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Forests and the EU – Perspectives for the International Governance of Natural Resources and the Conservation of Biodiversity

Stiina Löytömäki

VANTAAN TUTKIMUSKESKUS – VANTAA RESEARCH CENTRE

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Metsien vähenemistä ja metsien biodiversiteetin köyhtymistä on jo jonkin aikaa pidetty sellaisina yleismaailmallisina ongelmina, jotka vaativat välitöntä toimintaa. Metsäasioissa suuri joukko organisaatioita ja toimijoita onkin jo nyt osallistunut kansainväliseen ja alueelliseen yhteistyöhön. Tästä huolimatta kansainvälisellä areenalla ei vieläkään ole löydetty sellaisia mekanismeja, jotka mahdollistaisivat ongelmien tehokkaan ratkaisemisen.

Huolimatta lisääntyneestä kansainvälisestä ympäristösääntelystä ja metsiä kohtaan osoitetusta mielenkiinnosta ei metsiä sääntele sitovasti yksikään kansainvälinen sopimus. Useat kansainväliset ja alueelliset instituutiot ja organisaatiot osallistuvat metsien sääntelyyn sillä seurauksella, että niiden toiminnot ovat osittain päällekkäisiä. Metsien sääntely kuuluu kansainvälisesti kahden eri regiimin alaisuuteen, metsä- ja biodiversiteettiregiimin. Rion ympäristö- ja kehityskokouksessa vuonna 1992 solmittu Biodiversiteettisopimus sitoo siihen liittyneitä valtioita. Riossa sovittiin myös ei-laillisesti sitovista kansainvälisistä metsäperiaatteista. Biodiversiteettisopimus sitovana kansainvälisenä sopimuksena suojelee myös metsien biodiversiteettiä. Sen sijaan metsiä luonnonvaroina sääntelevät vain ei-sitovat metsäperiaatteet. Biodiversiteettisopimus heijastelee yleisiä tai yhteisiä kansainvälisiä luonnonsuojeluintressejä, kun taas metsäperiaatteet kuvastavat kansallisvaltioiden suvereenisuuden periaatteen mukaista oikeutta päättää itsenäisesti luonnonvarojen hyväksikäytöstä. Näitä intressejä on pyritty sovittamaan yhteen paitsi kansainvälisessä ympäristölainsäädännössä myös kansainvälistä kauppaa koskevassa lainsäädännössä.

Tutkimuksen keskeinen hypoteesi on se, että luonnon hyväksikäytön ja luonnonsuojelun välillä vallitsee ratkaisematon jännite, jota Biodiversiteettisopimus ja metsäperiaatteet ilmentävät. Kansainvälisen metsäsääntelyn toteuttamista vaikeuttaa nimenomaan luonnonsuojelutavoitteen ja luonnon hyväksikäytön intressin yhteentörmäys. Toistaiseksi sovittamattomaksi osoittautunut ristiriita on johtanut siihen, että kansainvälinen metsiä koskeva sääntely on fragmentoitunut eri regiimien alaisuuteen.

Ympäristölainsäädännössä ovat viime vuosina lisääntyneet ns. pehmeä lainsäädäntö (soft law) ja markkinakannustimiin perustuva sääntely. Sitovan kansainvälisen metsäsopimuksen puuttuessa näin on tapahtunut myös metsien sääntelyn kohdalla. Tutkimuksessa tarkastellaan siirtymistä niin sanotusta komenna ja kontrolloi -sääntelystä joustaviin markkinakannustimiin tai vapaaehtoiseen sääntelyyn. Se, että markkinakannustimiin on siirrytty metsäsääntelyssä saattaa myös osittain olla seurausta edellä mainitusta luonnonsuojeluintressien ja luonnonvarojen taloudellisen hyödyntämisen yhteensovittamisongelmasta.

Ekologisen taloustieteen paradigma tai perspektiivi on kuitenkin viime vuosina pyrkinyt osoittamaan, etteivät talouden ja ympäristön intressit viime kädessä ole aivan niin eriävät kuin mitä käsillä olevassa tutkimuksessakin annetaan ymmärtää. Biodiversiteetillekin on viime vuosina kyetty osoittamaan taloudellista arvoa ja biodiversiteettiä on entistä enemmän alettu tarkastella paitsi itseisarvona myös voimavarana ja taloudellisena hyödykkeenä (muun muassa lääkeaineina) tai ainakin sellaisten tärkeänä edellytyksenä.

Tutkimuksen pääasiallisena tavoitteena on katsauksen luominen olemassa olevaan metsiä koskevaan kansainväliseen ja EU-säädöstöön sekä niin sanottuun pehmeään lainsäädäntöön (soft law). Tutkimuksen luvussa 2 esitellään metsien hoidon kannalta tärkeimmät kansainväliset sääntelyperiaatteet, joita ovat edellä mainitut kansainväliset metsäperiaatteet ja Biodiversiteettisopimus. Luvussa 3 pyritään antamaan kokonaiskuva kansainvälisen ympäristöoikeuden keskeisimmistä sääntelytrendeistä. Luvussa 4 tarkastellaan luonnonsuojelun ja luonnonvarojen hyväksikäytön yhteensovittamispyrkimyksiä kansainvälisessä ympäristöoikeudessa. Luvussa 5 kuvataan Euroopan Unionin ympäristösääntelyn historiaa johdantona luvun 6 nykypäivän Euroopan Unionin metsäbiodiversiteetin sääntelyn kuvaamiselle. Lopuksi luvussa 7 kuvataan esimerkkinä Suomen metsäsääntelyinstrumentteja ja kerrotaan työn johtopäätökset.

Avainsanat: Kansainvälinen metsäpolitiikka, kansainvälinen ympäristöpolitiikka, metsien biodiversiteetti
Key words: International environmental law, international forest policy, forest biodiversity

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Preface

This publication has been produced in collaboration by the Finnish Forest Research Institute (METLA) and the Institute of International Economic Law (KATTI), University of Helsinki. It is part of and financed by the EU Fifth Framework project *Biodiversity and Economics for Conservation* (BIOECON) that is co-ordinated by professor Timothy Swanson from University College London.

Stiina Löytömäki was supervised by professor Tapio Määttä from KATTI and senior researcher Paula Horne from METLA. Docent Tuomas Pöysti and professor Tuomas Kuokkanen gave valuable comments during the writing process. Researchers Harri Hänninen and Arto Naskali from METLA reviewed the final manuscript giving helpful suggestions. Michael Mehling checked the language and assisted in the editing of the report. Maija Heino made-up the final technical editing for publication.

We would like to thank everyone who has contributed towards this publication.

In Helsinki, January 15, 2004

Paula Horne
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Esipuhe

Tämä julkaisu on valmistunut Metsäntutkimuslaitoksen (METLA) ja Kansainvälisen talousoikeuden instituutin (KATTI) yhteistyönä. Se on osa EU:n viidennen puiteohjelman rahoittamaa *Biodiversity and Economics for Conservation* (BIOECON) tutkimusprojektia, jonka koordinaattorina on toiminut professori Timothy Swanson Lontoon yliopistosta.

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Haluamme kiittää kaikkia julkaisuun myötävaikuttaneita henkilöitä.

Helsingissä, tammikuun 15. päivänä, 2004

Paula Horne
Metsäntutkimuslaitos

Tapio Määttä
Kansainvälisen talousoikeuden instituutti

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List of Abbreviations

ACP	Countries of sub-Saharan Africa, the Caribbean and the Pacific
CBD	Convention on Biological Diversity
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora
COP	Conference of the Parties
CPF	Collaborative Partnership on Forests
CSD	United Nations Commission on Sustainable Development
DSU	Dispute Settlement Understanding
EC	European Community
EC Treaty	Treaty Establishing the European Community
ECJ	European Court of Justice
ECOSOC	Economic and Social Council of the United Nations
EEC	European Economic Community
EFTA	European Free Trade Association
EU	European Union
FSC	Forest Stewardship Council
G-7	Group of Seven
G-77	Group of Seventy-Seven
GATT	General Agreement on Tariffs and Trade
IBRD	International Bank for Reconstruction and Development
ICJ	International Court of Justice
IFF	Intergovernmental Forum on Forests
IPF	Intergovernmental Panel on Forests
IPR	Intellectual Property Right
ITFF	Interagency Task Force on Forests
ITTA	International Tropical Timber Agreement
ITTO	International Tropical Timber Organisation
MAB	Man and the Biosphere Programme
MCPFE	Ministerial Conference on the Protection of Forests in Europe
NGO	Non-Governmental Organisation
OECD	Organisation for Economic Cooperation and Development
PEFC	Pan-European Forest Certification
SEA	Single European Act
UNCCD	United Nations Convention to Combat Desertification and Drought
UNCED	United Nations Conference on Environment and Development
UNCHE	United Nations Conference on the Human Environment
UNCLOS	United Nations Convention on the Law of the Sea
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	United Nation Framework Convention on Climate Change
UNFF	United Nations Forum on Forests
UNGASS	United Nations General Assembly Special Session
WHC	World Heritage Convention
WTO	World Trade Organisation
WWF	World Wide Fund for Nature

1 Introduction

Recent decades have seen an increased interest in environmental regulation on the international plane due to growing alarm for the continuous accumulation of environmental problems. A number of arrangements of differing legal character have been agreed upon as a result, covering all areas of environmental protection, such as ozone depletion, toxic substances and the conservation of biodiversity. The importance of forests – be it as sources of biodiversity or as possible carbon sinks, to mention but a few of the environmental benefits of forests – is hardly contested nowadays. Consequently, the decrease of forested areas and impoverishment of biodiversity in different parts of the world are widely considered environmental problems that require global attention. That is also why forests are nowadays governed by different international and regional institutions and organisations, whose efforts to establish forest regimes partly overlap.

Despite many initiatives, however, no binding environmental convention on forests exists to date in international law. This is largely due to the fact that forests, being natural resources, are seen as belonging within the jurisdiction of sovereign states, which are reluctant to let their hands be tied in matters they consider purely national. In the absence of a single, legally binding convention on the regulation of forests, numerous instruments have been adopted in the non-binding category referred to as "soft law". Simultaneously, the forest sector itself is increasingly resorting to self-regulation, marking another departure from traditional approaches to environmental regulation. Nonetheless, forests are increasingly seen as a global issue requiring international environmental governance. For instance, the importance of sustainable forestry in relation to climate change is receiving much attention nowadays, and forests have, as a result, become conceptualised as a field where national action has global consequences that require action by the international community at large.[1] Still, while different international efforts have aimed at some sort of international consensus concerning forests, they have only succeeded in arriving at political compromises, mainly due to the differing positions taken by the countries of the North and the South.

As regards the European Community,[2] a coherent forest policy has traditionally been located outside the areas of community interest and competence. All along, forest-based products have been considered goods governed by the guarantee of free movement. As natural resources, forests have belonged to the sphere of sovereignty of the Member States. The Community does not, accordingly, have an explicit power for action on forests as natural resources. Following the accession of Finland,

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[1] Hugo M. Schally, "Forests: Toward an International Legal Regime?" 4 *Yearbook of International Environmental Law* (1992): 33.

[2] Since its establishment in 1993 by the Treaty of Maastricht, the European Union (EU) has come to be used synonymously with the European Community (EC); as a political union, however, it is not endowed with genuine powers of legislation. Therefore, in the following study, the distinction will be upheld and pertinent acts ascribed to the Community, whose powers are laid down in the EC Treaty. References to the European Union will only be made where the political union of Member States or their geographic area are meant.

Sweden, and Austria to the Community in 1995, the forest area within the Community increased substantially. Due to a growing interest in environmental regulation and biodiversity protection as well as the recent climate change negotiations, greater attention was also afforded to forests within the Community.

Whereas hardly any international or European legislation exists on forests as such, issues of biodiversity have been well represented on the international agenda since the Convention on Biological Diversity (CBD)[3] was adopted in 1992, and have also attracted increasing currency within the European Union. The Community and its Member States are all signatories of the Biodiversity Convention. After the Biodiversity Convention was ratified, its objectives have been implemented through various Community policies and regulatory activities. Biodiversity regulation naturally affects forests, as well; in many countries, forests are the main sources of biodiversity. Unsurprisingly, thus, several international and European law instruments on biodiversity protection contain sections on forests, but they only provide rather general guidelines for their management. In the end, the exploitation of forests is essentially left to the individual States, which are, in turn, bound by those international conventions they have acceded to as well as by general principles and customary rules of international law. As a matter of law, therefore, the ensuing picture for biodiversity protection in European forests is not easily assessed and frequently unclear.

This study aims to provide an overview of existing international rules, Community legislation, and different types of soft law concerning the biodiversity of forests. At the international level, forests are currently regulated under two distinct regimes: a particular forest regime and a regime on the conservation of biological diversity. The study focuses on how the maintenance of biological diversity in forests has been taken into account and carried out under these two regimes. The regulation of biodiversity protection is examined alongside regulations on forest management, all with the aim of ascertaining how the protection of forest biodiversity is taken into consideration in international and European legislation, on the one hand, and how it has found a reflection in pertinent soft law instruments affecting forests, on the other.

A general change in regulatory trends is also discussed as part of the study. Soft law is becoming more and more common in the field of international environmental law, with new approaches to environmental and natural resource regulation emerging on both the domestic as well as the international level. Accordingly, traditional command-and-control rules have been complemented by more flexible market incentives, such as taxes and tradable permits, as well as by novel forms of self-regulation, in which a specific sector of industry, for instance, binds itself voluntarily to a set of mutually agreed principles or rules. Self-regulation has become more widespread in the field of international forest regulation due to the lack of institutionally agreed binding rules.

Although no single instrument of international or Community law seems to cover the protection of forest biodiversity as such, a group of international Forests Principles and the Forestry Strategy of the European Commission lay down the most

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[3] United Nations Convention on Biological Diversity, Nairobi, 22 May 1992, in force 29 December 1993, 31 *International Legal Materials* (1992): 818.

important principles and activities with regard to forest management. Both also contain provisions on biological diversity. Various international arrangements, such as the Biodiversity Convention, and Community measures and policies in other areas contain specific references to forests and provisions for their management. Moreover, since the Treaty of Amsterdam, environmental protection needs must be taken into account in all other policies and activities of the Community according to Article 6 of the EC Treaty, which codifies the so-called "Integration Principle". This is in conformity with a more general trend in international environmental regulation, which had its starting point in the Stockholm Declaration of 1972[4] and culminated in the 1992 Rio Declaration,[5] aiming at the integration of environmental concerns into other policy areas such as social, economic, and developmental matters.

As their objective, the institution-based procedures of Stockholm and Rio had the management of a broad range of environmental and developmental issues, thereby approaching the global environment in a holistic manner.[6] It has been widely recognised that environmental protection can no longer effectively take place in isolation from other policy sectors. Whereas environmental regimes and trade regimes were traditionally regarded as two separate spheres, with environmental problems approached as negative side-effects of economic activities, there is now growing awareness of the need to co-ordinate and integrate environmental protection, trade, and other policies on the national, international and European level. Within the Community, the pursuit of both a common market and adequate protection of the environment require certain mechanisms to co-ordinate both aims and balance the interests concerned. An important interface in that regard is the one between national environmental measures, Community environmental measures, and the elimination of trade-impeding regulatory differences.[7]

The different emphasis within international and European regulation given to biodiversity issues, on the one hand, and to forest issues, on the other, reveals the continuous bias between conservation and exploitation interests of the human environment. The exploitation interests of nation states are often economic and have their basis in the principle of permanent sovereignty over natural resources. Environmental protection interests can be understood as colliding with the economic interest in exploiting natural resources. In general terms, this discrepancy between conservation and exploitation interests could be described as the struggle of global conservation interests against the exploitation interests of sovereign states.[8] In this

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[4] *Stockholm Declaration on the Human Environment*, Report of the United Nations Conference on the Human Environment (16 June 1972), UN Doc. A/CONF.48/14/Rev.1.

[5] *Rio Declaration on Environment and Development*, Report of the United Nations Conference on Environment and Development (3-14 June 1992), UN Doc. A/CONF.151/26, Vol. I.

[6] Thomas M. Franck, *Fairness in International Law and Institutions* (Oxford: Clarendon Press, 1995), 358.

[7] Andreas R Ziegler, *Trade and Environmental Law in the European Community* (Oxford: Clarendon Press, 1996), 4.

[8] Tuomas Kuokkanen, *International Law and the Environment: Variations on a Theme* (The Hague: Kluwer Law International, 2000), 279. In his dissertation, Tuomas Kuokkanen identifies the tension between protection concerns and exploitation interests as a reflection of the general tension between international law and sovereignty. According to Kuokkanen, this bias is characteristic for postmodern international law.

study, the resulting dilemma is discussed in the context of the concept of sovereignty and international efforts to reconcile free trade and environmental protection. The manner in which forests are governed internationally offers an example of this divergence between environmental concerns and the interest in exploiting natural resources.

The study starts with an overview of the international regulation of forests and biodiversity in Chapter 2. All major instruments of forest policy and biodiversity protection in international environmental law are introduced. The chapter focuses on the 1992 Forest Principles and on the 1992 Convention of Biological Diversity. Pan-European efforts in the fields of forestry and biodiversity are also briefly introduced.

Chapter 3 aims to give an overview of the current regulatory trends within international environmental law. In addition to binding international environmental agreements, a number of soft law instruments have emerged. States recognise the importance of international norms, but are reluctant to enter binding agreements and thereby limit their range of available options. Within domestic legal systems, traditional command-and-control rules has been complemented by more flexible market incentives.

Chapter 4 discusses reconciliation efforts in international environmental law between the exploitation of natural resources and environmental protection. The principle of permanent sovereignty over natural resources and its possible limitations by new principles of international law, such as sustainable development and equitable utilisation, are addressed. The relationship of trade and the environment, and the efforts to reconcile both, are also dealt with in this chapter.

Chapter 5 starts with a presentation of the history of environmental protection within the European Union. The aim of this section is to trace the developments which have led to the actual situation of environmental law within the Community. The current rules on forest biodiversity are dealt with in Chapter 6, in which emphasis is given to the 1998 Forestry Strategy. The Biodiversity Strategy and other biodiversity legislation within the Community is discussed in the same chapter, as biodiversity regulation has an impact on forests as well.

Finally, Chapter 7 presents the conclusions of this study as well as a general discussion of how the trends outlined therein are reflected in Finnish forest policy and legislation.

2 The International Regulation of Forests

2.1 Major Forest Policy Instruments at the International Level

2.1.1 The 1992 Forest Principles and Chapter 11 of Agenda 21

A number of efforts have been made in recent decades to reach a globally binding agreement on forest conservation. Nevertheless, these attempts have proven unsuccessful so far, mostly due to disagreements between the global North and the South. The existing regulatory framework on forests therefore remains on the level of soft law, and rather complements than determines international forest policy. In 1992, the United Nations Conference on Environment and Development (UNCED),[9] also known as the Rio Earth Summit, was the first major international conference to produce an agreement on global forest management. It addressed the dramatic loss of forest biodiversity due to deforestation, fragmentation and degradation of all forest types. Although governments failed to reach a legally binding agreement on that occasion, they adopted a set of guidelines known as the Forest Principles[10]. Forests had previously been dealt with at the 1972 United Nations Conference on the Human Environment, also known as the Stockholm Conference. The Stockholm Conference Action Plan contained recommendations for forests which reflected the prevailing emphasis on the economic development of forests, on the one hand, and traditional conservation through designation of protected forest areas, on the other. Since the Stockholm Conference, the international attention given to forests has shifted from temperate to tropical forests and from a regional to a global perspective. This shift was prompted by the recognition of the importance of tropical forests for the preservation of biological diversity and for the prevention of global warming. The perspective with regard to forests has thus widened, bringing along new questions. These include, for instance, the concept of global commons or the relationship of sovereign rights of states and their duties towards conservation of national resources.[11]

The value of annual international trade in wood products is more than $100 billion, most of which comes from developing countries.[12] It is perhaps not surprising

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[9] Rio de Janeiro, Brazil, 3-14 June 1992.

[10] Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, Report of the United Nations Conference on Environment and Development (14 August 1992), UN Doc. A/CONF.151/26, Vol. III.

[11] Schally, "Forests" (supra, note 1): 33-34.

[12] David Hunter, James Salzman, and Durwood Zaelke, International Environmental Law and Policy (New York, N.Y.: Foundation Press, 1998), 1108.

that some states, especially those still on the path of development, are reluctant to surrender their sovereign right to decide on issues of international regulation when it affects such a potential provider of welfare. Rather, states choose to adhere to the doctrine of state sovereignty, which ensures them uncontrolled access to their own natural resources. Developing countries, in particular, see their economic development tied to the possibility of freely exploiting their domestic timber resources. The North, for its part, places greater emphasis on the sustainable management and conservation of forests, particularly tropical forests.[13] Beginning in the 1990s, the G-7 recognised the need for an instrument to "curb deforestation, protect biodiversity, stimulate positive forestry actions and address threats to the world's forests." Unsurprisingly, the South questioned the emphasis on tropical forests while the North stressed the link to climate change and biological diversity. As the North pushed for the adoption of a special forest regime, it met with noticeable hesitation from the South, which saw no benefits in dealing separately with forests and rather favoured dealing with forests in the chapters of conventions covering fields as, for example, biological diversity, land management, or climate change.[14] The division between North and South also defeated any chance of adopting a binding instrument at Rio. During the Earth Summit, the formulation of a non-binding statement, the Forest Principles, reflects both a search for consensus as well as confusion about the kind of consensus that should be achieved. According to some, the story of international forest policy is a "story of national economic interests triumphing over international environmental issues, of State sovereignty triumphing over common concern. It is in essence a case study of the failure and limitations of international co-operation in the field of environmental protection."[15]

Forests have played a very different role from other "global commons" in the political economies of nation states and in national forestry programs, which originally aimed at conserving timber through production methods and quotas while paying little attention to other environmental benefits provided by forests. As a result, strong domestic interests have developed around forests, with much concern for continued logging offsetting concern for the environment. This type of forestry programme is part of a historically rooted institution which affects actual forestry policies and may not be easily modified by international law.[16] At different times, the depletion of forest resources has played an important role in the economic and political development of various countries and regions. One of the aspects which distinguishes forestry from other environmental issues is that forest resources typically have a clearly and easily definable market value.[17] It is evident that none of the environmental benefits provided by forests, such as water purification or carbon sequestration, provide as direct and immediate a gain for national economies as

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[13] See, for instance, Hunter et al., International Environmental Law and Policy (supra, note 12), 1108. The North-South division is by no means clear-cut, however.
[14] Schally, "Forests" (supra, note 1): 39-41.
[15] Hunter et al., International Environmental Law and Policy (supra, note 12), 1117.
[16] Ronnie D. Lipschutz, "Why is there No International Forestry Law? An Examination of International Forestry Regulation, Both Public and Private," 19 UCLA Journal of Environmental Law and Policy (2000/2001): 152.
[17] Schally, "Forests" (supra, note 1): 32-33.

timber production does. Nation states do not wish to be tied to a convention on forests that might restrict their freedom of action on the grounds of environmental protection. Public forests are regarded as a national resource, as the sovereign property of a state. The conservation of forests has traditionally been tightly linked to the production of timber and other commodities that have generated capital and jobs.[18]

In political terms, therefore, the mainly economic interest in national control of forests have traditionally outweighed and continue to outweigh the far more reticent interest in environmental protection, which seems to remain a secondary aspect of forests only. Against this background, international forest protection differs significantly from the protection of other aspects of the environment, such as oceans and the atmosphere, which have been defined as global commons. It even differs from the protection afforded to global biodiversity, which, although it has not been defined as a global common, is still seen as necessitating protective action, and has therefore been regulated through international conventions. Had forests been conceptualised as part of the "global heritage of mankind", environmentally motivated action would have been more justified than in the current situation of virtually unrestricted national sovereignty over natural resources.[19]

It seems that the point at which different parts of the natural environment have become subject to international regulation is one at which the balance of interests and costs tilted towards a public (international) solution. A public solution is most easily negotiated when a framework is already in existence within which a new issue can be addressed, for instance a trade regime to which new environmental issues can be accommodated. By contrast, such environmental issues which are not amenable to management through a trade regime seem to be far more difficult to address at the international level. International efforts to regulate forests have come to rest largely on tools of trade. Nonetheless, the advocates of international trade law seem to stand in opposition to such regulation.[20]

During the discussions concerning forests at Rio, the United States and other countries of the industrialised North manifested their desire for a global forest convention that would slow down the deforestation of tropical forests. The G-77 countries, however, preferred to see the proposed restrictions on timber production from rainforests as an attempt by the North to impose hidden trade barriers in the name of environmental protection. As a result, the G-77 insisted that any forest convention should address all forests, including the temperate forests of the North. The G-77 also saw a need to link issues such as financial assistance and debt matters to deforestation. Ultimately, the G-77, led by Malaysia, India, and Brazil, blocked the adoption of a forest convention at UNCED. Instead, the parties agreed on a set of guiding principles, formally known as the *Non-legally binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests*.[21] The Forest Principles are the

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[18] Lipschutz, "International Forestry Law" (supra, note 16): 3.
[19] Schally, "Forests" (supra, note 1): 30.
[20] Lipschutz, "International Forestry Law" (supra, note 16): 1-4.
[21] See supra, note 10; full text available under < www.un.org/documents/ga/conf151/aconf15126-3annex3.htm> (last accessed 15 October 2003).

first global consensus statement on forests, but they neither set forth many specific standards nor break much new ground.[22]

The consensus reached during the Earth Summit extended to the role of forests in maintaining biological diversity and slowing down climate change, on the driving forces behind deforestation, and on the need for cross-sectoral policy frameworks to confront deforestation. Forests were given an increasingly important role in the context of sustainable development and environmental conservation. The Forest Principles accompanied a more general chapter on deforestation in the principal outcome of the Rio Agreement, Agenda 21. Its Chapter 11, titled "Combating Deforestation", introduces principles to combat deforestation, which include: sustaining the multiple roles of all types of forests, enhancing the protection, sustainable management and conservation of all forests and the greening of degraded areas by means of rehabilitation, promoting efficient utilisation and assessment to recover the full valuation of the goods and services provided by forests, and establishing and strengthening capacities for the planning, assessment and observation of forests and related projects and activities, including commercial trade and processes. The texts of the Forest Principles and the Agenda 21 place all forests on the same footing and demand similar efforts by states toward the achievement of sustainable forest management, be they tropical, temperate or boreal forests. Since 1992, the number of international forest-related initiatives, working groups, and processes has increased significantly. However, they have produced few visible effects on the world's forests, which means that international negotiations on forests still need to make substantial progress, at least until an International Forest Convention can be agreed on.

Returning to the Forest Principles in greater detail, it is worth noting that their wide scope includes recognition of a number of substantive issues, including: the multiple functions of forests, the need to manage forests in a sustainable manner to meet the needs of present and future generations, the role of forests in maintaining ecological processes, the role of local communities and indigenous people, and the need of financial resources for developing countries. But they also state the sovereign right of states to exploit their own resources pursuant to their own environmental policies, as well as the sovereign and inalienable right of states to utilise, manage, and develop their forests, provided this occurs on the basis of national policies consistent with sustainable development and legislation. According to the principles, trade in forest products should be based on non-discriminatory and multilaterally agreed rules and procedures. Unilateral measures incompatible with international obligations to restrict or ban international trade in timber should be avoided, "in order to attain long-term sustainable forest management"[23]. This principle seems to support free trade in timber products and does not suggest a need to amend the current interpretation of trade rules in the General Agreement on Tariffs and Trade (GATT) by the bodies of the World Trade Organisation (WTO). Instead, it strengthens the idea of effectively eliminating any semblance of "green protectionism", a concern traditionally shared by developing countries reliant on the export of natural resources. At the same time, however, this

[22] Hunter et al., International Environmental Law and Policy (supra, note 12), 1118-1119.
[23] See supra, note 10, Principle 14.

principle also suggests a causal link between expanded trade and sustainable management.

Are the Forest Principles balanced in the sense that they would equally emphasise aspects of sovereignty and environmental concerns, or do they rather give priority to the sovereign rights of states at the expense of global conservation interests? It might naturally be questioned whether this is of any importance, given that he principles are not legally binding. As discussed before, however, forests have not traditionally been viewed as a resource in need of international co-operation or legislation. Forests are not migratory and have not been declared global commons. Thus any departure from the likely argument that forests are covered by the doctrine of state sovereignty over natural resources would be worth noting, even if it is not, at first, legally binding; for it might herald the onset of a new political consensus. And indeed, as the regulation of biodiversity has gained ground globally, the concept of "common concern" has become more popular. Paragraph f of the Preamble of the Forest Principles, for instance, emphasises the environmental values of forests and their capacity to provide resources for the satisfaction of human needs. Their sound management and conservation are, accordingly, seen to be a concern of both the governments of those countries to which the forests belong, as well as of local communities. Still, while this formulation may perhaps approach the concept of common concern, the latter is not explicitly mentioned in the Forest Principles. By contrast, the common concern aspect is mentioned in the Convention on Biological Diversity. Paragraph g of the Preamble of the Forest Principles states that forests are essential to economic development and the maintenance of all forms of life. In this sense, the importance of forests for the environment and for humankind is recognised. It would be difficult to conclude that the position of state sovereignty is put to question by the principles, however, as the principle of state sovereignty over natural resources is clearly and explicitly articulated in the principles. The idea of forests as goods of common concern is thus promoted without threatening the doctrine of state sovereignty.

The Forest Principles do not form a framework convention. No new international regime is created. On the contrary, as stated above, the Forest Principles emphasise the sovereign right of states to utilise their forests in accordance with their developmental needs and socio-economic development. It is also stated in the Forest Principles that the costs of forest conservation and sustainable development should be equitably shared by the international community. Compensatory financial transfers should therefore be made to developing countries with significant forest areas. Given the voluntary nature of these principles, some authors already foresee an international arrangement in which states would have a duty to preserve their forests at sustainable levels, while the international community, as the beneficiary, would have an obligation to share the costs of conservation.[24] These costs may not only include the expenses directly attributable to conserving forest nature, but also the cost of compensating income and industrial development lost due to the decision not to engage in logging activities and the clearing of forests. An example of this view are, for instance, the so-called "debt-for-nature" swaps, which have been worked out among governments, corporations, and environmental groups. These involve the

[24] Franck, Fairness in International Law (supra, note 6), 408.

purchase of Third World debt from banks at a steep discount after their translation, often at a premium, into local currency. This credit is then devoted to the acquisition and conservation of forest land. Although swaps may be too small an instrument to have a major impact on deforestation, they do illuminate important aspects of a larger problem in the management and preservation of resources; for the latter are clearly within the domestic jurisdiction of states and thus differ significantly in their international classification from the arrangements involving a "common concern", such as the resources of outer space, Antarctica, and the ocean floor.[25]

The traditional approach in international environmental law to the management of resources which pertain to the sovereign jurisdiction of nation states is reflected in the "due diligence"[26] and "polluter pays"[27] principles. Nonetheless, the doctrine of liability for damages will not, on its own, be able to prevent the destruction of forest. Compensation generally requires proof of causality and a specific injury, and these criteria are inappropriate for addressing injuries caused to the environment as such and as a concern of humankind rather than individual proprietors willing to enforce their interests. Furthermore, the liability approach addresses the problem too late in time, namely after the deterioration has already been caused. Most likely, therefore, the emphasis in international forest management should be shifted from liability for damages to responsibility for sustainable management. As Franck points out, such a shift would have important economic and political implications: despite the well-established principle of sovereignty, some degree of external intrusion may be inevitable to sustain forest nature globally. The Latin American rain forests, for instance, will remain within the sovereign jurisdiction of nation states, but in order to reach effective protection results, their care should perhaps fall under global responsibility.[28] And this is precisely where the foregoing obstacle of any international arrangement on forest protection has its origin: while it may be naive to presume that states struggling with economic and social problems would restrict the economic exploitation of their forests because more developed nations, which have been exploiting their own forests for centuries, urge them to do so, it equally seems that without some form of global solution, the international protection of forests will remain an unfulfilled hope.[29]

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[25] Franck, Fairness in International Law (supra, note 6), 408-409.

[26] This principle, also referred to as the doctrine of sic utere tu ut alienum non laedas ("use your property in a manner not to injure others"), was originally applied in the Trail Smelter case during the late 1930s and has since found its reflection in numerous documents, for instance in principle 15 of the Rio Declaration (supra, note 5); see generally Patricia Birnie and Alan E. Boyle, International Law and the Environment, 2nd ed. (Oxford: Oxford University Press, 2002), 112-125.

[27] This principle calls for the party responsible for environmental damage to rectify it, if needed by means of financial compensation; it is commonly expressed in rules on environmental liability, but has recently also become the guiding rationale behind an entire class of policy instruments known as "economic instruments".

[28] Franck, Fairness in International Law (supra, note 6), 408-409.

[29] Ibid.

2.1.2 The United Nations Forum on Forests (UNFF) and the Collaborative Partnership on Forests (CPF)

The United Nations Forum on Forests (UNFF) is a subsidiary body of ECOSOC, the Economic and Social Council of the United Nations. The follow-up process of the Forest Principles started with the Intergovernmental Panel on Forests (IPF, 1993-1997), which in turn was followed by the Intergovernmental Forum on Forests (IFF, 1997-2000), and which currently continues through the UNFF established in 2000.

The North-South polarization, which had prevented a more stringent agreement than the Forest Principles at Rio, eased somewhat in the years following UNCED. This so-called "Post-Rio" period between 1992 and 1995 has been described by the United Nations as a period of "confidence building and emerging North-South partnerships."[30] The resulting international dialogue on forests led to the establishment of the Intergovernmental Panel on Forests (IPF) during the third session of the United Nations Commission on Sustainable Development (CSD) in April 1995. The mandate was adopted for a two-year period (1995-1997), during which the IPF was charged with reviewing "the fragmented approaches of existing international forest initiatives, improve their co-ordination and formulate actions for implementing UNCED's forest-related agreements on the domestic and global levels."[31] Among other things, the work programme of the IPF included: the national and international implementation of UNCED decisions related to forests; international co-operation in financial assistance and technology transfer; scientific research, forest assessment and development of criteria and indicators for sustainable forest management; trade and environment issues relating to forest products and services; and international organisations and multilateral institutions and instruments including appropriate legal mechanisms. The IPF met four times between 1995 and 1997, and produced over one hundred negotiated proposals for action on issues related to sustainable forest management, such as national forest programmes, forest assessments, criteria and indicators of forest condition, traditional forest related knowledge, research on the underlying causes of deforestation, and many other pertinent issues.[32] Ultimately, however, the participants were unable to reach a consensus on most of the major issues. Instead of passing specific recommendations to the Commission on Sustainable Development in its final report in May 1997, the IPF merely forwarded a listing of available options.[33]

Perhaps the most interesting aspect of the IPF debate was whether that body was to recommend the future negotiation of a binding forest treaty. The United Sates and the European Union both originally hoped for the adoption of such a treaty. During the IPF sessions, surprisingly many countries on the road to development, including

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[30] See the statement of Under-Secretary General for Economic and Social Affairs of the United Nations, Nitin Desay, to the Third Ministerial Conference on the Protection of Forests in Europe, E/CN.17/IFF/1998 (2 June 1998), at <www.un.org/documents/ecosoc/cn17/iff/1998/ecn17iff1998-usgstmt.htm> (last accessed 31 October 2003); all pertinent documents and a description of the mandate of these bodies and their diplomatic history can be found at <www.un.org/esa/forests/index.html> (last accessed 31 October 2003).

[31] Hunter et al., International Environmental Law and Policy (supra, note 12), 1123.

[32] See supra, note 30.

[33] Hunter et al., International Environmental Law and Policy (supra, note 12), 1124.

Malaysia and Indonesia, also supported a binding treaty. They possibly believed that a binding treaty at this point would prove no stronger in environmental terms than the Forest Principles adopted in 1992. Most environmental organisations ultimately opposed negotiations of the treaty, fearing that a treaty weak in environmental terms would only serve to give a formal guised to weak, non-binding standards, while slowing down possible future efforts to increase the importance of environmental aspects in forest management. Not coincidentally, perhaps, many of the nations that now support an international forest convention have powerful timber industries.[34]

Some environmental organisations seem to have recognised that, with a view to the political realities and the urgency of the "forest problem", the most effective way to deal with it would be to use existing mechanisms and legal instruments such as the Biodiversity Convention and the Climate Change regime rather than strive for a convention specifically regulating forests. Ultimately, the support or opposition to a proposed global forest convention would depend on the contents of the treaty in question. It seems that the environmentalists who oppose a forest convention are concerned that it might become an instrument primarily to address trade or resource exploitation issues. If we think about what a possible future convention on forests should contain and which issues it should resolve, therefore, there is a clear need for an agreement which would deal with all aspects and interests related to the forest sector and which would provide for a mechanism to reconcile the countervailing interests of trade and conservation.[35] Given the political controversies attached to this issue, achieving the consensus needed for such an agreement will pose a challenging task.

Following the establishment of the IPF in 1995, an informal Interagency Task Force on Forests (ITFF) was set up in July 1995 to co-ordinate the inputs of international organisations to the forest policy process. The ITFF consisted of eight international forest or forest-related organisations. The ITFF was established to support the IPF (1995-1997) and, subsequently, the IFF (1997-2000). The ITFF members supported the IPF/IFF process by assisting in the preparation of the reports of the UN Secretary-General on various IPF/IFF programme elements, contributing to the implementation of the IPF/IFF proposal for action, and enhancing coordination on forest-related matters among its members.

In view of the remaining unresolved issues, the United Nations General Assembly Special Session (UNGASS) recommended a continuation of the intergovernmental policy dialogue on forests. In its annual meeting in Geneva during July 1997, ECOSOC thus decided to establish the ad-hoc open ended Intergovernmental Forum on Forests under the CSD. The mandate of the IFF was formulate to include: promoting the implementation of the proposals for action of the IPF and reviewing, monitoring, and reporting on any progress in the management, conservation, and sustainable development of all types of forests; considering matters left pending and issues arising from the IPF process; and considering international arrangements to promote the management, conservation and sustainable development of all types of

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[34] Ibid, 1124.
[35] Ibid, 1124-1125.

forests, among which a legally binding instrument on all types of forests was held a possible option.

In February 2000, the IFF recommended the establishment of a new international arrangement on forests, composed of a policy forum and a collaborative partnership on forests. Therefore, in October 2000, ECOSOC adopted a resolution establishing the UNFF as a subsidiary body and inviting the heads of relevant organisations of the UN and other international and regional organisations and institutions to form a collaborative partnership on forests to support the work of the UNFF and to enhance coordination among participants. Accordingly, the UNFF continues the five-year process of the ad-hoc IPF and the IFF. Its principal functions are to: facilitate and promote the implementation of IPF/IFF proposals for action and the UNFF Plan of Action, as well as other actions and catalyse, mobilise and generate financial, technical and scientific resources to this end; provide a forum for continued policy development and dialogue and foster common understanding of sustainable forest management; enhance cooperation and coordination among relevant international and regional organisations, institutions and instruments; foster international (North-South, public-private) and cross-sectoral cooperation; monitor, assess and report on progress; and, finally, strengthen political commitment to sustainable forest management. The UNFF will report to ECOSOC and, through it, to the General Assembly.

Following the establishment of the UNFF, a Collaborative Partnership on Forests (CPF) was established in April 2001 upon recommendation of ECOSOC. The CPF is based on the experience of the ITFF during its last six years. Its initial membership consisted of eight founders, who were members of the ITFF. It will eventually be expanded to include some dozen international forest-related organisations and institutions. The mission of the CPF is to support the work of the UNFF in the promotion of the management, conservation, and sustainable development of all types of forests, and in the strengthening of international political commitment to this end.[36] These activities, including the CPF, are all based on the Rio Declaration, the Forest Principles, Chapter 11 and other relevant Chapters of Agenda 21, as well as on the outcome – essentially the reports – of the five year IPF/IFF process. It remains to be seen whether the stated goal of achieving greater sustainability and placing more attention on conservation needs can be achieved by these new bodies. A first important step would consist in the compilation of more stringent rules and principles, which might eventually become the starting point for a binding convention.

2.2 Pan-European efforts

2.2.1 The Ministerial Conference on the Protection of Forests in Europe

The Ministerial Conference on the Protection of Forests in Europe (MCPFE) was initiated in 1990, and it involves 40 countries and the European Community.[37] Its aim

[36] CPF network concept paper, February 2001, available at and CPF Policy Document, May 2001.
[37] In-depth information about the evolution and activities of this body as well as all pertinent documents can be accessed at the MCPFE website under <www.minconf-forests.net/> (last accessed on 31 October 2003).

is to develop general guidelines for sustainable forest management, with a focus on the elaboration of national forest programmes and the development of a coherent framework for sustainable forest management on a Pan-European scale. This forum has been particularly important for those European countries which are not, or yet to become, members of the European Union. The Ministerial Conference has been one of the arenas used by the industrialised countries to further the implementation of the Forest Principles with regard to temperate and boreal forests.[38]

So far, four Ministerial Conferences on the Protection of Forests in Europe have been organised. In 1990, the First Ministerial Conference took place in Strasbourg, where resolutions were adopted on co-operation in research and data gathering.[39] The 1993 follow-up conference in Helsinki led to the adoption of six resolutions dealing with, *inter alia*, general principles for the sustainable management of forests in Europe.[40] The Third Ministerial Conference was held in Lisbon in 1998, and a fourth conference recently took place in Vienna in April 2003.

2.2.2 The Pan-European Biological and Landscape Diversity Strategy

The Pan-European Biological and Landscape Diversity Strategy was developed through the ministerial process "Environment for Europe". It has several priorities for action relating to forestry, including the better integration of strategic principles into forest management, and thus further enhancing indigenous tree species, setting aside forest areas to develop naturally and harmonising afforestation policies with nature conservation and landscape policies.

2.3 The Convention on Biological Diversity (CBD)

During the past decade, in particular, the concept of biodiversity protection has gained ground in international as well as national environmental law. It should be recalled, however, that biodiversity is originally a non-legal concept; its relevance nowadays transcends the context of the natural sciences because its use also implies various socio-economic consequences. In Article 2 of the 1992 Biodiversity Convention,[41] biodiversity is defined as the variability among living organisms from all sources and ecological complexes of which they are part. Biodiversity includes diversity within species, between species and of ecosystems.

The use of broad and general concepts is consistent with the general tendency of international environmental law to build on general, flexible principles rather than strict rules. But generality is often achieved at the expense of precision. If a concept is so general that it allows a large variety of definitions and interpretations, its substance may gradually diminish and the possibility of indeterminacy grow as the amount of possible definitions increases. At some point, for instance, the flexible definition of

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[38] Schally, "Forests" (supra, note 1): 44.

[39] See, for instance, Resolution S4 (18 December 1990), Adapting the Management of Mountain Forests to New Environmental Conditions (available at the MCPFE website, supra, note 37).

[40] Resolution H1 (16-17 June 1993), General Guidelines for the Sustainable Management of Forests in Europe (available at the MCPFE website, supra, note 37).

[41] See supra, note 3, for sources and the full title.

biodiversity and the stated objective of maintaining and improving it may both serve as a slogan for entities which merely seek to improve their public image. This threat is augmented by the fact that no consensus exists on the means to achieve effective protection of biodiversity in specific cases. The slogan of biodiversity conservation might then become a legitimising justification for actions which do not actually have much bearing on the conservation of biodiversity. On the other hand, a flexible concept may open up new possibilities: law could be seen as an information process by which a concept is gradually specified. A concept such as biodiversity need not have an essentially independent meaning within the law, as its importance can also be reflected in the different political intentions that exist within the concept.

The obligations of the Convention dealing with conservation and sustainable use are far-reaching, but they are also remarkably confined by certain qualifiers, such as the expressions "as far as possible" and "appropriate". The purpose of these kind of qualifiers is naturally to make the level of implementation conditional on the capacities of each respective party when it comes to meeting the obligations at hand. Such qualifiers introduce a measure of flexibility into a legal text and are thus almost inherent to global conventions with broad, sectoral conservation goals. In some cases, the qualifier is so limiting that it negates the very purpose of the international obligation.[42] The duties under the Convention are to be met primarily in terms of unilateral domestic action rather than international cooperation. Efforts aiming at the establishment of international priority-setting mechanisms within the framework of the CBD were met with resistance during the drafting process because of the Convention's emphasis on sovereign rights of states. The familiar North-South division was also visible during the drafting of the Convention, just as it had been during the formulation of the Forest Principles. The Group of 77 perceived international priority setting mechanisms as an attempt by the developed world to dictate action concerning the use of biological resources under their jurisdiction.[43]

The Biodiversity Convention can be interpreted as reflecting various political intentions. One of the main objectives of the Convention is to relate biodiversity to wider social, economical and developmental causes. It has been recognised that the conservation of biodiversity – and the protection of nature in general – cannot effectively occur in isolation from other policies. As stated earlier, this is reflective of a larger trend in international environmental law, which had its starting point in the Stockholm Declaration and may have culminated in the 1992 Rio Declaration. As discussed in earlier chapters, the European Union has adopted a similar kind of policy in its environmental policy and relevant programmes. This trend of connecting environmental protection with other political, social, and economic issues brings the biodiversity concept closer to the concept of sustainable development. The aim of maintaining biological diversity for future generations, so often proclaimed in political settings, can be regarded as one aspect of the larger politics of sustainable development.

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[42] Francoise Burhenne-Guilmin and Susan Casey-Lefkowitz, "The Convention on Biological Diversity: A Hard-won Global Achievement," 3 Yearbook of International Environmental Law (1992): 51.

[43] Burhenne-Guilmin et al., "The Convention on Biological Diversity" (supra, note 42): 51-52.

The Convention on Biological Diversity is the main international instrument dealing with biodiversity and has also served as a starting point for regional and national regulation. Nonetheless, a critical reader will find certain parts of the Convention text to be contradictory. In Article 1, the Convention states its main objectives: conservation of biological diversity, sustainable use of its components and fair and equitable sharing of the benefits arising out of the utilisation of genetic resources. But, as one proceeds within the text of the Convention, one is confronted with what seems to be the very the negation of that same Article 1. Indeed, Article 3 manifests the core dilemma of most international environmental agreements: the sovereign right of states to exploit their own resources pursuant to their own environmental policies. These two articles of the Biodiversity Convention reveal quite much of international environmental law, perhaps even of international law or law in general.[44] They reflect the collision of interests within law, with one article drawing attention to a common good, the environment, and another article protecting the – typically economic – interests of individual states. These articles also expose the struggle of law between idealism and realism, Article 1 representing idealism, as opposed to Article 3, which rather represents a more realistic state of affairs.[45] The "silence" of law or its lacking omnipotence also seem to be apparent, as both articles contain concepts such as "fair and equitable", notions which are not easily defined by or within the law and perhaps should be left to the sphere of morality or ethics, instead – or, if they are to be part of the law, at least identified and specified in more concrete rules.

These articles also manifest a dualism between a need for the global regulation of biological diversity, since biodiversity can be considered a common good which benefits the global community as a whole, and a need for the national regulation of domestic interests, because biodiversity does not constitute a common patrimony of humankind and falls within the sovereignty of nation states. At the moment, it seems that the international regulation of biological diversity largely remains on the level of encouraging suggestions, while actual rules of legal character are only adopted on the national level. One could come to assume that, given how the CBD recognises the sovereign rights of states over their natural resources and the authority of national governments to determine access to these resources pursuant to national legislation, the role of international rules on biological diversity is quite limited. This strong emphasis on national sovereignty is a political intention – or a political reality – represented through the Convention. It is true for most other instruments on forest regulation.

The Convention on Biological Diversity is, nonetheless, not purely a reflection of the principle of state sovereignty. Although the sovereign right of states over their natural resources is recognised by the Convention, the Convention also emphasises the protection of biodiversity as "a common concern of humankind" and declares that

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[44] Martti Koskenniemi, "Peaceful Settlement of Environmental Disputes," 60 Nordic Journal of International Law (1991): 76.

[45] This view can justifiably be criticized as amounting to conventionalism, since sovereignty may also be seen as a judicial fiction belonging to the realm of idealism. Universalism – in this case the protection of the environment – could thus equally be seen as reality.

nations are "responsible for conserving their biological diversity and for using their biological resources in a sustainable manner." As Article 16 clarifies, the Convention strives to include elements of fairness both as to the negotiating procedures – states are to engage in planning and research, giving one another access to their biological resources – and distributional justice. Parties to the Convention agree to takes measures, when appropriate, with the aim of sharing in a fair and equitable way the results of research and the benefits arising from the utilisation of genetic resources. The Convention also has other provisions linked to fairness, such as the commitment by developed countries to provide financial assistance to developing countries for the fulfilment of duties under the Convention.[46] The CBD can also be regarded as an example of a skilful balancing of rights and duties between resource-endowed countries and the interests of these countries and those of third States.[47]

The Convention on Biological Diversity is a so called framework convention. This "framework approach" has become a popular technique of international environmental law-making.[48] Participants to the convention start out by defining the normative scope of a particular convention in very general language, rather than attempting to codify a sectoral regime once and for all. At a later stage, the convention is specified through a sequence of subsequent "protocols".[49] The Convention on Biological Diversity certainly cannot be regarded as an all-embracing global regime for the living resources of the earth in the same line as, for instance, the 1982 United Nations Convention on the Law of the Sea (UNCLOS).[50] What it does, however, for the first time is take a comprehensive rather than a sectoral approach to the conservation of global biodiversity and sustainable use of its components.[51]

The Convention on Biological Diversity addresses biodiversity issues in forests through one of its five thematic Work Programmes, adopted at the Conference of the Parties (COP) during its fourth session in 1998.[52] This programme focuses on the integration of conservation and sustainable use of biological diversity, an approach labelled "ecosystem approach", by focusing on an analysis of how forest management practices influence forest biodiversity and on ways in which to mitigate negative impacts of forest practices for biodiversity. The expansion of the work programme is underway and will focus on practical actions. It was discussed as a priority issue at the COP meeting in The Hague in February 2002. As an international legal issue, forests are thus treated under two separate regimes, the UNFF process and the CBD convention. Nation states have expressed differing views on whether forests should

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[46] Franck, Fairness in International Law (supra, note 6), 405-407.
[47] Nico Schrijver, Sovereignty Over Natural Resources: Balancing Rights and Duties (Cambridge: Cambridge University Press, 1997), 393.
[48] See, generally, Geoffrey Palmer, "New Ways to Make International Environmental Law," 86 American Journal of International Law (1992): 251.
[49] Thomas Gehring, "International Environmental Regimes: Dynamic Sectoral Legal Systems," 1 Yearbook of International Environmental Law (1990): 35.
[50] Peter H. Sand. "UNCED and the Development of International Environmental Law," 3 Yearbook of International Environmental Law (1992): 7.
[51] Burhenne-Guilmin et al., "The Convention on Biological Diversity" (supra, note 42): 43.
[52] See Decision IV/7, Forest Biological Diversity (4-15 May 1998), available under <www.biodiv.org/doc/decisions/cop-04-dec-en.pdf> (last accessed 31 October 2003), 46.

be treated simultaneously under two processes or whether forest issues should be concentrated under either the UNFF process or under the Convention on Biological Diversity. Two different regimes approaching the same issue at the same time can produce a certain overlapping of efforts and outcome, and also increase regulatory uncertainty as to which rules might enjoy priority in case of conflict. Proponents of a one single forest convention and regime criticise the actual state of affairs on these grounds.

2.4 Other International Regimes on Forests

Before Rio, there was no other international document that focused exclusively on forests, except for the 1983 Tropical Timber Agreement. Some international agreements dealing with natural resources and the environment were, in some ways, indirectly applicable to forests. Various international and regional conventions may have also had some relevance for forests. Some of these will be briefly outlined in this Chapter. The list does not aspire to be exclusive, as it can prove difficult to draw limits on the threshold of relevance when approaching the vast body of international instruments in the field of the environment. The body of soft law which applies directly or indirectly to forests is somewhat wider, including various declarations, statements and other political instruments on environmental protection.[53]

2.4.1 The International Tropical Timber agreement (ITTA)

The 1983 International Tropical Timber Agreement (ITTA)[54] and its 1994 successor aim at regulating the international trade in tropical timber between producer countries and consumer countries, seeking to balance the environmental and economic interests. This makes the ITTA different from other commodity agreements. ITTA created the International Tropical Timber Organisation (ITTO), which has the mission to facilitate discussions, consultations and international co-operation on issues relating to the international trade and utilisation of tropical timber and the sustainable management of its resource base. The ITTA is an example of an attempt to include international environmental regulation in a resource-related multilateral treaty. In the preamble to the 1983 Agreement, the parties recognised "the importance of, and the need for, proper and effective conservation and development of tropical timber forests with a view to ensuring their optimum utilisation, while maintaining the ecological balance of the regions concerned and of the biosphere." Recognising the sovereignty of Member States over their natural resources, the Agreement encourages members "to develop national policies aimed at sustainable utilisation and conservation of timber producing forests and their genetic resources and at maintaining the ecological balance in the regions concerned, in the context of tropical timber trade."[55] Firm

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[53] See, for instance, Alberto Szekely, "The Legal Protection of the World's Forests after Rio '92," in The Environment after Rio: International Law and Economics, ed. Luigi Campiglio et al. (London: Graham & Trotman, 1994), 65-69.

[54] International Tropical Timber Agreement, Geneva, 18 November 1983, in force 1 April 1985, 1393 United Nations Treaty Series (1983): 67.

[55] Article 1 (1).

decisions were still considered unattainable under the negotiations leading to the agreement, which is why the Agreement only formulates objectives. The International Tropical Timber Counsel may be able to stimulate and at best assess sustainable utilisation and conservation of tropical forests, but it can hardly prohibit unsustainable production.[56]

The Lomé IV Convention

The Lomé IV Convention[57] of 1989 includes the principle of "a sustainable balance between its economic objectives, the rational management of the environment and the enhancement of natural … resources."[58] In November 1995, as a result of the Mid-Term Review of the Lomé IV Convention, a new protocol was added on the sustainable management of forest resources.[59] Its objectives include "supporting the development of ACP national policies aimed at the sustainable utilisation and preservation of tropical timber producing forests and their genetic resources as well as the maintenance of an ecological balance in the regions concerned within the context of the tropical timber trade'. Yet, all these objectives and duties in the Lomé IV Convention and in subsequent Lomé Conventions seem to be of a promotional nature only.

The World Bank Forest Policy

The potential of forests to reduce poverty and to mitigate climate change prompted the International Bank for Reconstruction and Development (IBRD), or World Bank, to prepare a forest strategy. A first strategy was developed in 1991,[60] and it focused on safeguarding tropical forests and halting deforestation. This strategy was revised in 2001 and refocused towards poverty reduction and sustainable management of forest resources.

The United Nation Framework Convention on Climate Change (UNFCCC)

The United Nation Framework Convention on Climate Change (UNFCCC)[61] sets out a framework for action to reduce greenhouse gas emissions and to stabilise their concentration in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system.[62] The Kyoto Protocol to the

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[56] Schrijver, Sovereignty Over Natural Resources (supra, note 47), 334.
[57] Fourth ACP-EEC Convention, Lomé, 15 December 1989, in force 1 September 1991, 29 International Legal Materials (1990): 783.
[58] Article 4 of the Lomé Convention (supra, note 57).
[59] Protocol 10, Sustainable Management of Forest Resources, ACP-EU Courier 155 (January/February 1996).
[60] International Bank for Reconstruction and Development, The Forest Sector: A World Bank Policy Paper (Washington, D.C.: IBRD, 1991).
[61] United Nations Framework Convention on Climate Change (UNFCCC), Rio de Janeiro, 4 June 1992, in force 21 March 1994, U.N. Doc. A/CONF.151/26, 31 International Legal Materials (1992) 849.
[62] See Article 2 of the UNFCCC (supra, note 61).

Convention[63] commits industrialised countries to achieve quantified targets for decreasing their emissions of greenhouse gases. It refers directly to forests and has important implications for biodiversity, since it provides for the designation of forests as so-called "carbon sinks".

The UN Convention to Combat Desertification and Drought (UNCCD)

The United Nations Convention to Combat Desertification and Drought (UNCCD)[64] primarily aims, as its name already suggests, at counteracting desertification and soil erosion. Among the means outlined to achieve this are intensified forestation and afforestation. The core of the UNCCD is the development of national, sub-regional and regional action programmes. It has the necessary holistic, locally driven approach, where the sustainable management of forests and other natural resources are regarded as an integral part of measures to achieve sustainability.

The World Heritage Convention (WHC)

The World Heritage Convention (WHC)[65] aims at encouraging countries to ensure the protection of their own cultural and natural heritage. It manages a list of world heritage sites including so-called "Biosphere Reserves", areas of terrestrial and coastal ecosystems which are internationally recognised within the framework of the UNESCO Man and the Biosphere (MAB) Programme, as well as Ramsar Wetlands of International Importance and some Tropical Forests. The WHC thus also has an important role to play in the conservation of global biodiversity.

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)[66] is an international agreement between governments with the objective of ensuring that international trade in specimens of wild animals and plants does not threaten their survival. Species are classified within 3 appendices. To date, about 15 species of trees have been placed on the CITES appendices. Some of them are commercially important, such as the Brazilian Rosewood listed in Appendix I, and the African Teak listed in Appendix II. Some mahoganies are also included in the Appendices. Several other species found in forest areas are also protected by the convention.

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[63] Kyoto Protocol to the United Nations Framework Convention on Climate Change (Kyoto Protocol), Kyoto, 10 December 1997, UN Doc. FCCC/CP/1997/L.7/Add.1, 37 International Legal Materials (1998): 22.

[64] United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa, Paris, 17 June 1994, in force 26 December 1996, 33 International Legal Materials (1994): 1328.

[65] Convention concerning the Protection of the World Cultural and Natural Heritage, Paris, 16 November 1972, in force 17 December 1975, 11 International Legal Materials (1972): 1358.

[66] Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), Washington, 3 March 1973, in force 1 July 1975, 12 International Legal Materials (1973): 1085.

The *OECD Environmental Strategy*

The Organisation for Economic Cooperation and Development (OECD) adopted an environmental strategy in 2001.[67] The main focus of the OECD Environmental Strategy is to ensure that continued economic growth is not accompanied by continued damage to the environment. The Environmental Strategy of OECD identifies the most pressing environmental problems through the year 2020 and outlines national actions required by Member States to address these problems, the indicators that can be used to measure their progress, and the work OECD can undertake to support them. The section on biodiversity aims at integrating biodiversity concerns into physical planning activities and economic, sectoral, and fiscal policies.

[67] OECD Environmental Strategy for the First Decade of the 21st Century, 16 May 2001, available at <www1.oecd.org/env/min/2001/products/EnvStrategy.pdf> (last accessed 31 October 2003).

3 Changing Trends in International Environmental Law and Their Significance for International Forest Regulation

3.1 Soft Law Instruments as Sources of International Law: Role and Effects

It has become habitual to categorise international environmental provisions as "hard law" or "soft law", depending on whether or not they meet the criteria outlined for sources of international law in Article 38 of the Statute of the International Court of Justice (ICJ Statute).[68] International conventions and international custom are regarded to be the most important formal sources of international law[69], whereas soft law, which seems to have gained more and more importance within international law during the last years, is often regarded as comprising instruments which do not belong to the more formal sources of international law.[70] But whereas national law is often understood in binary terms, with norms being either binding or non-binding, it was already recognised decades ago by international lawyers and legal scholars that international law does not adhere to such a clear distinction. International law allows

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[68] Statute of the International Court of Justice (ICJ Statute) Statute of the International Court of Justice (ICJ Statute), 26 June 1945, in force 24 October 1945, 961 United Nations Treaty Series (1945): 183; Article 38 reads:

> "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
> a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations; […]"

See also Sand, "UNCED" (supra, note 50): 5.

[69] This derives from Article 38 of the Statute, see supra, note 68; nonetheless, treaties can be seen to form a material rather than formal source of law, as treaty and the rights and obligations they contain only apply to the parties of the treaty. Treaties do not really create law but are rather evidence of law. A treaty may also have a double aspect, both declaring existing law and creating new conventional obligations that may lead to or become law. Strictly speaking, however, treaties are formally a source of obligation rather than a source of law, as in their contractual aspects they are no more a source of law than an ordinary private law contract which creates rights and obligations. Gerald G. Fitzmaurice, "Some Problems Regarding the Formal Sources of International Law," in Sources of International Law, ed. Martti Koskenniemi (Aldershot: Ashgate, 2000): 61.

[70] Ulrich Fastenrath, "Relative Normativity in International Law," 4 European Journal of International Law (1993): 305.

for legally relevant areas in between these two poles, binding and non-binding norms, which do not conform with the traditional perception of law, but which can neither be said to be totally insignificant. Although the binary character of law is usually acknowledged, law can also be regarded as entailing a variety of nuances without losing its binary character. In between these binary poles, law can be more or less binding, more or less specific, more or less exact, and more or less determinate.[71]

Various definitions of soft law exist. Strictly speaking, soft law does not include political or moral commitments, but many soft law instruments fall under the domain of political decisions that have a more or less distinct legal provenance. It is inherent within the idea of soft law that the violation of soft law instruments may lead to so-called "soft sanctions" or a "soft responsibility", since soft law would otherwise loose its *raison d'être*.[72] "Soft responsibility", which is often based on consultations, monitoring, and reporting, is increasingly used for compliance control because it allows states that are willing to co-operate in the solution of a problem to do so without completely restricting their freedom of action.[73]

What kinds of instruments and documents are given the status of soft law? Documents are considered to be soft law instruments on the basis of various characteristics, derived either from the name of the instrument,[74] from states' claims, or from the logical assumption that, when a certain institution is not empowered to make hard law, it has consequently created soft law.[75] When it comes to the legal effects of soft law instruments, they have often been categorised as interpretative guides because they are not generally considered to have the same weight as hard law instruments. The situation is easier when soft law has become part of customary law, which for its part is a more firmly acknowledged source of international law.[76] The altogether more ambiguous position of soft law within international law is not surprising if we consider that some international law scholars tend to think a confusion exists on the ways of identifying what is international law and what is not, and on the ways of making it and changing it.[77]

Realistically speaking, soft law is a result of lacking political determination, of a process that has failed to lead to an agreement and thus to a "hard law" outcome, but

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[71] Generally critical, Jan Klabbers, "The Redundancy of Soft Law," 65 Nordic Journal of International Law (1996): 167, 180.
[72] Klabbers, "Redundancy" (supra, note 71): 169.
[73] Martti Koskenniemi, "Breach of Treaty or Non-compliance? Reflections on the Enforcement of the Montreal Protocol," 3 Yearbook of International Environmental Law (1992): 127.
[74] As Klabbers formulates it, if words have any meaning, such instruments which explicitly claim to be non-binding could hardly be considered to be soft law. He gives as the example the "Non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests." It is difficult to draw a conclusion that such a document would be soft law or any other type of law. However, if one takes into consideration a process possibly initiated by a certain document, a process that may lead to legally relevant measures, one could perhaps categorise the instrument that initiated such a process as soft law. Klabbers, "Redundancy" (supra, note 71): 169.
[75] Ibid., 171.
[76] Ibid., 177.
[77] Robert Y. Jennings, "What is International Law and how do we tell it when we see it?" in Sources of International Law, ed. Martti Koskenniemi (Aldershot: Ashgate, 2000): 47.

which has instead resulted in something more binding than purely political declarations. It is not so much the indeterminacy of soft law, then, as it is the lacking determination in the process that leads to soft law. Neither hard law nor soft law can resolve political disputes. The fact that a binding international convention on biodiversity was concluded in Rio de Janeiro, while only a soft law instrument, a mere political document, was adopted for forests ("Non-legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests"), reveals the political indecision surrounding forest issues. The warning label of the Forest Principles ("non-legally binding") reflects the wariness of governments to formulate reciprocal principles even in non-mandatory terms, as "soft" declarations or recommendations have a tendency to harden over time into formal treaty obligations when they form the basis for the negotiation of treaty provisions. If soft law is later followed by state practise, it can also develop into rules or principles of customary law. Should a formal legal instrument on forests emerge at some point in the future, it is most probable that such an instrument will contain principles which to date have been included in the soft law type of Forest Principles.[78]

Soft law instruments allow states to tackle a problem collectively without strictly limiting their freedom of action. Flexibility is an essential aspect of international environmental law, since state sovereignty has to be respected, but at the same time international environmental problems require co-operation for their resolution. Soft-law guidelines and norms reflect general consent to certain basic principles.[79] In practise, when a government binds itself to a soft law instrument, it expresses a clear intention to act in a particular way in future, a moral duty, as it were, which is relied upon by other states and which may give rise to an international claim by another state if the undertaking is not honoured. Most often, this results in a loss of credibility and can entail a measure of political embarrassment.[80]

3.2 The Shifting Rationale of Environmental Regulation

If we agree that the general concept of regulatory instruments also includes other instruments besides conventional rules, regulatory instruments can be divided in various different ways. One traditional division is the division between regulatory instruments of direct behaviour control and financial instruments based on market incentives. The regulatory model is also known as the "command and control" approach, which operates through legislation and seeks to regulate the conditions under which certain activities with potential environmental effects may take place. Within environmental law, the key instrument based on "command and control" is the permit, which translates into a prohibition of certain activities unless a permit has been issued. The "command and control" approach is based on the idea of the

[78] Sand, "UNCED" (supra, note 50):8-9; David Freestone, "The Road from Rio: International Environmental Law after the Earth Summit," 6 Journal of Environmental Law (1994): 204.
[79] Birnie et al., International Law and the Environment (supra, note 26), 24-27.
[80] Freestone, "Road from Rio" (supra, note 78): 204-205.

centrality and exclusivity of national governments.[81] In recent years, however, this regulatory model has faced criticism for various reasons, as has the theoretical assumption on which it is based, that is: the centrality of national government, which has been subject to growing limitations. One of the most often voiced criticisms against the "command and control" approach is the argument that such regulation does not aim to inherently change harmful activities, because it does not create incentives for such change, but rather regulates the conditions upon which such activities can continue.

Market-based instruments, in contrast, act more indirectly. They aim at integrating environmental objectives into the current market conditions by internalising the externalities of certain harmful activities, all with the expectation that this will lead to revised conduct among actors.[82] Various categorisations of market based instruments exist, of which a classical one is the OECD classification of 1989.[83] This classification suggests five main groups of instruments – charges, subsidies, deposit-refund systems, market creation, and financial enforcement incentives. In this classification, "charges" are equalled to be the price of pollution or other harmful activities. "Subsidies" is a general term for financial assistance, and include grants, soft loans and tax allowances. "Deposit refund systems" are characterised by a surcharge added to the price of environmentally harmful products, and which is refunded if the product is returned for recycling. "Market creation" is a wider term, essentially denoting the requirement to buy permissions for polluting activities. It includes emissions trading, market intervention, and compulsory liability insurance.[84] Some of these instruments naturally require more state involvement and rely to a larger extent on the enforcement capacities of the state than others; thus, charges, subsidies, pricing, enforcement incentives, state property and services are more dependent on a centralised and active state than other instruments which operate more through financial institutions, such as deposit-refund systems, market creation, offset approaches, or compulsory insurance. A clear cut division between "command and control" instruments and market based instruments is nonetheless misleading. No market exists that would function completely without a legal framework, meaning that some amount of state intervention is always needed. Also, environmental quality objectives are always set by the state, regardless of the type of instrument implemented. The setting of these objectives requires careful analysis not only of environmental factors, but also of social and economic factors. Environmental objectives are also increasingly set by international institutions.[85] Legal instruments are always a result of political decisions, which formulate the required objectives and means to reach such objectives. Indeterminate regulatory instruments are hence a result of indeterminate political decisions. As Thomas Franck has stated it, economically and morally ideal solutions need a legal formulation if they are to be

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[81] See, for instance, Jan H. Jans, European Environmental Law, 2nd ed. (Groningen: Europa, 2000), 187-188, 191.
[82] Ibid., 203-204.
[83] See generally OECD, Economic Instruments for Environmental Protection: A Classification (Paris: OECD, 1989).
[84] Ibid., 14-16.
[85] Jans, European Environmental Law (supra, note 81), 214.

implemented, but "although lawyers and law can supply means, they cannot supply ends."[86]

When it comes to environmental policy, there are a number of difficulties with the application of economic instruments. It may be difficult to include certain environmental "goods" such as aesthetic values into the market economy. Environmental charges or fees may aid in bringing the value of environmental goods closer to the value of marketable goods, but as environmental values have no clear proprietary consequences, their market price is an artificial construction.[87] The lack of property rights when environmental commons are concerned may be problematic in the sense that civil liability in the traditional sense does not provide protection for the "ownerless environment". Still, an enhanced civil liability regime could empower public interest groups and individuals, allowing them to commence proceedings if public entities fail to do so in the event of environmentally harmful activities or the threat of such activities.[88] Certain deficiencies also remain as regards the liability for the "owned environment", that is, those parts of the environment currently within the property of individuals or legal entities: that is because liability is often measured in terms of economic loss for the owner rather than in terms of the cost of restoring the environment itself.

Not only "command and control" instruments, but also market-based instruments can be seen as instruments of interventionist environmental policy, which require the setting of concrete environmental targets. The "command and control" approach is still well rooted in the modern environmental policy within industrial societies. Administrative regulation tends to be more predictable and offers greater certainty that environmental quality goals are really met. Administrative regulation also typically provides for greater participation of the public, transparency of decisions, and political accountability of administrators; thus it embodies a democratic element.[89] Nonetheless, the application of market-based instruments can be decided on as democratic grounds as the application of an administrative regulation. Still, within Community environmental policy, and within biodiversity policy in particular, the traditional "command and control" approach to regulation firmly remains in place. The environmental action programmes and also the NATURA 2000 network are an example of this.

The conventional rationality of means and ends is perhaps not the best basis for environmental policy, given the scientific uncertainty inherent in environmental problems and risks. It also has difficulties in addressing the complex and potentially adverse impacts of environmental policy on industry, and fails to fully recognise the need to achieve structural changes in the economy as well as changes in societal values. Self-regulation of industry has been suggested as a means to avoid the deficiencies of both administrative regulation and economic instruments. As mentioned earlier, this type of regulation is typical for the international forestry

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[86] Franck, Fairness in International Law (supra, note 6), 363, 372.
[87] Jans, European Environmental Law (supra, note 81), 215.
[88] Ibid., 220.
[89] Eckard Rehbinder, "Self-regulation by Industry," in European Environmental Law: A Comparative Perspective, ed. Gerd Winter (Aldershot: Dartmouth, 1996): 239-240.

sector. The regulation of biological diversity seems to rely on both traditional "command and control" instruments as well as on some economic incentives, whereas international forest regulation is mainly based on soft law instruments and on the self-regulation of the forest sector. This is consistent with the fact that, in the field of biodiversity regulation, either state authorities or international institutions and conventions set the objectives and the means of regulation, whereas the forest sector lacks an internationally concerted forum of decision making and binding rules.

3.3 Private Efforts to Regulate Forest Practices and New Approaches to Public Regulation

Some international legal scholars have witnessed a trend in international environmental agreements, according to which obligations are supposedly channelled towards private, non-governmental parties.[90] This trend can also be perceived in the international regulation of forestry issues. One result of the impasse facing an international forest convention is the growing privatisation of international forestry regulation. This type of private regulation differs from the private international law that governs relations between individuals or corporations based in different countries, drawing its rationale from some form of "social contract" between producers and consumers instead. Such a contract involves consumer brand loyalty in return for corporate production of goods that meet certain consumer demands. Thus, besides the foregoing public international efforts to regulate forestry practices – public agreements and conventions whose members are primarily interstate and intergovernmental regimes or organisations seeking to harmonise international standards – a substantial number of initiatives exist which implement semi-public or private forestry regulation and are mainly based on market-based models. Such regulations is voluntary, however, and is intended to apply only to members or to specific industrial sectors.[91]

In terms of the regulatory approach, a recent trend in sustainable forestry regulation goes away from "command-and-control" regulation towards certification of both national and private practices through "eco-labelling". An eco-label is a label placed on a product pursuant to its production methods or performance, which supposedly enhances the social value or market value of the item by conveying its environmental benefits. Such a label is expected to make the product more attractive to environmentally conscious consumers. Labelling is most often performed independently by a third party, which is either a governmental agency or a non-profit group. This third party sets guidelines that products must meet in order to use their label. They may also conduct audits in order to ensure compliance with the guidelines.[92]

The process of international privatisation of the regulation of forestry practices through certification is being achieved largely through a growing reliance on markets

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[90] See, for instance, Franck, Fairness in International Law (supra, note 6), 356.
[91] This division was suggested by Lipschutz, "Why is there no International Forestry Law?" (supra, note 16): 6-7.
[92] Ibid., 8-9.

and market-based mechanisms to foster compliance.[93] An interesting aspect is that, parallel to the growing trend of using economic incentives for the regulation of environmental practices, there is also a trend towards using environmental controls to regulate economic activities, for instance in the inclusion of environmental concerns in trade agreements.[94]

Internationally, perhaps the best known label for forests managed in a sustainable manner is the label provided by the Forest Stewardship Council (FSC). The FSC is supported by most environmental NGOs, including the World Wide Fund for Nature (WWF), Greenpeace and Friends of the Earth. About half of the forests certified by the FSC scheme until the end of 1999 were located in Europe.

Under the initiative of European forest owners and the forestry industry based within the European Union, a private forest certification scheme, the Pan-European Forest Certification (PEFC), was created in 1999 to compete with the FSC. It was elaborated in order to promote forests managed in accordance with the Pan European Criteria as defined by the resolutions of the Helsinki and Lisbon Ministerial Conferences of 1993 and 1998 on the Protection of Forests in Europe.

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[93] Ibid., 11.
[94] Ibid., 12.

4 Reconciling the Exploitation of Natural Resources and Environmental Protection: Towards Sustainable Forest Regulation

4.1 Reconciliation Efforts Between International Trade and Environmental Law

The earlier comparison of Articles 1 and 3 of the Convention on Biological Diversity revealed an underlying contradiction between environmental protection concerns and the exploitation of natural resources: as was shown, Article 1 promotes the protection of biodiversity whereas Article 3 promotes the right of sovereign states to freely exploit their natural resources. On a more general level, so the conclusion, this contradiction can be understood as a disparity between environmental and economic interests.[95] Recent international as well as national regimes in the environmental field can be seen as an attempt to reconcile this tension. The Biodiversity Convention can, in itself, be understood as an attempt to reconcile economic and environmental interests within a single legal instrument.[96] The CBD provisions on trade in economically valuable genetic resources is a useful example of this.

Traditionally, trade and the environment have been separate spheres in international politics. The world trading system has been seen as an autonomous system, more or less isolated from other human activities and detached from its environmental or other societal consequences. As a consequence, the international legal system has been described as lacking mechanisms that would link trade agreements with instruments that cover other issues such as the environment, labour rights, or human rights.[97]

In recent years, however, the so called "trade and …" issues, such as trade and the environment, have gained ground in the trade agenda. Likewise, many environmental agreements explicitly state that environmental issues must be examined in a holistic manner, reconciling and integrating environmental protection with other policy fields such as – and perhaps most importantly – trade. The challenge lies in whether the trade system can accommodate these new issues, such as environment, or whether

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[95] In his dissertation, Tuomas Kuokkanen studies this tension between protection concerns and exploitation interests, and descries it as a reflection of the general tension between international law and sovereignty. See Kuokkanen, International Law and the Environment (supra, note 8), 289.

[96] See, for instance, David R. Downes, "Global Trade, Local Economies, and the Biodiversity Convention" in Biodiversity and the Law, ed. William J. Snape III (Washington, D.C.: Island Press, 1996): 202.

[97] Downes, "Global Trade" (supra, note 96): 206.

these new issues put in question the fundamental premises of the trade regime.[98] Looking at the new development from the environmental point of view, one might ask whether the trade agenda is a suitable forum to discuss such issues as environmental protection, or whether an entirely new institutional framework would instead be needed for the examination of environmental matters and their relationship to trade. If we hold on to the "trade and …" debate when looking at the disparities between trade and the environment, expecting that the trade regime will eventually accommodate the issue of environmental protection, at least on a level of language we might also be accepting a priority of the trade regime over the environment. In the end, that could translate into the rationale of free trade overruling that of environmental protection. Choosing economic rhetoric for our point of departure, issues such as the environment might not be adequately captured, but rather obscured. The point of departure and the point of view from which we look at the disparity between environment and trade, that is: either from an environmental or from a trade point of view, may determine the whole style of argumentation and possibly also our conclusions. The use of an economic rationale when describing certain social values, including environmental concerns, threaten to transform our understanding of these social goods. In other words, the incorporation of "trade and …" issues into the trade regime could be seen to threaten the social values underlying these goods.[99]

Still, the increased openness of the trade regime for external concerns, as reflected in the "trade and …" debate, may also challenge the traditional understanding of the world trading system.[100] For instance, by highlighting the necessity of trade-offs among incommensurable social values such as the environment, such introduction of "trade and …" features into the free trade regime might challenge the dominant assumption that free trade rules should be designed purely to maximise economic efficiency.[101] "Trade and …" discussion often reveal tensions between economic and non-economic values, and it is becoming increasingly clear that the economic efficiency model and its welfare maximisation calculus do not adequately account for a number of important non-economic values. Often these non-economic values cannot be reached or realised purely by trade liberalisation or other market mechanisms, but call for governmental action or intervention.[102] The exclusive use of economic analysis when evaluating such non-economic values can ultimately obscure the diverse ways – many of which are not linked to economic calculations – in which a culture measures its non-economic values.

International trade is simultaneously an economic, social, political and legal phenomenon. Any understanding of the trade system should integrate insights from at least these four disciplines.[103] The "trade and …" discussion has involved other disciplines as well, as exemplified by how the "trade and the environment" movement has attracted attention from law, economics, the environmental sciences and political

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[98] Jeffrey L. Dunoff, "The Death of the Trade Regime,"10 European Journal of International Law (1999): 733.
[99] Ibid., 756.
[100] Ibid., 735.
[101] Ibid., 735.
[102] Ibid., 745-746.
[103] Ibid., 736.

science. These "trade and …" issues may illuminate certain deficiencies in the conventional understanding of the trade regime and thereby open up intellectual space necessary for the reconceptualisation of the trade regime.[104]

Panels which try to resolve such "trade and …" dilemmas are often criticised for decisions and reports which ignore the underlying value conflicts. A fundamental tension results from how to best strike a balance between the pursuit of economic interests and other social interests and how to mediate the tension between law and politics. For instance, if we think about dispute resolution under the world trading system, there has been a long debate on whether the dispute resolution system should be a rule-based, formal system or a more flexible diplomatic mechanism. The Uruguay Round Dispute Settlement Understanding (DSU)[105] clearly emphasises a more formal system. Thus, WTO panels established in accordance with the DSU are not intended as a forum for the political resolution of controversial value conflicts. The legitimacy and expedience of the dispute resolution mechanism would perhaps be questioned if panels were seen as engaging in general policy-making. "Trade and …" issues therefore seem to be moving from the legal domain into the more political domain. But this naturally raises problems for a satisfactory resolution of "trade and …" disputes in the context of WTO dispute resolution. The core of the problem is the extremely contested nature of the underlying issues, which ultimately goes back to value conflicts. Value conflicts cannot be solved by skilful treaty language, even if the treaty *prima facie* seems to solve the problem – and even that is something many treaties often fail to do. In this regard, much of the criticism directed against the reasoning of WTO panels may be correct, but somehow beside the point. From the point of view of the legitimacy principle, it might be accurate that the value conflict can be resolved more successfully at the level of a specific treaty, which in turn requires political agreement. And that, of course, entails greater legitimacy than any attempt to resolve the value conflict at the judicial level, as decisions by the judiciary are endowed with less democratic legitimacy than more representative decisions reached within other branches of government. If the value conflicts were resolved at the level of international agreements, the value conflicts would cease to be a purely political issue. The formal consensus reached and reflected in an international agreement could, instead, guide panels to distinguish between protectionist measures and valid environmental concerns.[106] The existence of an international environmental agreement on the contentious issue, for instance, could serve as an argument against claims of protectionism. Since lawyers cannot escape the responsibility of weighing and balancing countervailing arguments, however, along with the responsibility of reaching a final decision, part of the task of resolving conflicts in values will always also remain a duty of lawyers.

The preoccupation of environmentalists with free trade partly arises from the assumption that liberalised trade can result in unsustainable consumption of natural

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[104] Ibid.

[105] Dispute Settlement Understanding (DSU), annexed to the Agreement Establishing the World Trade Organization (WTO Agreement), Marrakech, 15 April 1994, in force 1 January 1995, contained in Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, 33 International Legal Materials (1994) 1144.

[106] Dunoff, " Death of the Trade Regime" (supra, note 98): 754-756.

resources. Trade agreements are also often criticised for containing provisions on market access that can be used to override domestic environmental legislation. Moreover, nations with low environmental standards are seen to enjoy a competitive advantage in a global market, thereby creating pressure to lower the level of environmental protection in nations with high environmental standards. The use of trade-measures is never an ideal vehicle for *environmental* policies. Also, a general fear remains that protectionists may seek to achieve their goals by using the politically attractive rhetoric of environmental protection.

The protection of the environment as well as free trade, the movement of goods, services, persons, capital and payments, are each regulated in hundreds of separate agreements, often in an uncoordinated manner. Until the Uruguay Round Agreements of 1994, most international trade agreements outside the European Union did not expressly address general "horizontal problems" such as the environment. Neither the EEC Treaty of 1957,[107] the EFTA Treaty of 1960[108] nor the GATT of 1947[109] explicitly referred to the protection of the environment or to the various bilateral and multilateral environmental agreements concluded by their member states.[110] Nonetheless, the environment is often affected by decisions on trade. It was not until the UNCED in 1992 that principles on trade and the environment were adopted, following a global consensus that trade and environmental rules should be mutually supportive.[111] In the Single European Act (SEA) of 1986[112] and through the 1994 Agreement establishing the WTO,[113] both the EC Treaty and the GATT explicitly took up the objective of sustainable development as part of their legal structure. Later, the Community also recognised the need to integrate environmental protection into other policies by inclusion of the Integration Principle in Article 6 of the Treaty.

The WTO rules on trade and the environment are largely compatible with their respective counterpart in Community law. The EEC Treaty explicitly stipulates that the rights and obligations arising from the GATT "shall not be affected by this Treaty". Both the GATT and Community law have comprehensive dispute settlement and enforcement mechanisms. Since the 1980s, the dispute settlement mechanisms of both the GATT and the Community have witnessed claims of "green protectionism" and "extraterritorial application" of environmental standards to imported products. The legal principles applied by the GATT dispute settlement panels and the European Court of Justice (ECJ) are to some extent similar, for instance in the principle of non-

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[107] Treaty Establishing the European Economic Community (EEC Treaty), Rome, 25 March 1957, in force 1 January 1958, 298 United Nations Treaty Series (1957): 3.

[108] Convention Establishing the European Free Trade Association (EFTA Convention), Stockholm, 4 January 1960, in force 3 May 1960, available at <secretariat.efta.int/> (last accessed 31 October 2003).

[109] General Agreement on Tariffs and Trade (GATT), Geneva, 30 October 1947, in force 1 January 1948, 55 United Nations Treaty Series (1947): 188.

[110] Ernst-Ulrich Petersmann, International and European Trade and Environmental Law after the Uruguay Round (London: Kluwer, 1995) at 3.

[111] Ibid.

[112] Single European Act (SEA), Luxemburg, 17 February 1986, in force 1 July 1987, 25 International Legal Materials (1986): 506.

[113] Agreement Establishing the World Trade Organization (WTO Agreement), Marrakech, 15 April 1994, in force 1 January 1995, in Final Act (supra, note 105): 1144.

discrimination, the principle of necessity and the use of least-trade restrictive measures of environmental policy.[114] Nonetheless, specific environmental regulation is much more extensive in Community law, consisting of hundreds of regulations, directives, decisions, and other measures. Moreover, under Articles 2 and 6 of the EC Treaty, the environmental dimension must form an integral part of the process by which all other Community policies are defined. In doing so, the Commission has reserved itself the right to declare the EC Treaty rules on subsidies and restrictive business practices inapplicable to certain "green state aids" and environmentally beneficial private agreements.[115] Still, there is nothing in the EC Treaty that would suggest that environmental considerations should prevail over those of competition policy.[116]

The Biodiversity Convention could be regarded as an innovation in that it is simultaneously a conservation agreement and – albeit to a limited extent – a trade agreement. Some previous multilateral environmental agreements had linked environment and trade as well, often by restricting certain categories of trade in order to accomplish environmental or conservation goals; a classical example would be CITES,[117] which bans all trade in products made from species listed as being in danger of extinction due to such trade.[118] Traditional trade agreements have reflected the neoclassical economic view that the economy contains the ecosystem, whereas the Biodiversity Convention aims to recognise the principle of ecological economics, which means that the ecosystem is seen to contain the economy: in that conception, the ecosystem supplies the economy with "matter-energy" without which the economy could not survive. The Convention requires that trade be sustainable within the context of a sustainable process of production.[119] However, this reversal of the poles of "trade" and "environment" within the Biodiversity Convention follows naturally from the fact that the Convention mainly seeks to improve environmental conservation rather than regulate trade. Also, no matter how fiercely environmental interests are emphasised in specific environmental agreements, due to the lacking hierarchy of international law, their provisions are unable to overrule either those of the GATT or of the EC Treaty regarding free trade. Thus the impact of specific environmental agreements such as the Biodiversity Convention on the relationship of trade and the environment should be evaluated within the context of other relevant international agreements.

Another crucial aspect is the impact of environmental conventions or free trade agreements on local ecosystems and the local economy. Genetic and biological resources are often essential for local ecosystems and local economies as the sole means of production and reproduction. These local biological resources are often managed under traditional institutions and rules. Most trade agreements do not recognise the value of genetic and biological resources for local economies, but tend to emphasise the benefits of long-distance international trade. The Biodiversity Convention Articles 8 (j) and 10 (c) are particularly relevant for local traditional

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[114] Petersmann, International and European Trade (supra, note 110), 54.
[115] Ibid., 58.
[116] Ibid., 65.
[117] For the full citation, see supra, note 66.
[118] In greater detail, Downes, "Global Trade" (supra, note 96): 206.
[119] Ibid., 206, 214.

economies. Article 8 (j) of the Biodiversity Convention requires parties, "as far as possible and as appropriate", to take measures to "respect, preserve and maintain knowledge, innovations and practices of indigenous and local communities embodying traditional lifestyles relevant for … conservation and sustainable use."[120] These provisions are relevant for the trade in genetic resources, since many of these resources are developments ascribed to indigenous and local communities. It could thus be interpreted as requiring an approval by local communities and their involvement when resources are taken from the territories of indigenous communities pursuant to Article 15 of the CBD. Governments should also encourage equitable sharing of the benefits of wider use of such genetic resources with the local communities. Furthermore, if governments were to create new intellectual property rights (IPRs), they should ensure that the new rights – as well as existing IPRs – are applied consistently with Article 8 (j).[121] Article 10 (c) requires parties, "as far as possible and as appropriate", to "protect and encourage customary use of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use."

4.2 The Principle of Permanent Sovereignty over Natural Resources and Its Possible Reformulation

Ever since the Peace of Westphalia of 1648, sovereignty has served as a basic doctrine and backbone of international law.[122] The concept of sovereignty of nation states is thus a well-established principle of international environmental law. Although it is derived from the general concept of sovereignty, the principle of permanent sovereignty over natural resources evolved later, as natural resources became an object of study in various scientific disciplines. Their definition is difficult, as each description of the concept of natural resources is determined by the theoretical assumptions and methods of the scientific branch in which the concept is defined. Lawyers, for instance, are mainly interested in the ownership and use of rights over natural resources. Still, natural resources are generally divided in non-renewable and renewable resources, of which forests belong to the renewable resources. Understandably, many so-called renewable resources are not renewable in any practical sense, for instance 1000 year old tropical forests. [123]

Despite the terminological uncertainties surrounding natural resources, a principal rule of international law – which is also reflected in many environmental treaties – is the right of states to freely exploit their natural resources. This is not only a question of sovereignty for the nation states, but to a large extent also an economical question. And environmental protection interests frequently collide with these economic interests. At the same time, environmental protection is not solely a national, but also increasingly a universal interest. This tension between environment concerns and unrestricted exploitation interests can, accordingly, be described as a more general tension between

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[120] Article 8 (j) of the CBD, supra, note 3.
[121] Downes, "Global Trade" (supra, note 96): 210, 216.
[122] See, for instance, Schrijver, Sovereignty Over Natural Resources (supra, note 47), 2.
[123] Ibid., 13-15.

international law and sovereignty.[124] From the point of view of environmental protection, the environment is understood as a common good subject to internationalisation, whereas the exploitation interests will view natural resources as property subject to national sovereignty. As always, however, the poles can be looked at form a reverse standpoint: natural resources can equally be understood as common goods, while environmental protection remains a prerogative of sovereign states.[125]

History provides interesting insights into the principle of permanent sovereignty over natural resources – amounting to exploitation interests – versus environmental protection interests. Indeed, international environmental law has not developed as a unified regime; instead, two distinct branches of law developed, first during the 19th century and then during the first half of the 20th century. These branches were, first, international environmental law, which dealt with the protection of nature and pollution prevention, and, secondly, the law of natural resources, which sought to enhance the status of developing countries.[126] According to Tuomas Kuokkanen, both these environmental projects had recourse to international institutions and regulations, but in a distinct manner. While the environmental regime sought to regulate environmental problems by transferring environmental issues from domestic jurisdiction to international jurisdiction, the development-minded regime of natural resources sought to transfer issues concerning natural resources from international to domestic jurisdiction by means of international arrangements and resolutions. Thus, while international environmental law in the strict sense sought to internationalise environmental issues, the law of natural resources aimed to nationalise issues relating to exploitation of natural resources.[127]

When we compare the international regulation of forests and the international regulation of biodiversity, we notice that they reflect the division presented by Kuokkanen, according to which natural resources have remained within national jurisdictions throughout the history of international environmental law while environmental protection became subject to international regulation. Since forests belong to the category of natural resources, they equally became subject to national jurisdiction, whereas biodiversity issues relating to environmental protection became subject to much more extensive international regulation. As forests also contain environmentally valuable aspects of biodiversity, however, their biodiversity level could indeed be regulated internationally. As a result, forests seem to rest between both spheres, natural resources and the environment, with the result that currently almost no international regulation exists regarding forests as natural resources, while a number of international arrangements have been concluded to protect biodiversity. This could be considered the general contradiction of international environmental law in the modern era: the attempt to simultaneously protect nature and facilitate the exploitation of natural resources.[128]

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[124] See Kuokkanen, International Law and the Environment (supra, note 8), 289.
[125] Ibid., 289.
[126] Ibid., 89.
[127] Ibid.
[128] Ibid., 190.

If we analyse the history of international environmental law and the disparity between protection and exploitation, it could be concluded that, during the traditional period of international environmental law, no clear distinction within international environmental law existed between environmental protection and the exploitation of the environment; later, during the modern era, they were almost completely separated; and now, finally, the postmodern era attempts to reconcile the two.[129] According to Kuokkanen, the traditional approach of international environmental law was based on the failed attempt to resolve environmental problems by applying the doctrine of absolute sovereignty. Nonetheless, the principle of permanent sovereignty of nation states over their natural resources continues to be a well-established norm of international environmental law. In the meantime, however, the concept of absolute sovereignty has developed towards a sovereignty subject to certain limitations based on international law or agreed to in international treaties.[130]

To date, the world and its sovereign states are becoming more and more interdependent in many ways. The concept and function of nation states have been under discussion in the post-modern world of globalisation. Likewise, transboundary environmental problems have contributed to a more limited concept of sovereignty. The principle of permanent sovereignty over natural resources was introduced in the United Nations debates during the post-war era as a means of underscoring the claims of colonial peoples to benefit from their own resources, and in order to alter the legal arrangements under which foreign investors had obtained title to exploit resources in developing countries. The principle of sovereignty over natural resources thus evolved as a new principle of international economic law. Until recently, the concept has been understood as being economically oriented, focusing on the economic use and thus neglecting the intrinsic value and ecological benefits of natural resources, which are only nowadays being recognised to some extent.[131]

It can be inferred from several environmentally relevant resolutions and treaties that states, as subjects of the right to permanent sovereignty, have increasingly been charged with the duty to manage natural resources within their jurisdiction in an environmentally sound and sustainable manner. Principle 21 of the Stockholm

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[129] Kuokkanen, International Law and the Environment (supra, note 8), xiv. Kuokkanen divides the three eras as follows: the traditional period took place from 1850 to 1939, the modern era lay between 1950 and 1980 and the postmodern period has been taking place since 1980. The traditional era of international environmental law represents a period during which classical methods of international law were applied to environmental law; the modern era brought about doctrinal development of international environmental law and the law of natural resources. The postmodern period, finally, refers to environmental integration and sustainable development.

[130] The doctrine of absolute territorial sovereignty, the "Harmon Doctrine", was formulated at the end of the 19th century, when the Attorney General of the United States, Judson Harmon, gave a legal opinion on the dispute between United States and Mexico on the use of the waters of Rio Grande in 1895. Under this doctrine, a state had absolute sovereignty to the part of the river which lied solely within its territory. The doctrine of absolute territorial sovereignty favoured by Judson Harmon has become known as the Harmon doctrine. Later, the Harmon Doctrine proved to be less helpful as a legal tool in dispute settlement. See, for instance, Kuokkanen, International Law and the Environment (supra, note 8), 4-5, 17.

[131] Schrijver, Sovereignty Over Natural Resources (supra, note 47), 2-3.

Declaration[132] introduced a new approach to the previously predominant concept of state sovereignty by proposing a duty of states to "ensure that the activities within their jurisdiction and control do not cause damage to the environment of other States or beyond the limits of national jurisdiction."[133] The Stockholm Conference on the Human Environment also proposed an integrated institutional framework for the advancement and management of global resources.[134] Principle 2 of the Stockholm Declaration, for instance, calls for careful planning and management of the natural resources of the earth, while Principles 3 to 5 provide that the capacity of the earth to produce vital renewable natural resources must be maintained and improved. These provisions refer to the interests of humankind, including present and future generations. Actually, a comparison of the Stockholm Declaration with the Rio Declaration reveals that the former contains more specific substantive provisions on natural resources management and nature conservation than the Rio Declaration, which appears to be altogether less environmentally centred than its predecessors, the 1972 Stockholm Declaration and the 1982 World Charter for Nature.[135]

The principle of permanent sovereignty over natural resources has become more relative as a result of the emerging principles of environmental law reflected in several international agreements on the environment. Following the Stockholm Declaration, resolutions of the United Nations have gradually elaborated standards for nature conservation and the utilisation of natural resources. Moreover, several important multilateral treaties have been concluded in the field of nature and natural resources conservation, for instance: the 1971 Ramsar Convention on Wetlands of International Importance Especially as Waterfowl Habitat;[136] the 1972 UNESCO World Heritage Convention,[137] under which each party has a duty to identify, protect, and conserve for future generations the cultural and natural heritage which lies within its territory; the 1973 CITES convention;[138] and the 1979 Bonn Convention on the Conservation of Migratory Species of Wild Animals,[139] which seeks to protect and conserve species of fauna. The 1992 Biodiversity Convention incorporates important new principles of international environmental law, such as the "precautionary principle" and the "intergenerational equity" principle. Sustainable use is defined in the Biodiversity Convention as "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations."

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[132] Supra, note 4.
[133] Supra, note 4, Principle 21.
[134] Franck, Fairness in International Law (supra, note 6), 359.
[135] World Charter for Nature, UN Doc. A/37/L4 and Add. 1 (28 October 1982), XXI United Nations Resolutions 239; see also Schrijver, Sovereignty Over Natural Resources (supra, note 47), 139-140.
[136] Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Ramsar, 2 February 1971, in force 21 December 1975, 11 International Legal Materials (1972): 969.
[137] See supra, note 65.
[138] See supra, note 66.
[139] Convention on the Conservation of Migratory Species of Wild Animals, Bonn, 23 June 1979, in force 1 November 1983, 19 International Legal Materials (1980): 15.

In the context of international environmental law, it may be more adequate nowadays to talk about sovereignty as restricted by certain principles of international law, including a number of rules of international environment law, rather than talking about absolute sovereignty over natural resources within the jurisdiction of a state. Due care for the environment and precautionary action with respect to the environment have become basic principles of environmental protection and preservation law. Growing emphasis is placed on the duty of states to take preventive measures to protect the environment, and the emergence of this "precautionary" principle is also reflected in several multilateral treaties, including the 1992 Biodiversity Convention as well as Principles 15 and 19 of the Rio Declaration. Although the precautionary principle is typically applied in a specific context, it may also have general relevance for biodiversity and forest matters. Another emerging principle of international environmental law with relevance for the sovereignty of states regarding their use of natural resources is the principle of inter- and intragenerational equity, according to which states must take into account the interests of both present and future generations. Principle 1 of the 1972 Stockholm Declaration, for instance, notes a "solemn responsibility to protect and improve the environment for present and future generations." This principle requires that states conserve their fauna and flora and manage their natural environment in such a way as to conserve its capacity for sustainable use by future generations. Other international law principles, such as the principles of preservation of *res communis* and of common heritage of humankind, also affect the sovereign right of states to dispose over their natural resources. They mostly relate to areas beyond national jurisdiction, such as outer space and Antarctica, but in future these principles may also have relevance for the protection and conservation of the nature and for the protection of the environment to the extent that it belongs to all humankind, such as major ecosystems and biological diversity *per se*. Accordingly, the third paragraph of the Preamble to the 1992 Convention on Biological Diversity declares – at least in the level of rhetoric – that the conservation of biological diversity has become a "common concern of humankind."[140]

This notion of "common concern" emphasises the role of the environment for all states and peoples, while it also recognises the intrinsic value of nature. The Biodiversity Convention recognises that "the conservation of biological diversity is a common concern of humankind." In contrast, the Forestry Principles do not recognise the concept of "common concern." They reaffirm the applicability of the principle of permanent sovereignty over all types of forests, and provide that "their sound management and conservation are of concern to the Governments of the countries to which they belong and are of value to local communities and to the environment as a whole." This absence of the concept of "common concern" may be due to the North-South dichotomy reflected in the negotiations, during which the developing countries strongly resisted any implication that third parties would enjoy proprietary rights over resources under their jurisdiction without their consent, as they held that this would infringe upon their permanent sovereignty.

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[140] On the discussion about the emerging principles of international environmental law, see for instance Schrijver, Sovereignty Over Natural Resources (supra, note 47), 241-249.

It could be concluded that earlier assertions of permanent sovereignty over natural resources are increasingly complemented by a trend towards international co-operation and the formulation of obligations and duties incumbent on states. On the one hand, states have the right to freely pursue their own economic and environmental policies, including conservation and utilisation of their natural resources; on the other hand, responsibilities and obligations have emerged which confine the freedom of action enjoyed by states. Changes in the interpretation of the principle of permanent sovereignty go hand in hand with the continuing evolution of international law.[141]

4.3 The Principles of Sustainable Development and Equitable Utilisation and Their Effect on the Sovereignty Doctrine

New concepts such as the inherent rights of future generations, the principle of equitable utilisation, and the principle of sustainable development have gradually emerged in international environmental law. At first sight, all of these appear to be somehow related; sustainable development can only be achieved by safeguarding rights of future generations and by equitable utilisation of natural resources. The problem of achieving sustainable development, however, seems to be easier to identify than to resolve. The concept of sustainable development reflects the general theme of this study, that is: the search for a balanced solution which takes into account both developmental and environmental factors in a particular context. International environmental law may be unable to offer a quick solution for the achievement of sustainable development, but it can provide a framework in the form of conventions or standards, mechanisms for negotiations and the settlement of disputes, improved supervision of treaty implementation, as well as the forums and institutions where these kinds of activities can take place.[142]

The principle of "equitable utilisation" was an important aspect of the negotiations at the 1992 UN Conference on Environment and Development.[143] In fact, all five texts agreed at the UNCED include references to the term equity. Article 1 of the Convention on Biological Diversity outline the "fair and equitable sharing of the benefits arising out of the utilisation of genetic resources." Furthermore, Article 15 (7) sets down how each contracting party should take legislative, administrative or policy measures "with the aim of sharing in a fair and equitable way the results of research and development and the benefits arising from the commercial and other utilisation of genetic resources." Article 16 (2) on access and transfer of technology states that transfer of technology to developing countries shall be provided or facilitated "under fair and most favourable terms". The Forest Principles state that the "benefits associated with forest conservation and sustainable development … should be equitably shared" by all states. The Rio Convention does not, however, specify the

[141] Schrijver, Sovereignty Over Natural Resources (supra, note 47), 395.
[142] See Birnie et al., International Law and the Environment (supra, note 26), 9-10.
[143] See supra, note 5.

term "equity" or "equitable utilisation", which may naturally result in problems when it comes to implementing the principle.

The eagerness of proponents to use the term "equitable" in the Rio Convention perhaps derives from the fact that the texts agreed at UNCED are not only concerned with environmental protection, but rather deal with the larger topic of sustainable development. Equity would require that the international community take into account all the relevant economic, social, and environmental objectives in order to reach a decision and thereby an equitable solution. Within the texts of the convention, however, there are no guidelines as to which considerations are relevant when deciding upon an equitable solution. Consequently, the notion of equity not only allows for flexibility, but may also permit political manoeuvring – as might, after all, any such general notion, including the concept of sustainable development. Resorting to the term "equity" during the negotiations during UNCED may also have been an attempt at "postponing difficult negotiations to some future meeting". As Duncan French puts it: "Through the notion of equity, states could agree to disagree."[144] Also, too little considerations has been given at a governmental level to the practical consequences such recognition of the needs of future generations might have.

There are several theoretical definitions of intergenerational equity. According to Edith Brown Weiss, three fundamental elements exist in the concept of intergenerational equity. First, there should be what she terms a "conservation of options" for future generations, who "should be entitled to diversity comparable to that of previous generations". Secondly, there ought to be a "conservation of quality", meaning that the environment should be passed from our generation to the next with no deterioration of its quality. Thirdly, there should be "conservation of access", which means that all members of the actual generation should have equal access to natural resources.[145]

The notion of sustainable development is another fairly new concept in international environmental law. The sustainable use of natural resources seems to imply an objective of optimum utilisation, which ensures long term sustainability, simultaneously taking into account short-term needs of use. In the modern perception of sustainability, ecosystem considerations are reconciled with the idea of rational utilisation. Increased scientific knowledge has led to a better understanding of ecosystems and their functions, and it has been increasingly agreed that the conservation of biological diversity does not necessarily request total conservation. The idea of total conservation advocated at an earlier stage in the development of international environmental law has been put aside and replaced

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[144] Duncan French, "International Environmental Law and the Achievement of Intragenerational Equity," 31 Environmental Law Reporter (2001): 10649.

[145] Edith Brown Weiss, In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity (Tokyo: United Nations University, 1989), 38-44.

by the idea of rational use, which includes the objective of conservation.[146] According to Kuokkanen, the Convention on Biological Diversity represents a climax in the reconciliation of conservation and utilisation needs of natural resources. The CBD requires that biological resources be used in a sustainable manner, while sustainable use is defined as meaning "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the need and aspirations of present and future generations." What sustainable use means in a specific context is naturally to be decided elsewhere. The entire Rio process of 1992 dealt with the promotion of this aim so as to integrate environmental objectives to other societal development.

It could be asked how environmental protection and economic growth are balanced within the concept of sustainable development, to what extent environmental protection should be subordinated to economic growth, and to what extent economic growth may require further exploitation of natural resources.[147] Within a specific context, the aspirations presented under the rhetoric of sustainable development, that is: the goals of environmental protection, economic welfare and social justice, may not be harmonised so easily. "While as a purely empirical matter the three goals may sometimes be combinable, they are essentially incommensurable and competing."[148] The concept of sustainable development cannot replace the balancing of those interests; the balancing process is rather achieved by the political measures which are taken under the principle of sustainable development.

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[146] See Kuokkanen, International Law and the Environment (supra, note 8), 258-282. Kuokkanen points out that the reconciliation of long-term objectives and short term needs already occurred within the early treaties on the conservation of natural resources, initially those concerning marine living resources and international watercourses; thus, for instance, the 1911 Convention for the Preservation and Protection of Bering Sea Fur Seals contained this idea. Later, this development extended to the use and the conservation of living natural resources, for instance in the 1971 Ramsar Convention and the 1979 Bonn Convention, both of which contain the idea of balancing between conservation and utilisation.

[147] Jonas Ebbesson, Compatibility of International and National Environmental Law (Uppsala: Iustus, 1996), 241.

[148] Ilona Cheyne, "Law and Ethics in the Trade and Environment Debate: Tuna, Dolphins and Turtles," 12 Journal of Environmental Law (2000): 313.

5 Environmental Protection in the European Union as a Regulatory Framework for Forest Management and Biodiversity Conservation

5.1 The Inclusion of Environmental Concerns into Community Primary Law

The original EEC Treaty[149] signed in 1957 contained no provisions on the environment, not to mention forests, as it had been mainly designed to be an economic agreement and had as its arguably most important objective the creation of a common market. Until the 1970s, the Community institutions paid no specific attention to the development of an environmental policy. Only in 1970s, following a stream of discussions during the preceding decade, did the European Commission announce the necessity to establish a Community action programme on the environment. These discussions had been sparked off by early environmental literature such as Rachel Carson's "The Silent Spring"[150] and culminated in an alarming report presented by the Club of Rome on the "Limits to Growth."[151] An actual starting point for the development of a European environmental policy occurred in 1972, when it was agreed within European Community that economic expansion should not be an end in itself, and that progress should be directed to serve all mankind, paying special attention to non-material values and the protection of the environment. Thereafter, economic expansion was no longer regarded in quantitative terms only, but also as a qualitative issue. From 1971 onwards, several directives and regulations were adopted on different fields of environmental policy.

Due to the lack of a clear provision on the matter, the Community competence to enact a comprehensive environmental policy remained controversial. By an extensive interpretation of the notion "economic expansion", environmental protection became the subject of Community decision-making. Most of the environmental decisions in the Community at that time were based on Articles 100 and 235,[152] which aimed at eliminating distortions of competition and sought to achieve an effective operation of the common market. Article 100 was used where differences in national environmental laws had a detrimental effect on the common market, as that provision

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[149] See supra, note 107.
[150] Rachel L. Carson, The Silent Spring (Boston, Mass.: Mifflin, 1962).
[151] Donella H. Meadows et al. (eds.), The Limits to Growth (New York, N.Y.: Universe Books, 1972).
[152] Arts. 95 and 308 ECT, respectively, in the new nomenclature introduced by the Treaty of Amsterdam.

aimed at the prevention, elimination, and avoidance of distortions of competition. This of course placed limits on the scope of issues to which that Article could be applied as a legal basis for environmental policy. Article 235, in turn, was used "if action by the Community should prove necessary to attain, in the course of the operation of the common market, one of the objectives of the Community and this Treaty has not provided necessary powers." With an extensive interpretation of Article 2 of the Treaty, which mentioned economic expansion, environmental protection was considered an objective of the Community, since economic expansion could now be regarded both in quantitative and in qualitative terms.[153]

On 1 July 1987, specific provisions on the environment were included in the Treaty as the changes to the EC Treaty brought by the Single European Act entered into force.[154] Objectives of Community environmental policy were included in the Treaty. For example, Articles 130r, 130s, 130t, 100a (3) and 100a (4)[155] made the application of the previously used articles unnecessary and confirmed the Community task of developing an independent environmental policy. As in other fields of Community policy, the Community was to exercise its powers in accordance with the principle of subsidiarity, that is: if the environmental objectives of the Community could be attained better at Community level than at the level of individual Member States.[156]

As the Treaty on European Union entered into force on 1 November 1993,[157] the importance of environmental policy within the Community grew again. The term "environment" was referred to in the central Articles 2 and 3[158] of the EC Treaty, which articulate the objectives of the Union. Article 2 referred to the promotion, throughout the Union, of a harmonious and sustainable development of economic activities and sustainable and non-inflationary growth respecting the environment, while Article 3 stated that one of the activities for attaining the objectives set out in Article 2 was a "policy in the sphere of the environment." Finally, the Treaty of Amsterdam[159] introduced further changes with regard to European environmental policy when it entered into force on 1 May 1999. The text of Article 2 was improved to state that the Community shall have as its task to promote a harmonious, balanced and sustainable development of economic activities, which is more in line with internationally accepted principles of environmental policy. Article 2 still reflects the

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[153] On the history of Community environmental legislation, see e.g. Jans, European Environmental Law (supra, note 81), 3-10; Damian Chalmers, "Inhabitants in the Field of EC Environmental Law," in The Evolution of EU Law, eds. Paul Craig and Gráinne de Búrca (Oxford: Oxford University Press, 1999): 653; Alexandre Kiss and Dinah Shelton, Manual of European Environmental Law, 2nd ed. (Cambridge: Cambridge University Press, 1993), 8-12; Stuart Bell and Donald McGillivray, Ball & Bell on Environmental Law: The Law and Policy Relating to the Protection of the Environment, 5th ed. (London : Blackstone Press, 2000), 122-127.

[154] See supra, note 112.

[155] Nowadays Arts. 174, 175, 176 and 95 ECT, respectively.

[156] Jans, European Environmental Law (supra, note 81), 7.

[157] Treaty on European Union, Maastricht, 7 February 1992, in force 1 January 1993, 31 International Legal Materials (1992): 253.

[158] Arts. 2 and 3 ECT in the new nomenclature.

[159] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Amsterdam, 2 October 1997, in force 1 May 1999, 37 International Legal Materials (1997): 56.

political decision to link sustainable development to economic activities. The changes at Amsterdam also introduced the concept of sustainable development into Community law, and, of great importance, the integration principle in a new Article 6 of the EC Treaty. According to this provision, environmental protection requirements must be integrated into the definition and implementation of the Community policies and activities as a general principle of EC law. This means that environmental protection needs to be taken into account in all other policies and measures taken by the Community. The scope and intensity of this article are still to be shaped, but it is clear that the environment nowadays plays an increasingly important role within Community policy.

There is, thus, an evident trend of affording environmental concerns more and more significance at each major amendment of the constitutive treaties. It is apparent throughout the history of the Community law, beginning with no reference whatsoever to the environment in the Treaty of Rome, and leading all the way up to the current integration principle in Article 6. The compatibility of striving to remove barriers to trade and giving consideration to the economic costs of environmental protection has been acknowledged by the Community. Moreover, it was already recognised in the 1970s that a common environmental policy had to be established in order to harmonise the efforts of different Member States, and to complement established common policies such as trade and agriculture.[160] This expansion of Community interest in new areas has not solely occurred in the environmental field. The European Community started out as a trade union and gradually moved into many other areas and fields, shaping the political Union into a real community of more or less shared values and principles. Not only economic and political integration are nowadays seen as important for a united Europe, but also increasing ideological integration. Accordingly, the environment and environmental protection may be understood as a shared value, because environmental protection has become a common interest of the Member States and large sections of their citizens. Of course, this emergence of environmentalism as a widely shared value did not only take place within the European Community, but globally. The emergence of the biodiversity as a concept and its ever growing relevance in Community and international law can be seen as a reflection of this worldwide trend towards placing greater emphasis on the importance of environmental protection.

5.2 The Objectives and Principles of Community Environmental Regulation

The general environmental objectives of Community policy are laid down in Article 2 of the EC Treaty, which is complemented by more specific objectives elaborated in Article 174. According to the latter, Community policy on the environment shall contribute to such objectives as preserving, protecting and improving the quality of

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[160] Patricia Birnie, "The European Community and Preservation of Biological resources," in International Law and the Conservation of Biological Diversity, eds. Michael Bowman and Catherine Redgwell (London: Kluwer, 1996): 212.

the environment, protecting human health, promoting measures at an international level to deal with regional or world wide environmental problems and promoting prudent and rational utilisation of national resources. This final aspect, the promotion of prudent and rational utilisation of natural resources, is evidently of importance also for the management of forests. The environmental objectives do not, however, translate into concrete action, nor are they directly enforceable. Instead, the Community institutions have a large scope of discretion as to whether or not to take legislative action. Whether the Community acts in the first place is generally determined by the principle of subsidiarity. Also, the responsibility and the competence of the Community in environmental matters is shared with the Member States.[161]

Both Article 2 and Article 174 set out the general Community objective to achieve a high level of environmental protection, which means that action also needs to be taken by the Community in its entirety, not solely by the Member States. However, neither of these Articles specifies what a high level of protection should precisely mean. According to Ludwig Krämer, a high level might best be measured in accordance with the standards adopted in the environmentally most advanced Member States. Still, safeguarding a high level of protection is a general objective of the Community and cannot thus be enforced in court. Articles 2 and 174 refer to Community environmental policy as a whole, not to specific measures. When a Commission proposal fails to reflect a high level of protection, the European Parliament can take action against the Commission under Article 230. This is mostly of theoretical interest, however, as it has never been invoked in practice. Actually, according to Krämer, the formula of a "high level of protection" has been used in such a way that, regardless of what is proposed by the Commission and Council, it shall be considered a high level of environmental protection. This may act contrary to the objective of a high level of protection by inflating the entire concept. Under certain conditions, Member States of the opinion that the Community has not sufficiently aimed at a high level of protection can introduce more stringent national measures pursuant to Article 176.[162]

Even the term "environment" itself is not explicitly defined by the Treaty. As Krämer states it, the concept follows from Articles 174 (1) and 175 (2), meaning that the environment includes human beings, natural resources, land use, town and country issues, and waste and water. Fauna and flora are also considered to be a part of the environment. When the environmental section was introduced in the Treaty in 1987, much secondary Community legislation had already been adopted on the basis of three Environmental Action Programmes, which were considered to be legislation on the environment. The term environment was considered to be all-embracing at that time, including economic, social, and aesthetic aspects, the preservation of natural and archaeological heritage, and thus also the man-made in addition to the natural environment. The term environment included in the EC Treaty can be regarded as having inherited the broad definition which it had according to the secondary legislation prior to the inclusion of the term into the EC Treaty.[163]

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[161] Ludwig Krämer, E.C. Environmental Law (London: Sweet & Maxwell, 2000), 6.
[162] Ibid., 8-9.
[163] Ibid., 1-2.

5.3 The Community Environmental Action Programmes: Balancing Environmental and Economic Interests

The 1972 Declaration of the United Nations Conference on the Human Environment and the adoption of an Action Plan for the Human Environment[164] inspired the Community to adopt a series of Action Programmes on the Environment. These Programmes perhaps manifest a shift from the emphasis on economic interests to greater consideration for environmental aspects in Community policies. The first Environmental Action Plan adopted by the EC Council in 1973[165] explicitly aimed at balancing environmental and economic interests. In the Third Action Programme, which lasted from 1982 to 1986,[166] the balancing of environmental and economic activities was articulated in the Preamble in a way that the Community was to promote a harmonious development of economic activities and a continuous balanced expansion which, according to the Action Programme, was inconceivable without making the best and most economic use possible of natural resources, and without improving the quality of life and protection of the environment. It still emphasised the exploitation of natural resources, however, as a vital step in achieving economic development.

In the First and Second Action Programmes, emphasis had been placed on pollution, with the aim of controlling it rather than using precautionary measures to prevent further degradation of the environment. The Third Action Programme brought a shift in focus towards the conservation of habitats, whose gradual disappearance was increasingly recognised as a threat to the survival of species. The Programme recognised that local measures were decisive, but nonetheless found that a Community framework was essential in order to give cohesion to local efforts. The Single European Act of 1986 then introduced a clear legal basis for the adoption of specific environmental policies and measures, requiring that Community policy and action on the environment must preserve, protect, and improve the quality of the environment, ensure a prudent and rational utilisation of natural resources and contribute to the protection of human health. These aims were to be balanced with the economic and sound development of the Community as a whole. The Fourth Action Programme[167] articulated the need to widen the array of instruments used for the

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[164] See supra, note 4.

[165] First Environmental Action Programme (1973-1976), Declaration of the Council of the European Communities and of the representatives of the Governments of the Member States meeting in the Council of 22 November 1973 on the programme of action of the European Communities on the environment, O.J. C 112 (20 December 1973), 1.

[166] Third Environmental Action Programme (1982-1986), Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council, of 7 February 1983 on the continuation and implementation of a European Community policy and action programme on the environment (1982 to 1986), O.J. C 46 (17 February 1989), 1.

[167] Fourth Environmental Action Programme (1987-1992), Resolution of the Council of the European Communities and of the representatives of the Governments of the Member States, meeting within the Council of 19 October 1987 on the continuation and implementation of a European Community policy and action programme on the environment (1987-1992), O.J. C 328 (7 December 1987), 1.

implementation of Community environmental policy, and suggested the development of efficient economic instruments to ensure the application of the "polluter pays" principle.

The Fifth Action Programme[168] was entitled "Towards Sustainability" and referred to the adoption of the 1992 Maastricht Treaty on European Union, which introduced a new primary objective of the EU, the promotion of "sustainable growth." To a large extent, the Fifth Action Programme reflected the rhetoric and terminology of the 1992 UNCED agreements, in whose drafting the Community had actively taken part. "Sustainability" was said to require policies and strategies that enable economic and social development without detriment to the environment and natural resources, on the quality of which continued human activity and further development depend. Thus, environmental protection and biological diversity were perceived as having an economic value, which is also consistent with Community purposes.[169]

As a response to the conclusion of the Convention of Biological Diversity in 1992 in Rio, both the Fifth Action Programme and the accompanying report on the State of the Environment in the European Union[170] referred to the concept of biological diversity. Especially in peripheral regions, there was a danger that developmental needs might be pursued at the expense of biological diversity and thus to the detriment of sustainable development. The report suggested broadening the range of instruments from conventional legislative measures, so as to include market-based instruments which might encourage producers and consumers to engage in a more responsible use of natural resources by internalising the external environmental costs and making environmentally friendly products as attractive or even more attractive than other products. This ambitious Programme was seen as the reflection of a serious intent to reconcile environmental and developmental interests.[171]

In its Fifth Action Programme, although it supported the Rio Declaration and was a party to the Biodiversity Convention, the Community had given priority to the general development of policy and to non-binding measures of environmental protection rather than to the implementation of specific legislation concerning biodiversity. The Community intended to rely on reviewing existing regulations, making them part of a more integrated approach, while at the same time – in keeping with the subsidiarity principle – leaving more matters to be dealt with at the national level. The Maastricht Treaty and the Fifth Action Programme also indicated that the European Community was seeking to play a more active role internationally by participating in relevant environmental conventions and international organisations. In Rio, it supported the

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[168] Fifth Environmental Action Programme (1993-2000), Towards Sustainability, Resolution of the Council and the Representatives of the Governments of the Member States, meeting within the Council of 1 February 1993 on a Community programme of policy and action in relation to the environment and sustainable development - A European Community programme of policy and action in relation to the environment and sustainable development, O.J. C 138 (17 May 1993), 1.

[169] Birnie, "Preservation of Biological Diversity" (supra, note 160), 215.

[170] Keimpe Wieringa, Environment in the European Union 1995: Report for the Review of the Fifth Environmental Action Programme (Luxembourg : Office for Official Publications of the European Communities, 1995); and earlier, European Environment Agency, Report on the State of the Environment in the European Union (Copenhagen: EEA, 1992) (unpublished).

[171] Birnie, "Preservation of Biological Diversity" (supra, note 160), 216.

UNCED Declaration on Forest Principles and the Agenda 21 programme for the conservation of biodiversity.[172]

The Sixth Environment Action Programme[173] of the European Community recognises the value of nature and biodiversity as providers of resources and different services and as a source of aesthetic pleasure and scientific interest. It establishes that the threats to biodiversity mainly originate in pollution, land-utilisation, and the exploitation of natural resources, as well as in the introduction of certain non-native species not well-suited to the local conditions.[174] In this programme, the Community takes a clear stand on behalf of the legitimacy of human activities, stating that "preserving nature and bio-diversity does not necessarily mean the absence of human activities. Much of today's valuable landscape and semi-neutral habitats are a result of our farming heritage."[175] It seems more difficult to reach a consensus on how much and what kind of human activities are legitimate. The well-being of natural systems of the earth is defined as "the diversity, distribution, composition in terms of size and age and abundance of different species."[176]

As the most important policies and instruments for the protection of biodiversity, the Sixth Environment Action Programme identifies the establishment of the Natura 2000 network, the LIFE programme's nature projects, and the Community Biodiversity Strategy, as well as its follow-up Action Plans in the various economic and social policy sectors.[177] When it comes to the protection and sustainable development of forests, the Sixth Environmental Action Programme recognises the efforts made under the Inter-governmental Panel and Forum on Forests, the International Tropical Timber Agreement, the Convention on Biological Diversity and the European Ministerial Conference for the Protection of Forests in Europe. As later already announced in its resolution of 15 December 1998 on a Forestry Strategy for the European Union,[178] the Council emphasised the multi-functional role of forests. It further encouraged the development of forestry under the Rural Development Plans, with emphasis on management that pursues multiple functions such as bio-diversity, nature conservation, protection, and recreation. The Community also promotes the drawing up of national and regional programmes, thereby outlining sustainable forest management and taking into consideration the multi-functional role of forests.[179]

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[172] Ibid., 217-218.

[173] Sixth Environment Action Programme (2001-2010), Environment 2010: Our Future, Our Choice, Decision 1600/2002/EC of the European Parliament and of the Council of 22 July 2002 laying down the Sixth Community Environment Action Programme, O.J. L 242 (10 September 2002), 1.

[174] This latter problem has become increasingly apparent in recent years and is threatening entire species of native flora and fauna, while bringing about moderate to severe changes in the composition of local ecosystems.

[175] Sixth Environmental Action Programme (supra, note 173), 31.

[176] Ibid.

[177] Ibid.

[178] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions on a Forestry Strategy for the European Union, COM/98/649 final (3 November 1998).

[179] Sixth Environment Action Programme (supra, note 173), 34.

The Community aims to integrate the issue of biodiversity into its international policies, more specifically into its trade, development, and aid policies, by promoting more sustainable agriculture, forestry, fishing, mining and oil extraction and other economic activity. According to the Sixth Action Programme, this will "contribute to the development of societies that are sustainable, prosperous and better able to trade."[180] The trading aspect is firmly linked with environmental objectives.

[180] Ibid., 37.

6 The Regulation of Forest Nature within the European Union

6.1 Forest Area and Forestry Practices in the European Union

The EU has a total forest area of 130 million hectares, accounting for about one third of its overall territory.[181] Of this, about 87 million hectares are considered exploitable forests, which means that they are managed for wood production and non-wood goods and services. These figures will naturally change with the inclusion of new Member States in the European Union in 2004. The European Union is the biggest trader and second biggest consumer of forest products in the word, from which follows that the forest sector is of great economic importance for the Union and its Member States. There is a wide variety of forest types as defined in terms of their bio-climatic and soil conditions. In the European Union, forested land is privately owned to 65%, and the privately owned forests tend to be highly fragmented into small plots: most holdings are smaller than five hectares. Still, the ownership of forests varies to a great extent within the Community. The constitutive treaties of the European Community and the European Union contain no provision for a common forestry policy, although several Community policies do have direct or indirect impact on forests, of which agricultural policy is one of the most important. Strictly speaking, however, forests are not even mentioned in the treaties, nor is there any specific secondary legislation[182] concerning forests. As outlined in earlier chapters, this is largely due to the fact that forests – being natural resources – are regarded as belonging within the sovereign jurisdiction of Member States.

6.2 The EC Forestry Strategy (1998)

The Forestry Strategy for the European Union, which was adopted by the Commission in 1998,[183] contains an overview of Community activities in the area of forestry management. In the Forestry Strategy, reference is made to trade and the internal market. It also contains a section on the Conservation of Forest Biodiversity, as well as remarks on the respective role of the Community and its Member States in the field of forest management.

The Forestry Strategy emphasises the multifunctional character of forests. The Strategy names important services and functions provided by forests, such as the

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[181] See supra, note 178.

[182] Primary legislation of EC consists of the constitutive Treaties on the establishment of the European Community and the European Union, whereas secondary legislation includes regulations, directives, decisions and other legislative acts.

[183] See supra, note 178.

recreational use of forests, as well as environmental aspects associated with the protective functions of forests, including their importance for biodiversity, local and regional climates, water and soil protection, avalanche control in mountain areas, protection of erosion, and the fixation of carbon oxides, which during the last decades has gained increasing importance. According to the Forestry Strategy, several functions of forests can be enjoyed simultaneously without impeding he other functions: "Because forests generally perform several of these functions, their value is best illustrated by their multifunctionality. That means for example that in a forest that is essentially providing soil protection but which is also important for biodiversity and recreation, selective timber harvesting can be performed without any loss of the forest's functions."[184] It would appear that the Commission does not want to take a stand on which services should be considered the most important, and thus does not explicitly favour either environmental or economic functions of forests. Still, the emphasis on economic aspects of forests is clear in the Forestry Strategy.

According to the Forestry Strategy, the main concerns of the Community in relation to forest management are: promoting the development of the forestry sector, and thus contribute to rural development, protect the natural environment and forest heritage, such as natural habitats and biodiversity, maintain the social and recreational functions of forests, as well as, finally, improve ecologically, economically, and socially sustainable approaches to forest management within the framework of the internal market and in line with international obligations. On the other hand, the Forestry Strategy names important threats to forests, listing the deforestation caused by urban and industrial uses, the creation of large-scale infrastructures, air pollution, fires, climatic change, and attacks by parasites and diseases.[185]

In the Forestry Strategy, moreover, support is expressed for international and Pan-European co-operation to protect forests at the European level and globally, given that forest destruction in other parts of the world could have long-term implications for the global environment. The Strategy also names as its key issues the fulfilment of the objectives of the Environmental Action Programmes, the promotion of the role of forests as carbon-trapping mechanisms and of wood products as carbon sinks, the promotion of environmental virtues of wood and other forest products and last, but not the least, the competitiveness of the European forest-based industries.[186] The Strategy thus focuses on such threats for forest nature which have an economic impact, such as atmospheric pollution, climate change, and forest fires.

The Strategy also emphasises the sovereignty of Member States when it comes to forest issues. According to the Forestry Strategy, sustainable forest management should primarily be defined and implemented through national or local programmes applied by the Member States, and only secondarily – in accordance with the principle of subsidiarity – through action taken by the European Community. Moreover, any forest management policies of the Community should comply with the following principles: they should further the objectives of other Community policies, contribute to the implementation of international commitments entered into by the

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[184] Ibid., 5.
[185] Ibid.
[186] Ibid., 5-6.

Member States and the Community, operate in accordance with the principles of free movement of goods and free competition, as well as, finally, enhance the competitiveness of the European forestry sector. At the same time, it should further the principle of integration, giving consideration to the need of sustainable development and environmental protection in forest-related policies.[187] At least on a rhetoric level, the objectives of free trade are tendentially emphasised over environmental objectives.

The politics of the internal market and unrestricted trade see forestry as part of the open economy, where the production of timber is guided primarily by market forces. Market distortions and obstacles are to be removed by measures such as technical and environmental standards for forest products, common rules on the quality and marketing of forest reproductive material, and plant-health controls. Within the context of the internal market and free trade, the Commission declared in its Forestry Strategy that it "considers that the current and proposed Community measures permit the commercial exploitation of forests within the framework of the single market and is not therefore suggesting any new initiatives in this context."[188]

All the measures in the forestry sector must be compatible with international trade obligations. The GATT provisions on trade apply to the trade of all forest products produced within the European Union and sold to third countries. Fiscal measures and public aid for forestry are decided by the Member States, but any aid granted to the forestry sector must be compatible with the rules of the common market and must be notified to the Commission.[189] The subsidies provided by the Community for forestry projects have mainly been connected to the objectives of the Community agricultural, regional, and environmental policies.[190] During the period of 1994 to 1999, about half of the subsidies were aimed at reforestation – mainly of agricultural land – and the other half to measures aimed at the improvement of the forest environment and more efficient forestry techniques.[191] Financial support can also be granted to municipalities and private forest owners with the aim of maintaining economic, ecological, and social functions of woodland in rural areas, for the management and sustainable development of forestry, the extension of woodland areas, and for the preservation of resources. This aid may contribute to the improvement of non-farm land, to reforestation of farm land and to the preservation of woodlands, where the protective and ecological interest of woodlands is in the general interest and where the cost of preventive measures exceeds the income from silviculture.[192]

The Forestry Strategy also contains a statement on the biodiversity of forests. It identifies the most important aspects of biodiversity conservation in forests, listing these as the conservation and enhancement of biodiversity in sustainable management systems for all forests, and the establishment of specially managed protected zones as a complementary instrument to the sustainable management of forests. These aspects

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[187] Ibid., 8.
[188] Ibid., 14.
[189] Ibid., 13.
[190] Euroopan unionin tuki metsätaloudelle ja Agenda 2000 –uudistus (Helsinki: Pellervon taloudellinen tutkimuslaitos, 1999), 1.
[191] Ibid.
[192] See <www.europa.eu.int/scadplus/leg/en/lvb/160006.htm> (last accessed 31 October 2003).

would imply measures such as appropriate ecological site adaptation measures, in particular regeneration methods, the enhancement of the regenerative and adaptive capacities of forests and their resistance, the maintenance of traditional management methods in silvo-pastoral systems with high levels of biodiversity, the improvement of harvesting techniques, and the management of reforestation measures in a manner that has no negative effects on ecologically valuable sites and habitats.[193]

6.3 Community Legislation on Nature and Biodiversity

6.3.1 The Habitat Directive and the Natura 2000 Network

The establishment of the ecological network Natura 2000 is the main measure adopted by the Community with regard to protected areas. Natura 2000 areas consist of "Special Protection Areas" designated under the Birds Directive and "Special Conservation Areas" established pursuant to the Habitat Directive.[194] The Natura 2000 network ultimately aims at creating a coherent European network of special areas of conservation, in which nature reserves with specimens covering all the typical European biotopes and habitats of species are represented. Member States shall contribute to Natura 2000 by designating special areas of conservation in their own territory. Designated areas enjoy strong protection under the Habitats Directive. Projects that ay result in the deterioration of natural habitats and the habitats of species, for instance, need to be avoided.[195] Projects that are not necessary for the management of the site are permitted only after the authorities have ascertained that they will not "adversely affect the integrity of the site concerned."[196]

The Natura 2000 network reflects the traditional idea of nature conservation by identifying specific parts of the land and creating protected areas of them, but it simultaneously incorporates elements of a new approach towards nature protection. Whereas protection was traditionally implemented in a binary "on-off" manner, either restricting special areas for total protection or alternatively leaving other areas without any protection at all, the Natura 2000 network does not except the areas within the network from all human activity, but rather from such activity only which may have a negative impact. Under certain conditions, Member States are allowed to invoke exemptions and build roads, railroads, or other infrastructural projects in such areas. Essentially, therefore, the idea is to integrate different forms of land use, or protection interests with economic interests.

The development of Community legislation on habitat protection has occurred alongside international trends. EC habitat protection law has made attempts to protect valuable habitats against pressures from agriculture, houses, roads, railways and other activities that are considered economically relevant activities. Community nature protection legislation affords greater weight to nature protection concerns as opposed to threats of infrastructure projects and other economic policies, but its provisions are

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[193] Ibid.
[194] Ibid., 20-21.
[195] Article 6 of Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (Habitat Directive), O.J. L 206 (22 July 1992), 7.
[196] Acticle 6 (3) of the Habitat Directive (supra, note 195).

phrased in a manner to provide ample scope of discretion and flexibility, with the result that it may be to weak to prevent Member States from carrying out economic measures with detrimental effects on the environment.[197] Nonetheless, the Habitats Directive cannot be lightly considered a mere instrument of economic development. It builds upon the Bern Convention, but contains stronger enforcement procedures than its international predecessor or any other international convention. It also provides for a high level of protection for designated areas. Plans or projects that may result in the deterioration of natural habitats are placed under an avoidance duty. Despite these far-reaching features and the potential of the Habitat Directive to decisively improve biodiversity conservation in Europe, one must also bear in mind that it contains numerous exemptions granting Member States a right to build infrastructure projects in protected areas. Moreover, and perhaps more crucially, Member States have the final word in determining which areas within their territory should be designated under the Habitats Directive and should thus fall under its obligations.[198]

The designation of protected nature areas has been traditionally carried out within the national boundaries of nation states. Still, some international conventions reflect the same concept on the global level. For instance, the 1971 Ramsar Convention and the 1972 World Heritage Convention each contain a list of important habitats and sites located within the national boundaries of states, with specified conservation and protection aims for these sites. In effect, they reflect an internationally recognised need of establishing mechanisms to ensure that these areas are accurately protected. These lists implement the notion that the contracting parties possess special areas as a form of international trust within their territory.[199]

6.3.2 The European Community Biodiversity Strategy

The European Community Biodiversity Strategy (1998) could be seen as a response to the objectives set out in the Convention of Biological Diversity. The Strategy addresses those requirements of the Convention on Biological Diversity which concern the European Community. "The European Union plays a leading role world-wide in furthering the objectives of the Convention. It does so to respond, not only to the legal obligations under the Convention, but also to the expectations and aspirations of its citizens, which in addition to the proven economic and environmental values of biodiversity, include the ethical principle of preventing avoidable extinction."[200] As in the CBD, the intrinsic value of nature and biodiversity are recognised in the European Biodiversity Strategy – at least on the level of rhetoric. In reality, the Biodiversity Strategy reflects a largely instrumental perception of biodiversity. Admittedly, the intrinsic value of biological diversity is mentioned; but so are its social, economic, scientific, educational, cultural, recreational, and aesthetic values, all of which are clearly utilitarian benefits of biodiversity. The utilitarian point of departure is, of course, consistent with the fact that the Community objectives in general tend to be pragmatic

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[197] André Nollkaemper, "Habitat Protection in European Community Law: Evolving Conceptions of a Balance of Interests," 9 Journal of Environmental Law (1997): 274-275.
[198] Nollkaemper, "Habitat Protection" (supra, note 198): 277-279.
[199] Kuokkanen, International Law and the Environment (supra, note 8), 136-137.
[200] Communication from the Commission to the Council and the European Parliament on a European Community Biodiversity Strategy, COM (98) 42 final (4 February 1998).

and instrumentalist. Still, the recognition of an intrinsic value of biodiversity in the Biodiversity Strategy is important to some extent, and it is consistent with the idea of a universal value of environmentalism. In that sense, the Community is not only designing itself as a free trade organisation, but also as a community with shared European and global values.

The European Community Biodiversity Strategy takes notice of the national biodiversity strategies prepared by the Member States, all of which are contracting parties to the CBD. Nonetheless, it also recognises that a number of Community policies and instruments have a significant impact on biodiversity. The Strategy, which aims to complement the initiatives of Member States taken in the field of biodiversity protection, provides for a series of action plans designed to integrate biodiversity within those policies and programmes for which there is a Community competence. Action taken at Community level is important in order to complement national efforts.[201] Community measures also guarantee that environmental action is taken in all the Member States. When Member States move forward separately and with differing schedules, there might be a risk for distortions of competition and trade patterns. Also, if action is left to the national level only, efforts of one Member State could easily be frustrated by the passive approach of another Member State.[202]

The Community Biodiversity Strategy is an element of the Fifth Environmental Action Programme – "Towards Sustainability" – and must be seen within the context of the aim of integrating environmental concerns into other sectoral policies pursuant to Article 6 of the EC Treaty.[203] Article 6 of states that environmental objectives must be taken into account in the elaboration and implementation of other Community policies, given that the environment is clearly affected by other policies such as transport, energy, and agriculture. In other words, whenever a measure is taken under the EC Treaty, environmental concerns are to be fully taken into consideration. Article 6 does not, however, imply that priority should be given to the environment over other requirements of the EC Treaty. Instead, the different Community objectives outlined in the Treaty rank at the same level, and the policy must aim at achieving them all.[204] The aspiration for integration is consistent with the objectives modified in the CBD as well as with the current trend in environmental politics discussed earlier. It has, accordingly, been recognised by the European Union that social, economic, and institutional issues frequently have an impact on biodiversity loss. In return, the loss of biodiversity has various socio-economic consequences, such as decreasing opportunities for future generations.

The Biodiversity Strategy calls for sustainable use of the different benefits offered by biodiversity. Along with the introduction of positive incentives which might support conservation and sustainable use of biodiversity, the Strategy recognises the importance of eliminating incentives which have a negative impact on biodiversity. This, according to the Strategy, would imply reviewing and preparing certain changes in legislation,

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[201] Ibid., 3.
[202] Krämer, "EC Environmental Law" (supra, note 161), 13.
[203] See supra, note 200.
[204] Krämer, "EC Environmental Law" (supra, note 161), 15-16.

systems of property rights, contractual mechanisms, international trade policies, and economic policies.[205] The Strategy does not specify which international trade and economic policies are at issue.

In the section covering forests, the Biodiversity Strategy states the following: "Globally, forests contain the greatest proportion of biological diversity in terms of species, genetic material and ecological processes and have an intrinsic value for the conservation and sustainable use of biodiversity". This meaning of "intrinsic" value seems a bit unclear in said context, and it is revealing that such a notion was not included in the Forestry Strategy. The environmental value of forests could, for instance, be seen as originating from the fact that forests are indispensable in combating climate change, a fact which might also have an impact on the national economies of different European Union Member States.

The Strategy clearly declares that, within the Community, forest policies are, in principle, developed at the national level.[206] The Community has promoted the development of a legally binding instrument on forests within the Intergovernmental Panel on Forests. Also, the Community is a signatory party to the resolutions adopted at the ministerial conferences on the protection of forests in Europe. Within the European Union itself, the Community has taken a number of initiatives to promote forest conservation in fields such as the protection of forests against atmospheric pollution and fire, afforestation, and other pertinent issues.[207]

6.3.3 The Sixth Environment Action Plan

The Sixth Environment Action Programme of the European Community[208] involves four priority areas: climate change, nature and biodiversity, health and environment, and natural resources and waste. Forests are referred to in the second priority area.

The Sixth Environment Action Programme recognises the value of nature and biodiversity as a source of resources and services, and as a source of aesthetic pleasure and scientific interest. Within the programme, it is stated that the main pressure on biodiversity arises from pollution, land-utilisation and exploitation of natural resources, and from the introduction of certain non-native species not well-suited to the local conditions.[209] These are all results of human activities. Nonetheless, in the Sixth Environment Action Programme, the Community took a clear position in defense of human activities and their legitimacy: "Preserving nature and biodiversity does not necessarily mean the absence of human activities. Much of today's valuable landscape and semi-neutral habitats are a result of our farming heritage. However, the ecological stability of such modern landscapes with diverse species of flora and fauna are also

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[205] Communication from the Commission to the Council and the European Parliament, Biodiversity Action Plan for the Conservation of Natural Resources, COM/2001/0162 final (27 March 2001), 6.
[206] Ibid., 16.
[207] Ibid., 16.
[208] See supra, note 175.
[209] Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions On the sixth environment action programme of the European Community, Environment 2010: Our future, Our choice, COM/2001/0031 final (24 January 2001), 30.

threatened as land is abandoned or marginalised."[210] The Sixth Action Programme does not reflect consensus on how much and what kind of human activities are legitimate and should be encouraged. The wealth of natural systems is simply defined as "the diversity, distribution, composition in terms of size and age and abundance of different species,"[211] but the concrete means to maintain this well-being of nature are not outspoken.

As mentioned earlier, the Sixth Environment Action Programme also lists the most important policies and instruments for the protection of biodiversity, emphasising the establishment of the Natura 2000 network, the LIFE programme's nature projects and the Community Biodiversity Strategy as well as its follow-up Action Plans in the various economic and social policy sectors.[212] The Community aims to join the biodiversity issue to its international policies, in particular to its trade, development, and aid policies, by promoting more sustainable agriculture, forestry, fishing, mining, oil extraction and other economic activities. According to the Sixth Action Programme, all this should "contribute to the development of societies that are sustainable, prosperous and better able to trade."[213] The role of trade has thus been firmly linked to environmental goals.

[210] Ibid., 31.
[211] Ibid.
[212] Ibid.
[213] Ibid., at 37.

7 Conclusion

International trends in forest and biodiversity regulation have exerted a number of effects on national forestry and biodiversity policies. During the 1990s, international forest policy has had an increasing impact on the forest policies in Finland, a trend that arguably began with the resolutions passed by the United Nations Conference on Environment and Development in Rio in 1992. As a result, Finnish forest legislation has been fundamentally reformed during the last decade. The new Nature Conservation Act was drawn up in close accordance with the Forest Act reform. Forest regulation in Finland traditionally emphasised the continuity of forest growth, timber production, and the right of forest owners to utilise the forest. As in international environmental law during its modern period, natural resources have been viewed primarily as objects of utilisation and environmental aspects have had less significance in the agenda.[214]

In accordance with the overall development in international environmental and European Community law, the current Forest Act aims to integrate multiple uses of forests. The Forest Act and the Act for the Financing of Sustainable Forestry came into force in 1997. They aim to promote economical, as well as ecologically and socially sustainable, management of forests. An important element of the Forest Act with regard to biodiversity conservation is its designation of a number of key biotopes to be protected, which usually are habitats of certain species threatened with extinction. The Act includes guidelines as to how these habitats may be managed. It is not prohibited to cut trees or construct roads in the areas, but these actions must still be carried out in a manner that respects the habitats. If the limitations cause more than minor inconvenience to the forest owner, he may be granted permission to damage an important habitat under certain conditions.[215]

The Nature Conservation Act also came into force in 1997. Its enactment was influenced by the international and European commitments entered by the Finnish state. The Nature Conservation Act proposes more flexible mechanisms to safeguard biological diversity; whereas traditional nature conservation legislation was mainly based on restricted nature reserves or on the protection of species, the new Nature Conservation Act brings forward an integrated approach, according to which all decision-making concerning the use of land and the environment must take nature conservation goals into account.[216] In addition to traditional nature conservation areas, the Act makes it possible to establish protection areas for a specific time. New means of protection include the protection of biotopes, which are rare in Finland and whose protection does not necessitate the establishment of a conservation area, but can be accomplished by limiting the activities in the area.

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[214] Anne Kumpula, "Environmental Law," in An Introduction to Finnish Law, ed. Juha Pöyhönen, 2nd ed. (Helsinki: Kauppakaari, 2002): 531-532.
[215] See <www.mmm.fi/english/forestry/policy> (last accessed 31 October 2003).
[216] Kumpula, "Environmental Law" (supra, note 214): 521-522.

The new Action Plan regarding Forests in Southern Finland adopted by the Finnish government represents the new approach of taking into consideration environmental, economic, and social interests in forestry management. The proposal of the Finnish Government Commission for the Protection of Forests in Southern Finland was handed to the Minister of the Environment in July 2002 and led to a governmental "Decision of Principles" in October 2002. This Action Plan contains various new instruments for sustainable forestry management aiming to safeguard the biological diversity of forests in Finland. These proposed measures complement the Forest Act and the Nature Conservation Act. The proposed new instruments are based on the voluntary participation of private forest owners. The Action Plan reflects new trends in environmental regulation, suggesting various so-called economic or market based instruments, all of which aim at improved economic efficiency. The Action Plan, for instance, proposes trade with natural values, which is a system where the landowner, under a special contract, maintains or adds to the natural values in his forests and is compensated by way of an income from the buyer of natural values, such as the State or a foundation. The Commission also proposed competitive bidding, which implies that the authorities ask the landowners to offer areas for protection, and the best offers are approved for implementation. The Commission also proposes local biodiversity networks between forest owners so as to conserve biological diversity in more extensive areas. The authorities would channel state funds to voluntary protection considered to have local value.

It seems that forests are in a dualistic position when it comes to their international management: as natural resources, they are regulated neither internationally nor in the European Union by binding treaties or norms, because of the principle of permanent sovereignty of nation states over their natural resources. The *biodiversity* of forest nature has been increasingly regulated internationally and in the Community under the regime of nature conservation. To date, forests as an international legal issue have been covered under two different regime: under the forest regime, which is largely identical with the UNFF regime at the international level, and under the biological diversity regime constituted by the Convention on Biological Diversity. The growing regulation of biodiversity, together with emerging principles such as sustainable development and equitable utilisation, may have limited somewhat the freedom of action enjoyed by nation states in dealing with natural resources. Still, as the greater part of the international regulation of biodiversity takes place at the level of open-ended framework conventions, vast principles, and guidelines, all of which leave much room for national decision, the exploitation and management of forest nature is still largely left to the implementation through national policies. Both internationally and nationally, a trend seems to have taken shape under which the conservation of biodiversity is departing from complete protection towards policies and instruments which try to combine environmental, economic, and social uses of forest nature.

Concerted action to protect the environment – environmentalism – represents a universal concern both internationally and within the European Union, a common idea or ideology that is shared by different nation states. Environmental protection, and within it the protection of biodiversity, is not only an important end in itself in a globalised world, but also a legitimate object of "common concern" for all humankind. In that sense, it may be regarded as a political unifier. The environmental

discourse and rhetoric of sustainable development, which combines environmental protection with social and economic development, is attractive in a world without boundaries, given that environmental protection as well as economic and social development are universal aspirations of all nations. As we have seen above, the internationalisation of environmental protection has represented a long trend in international law and politics. Nonetheless, environmental protection, including the protection of biodiversity, represents the "universal"; it is faced with the intentions and interests of sovereign nations, which not only include the common universal interest in protecting the environment, but also the idea of sovereign exploitation of natural resources. Understandably, the latter will often collide with the aspiration environmental protection. The regulation of forests serves as an example of this dichotomy. The collision of a universal desire to protect nature versus the sovereign right of nation states to exploit their natural resources ultimately results in the international lack of forest regulation. Of course, biological diversity is regulated internationally and within the Community, including, to a limited extent, the biodiversity of forests. But an internationally binding, comprehensive attempt to regulate forests has yet to be concluded.

On the international level, the non-regulation of forests also reflects the north-south bias. Within the European Union, the principle of subsidiarity helps to prevent comprehensive forest legislation, since the Community is only empowered to act when it such action is considered more appropriate and effective than national regulation. Despite the recent attempts to reconcile economic and environmental interests within international law, a certain tension between the two objectives of environmental protection and exploitation of natural resources undeniably remains. Can this tension be ultimately reconciled? If the tension is seen as a contradiction between the underlying values of environmental protection and economic growth, as reflected, for instance, in the struggle between individualism – usually linked to neoclassical economics – and collectivism, which is usually connected to environmental protection, the question seems problematic.

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