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A non-legally-binding instrument as an alternative to a forest convention

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WORK REPORT

Institute for World Forestry

A non-legally-binding Instrument as an Alternative to a Forest Convention

by

Thomas W. Schneider



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for Forestry and Forest Products (BFH)**

and

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NON-LEGALLY BINDING INSTRUMENT

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Institute for World Forestry

A non-legally-binding Instrument as an Alternative to a Forest Convention

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The question of protecting forests under an international binding convention has challenged nations like few other environmental issues and dominated much of the "United Nations Conference on Environment and Development" (UNCED) in 1992, where countries ultimately adopted a set of non-legally-binding "Forest Principles". The debate among governments intensified UNCED follow-up, in tandem with growing public concern about ongoing deforestation and forest degradation worldwide. In May 2005 the fifth session of the United Nations Forum on Forests (UNFF-5) was held in New York. UNFF-5 was meant to be a milestone for a new chapter of the international forest policy. However, the session ended in complete confusion due to irreconcilable country positions. The session was discontinued without any result. The negotiated Chairmen's text was sent to UNFF-6 (February 2006). The chance to launch a negotiating process on a forest convention was not used. At UNFF-6 it was decided to negotiate at UNFF-7 (April 2007) on a non-legally-binding Instrument (NLBI) on Management, Conservation and Sustainable Development of All Types of Forests (*International Instrument on All Types of Forests*). A decision to negotiate on a legally-binding-Instrument (LBI) will be subject of the UNFF session in the year 2015.

The history of a Forest Convention

Forests are a major component of the Earth's basic life support system. It is widely recognized that the economic, social and environmental well-being of people world-wide is closely associated with the health of forests and their sustained ability to provide multiple benefits. The alarming rates of deforestation and forest degradation-, experienced during the past four decades - especially in the tropical and boreal regions, and the consequent impact on the structure and functions of forests and their associated benefits, elevated forests on the international political agenda in the 80's, particularly with regard to the postulation of environmental NGOs to boycott tropical timber.

Initiated by the recommendations of

- the Scientific Committee on Problems of the Environment (SCOPE) established in 1969, dealing with scientific issues of major significance on the world environmental scene,
- the Report of The Club of Rome (1972) "The Limits to Growth",
- the "Global 2000 Report to the President" (1981) by the [Council on Environmental Quality](#), commissioned by President [Jimmy Carter](#), and finally
- the report of the UN World Commission on Environment and Development (WCED) "Our Common Future"(1987),

the 44th session of the United Nations General Assembly (GA) in 1989 passed resolution 44/228¹ to convene in 1992 in Rio de Janeiro/Brazil the "United Nations Conference on Environment and Development", to elaborate strategies to halt and reverse the effects of environmental degradation [by strengthening efforts] to promote sustainable and environmentally sound development in all countries".

¹ The Economic and Social Council decided to convene the United Nations Conference on Environment and Development for the duration of two weeks ([ECOSOC 1989/87](#)). The General Assembly affirmed the decision in December 1989 ([A/RES/44/228](#)).

NON-LEGALLY BINDING INSTRUMENT

The UN Conference on Environment and Sustainable Development (UNCED) - popularly known as the "Earth Summit" - provided the first opportunity on high political level to address international forest policy and related actions. The forest issue was one of the most politically sensitive and controversial issues negotiated at the Earth Summit in Rio that polarized the industrialized and the developing countries. Under these circumstances was unrealistic to adopt a Forest Convention. However, one of the intensely negotiated outcomes of the UNCED were the Forest Principles, officially called the *Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests*. The *Agenda 21*, another instrument adopted at Rio, included Chapter 11, *Combating Deforestation*. The guiding objective of the Forest Principles is to contribute to the management, conservation and sustainable development of forests and to provide for their multiple and complementary functions and uses.

Although there is no single legally-binding global instrument that deals exclusively with forests, a number of legally-binding agreements have an effect on the management of forest resources and trade of forest products. The intension of some countries for the creation of a legally-binding instrument (LBI) on forests (forest convention) at UNCED and in the post-Rio process was to establish a framework covering the various issues of the fragmented or scattered international forest regime and e.g. to avoid duplication and repetition. An international binding convention on forests is sometimes referred to as "the missing Rio convention" or the "fourth convention", the three others being the Framework Convention on Climate Change (FCCC), the Convention on Biological Diversity (CBD), and the Convention to Combat Desertification (CCD).

Throughout this last decade, the main focus within the United Nations has been to develop coherent policies to promote the management, conservation and sustainable development of all types of forests. The United Nations Commission on Sustainable Development (CSD)² – mandated with the implementation of Agenda 21 - established in 1995 the *Intergovernmental Panel on Forests (IPF)*, which was in 1997 succeeded by the *Intergovernmental Forum on Forests (IFF)*, to implement the Forest Principles and *Chapter 11 of Agenda 21*. From 1995 to 2000, the IPF/IFF processes dealt with such issues as the "underlying causes of deforestation, traditional forest-related knowledge, international co-operation in financial assistance and technology transfer, the development of criteria and indicators for sustainable forest management, and trade and environment" and were the main intergovernmental fora for international forest policy development.

The IPF/IFF processes examined a wide range of forest-related topics and presented the outcome in the form of more than 270 proposals for action towards sustainable forest management and are considered collectively as the IPF/IFF Proposals for Action. Although the IPF/IFF Proposals for Action are not legally binding, participants of these processes are under a political obligation to implement the agreed proposals for action.

To give forest related issues a higher political awareness and to negotiate them on a higher political level within the UN-system, in 2000 the United Nations Economic and Social Council (ECOSOC) established the *United Nations Forum on Forests (UNFF)*, as a subsidiary body directly positioned under ECOSOC, which had as its main objective to promote "...the management, conservation and sustainable development of all types of forests and to strengthen long-term political commitment to this end".

² Three years after Rio, in 1995, governments decided, to establish IPF and subsequently IFF as subsidiary bodies of the UN Commission on Sustainable Development (UNCSD) under the Economic and Social Council (ECOSOC) of the United Nations.

NON-LEGALLY BINDING INSTRUMENT

The purpose of the UNFF is to facilitate implementation of the IPF/IFF Proposals for Action, provide a forum for policy dialogue, enhance coordination of work of international organizations, foster international cooperation, monitor and assess progress, and enhance political commitment to sustainable forest management. Through this process, the Collaborative Partnership on Forests (CPF) was established to support the work of the UNFF and to foster increased cooperation and coordination on forests. Since UNCED intergovernmental deliberations (IPF, IFF and UNFF) have made notable progress towards international forest policy development and policy coordination at the international level. However, despite the achievements, deforestation and forest degradation in the world continue at an alarming rate. Adequate progress in implementation is lacking. The need for the mobilization of financial and technical resources for this implementation is stronger than ever.

A decade after the initiation of the IPF/IFF/UNFF processes, the international community is now faced with the challenging task to decide the future of the International Arrangements on Forests (IAF) in the context of the current political realities that have evolved since UNCED. UNFF 5 showed a strong call for a significant strengthening and improvement of the IAF in order to make it more effective not only at mobilizing political commitment but also in actually catalyzing and facilitating implementation actions on the ground. Key elements for the future IAF are the overarching objectives, means of implementation, especially adequate financial and technical resources, and an international instrument on forests.

During the past meetings, views differed on whether or not a convention on forests or other legally binding instrument is needed but most experts agreed that the IAF needs to be strengthened in some way. Different options for strengthening the IAF were discussed, including:

- A global framework, possibly including priorities and targets for forest policy
- A focus for collaborative action, addressing forest-related issues in a coordinated and comprehensive manner, in contrast to the current fragmented approach
- Improvement in the level of monitoring, assessment and reporting, with a clearly defined approach
- Promoting co-operation, financial assistance and technology transfer; and
- Ensuring the long-term reliability in sources of funding.

Shift in global priorities on high-political level

Since 1992, the international community has been considering the adoption of a global instrument on all types of forests. However, since UNCED, the current realities and political context surrounding forest issues has changed considerably and a significant shift has occurred in the global priorities now being addressed on high-political level, there has been a concurrent and notable decline in domestic as well as international political commitment, financial support and international cooperation towards forests³.

The post-Rio attention on forests as a priority issue on high political level is no longer evident. It is, however, noted that in the Millennium Development Goal (MDG) No. 7, aimed to "Ensure Environmental Sustainability", reference is made to intensify collective efforts for the management, conservation and sustainable development of all types of forests. Furthermore, sustainable forest management was noted essential at the World

³ CLI-FIAF background document, entitled: *Background Discussion Paper Prepared for the Country-led Initiative in Support of the United Nations Forum on Forests on the Future of the International Arrangement on Forests*, by Jagmohan S. Maini, O.C., Ph.D., dated December 31, 2004.

NON-LEGALLY BINDING INSTRUMENT

Summit on Sustainable Development (WSSD), held ten years after UNCED in Johannesburg, South Africa, in 2002, to achieve sustainable development as a critical means for eradicating poverty thus also contributing to the achievement of the MDG Goal No. 1 to "Eradicate Extreme Poverty and Hunger". However, the indicators to monitor progress on MDG focus on biophysical aspects of forests, namely, on the changes in forest cover and on the number and area of protected forests (Box 1).

High level political attention around the world is now heavily focused on 'societal issues', for example: the economic, social and human development issues such as poverty alleviation, sustainable livelihoods, rural development; human health including HIV/AIDS, Malaria and other diseases; food security; adequate clean water; and concerns about national security and public safety in context of political instability, terrorism, civil unrest and armed conflicts in many parts of the world. Forests, environment and natural resources per se no longer appear to be a high global priority on the current high-level political agenda.

Box 1: What are the Millennium Development Goals?

The eight Millennium Development Goals (MDGs, Box. 8) – which range from halving extreme poverty to halting the spread of HIV/AIDS and providing universal primary education, all by the target date of 2015 – form a blueprint agreed to by all the world's countries and all the world's leading development institutions. They have galvanized unprecedented efforts to meet the needs of the world's poorest.

Results of the fifth session of the UNFF

From 2000 to 2005 UNFF held five sessions according to its Multi-Year Programme of Work (MYPOW), adopted at the first session of UNFF. The MYPOW suggests a structure for subsequent sessions of the UNFF (box 3). Several important issues were grouped under "Means of Implementation" and "Common Items" that are to be treated across all UNFF elements. The fifth session of the UNFF (May 2005) had in the forefield been the session with the greatest expectations since UNFF was established in the year 2000. On the agenda were - in accordance with its MYPOW - among others the following items:

- Review of progress and consideration of future actions.
- Review of the effectiveness of the international arrangement on forests, as referred to in paragraph 17 of Economic and Social Council resolution 2000/35.
- On the basis of the assessment referred to in paragraph 2 (e) of Economic and Social Council resolution 2000/35, consideration of the parameters of a mandate for developing a legal framework on all types of forests, with a view to recommending them to the Council and through it to the General Assembly.

A promising starting point was the far reaching consensus of all participants that the „status quo“ of the current International Arrangement on Forests (IAF) was not acceptable and fundamental changes are necessary in view of the intrinsic objective to promote "... the management, conservation and sustainable development of all types of forests and to strengthen long-term political commitment to this end..." based on the Rio Declaration, the Forest Principles, Chapter 11 of Agenda 21 and the outcome of the IPF/IFF Processes and other key milestones of international forest policy (Box 2).

Box 2: Key milestones of international forest policy:

- The Rio Declaration, Forest Principles and Agenda 21 (Chapter 11 +16 other Chapters) agreed in 1992;
- Millennium Development Goals established in 2000;
- The Johannesburg Plan of Implementation agreed in 2002;
- The Monterrey Consensus reached in 2002;
- The Ministerial Statement at UNFF 2, agreed in 2002;
- The Bali and Yaoundé Ministerial Declarations on Forest Law Enforcement and Governance, agreed in 2002 and 2003, respectively;
- The Final Statement on "Forests, Source of Life", made at the XII World Forestry Congress, in Quebec City, Canada, in 2003;
- Report of the AHEG RARAM held in New York, September 2004
- The outputs of IPF/IFF/and UNFF process: 1995-2006

Even those countries, which had in the past presented UNFF as an efficient forum, accepted that UNFF shows considerable deficiencies. Therefore it was expected that all participants agree to strengthen the future IAF. It was provided to adopt global objectives and quantitative terms of reference to make the IAF more effective and popular to give the global forest process by this means a higher attention. But the negotiating process trended in another direction: concerning the contents the UNFF-5 negotiations were only focused on the establishment of global goals in the frame of the international forest policy dialogue.

Already here the negotiating process bogged down, because the minimum requirements of the EU (Council Conclusion 26.04.2005) and some other countries like Canada, Switzerland, Norway, South Korea und Mexico, to establish clear and time bounded global objectives was not acceptable for Brazil, the USA, and India. UNFF-5 was unable to reach agreement on strengthening the IAF and could not produce either a ministerial statement or a negotiated outcome although they agreed in principle to negotiate, at some future date, the terms of reference for a voluntary code or international understanding as well as means of implementation.

The negotiations of UNFF-5 were abandoned without a decision on the Draft Chairman`s Text (Thursday 26 May 2005 8:00 pm). Due to various change requests it was not possible to finalize the negotiations on the Draft Chairman`s Text in the given time frame. Therefore it was adjourned to UNFF-6 (February 2006). The chance to launch negotiations on a Forest Convention was missed, as a bigger part of the countries associate the assessment of forest development with the implementation of the Millennium Development Goals, MDGs.

NON-LEGALLY BINDING INSTRUMENT

Box 3: Multi-Year Programme of Work of UNFF

First session (2000)	Second session (2002)	Third session (2003)	Fourth session (2004)	Fifth session (2005)
Adoption of the multi-year programme of work	Combating deforestation and forest degradation	Economic aspects of forests	Traditional forest-related knowledge	Review of progress and consideration on future actions
Development and adoption of a plan of action	Forest conservation and protection of unique types of forests and fragile ecosystems	Forest health and productivity	Forest-related scientific knowledge	On the basis of the assessment referred to in para. 2 (e) of Council resolution 2000/35, consider, with a view to recommending to the Council and through it to the General Assembly, the parameters of a mandate for developing a legal framework on all types of forests
Initiation of the work of the Forum with the Collaborative Partnership on Forests	Rehabilitation and conservation strategies for countries with low forest cover	Maintaining forest cover to meet present and future needs	Social and cultural aspects of forests	Review the effectiveness of the international arrangement on forests
	Rehabilitation and restoration of degraded lands and promotion of natural and planted forests		Monitoring assessment and reporting, concepts and terminology and definitions	
			Criteria and indicators of sustainable forest management	
	Concepts, terminology and definitions			
	Ministerial			Ministerial

Results of the sixth session of the UNFF

UNFF-6 (February 2006) pursued the abandoned negotiations to decide according to ECOSOC-Resolution 2000/35 on the future of the International Arrangements on Forests (IAF) and to negotiate the mandate on a legally-binding Instrument (LBI) on Management, Conservation and Sustainable Development of All Types of Forests based on Economic and Social Council resolution 2000/35 and the United Nations Forum on Forest's multi-year programme of work adopted in its resolution 1/1. On the agenda was among others the item: Implementation of decision 5/2 of the fifth session of the United Nations Forum on Forests.

UNFF-6 tried back to the Draft Chairman's Text and gave states again the opportunity to expose their positions and thoughts of what should come out of the forum, their commitments to what they think are the major issues for the future International Arrangement on Forests (IAF). The discussion at UNFF-6 focused on the indicative elements of an instrument, the process by which an instrument would be developed and consideration of the international instrument on all types of forests option.

At the end the Chairman's Text/Resolution emphasized the importance of strengthening political commitment and action at all levels to implement effectively the sustainable management of all types of forests and to achieve the global objectives set out in the resolution (Box 4), by requesting the United Nations Forum on Forests to conclude and adopt at its seventh session a non-legally binding instrument (NLBI) on all types of forests. The outcome of the UNFF-6 negotiations is that there is actually no consensus on a legally binding instrument. Opposition is for several reasons too strong in several regions worldwide. However, a LBI has been maintained as a future option for UNFF-11 in 2015. This option was the reason that also those states – advocating a LBI – adopted to negotiate on a NLBI.

Box 4: The four Global Objectives adopted at UNFF-6

Global Objective 1

Reverse the loss of forest cover worldwide through sustainable forest management, including protection, restoration, afforestation and reforestation, and increase efforts to prevent forest degradation;

Global Objective 2

Enhance forest-based economic, social and environmental benefits including by improving the livelihoods of forest dependent people;

Global Objective 3

Increase significantly the area of protected forests worldwide and other areas of sustainably managed forests, and increase the proportion of forest products from sustainably managed forests;

Global Objective 4

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;

The chairman's text to this item finally reads as follows: "With a view to achieving the main objective of the international arrangement on forests, and to enhancing 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, and in this regard, emphasizing the

NON-LEGALLY BINDING INSTRUMENT

importance of political commitment and action at all levels for effective implementation of the sustainable management of all types of forests, sets the following shared global objectives on forests and agrees to work globally and nationally and to make progress toward their achievement by 2015”.

Options for UNFF-7

Substantive issues to be concluded and adopted at the seventh session are specifically: (i) the non-legally binding instrument, and (ii) the MYPOW such as the Regional Dimension in UNFF and Interagency collaboration, including Collaborative Partnership on Forests (CPF).

In the forefield of UNFF-7 (April 2007) contributions and proposals for a non-legally binding instrument (NLBI) (*International Instrument on All Types of Forests*) have been submitted by several member States and a number of groups. These show a continued commitment and willingness to strengthen the International Arrangement on Forests through a NLBI and will be for the first time discussed at the open ended ad-hoc expert group meeting in December 2006 to further elaborate the non-legally binding instrument on forests particularly with regard to common elements, major differences and possible additional desirable elements for a NLBI in the submitted proposals and on the reactions to them.

The establishment of an international forest convention within the UN-system⁴ is only realistic if two prerequisites are met:

- commitment by developed states to provide additional overseas development assistance (ODA);
- political support of the United States and Brazil.

This does not appear likely in the near future, because there is absolutely no evidence to suggest that the key actors that currently oppose a forest convention and/or aid increases are prepared to change position. An alternative seems to be a non-legally binding instrument on forests, a so-called “soft law” instrument.

Especially the nature of legally binding is the blocking element for a way forward. Against this background as a compromise between the opposite positions an instrument for sustainable forest management is proposed that is not legally binding, but should be at the same time strong and powerful enough to attract political commitment and a firm basis for the necessary financial resources and requires states to actively subscribe to it in order to demonstrate their political commitment to it. Participation in the instrument would be voluntary and open to all states.

States would subscribe to the instrument by means of a note verbal/diplomatic note⁵, which is sent to the state or international organization that organizes the launching conference. A non-binding model for the note verbal/diplomatic note will be made available to states that have indicated their intention to subscribe to the instrument. Since the instrument is not legally binding, it will not be subject to ratification, acceptance, approval or accession and may therefore become operational immediately after its formal adoption at the launching conference.

⁴ Canada hosted in October 2006 a meeting to discuss options on an initiative on a Legally-Binding Instrument outside the UN-system as a consequence of the dissatisfactory results and slowly progress of UNFF. Participants were experts of those countries advocating a Forest Convention since the beginning of the international negotiations.

⁵ A non-binding model for the *note verbale* is made available to states that have indicated their intention to subscribe to the instrument. An example is The Hague Code of Conduct against Ballistic Missile Proliferation that was adopted at a diplomatic conference in The Hague.

NON-LEGALLY BINDING INSTRUMENT

There exists a variety of non-binding “soft law” instruments in the international system. These instruments are differently formulated and differently structured. There is also a variety of titles for non-binding legal instruments: e.g. codes of conduct (box 5), guidelines, undertaking, and memoranda of understanding. The title is not in itself the determinant of its legal or political weight.

This type of instrument is adopted at a diplomatic conference. Participation in the instrument is voluntary and open to all states. Since the instrument is not legally binding, it is not subject to ratification, acceptance, approval or accession and may therefore become operational immediately after its adoption. However, states are required to actively subscribe to the instrument in order to demonstrate their political commitment. States subscribe to the instrument by means of a *note verbale* that is sent to the state or international organization that organizes the diplomatic conference.

Examples are the Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests that was adopted at the United Nations Conference on Environment and Development, FAO Voluntary Guidelines on Responsible Fishing and International Undertaking on Plant Genetic Resources for Food and Agriculture.

Box 5: Examples of Codes of Conduct in the UN-System

FAO Code of Conduct for Responsible Fisheries (“FAO Fish Code”)
International Code of Conduct Against Ballistic Missile Proliferation
FAO International Code of Conduct on the Distribution and Use of Pesticides
The International Arms Sales Code of Conduct Act of 1999
Code of Conduct for Social Science Research
International Code of Conduct on Transnational Corporations
(UN Code of conduct for transnational companies)
Voluntary Code of Conduct for the Release of Organisms into the Environment
International Code of Conduct for Plant Germplasm Collecting and Transfer.

Non-binding legal instruments are adopted in a number of ways, which can be significant for their ultimate legal effect. Indeed, although some attributes of treaty development may not be present – e.g. full powers or a diplomatic conference – the elaboration of a non-binding instrument can involve similar negotiation approaches. The EU advocated in its Council Conclusion April 2005 subscription following adoption. For the European Union, the added value of subscription depends on the level of adherence to and the contents of the International Instrument on all types of forests.

Box 6: The seven thematic elements of SFM

UNFF-4 acknowledged the following thematic elements of sustainable forest management, which are drawn from the criteria identified by existing criteria and indicators processes and offer a reference framework for sustainable forest management:

1. Extent of forest resources.
2. Biological diversity.
3. Forest health and vitality.
4. Productive functions of forest resources.
5. Protective functions of forest resources.
6. Socio-economic functions.
7. Legal, policy and institutional framework.

An added value of the NLBI is only given if it addresses and regulates forest issues not or only partly covered by other forest related instruments like FCCC and CBD. As the FCCC rep. the Kyoto-Protocol is more focused on technical aspects of implementation and the CBD on biodiversity and conservation, the NLBI should be focused on sustainable forest management (SFM) in its widest sense, with regard to the seven thematic elements of SFM (box 6). With other words, a clear formulation is urgently needed to demonstrate the added value of the NLBI in view of SFM to launch a strong political process to achieve a LBI.

Box: 7: The Millennium Development Goals (MDGs)

The MDGs are eight goals to be achieved by 2015 that respond to the world's main development challenges. The MDGs are drawn from the actions and targets contained in the **Millennium Declaration** that was adopted by 189 nations-and signed by 147 heads of state and governments during the **UN Millennium Summit** in September 2000.

- Goal 1: Eradicate extreme poverty and hunger
- Goal 2: Achieve universal primary education
- Goal 3: Promote gender equality and empower women
- Goal 4: Reduce child mortality
- Goal 5: Improve maternal health
- Goal 6: Combat HIV/AIDS, malaria and other diseases
- Goal 7: Ensure environmental sustainability
- Goal 8: Develop a Global Partnership for Development

Resolution adopted by the General Assembly [without reference to a Main Committee (A/55/L.2) 55/2. United Nations Millennium Declaration