothing is said on the overall amount of ODA, so not excluding a reallocation of ODA in favour of the forest sector, although the idea behind this subparagraph is to increase the ODA. At the same time, ODA recipient countries should set priorities in the use of the existing ODA.

This subparagraph again refers to financial resources from all sources, i.e. ODA and internal resources like those originating from the sustainably managed forests themselves. As ODA is already covered by the first part whereas the sustainably managed forests seldom are used as a source of resources, the reference to “significantly increased new and additional” makes more sense when read in the latter sense, and the placement in the part of international cooperation refers to capacity strengthening.³⁸ This interpretation is supported by the following subpara. 7(c), which deals explicitly with the allocation of ODA and other financial resources.

2. *SFM, subpara. 7 (b), (d) and (e)*

SFM plays a central role in the Instrument’s part on international cooperation as well. Subpara. 7(b) emphasises the commitment to use the resources not simply for any kind of forest management, but to implement and ensure its sustainability; subpara. 7(d) commits States to develop and establish positive incentives to reduce the loss of forests and to increase the area of protected forests as well as to implement SFM and subpara. 7(e) addresses the cooperation and support for the development and implementation of economically, socially and environmentally sound measures as incentives for SFM.

3. *Global Objective 3, subpara. 7(f)*

Subpara. 7(f) contains a wording that should be considered to be an editorial lapse. The text of subpara. 7(f) reflects the third global objective on forests with the difference that it discusses “production” instead of “proportion” of forest products from sustainably managed forests. From the history of the negotiations, it cannot be assumed that States meant to change the meaning, but that the proportion of forest

³⁸ *Id.* para. 7(f), (i), (j).

products from sustainably managed forests should be increased, independently of the increase or decrease of the overall production of such forest products.

4. *Illegal logging and trade, para. 7(g), (h) and (i)*

After intensive discussions, three clauses relating to illegal logging and trade in related products have been agreed upon: subpara. 7(g), (h) and (i).

They all aim at measures to prevent illegal logging, especially when read together in context, and broaden the traditional view that legality was determined only in relation to national legislation irrespective of that legislation's sustainability. Subpara. 7(g) requires that the forest products – including non-wood forest products – shall be harvested according to national legislation, but in addition they must originate from sustainably managed forests. Subpara. 7(g) thus combines legality and sustainability as criteria and conditions and thereby sets new standards to international forest policy.

Subpara. 7(h) and (i) both deal with trade in illegally respectively unsustainably harvested forest products. Faced with the difficulty to differentiate between the legality of trade and the illegality of the production, UNFF finally adopted the definition which had been agreed upon by the UN Commission on Crime Prevention and Criminal Justice (CCPCJ) at its 17th session a few days before, on April 25, 2007, in the Resolution on international cooperation in preventing and combating international trafficking in forest products, including timber, wildlife and other forest biological resources.³⁹ This approach enhances coherence and complementarities between the two bodies of ECOSOC. It also emphasises the conviction that any trade in forest products that are harvested in contravention of national laws is *per se* illicit international trafficking and as such is to be addressed by all competent fora.⁴⁰ UNFF Member States furthermore reaffirm by this reference to the UN CCPCJ resolution that the relevant UN Conventions against Transnational Organized Crimes and against Corruption apply to these practices and are to be addressed among others by exchange of information between the Secretariats of both bodies.⁴¹

³⁹ UN Commission on Crime Prevention and Criminal Justice, Resolution 16/1, E/CN.15/2007/L.3, (2007), 62 available at http://www.unodc.org/pdf/crime/commissions/E-CN-15-2007-17_en.pdf

⁴⁰ *Id.* preambular para. 2 and 3.

⁴¹ *Id.* para. 2.

VII. Final clauses – para. 8-10

Para. 8 and 9 constitute the obligation of states to monitor and assess their progress towards achieving the purpose of this Instrument, i.e. especially the implementation of sustainable forest management.⁴² As many others, these commitments were intensely discussed and the final text constitutes a compromise.

Para. 10 of the Instrument constitutes a final clause comparable to a treaty, providing for the UNFF as the governing body of the Instrument. This provision also states that the UNFF Secretariat is to serve as the secretariat of the Instrument and that UNFF will consider the reports submitted by the Member States according to para. 8 and 9. Special provisions for these purposes, as well as regarding authentic texts or amendments, had been proposed but deemed superfluous, as this follows from para. 10 with respect to the nature of the Instrument as an amendment to a GA resolution.

It had been discussed to include a provision which authorises UNFF to establish subsidiary bodies. However, by para. 4(k) of ECOSOC Resolution 2000/35 the UNFF is authorised already to establish certain bodies and could not by itself enlarge this authorisation without running the risk of acting *ultra vires*. Such an authorisation, however, could have been approved by ECOSOC and the General Assembly and thus would have broadened the competences of UNFF. As this proposal was dropped during the negotiations, the UNFF competences remain the same as before.

C. Evaluation

The final text is much shorter and more concise than the draft text of the ad hoc expert group which was the basis of the negotiations. This is partly due to the deletion of duplications and alternative proposals and to an improvement of the wording, but mainly to the fact that the Member States agreed only on the lowest

⁴² See, *supra*, note 3, VII. Monitoring, assessment and reporting, paras. 8-10.

8. Member States should monitor and assess progress towards achieving the purpose of this instrument;

9. Member States should submit, on a voluntary basis, taking into account availability of resources and the requirements and conditions for the preparation of reports for other bodies or instruments, national progress reports as part of their regular reporting to the United Nations Forum on Forests;

VIII. Working modalities

10. The UNFF should address, within the context of its multi-year programme of work, the implementation of this instrument.”

common denominator, thus considerably reducing commitments. This also had the consequence that the Instrument does not add so much to the agreed language which existed prior (ECOSOC Resolutions, global objectives on forests etc.).

The value of this Instrument therefore lies in the advantage that it ties together the most important rules and standards of forest policy in one document and that it aims to realise sustainable forest management instead of limiting itself to a mere repetition of the global objectives of forests.

The Instrument, however, does not succeed in creating one comprehensive set of all rules applicable and desirable for the forest sector, nor does it in fact reflect each state's responsibility to ensure the sustainable management of its forests. Furthermore, the fact that no consent could be reached on a legally binding instrument remains a setback.

In summary, the Instrument is not of such a comprehensive nature as to make the attempts for a legally binding instrument superfluous. Thus, an initiative of Canada in this regard may produce some valuable outcome and inputs to be considered for negotiations on further development of forest policy. UNFF by contrast will review the Instrument and discuss options such as a legally binding set of rules no earlier than in 2015.

