

# The Global Regime for the Conservation and Sustainable Use of Forests: An Assessment of Progress to Date

*Richard G. Tarasofsky\**

## *I. Introduction*

This article will examine the extent to which a global regime exists for the conservation and sustainable use of forests. A regime, in this article, will be defined as a set of principles, norms, rules, and decision-making procedures, implicit or explicit, around which actors' expectations converge in a manner in which it is possible to measure norm- and rule-guided behaviour.<sup>1</sup>

The first observation must be that a global regime on the conservation and sustainable use of forests is still in the early stages of formation. This is because of the somewhat curious current situation that despite the many international rules and institutions which already affect the conservation and sustainable use of forests, efforts to develop a global regime on forests, *per se*, have so far met with failure.

For a variety of reasons, the familiar divide between North and South on international environmental matters has proven more difficult to bridge in the case of forests, partly because States tend to jealously guard their sovereignty over these particular natural resources. Although not the

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\* Legal Officer, IUCN Environmental Law Centre, Bonn. The views expressed in this article are strictly personal and do not reflect those of IUCN – The World Conservation Union.

<sup>1</sup> See M. List/V. Rittberger, Regime Theory and International Environmental Management, in: A. Hurrell/B. Kingsbury (eds.), *The International Politics of the Environment*, 1992, 89. The authors go on to suggest that a regime is a “social institution wherein stable patterns of behaviour result from compliance with certain norms and rules, whether they are laid down in a legally-binding instrument or not” (at 90).

sole obstacle to the development of a regime, this dynamic has tended to exacerbate matters.

The recent establishment of the Intergovernmental Panel on Forests (IPF) of the UN Commission on Sustainable Development (CSD) is a significant milestone on the road towards regime development. The mandate of the IPF, broadly speaking, includes assessing action already undertaken to combat deforestation and proposing options for future action. The IPF's deliberations are intended to be open, participatory, and transparent; on a subject matter as controversial as forests, this is the only way for progress to be made in global consensus-making.

Although the global regime for the conservation and sustainable use of forests is not yet firmly in place, this article will show that international law relating to forests already provides a strong basis upon which such a regime could be further developed. But, at the same time, it cannot confidently be asserted that such a regime is yet firmly in place.

## *II. Scope of the Problem and the Nature of the Challenge*

Forests are significant natural resources ranging from being tidal to subalpine, tropical and sub-arctic, and totalling some 40 % of the Earth's surface.<sup>2</sup> They provide major economic, social and ecological functions. Economically, timber forms an important part of many countries' export commodities. At the local level, forests are often intrinsically linked to the economic well-being of the people living around them. This value can take several forms, including forest-related industry, tourism, and fuelwood. Forests are important cultural, recreational, and religious sites. Ecologically, forests are carbon sinks, regulators of the hydrological cycle, and capable of moderating floods. They house 50 – 80 % of the world's terrestrial biodiversity, in the form of complex ecosystems, millions of species and vital genetic resources.

The crisis of deforestation is characterized by an array of causes.<sup>3</sup> Although this problem is not new and has existed in virtually all countries, in recent times it tends to be most severe in developing countries, and is thereby exacerbated by a whole host of economic and social factors. At the international level, difficulties experienced by developing countries in

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<sup>2</sup> See *Caring for the Earth*, 1991, at 122, for this and subsequent points.

<sup>3</sup> This situation is well summed up in Paragraph 11.10 of Agenda 21. See also Programme Element I.2: underlying causes of deforestation and forest degradation, Report of the Secretary-General, UN Doc. E/CN.17/IPF/1996/2, 13 February 1996.

connection with trade in commodities and external debt often adversely affect forests. National socio-economic factors, such as unsustainable agricultural practices, uncontrolled urbanization, population growth, pollution, lack of an economic structure that internalizes environmental externalities, and lack of capacity to achieve environmental objectives or effectively regulate human activities can operate to the detriment of forests. At the local level, poor local communities, subsistence farmers, and forest-dwellers turn to the unsustainable exploitation of forests as one of the few means of earning a livelihood.

Appreciation of the vast matrix of interests and factors which affect the fate of forests reveals how immense the challenge is facing those seeking to establish a global regime. Matters are further complicated by the fact that forests are resources which lie exclusively within the territorial jurisdiction of States, although actual forest ecosystems may transcend national frontiers. It must be recalled that the bulk of international law on natural resources reflects the traditional view that the appropriate focus should be largely restricted to transboundary aspects.<sup>4</sup> The recently concluded Convention on Biological Diversity (CBD)<sup>5</sup> is, however, an example of a treaty aimed at conservation and sustainable use of natural resources within a State's jurisdiction and provides for international cooperation in relation thereto.

### *III. Efforts to Create a Regime, per se*<sup>6</sup>

The fate of the world's forests rose from being a relatively obscure matter to one that attracted considerable international anxiety in the late 1980s. This was triggered by mounting concern about global warming and the realization that millions of hectares of forests, largely tropical but not only, were being cleared annually at an ever growing rate. It was increasingly perceived, especially by NGOs and policy-makers in the North, that something needed to be done to conserve these important storehouses of biological diversity and vital carbon sinks. By 1990, as reflected at the G7 Economic Summit, it became clear that the North was seeking an international convention on forests.

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<sup>4</sup> E.g. Convention on the Conservation of Migratory Species of Wild Animals, reprinted in 19 ILM (1980) 11.

<sup>5</sup> Reprinted in 31 ILM (1992) 822.

<sup>6</sup> See, generally, H.M. Scally, *Forests: Toward an International Legal Regime?*, in 4 Ybk IEL (1993) 30, et seq.

In several key developing countries, this notion was perceived with suspicion. Developing countries were particularly sensitive to the tendency of Northern countries to single out tropical forests as the focus of their attention: this heightened their fear that a convention on forests was a way for Southern forests to be regulated, while Northern countries, much of whose forests had already been cleared, would be free to carry on business as usual.

Hope for at least setting the stage for a global convention on forests persisted throughout the UN Conference on Environment and Development (UNCED) process. At UNCED Preparatory Committee 2, held in March 1991, the decision was taken, however, to work towards a non-binding instrument on forests instead of a treaty.<sup>7</sup> But developed countries still held out the hope that UNCED could be the springboard for a future convention on forests. Ultimately, Northern aspirations were dashed and the expressly “soft law” instrument entitled, Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests (hereinafter, “Forests Principles”), made no explicit reference to the need for such a convention.

But the idea of an international convention on forests did not die at UNCED. Firstly, the Preambular Paragraph (d) of the Forests Principles leaves open the possibility of a future convention by stating that in keeping with their commitment to implement the principles, “countries also decide to keep [the Forests Principles] under assessment for their adequacy with regard to further international cooperation on forest issues”. Further, Agenda 21, in Paragraph 11.12, declares that its intention is “to facilitate and support effective implementation of [the Forests Principles] ... and on the basis of the implementation of these principles to consider the need for and feasibility of all kinds of appropriate internationally agreed arrangements to promote international cooperation on forest management, conservation, and sustainable development of all types of forests, including afforestation, reforestation and rehabilitation”.

Although UNCED confirmed that any future legal instrument on forests would have to encompass all types of forests, the next occasion to develop such a comprehensive instrument – the renegotiation of the International Tropical Timber Agreement (ITTA)<sup>8</sup> – was a failure in this regard. The ITTA, originally adopted in 1983, is a commodity agreement in-

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<sup>7</sup> M. Sanwal, *The Sustainable Development of All Forests*, in 1 RECIEL 289 et seq.

<sup>8</sup> UN Doc. TD/TIMBER/11/Rev.1 (1984).

tended to facilitate trade between producer and consumer countries. Its institutional creation, the International Tropical Timber Organization (ITTO), agreed in 1990, the non-binding "Target 2000", that by the year 2000 all exports of tropical timber products should come from sustainably managed resources.<sup>9</sup>

The negotiation of the successor to the ITTA, which expired in 1994, proved to be a long and acrimonious affair that only served to entrench the North-South divide on global forest issues. Consumer (Northern) countries resisted producer (Southern) countries efforts to expand the scope of the ITTA so as to cover all timber. Consumer countries feared that such an agreement would be a poor substitute for a comprehensive treaty on forests. At the same time, producer countries rejected proposals by consumer countries for the new ITTA to stipulate firm environmental obligations. Producer countries affirmed that they would not take on additional environmental obligations which the consumer countries themselves were unwilling to take on. The result was that the new ITTA<sup>10</sup> remains a commodity agreement for only tropical timber<sup>11</sup> and Target 2000 remains a non-binding commitment.<sup>12</sup> Agreement, even on this, was possible only because consumer countries, through a joint statement published together with the Final Act, committed themselves to applying principles of sustainable forest management.<sup>13</sup>

Since UNCED, a variety of non-legal international initiatives have occurred in order to build consensus. Under various auspices, e.g. Conference on Security and Cooperation in Europe (Montreal Process), Inter-Governmental Working Group on Forests (Canada/Malaysia Initiative), Memorandum of Understanding on Forestry Issues between the United Kingdom and India, a significant amount of substantive international dialogue has taken place.<sup>14</sup> It is now no longer inconceivable that a convention on forests may eventually be agreed, although it remains far from clear what the contents of such an instrument would be.

<sup>9</sup> The ITTO has adopted several environmental guidelines, e.g., Guidelines for the Sustainable Management of Natural Tropical Forests (ITTC [XII] 14, 14 May 1992), which although noteworthy for their level of detail, have not been successfully implemented.

<sup>10</sup> Reprinted in 5 Ybk IEL (1994) 832, et seq.

<sup>11</sup> Scally (note 6), makes the interesting observation that the scope of the agreement did expand, in that some provisions refer to trade in timber in general, although the substantive obligations of parties were not added to.

<sup>12</sup> See Preamble and Article 1(d).

<sup>13</sup> TD/TIMBER.2/L.6, 21 January 1994.

<sup>14</sup> For a more detailed description of this, see R.G. Tarasofsky, *The International Forests Regime: Legal and Policy Issues*, 1995.

The mandate for the IPF includes examination of legal and institutional issues, although this will not be substantively discussed until the final meeting of the IPF to be held in March 1997. This postponement of substantive discussion is likely due to the inherent controversy of the topic and the view of the IPF secretariat that it might be easier to address once a variety of other difficult matters had been dealt with. In order to facilitate the IPF process, several inter-sessional events are being hosted by States, including the Swiss-Peru Initiative on legal and institutional issues. At time of writing, only the first meeting of this working group had taken place, where purely preliminary matters were considered.

#### *IV. Existing International Law Relating to Forests*

Although there is no global convention aimed specifically on forests, many international rules affecting forests do exist. This is not surprising given the many important functions forests serve, as well as the variety of factors which affect them.

##### 1. Is the CBD already a framework convention on forests?

Given that the vast amount of the Earth's terrestrial biodiversity lies in forests, the most relevant legally-binding global instrument relating to the conservation and sustainable use of forests is the Convention on Biological Diversity (CBD). The adoption of the CBD in 1992 and its subsequent entry into force represents the achievement of a significant global consensus, reflected in the fact that currently 144 States and the European Community are party to it.

Biological diversity is defined in the CBD as including diversity within species, between species and of ecosystems.<sup>15</sup> According to Article 1, the objectives of the CBD are "the conservation of biological diversity, the sustainable use of its components, and the fair and equitable sharing of the benefits arising out of the utilization of genetic resources". The Preamble to the CBD reaffirms that while States have sovereign rights over their biological resources, they also bear a responsibility for conserving their biological diversity and sustainably using their biological resources. The

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<sup>15</sup> Article 2.

CBD goes on to elaborate specific obligations on conservation<sup>16</sup> and sustainable use.<sup>17</sup>

By seeking to approach its objectives on the genetic, species and ecosystems level, the CBD is a comprehensive regime pertaining to conservation and sustainable use. In this respect, it would appear to be an appropriate framework for a global forests regime.<sup>18</sup> Some NGOs have worked from this assumption to propose that any legally-binding rules specifically aimed at forests should be concluded as a specific Protocol to the CBD.<sup>19</sup>

There would appear to be several advantages to this assertion. Firstly, a forest Protocol to the CBD could, in addition to the CBD itself, further develop and refine a holistic approach to forest conservation and sustainable use. The merit of the CBD approach lies in its premise that the conservation of forest biological diversity cannot be achieved without the sustainable use of all the goods and services a forest can provide. Secondly, the CBD is already reflective of an internationally agreed consensus on the balance between the conservation and sustainable use, and of particular relevance to forests, the second meeting of the CBD Con-

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<sup>16</sup> As regards *in situ* conservation, the CBD requires Parties to establish a system of protected areas, regulate or manage biological resources important for the conservation of biological diversity with a view to ensuring their conservation and sustainable use; promote the protection of ecosystems, natural habitats, and the maintenance of viable populations of species in natural surroundings; rehabilitate or restore degraded ecosystems; prevent the introduction of alien species which threaten ecosystems, habitats or species, and where introduced, control or eradicate them; develop or maintain necessary legislation and/or other regulatory provisions for the protection of threatened species or populations; and regulate and manage processes and activities which have or are likely to have significant adverse impacts on the conservation of biological diversity and the sustainable use of biological resources (Article 8).

<sup>17</sup> The CBD requires Parties to conserve and sustainably use biological resources by, *inter alia*, integrating this objective into national decision-making and by adopting measures regarding such use aimed at avoiding or minimizing adverse impacts on biological diversity (Article 10). It also requires Parties to develop national biodiversity strategies and plans, promote the sharing of information, adopt incentive measures, undertake research and training, encourage public education and carry out environmental impact assessments on projects likely to have significant adverse effects on biological diversity (Articles 6 and 10-14).

<sup>18</sup> Indeed, several items on the CBD's medium-term work programme are related to forests: item 6.4 (1996) on the future work programme for terrestrial biological diversity in light of the outcome of CSD III; item 6.5 (1996) on indigenous and local communities; and item 6.8 (1996) on incentives. In addition there are potentially significant roles in this connection for the CBD's Subsidiary Body on Scientific, Technical and Technological Advice (Article 25) and the information clearinghouse established under Article 18.

<sup>19</sup> See, e.g. I. Fry, *Addressing the Loss of Forest Biodiversity: The Need for a Forest Protocol Under the Convention on Biological Diversity*, 1994.

ference of the Parties affirmed the centrality of the ecosystem approach. This might mean that the renegotiation of a completely new convention on forests would be unnecessarily time-consuming, a strain on resources, and to a certain extent redundant. Thirdly, a Protocol could gear already established and potentially effective institutions to forests matters. In particular the Global Environment Facility (GEF) has been deemed the *ad interim* financial mechanism under the CBD.<sup>20</sup> The fact that already relevant institutions exist is especially important in the current climate when many donor countries are experiencing financial constraints and are reluctant to create new institutions or financial mechanisms. Finally, even if one considers that there are elements of the CBD which should be strengthened or supplemented to if it were to be geared specifically to forests, international law appears to permit protocols to be stronger or broader than the parent convention so long as the new obligations do not go against the object and purpose of the parent convention.<sup>21</sup>

In spite of the merits of the foregoing arguments, no State has yet come forth to propose a CBD Protocol on forests. Firstly, some timber-producing countries would be most reluctant to have one of their most important resources to be dealt with under the CBD, which they might perceive as a strictly "conservation" convention, notwithstanding that the CBD also provides for sustainable use. But even more prevalent is the view that forests consist of more than biological diversity, and that the CBD is too narrow an instrument to deal effectively with the many economic or social factors affecting forests. But this argument rests on the questionable assumption that the CBD requires that the status of biodiversity be the point of departure for State action. Rather, the ordinary meaning of the CBD suggests that only the end result be conservation and sustainable use.<sup>22</sup> In other words, States retain considerable freedom of action to devise appropriate measures dealing with economic and social aspects of forests, under the condition that one of the end results be conservation and sustainable use.

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<sup>20</sup> Article 21.

<sup>21</sup> See, e.g., Montreal Protocol on Substances that Deplete the Ozone Layer (reprinted in 26 ILM 1550 [1987]), which establishes trade restrictions even though the Vienna Convention on the Protection of the Ozone Layer (UKTS 1 [1990], Cmnd 910) makes no reference to trade. There are even instances where protocols amend the parent convention (eg. International Convention for the Prevention of Pollution from Ships (reprinted in 12 ILM 1319 [1973]) and its Protocol of 1978 (reprinted in 17 ILM 546 [1978])).

<sup>22</sup> See, e.g. Article 10(a).



In any event, this type of debate will eventually determine the scope of the CBD and its role in relation to other environmental instruments. Perhaps concerned with the *de facto* shaping of its scope in an external forum, the 1995 meeting of the CBD Conference of the Parties adopted an extensive statement to the IPF signalling the broad applicability of the CBD to forest issues.<sup>23</sup> This was an unsolicited communication in that the CBD had only been assigned responsibility to have an input into the IPF on issues relating to traditional forest-related knowledge.

## 2. Other relevant global international instruments and institutions

### *a) Forest products in international economic relations*

The General Agreement on Tariffs and Trade, and the package of agreements adopted under the Uruguay Round,<sup>24</sup> provide the legal framework for international trade in forest products, with the exception of trade in tropical timber which is governed by the ITTA. Although there have been no panel cases specifically on forests, recent decisions have fuelled general concern that environmental and trade objectives are not fully compatible.<sup>25</sup> This general concern has led to the establishment of the World Trade Organization's Committee on Trade and Environment (CTE), which is charged with examining a broad range of issues,<sup>26</sup> all of which are relevant to forest products. The CTE will report its findings to the Ministerial Conference to be held in Singapore in December, 1996. An especially relevant issue concerns certification and labelling for environmental purposes. In 1992, Austria was severely criticized in the GATT Council for adopting a law establishing a mandatory labelling scheme for

<sup>23</sup> Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, Annex to Decision II/9, UN Doc. UNEP/CBD/COP/II/19, 30 November 1995.

<sup>24</sup> See Agreement Establishing the World Trade Organization and other agreements, reprinted in 33 ILM (1994) 1144.

<sup>25</sup> These decisions related to a State's ability to take unilateral trade measures for environmental purposes. See, especially, Articles I, III, XI and XX of GATT. See, also, decisions in various cases, e.g. *United States: Restrictions on Imports of Tuna*, GATT Doc. DS21/R (3 September 1991), *United States: Restrictions on Imports of Tuna (Tuna II)*, GATT Doc. DS29/R (16 June 1994), and *United States: Standards for Reformulated and Conventional Gasoline*, Report of the Appellate Body, WTO Doc. WT/DS2/AB/R (29 April 1996).

<sup>26</sup> See decision to establish the WTO Committee on Trade and Environment, GATT Doc. MTN.TNC/MIN(94)/1/Rev.1 (11 April 1994).

sustainably managed tropical timber.<sup>27</sup> The formal dispute-settlement process was avoided on account of Austria's amendment of the legislation to remove the offending provisions.

The Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES)<sup>28</sup> places controls on the international markets in listed species so as to help eliminate economic incentives to their over-exploitation. It operates through a system of appendices that classify species in accordance with their conservation status: for Appendix I species, which are most endangered, international trade is virtually halted.<sup>29</sup> So far, some 15 timber or "woody" species have been placed on CITES appendices. Because of the controversies which erupted as a result of attempts at the 1994 meeting of the Conference of the Parties to list several widely traded timber species, a working group was established to study the subject in general and report to the 1997 meeting of the Conference of the Parties.

#### *b) Significant forest sites*

Under the Convention for the Protection of the World Cultural and Natural Heritage (World Heritage Convention),<sup>30</sup> more than 30 forests have been designated as World Heritage sites. The World Heritage Convention provides for the protection of such heritage which is of "outstanding universal value", *inter alia*, from the standpoint of conservation.<sup>31</sup> It places a duty on States to ensure the continuance of this heritage for future generations,<sup>32</sup> including by protection, conservation and rehabilitation.<sup>33</sup> It also requires the international community to cooperate to this end and to provide assistance when so requested.<sup>34</sup> In virtually all cases, the World Heritage forests sites are areas where no use is permitted.

The scope of the Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat (Ramsar Convention)<sup>35</sup> is such that it applies to some forest ecosystems, including mangroves. The

<sup>27</sup> See the Austrian Tropical Timber Labelling Act, Federal Law Gazette 309/118 of 26 June 1992.

<sup>28</sup> UKTS 101 (1976), Cmnd 6647.

<sup>29</sup> See Articles II-V.

<sup>30</sup> 1972 UNJYB 89.

<sup>31</sup> Article 2.

<sup>32</sup> Article 4.

<sup>33</sup> Article 5.

<sup>34</sup> Article 6. See also Articles 15 and 16, which establish the World Heritage Fund.

<sup>35</sup> UKTS 34 (1976), Cmnd 6465.

Ramsar Convention requires each Party to nominate suitable wetlands under their jurisdiction to the List of Wetlands of International Importance and to promote their conservation and wise use.<sup>36</sup> The Convention also calls for the conservation of wetlands by the establishment of nature reserves.<sup>37</sup>

*c) Forests in the context of natural systems*

The UN Framework Convention on Climate Change (Climate Change Convention)<sup>38</sup> relates to forests in their capacity to be carbon sinks that reduce the level of greenhouse gases in the atmosphere. The conservation and sustainable use of such sinks are required by the Convention.<sup>39</sup> The Global Environment Facility, the Climate Change Convention's financial mechanism,<sup>40</sup> has, however, taken the decision not to fund forest-related projects under its climate window. The 1995 meeting of the Conference of the Parties adopted a particularly relevant decision on "activities implemented jointly", which allows industrialised parties to contribute to meeting the objectives of the Convention by taking action, such as reforestation and prevention of deforestation, outside their territories.

The UN Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (Desertification Convention)<sup>41</sup> seeks to establish an integrated approach to address the physical, biological and socio-economic aspects of the process of desertification and drought.<sup>42</sup> Forests are significant because they carry out important ecological functions which prevent or mitigate both desertification and drought. The Convention's regional annexes for Africa and Latin America and the Caribbean require national action programmes to integrate and sustainably manage natural resources, including forests.<sup>43</sup>

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<sup>36</sup> Article 2 ad 3(a).

<sup>37</sup> Article 4(a).

<sup>38</sup> Reprinted in 31 ILM (1992) 849.

<sup>39</sup> Article 4(1)(d).

<sup>40</sup> Article 11.

<sup>41</sup> Reprinted in 5 Ybk IEL (1994) 685, et seq.

<sup>42</sup> Article 4(2)(a).

<sup>43</sup> Article 8(3)(b)(i) for Africa and Article 4(c) for Latin America and the Caribbean.

*d) Forests in connection with indigenous peoples*

The 1989 ILO Convention 169 on Indigenous and Tribal Peoples in Independent Countries<sup>44</sup> is especially relevant to indigenous people who live in or around forests. The Convention requires States to take measures that ensure the full realisation of the social, economic and cultural rights of indigenous peoples,<sup>45</sup> and the safeguarding of their environment.<sup>46</sup> States are required to protect and preserve the territories indigenous peoples inhabit<sup>47</sup> and stipulates recognition of ownership, possessive, and use rights of indigenous peoples over the lands they occupy.<sup>48</sup> The Convention also places particular emphasis on the rights of indigenous peoples to use, manage and conserve the natural resources pertaining to the lands they occupy.<sup>49</sup>

*e) International institutions in relation to forests*

While there are several global institutions which impact on forests,<sup>50</sup> the Food and Agriculture Organization of the UN (FAO) stands out for special mention. The FAO has, by virtue of Article I(2)(3) of its constitution, the mandate to promote the conservation of natural resources. It has been heavily involved in assisting developing countries elaborate national forestry legislation and has its own forestry programme and Committee on Forestry. The FAO is now the only remaining organization to operate the Tropical Forestry Action Programme (TFAP), which had become severely discredited and is in the process of reorientation. The FAO has been criticized for its handling of forestry issues, in that it has been seen as focusing too much on conventional forestry and timber exploitation, as compared with conservation. Many failures of the TFAP have been attributed directly to the FAO. The organization has earned the distrust of NGOs, for not being transparent, and of developing countries, for pro-

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<sup>44</sup> Reprinted in 28 ILM (1989) 1382.

<sup>45</sup> Article 2(2)(a).

<sup>46</sup> Article 4(1).

<sup>47</sup> Article 7(4).

<sup>48</sup> Article 14.

<sup>49</sup> Article 15.

<sup>50</sup> E.g. ITTO, UN Development Programme, UN Environment Programme, UN Conference on Trade and Development. The World Bank should be noted as a particularly important player. It has adopted a policy on forests that includes forest conservation and sustainable use. Since 1994, an independent Inspection Panel has been in operation to help ensure that Bank policies are complied with.

moting a global convention on forests during UNCED. Although the FAO is the task manager in the UN system for forestry issues, it has not been given the lead mandate to develop global policy and was passed over for administering the IPF. It should be noted that there have been recent signs that the FAO is seeking to reform its approach in answer to past criticisms.

*V. Elements of an International Regime for the Conservation and Sustainable Use of Forests: the Forest Principles as a Start*

Although the Forest Principles are less legally significant than a treaty on forests would be, its conclusion is nonetheless an achievement which should not be underestimated. The wording of the instrument is certainly reflective of many compromises, but the document is nonetheless of legal significance in codifying and applying existing principles of international law to the forest context. As indicated above, the CBD already provides a solid legal basis for an international regime. But if the CBD is unacceptable, from the political standpoint, the Forests Principles may also serve a useful function in this regard. Indeed, the strength of this “soft law” document is apparent in that it was relied upon at several points during the renegotiation of the ITTA, indicating that some States perceive it as expressing *opinio juris*.<sup>51</sup>

The main legal principles that appear in the Forest Principles are listed below, each of which is now well grounded in international environmental law:

- States have sovereign rights over the forests under their jurisdiction (Principle 1(a)).<sup>52</sup>
- Forests should be sustainably managed (Principle 2(b))<sup>53</sup> and conserved (Principles 7 (b) and 8(f)).<sup>54</sup>

<sup>51</sup> Scally (note 6).

<sup>52</sup> See, e.g., 1962 UN General Assembly Resolution 1803 on Permanent Sovereignty over Natural Resources; Principle 2 of the Rio Declaration on Environment and Development; and Article 3 of the CBD.

<sup>53</sup> For evidence to support the proposition that natural resources should be sustainably managed, even when within national jurisdiction, see, e.g. Articles I and IX of the Treaty for Amazonian Cooperation, reprinted in 17 ILM 1045 (1978); Article 1(1), 9 and 12(1) of the ASEAN Agreement on the Conservation of Nature and Natural Resources, 15 EPL 64 (1985); CBD, generally; and Article 1(l) of the 1994 ITTA.

<sup>54</sup> The notion that special natural resources should be conserved is found in several sources, e.g. Pacific Fur Seal Arbitration (*UK v. USA*), 1893, Moore, International Arbitration History, Vol. 1, 945; Article 4 of the Convention on the Conservation of European Wildlife and Natural Habitats, UKTS 56 (1982), Cmnd. 8738; and Article 8 of the CBD.

– A preventive/precautionary approach should be taken to forest protection (Principle 2(b)).<sup>55</sup>

– The costs of forest conservation and sustainable development should be shared equitably by the international community (Principles 1(b), 9 and 10).<sup>56</sup>

– The importance of the role of public participation in the decision-making process affecting forests should be recognized (Principles 2(c) and (d)).<sup>57</sup>

– Agreed rules that are non-discriminatory and consistent with international law should govern trade in all forest products (Principle 13(a)).<sup>58</sup>

The Forest Principles do not, however, contain all elements of a global regime. For example, there could be more emphasis on conservation. But at the same time, important policy assertions are made therein, such as the recognition that forests are of value to the environment as a whole (Preamble Paragraph (f)), and on the need to safeguard the cultural, spiritual and recreational value of forests ((Principle 2(b)). It must also be noted that Agenda 21 contains a detailed recipe for specific action which follows several notions set forth in the Forest Principles.

#### VI. A New Convention on Forests

It is still too soon to know whether a convention on forests is a realistic option. Certainly, the idea is very much alive in the Northern countries, especially in the European Union and Canada. At the same time, the

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<sup>55</sup> See, P. Sands, *Principles of International Environmental Law*, 1995, at 208, where it is asserted that the preventive principle is traceable to international environmental law since the 1930s. Regarding the precautionary principle, see e.g., Preamble to the Vienna Convention for the Protection of the Ozone Layer, reprinted in 26 ILM 1529 (1987); Article 4(3)(f) of the Bamako Convention on the Ban of Import into Africa and Control of Transboundary Movement and Management of Hazardous Waste Within Africa, reprinted in 30 ILM 775 (1991); and Preamble to the CBD.

<sup>56</sup> See Principle 7 of the Rio Declaration on Environment and Development, acknowledging “common but differentiated responsibilities” and the financial mechanisms established in post-UNCED environmental treaties.

<sup>57</sup> The principle of public participation is well entrenched in international law: see Article 21 of the Universal Declaration of Human Rights, Article 25 of the UN Covenant on Civil and Political Rights, Article 13 of the African Charter on Human Rights and Article 23 of the American Convention on Human Rights. This right implies a right to seek and receive information, which is also well reflected in international environmental law, e.g. Article 6 of the Climate Change Convention. With respect to forest dwellers, see, e.g. Articles 10(c) and 8(j) of the CBD.

<sup>58</sup> See, e.g., Articles I and III of the General Agreement on Tariffs and Trade.

constructive dialogue which has occurred in various international contexts since UNCED may have succeeded in moving some developing countries away from their hard opposition to such a treaty. No developing country, however, has so far officially supported this option and it is not yet apparent what obligations such a convention, even if feasible, would contain.

The principal reason put forth for a convention on forests is that the issues relating to forests are so distinct and varied that the holistic approach necessary to deal effectively with them transcends the confines of existing agreements. Several advantages to a new convention exist. Firstly, the negotiating process for such an agreement could catalyse fresh thinking about institutional and substantive matters. Secondly, it might be easier to focus a new convention not only on conservation and sustainable use of forests, but also the role of forests in natural systems (e.g. as carbon sinks and in stabilizing watersheds), their socio-economic significance in each country, the effects of international trade, and their cultural and spiritual value. Thirdly, many issues relating to forests might be better dealt with through regional cooperation; a new convention on forests could be a framework which allows for regional annexes or protocols.

There are three risks associated with a new convention on forests. The first is common to many environmental contexts, and that is that in order to achieve global agreement the substantive obligations will reflect the lowest-common-denominator. This is a very real risk, in that the experience of the IPF to date reveals that many differences persist as between States. Secondly, there is a risk that a new convention on forests might undermine existing instruments, especially the CBD. This need not necessarily be the case, just as having separate instruments on protecting the marine ecosystem, species, and habitats<sup>59</sup> does not undermine the CBD. But this risk is best addressed openly during the drafting process and appropriately dealt with. The challenge of finding synergy between various international environmental regimes is currently high on the international agenda. At a minimum, a separate convention on forests should establish links to the CBD, Climate Change Convention, Desertification Convention and other relevant international agreements. Thirdly, there is a fear among some environmentalists that the somewhat discredited FAO might be assigned the task of providing the institutional framework for such an agreement.

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<sup>59</sup> I.e. the 1982 UN Convention on the Law of the Sea, UN Doc. A/CONF 62/122 (with corrigenda).

### VII. *Evaluation*

Certainly, it must be said that the efforts to develop the international forests regime must continue, since the objective situation is not improved since UNCED. The Secretariat of the FAO Committee on Forestry has recently reported the following progress since UNCED:

“The number of projects aiming at more involvement of the ‘major groups’ in forest management at local and national levels has increased, but much more remains to be done. On the other hand, little progress has been achieved in inter-sectoral planning, including land use planning, and indiscriminate clearing and over-exploitation of forests continue unabated in too many parts of the world. Capacity-building continues to be hampered in most developing countries by financial difficulties and the severe structural adjustment programmes which many governments have to face. And the levelling off of Official Development Aid to the forestry sector, despite the high expectations raised by UNCED, has been a major setback in efforts by developing countries to implement their national forest action plans”.<sup>60</sup>

The regime, as defined at the outset of this article, has not yet fully crystallized: a consensus has yet to be reached on a substantive approach to the conservation and sustainable use of forests. Very little in terms of agreed benchmarks and targets exists against which behaviour can be measured. In addition, no division of labour among international institutions has yet been concluded and no agreed forum has been selected for integrated negotiation and dispute resolution in relation to forest issues. Therefore, further development of all foundations of a regime – norms, principles, and decision-making procedures – is required for the forests regime to reach maturity.

Nonetheless, the wheel does not require re-invention. Some consensus already does exist and is reflected in current international law. The overall goal of sustainability has now been accepted without question. Differences over the precise achievement of this goal, partially reflected in the recent debate at the IPF on “criteria and indicators” of sustainable forest management are, however, indicative that further consensus building must take place.<sup>61</sup> Indeed, the differing interests in the international community

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<sup>60</sup> Committee on Forestry, “Assessing the Advantages and Disadvantages of a Legally Binding Instrument on Forests” (COFO 95/2, Supp. 4), paragraph 12.

<sup>61</sup> See 13 Earth Negotiations Bulletin, No. 11.



– global versus national and local, forest-rich States versus forest-poor States, and tropical versus temperate States<sup>62</sup> – are still very much in evidence. It remains to be seen whether the IPF process will succeed in bridging some of the major gaps. But, as has been argued in this article, the combination of the Forest Principles and the CBD provide a strong legal basis upon which the substance and procedure entailed in a global regime for conservation and sustainable use of forests can be built.

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<sup>62</sup> See G. K. Rosendal, *The Forest Issue in Post-UNCED International Negotiations: Conflicting Interests and Fora for Reconciliation*, 4 *Biodiversity and Conservation* 91 (1995).