

Anja Eikermann

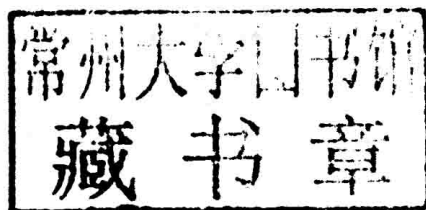
Forests in International Law

Is There Really a Need for an
International Forest Convention?

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Chapter 1

State of Research and Structure of the Book

The issue of forests has been seen on the international political agenda for several decades by now. The loss of tropical forests in particular began to raise concern in politics and society, especially in industrialised countries. First calls for an international instrument on forests came from northern countries and non-governmental organizations. The particular idea of an international forest convention was made by the United States of America.¹

Subsequently, “the quest for a global forest convention”² remained a persistent issue on the international political agenda. Preoccupied with the quest for substance and disregarding necessary and inevitable interrelations of forest matters in ecological as well as in political and legal regard, the sole achievement of the negotiators was the establishment of new, self-contained negotiation forums. In the light of the lack of a clear international forest competence, the different forums commenced and pursued their work independently from one another, each with a specific underlying rationale towards forests. Nevertheless, the call for an international forest convention did not trickle away. Despite this ongoing search for a singular international forest convention, there is recognition of a vague aggregate of “international forest law” in existence, which is understood as referring to a variety of international treaties that have a potential impact on forest matters. Hence, a complex web of processes and instruments engaged in international and regional forest matters has been woven, further exacerbating the probability of a comprehensive international forest convention.

The early debates considering reasons for the lack of an international forest convention, the assessment of its probability and the potential means for the creation of an international forest convention, centred around the developmental north-south-divide and related issues of financing.³ Particularly the scholarly

¹ Cf. Davenport (2005), p. 107.

² A description lent from Humphreys (2005).

³ Davenport calls this “an asymmetric deadlock”, Davenport (2005), pp. 107 *et seq.*

writings of the 1990s are concerned with the failure of an international forest convention and pay special attention to the need to bridge the gap between the differing interests in forest issues that surfaced already in the run-up to and during the United Nations Conference on Environment and Development (UNCED) in Rio in 1992.⁴ These studies refer particularly to the diverging interests between forest-poor, industrialized countries in the protection of tropical forests and the forest-rich, developmental countries in being compensated for a potential limitation of forest utilization and, resulting from this discussion, the divergence in global and local forest interests.⁵ In the light of the accomplishments of the UNCED with respect to the United Nations Framework Convention on Climate Change (UNFCCC)⁶ and the Convention on Biological Diversity (CBD)⁷ as well as with regard to the proliferation of international treaties in environmental concerns in general, the idea to achieve the balance between the diverging interests via an international forest convention was supported.⁸ At the same time, the recognition of the fundamental structural differences in forests and—for example—climate change as a legal subject became apparent, making forests not seem eligible for a singular international convention.⁹ However, this did not necessarily lead to the rejection of the idea of an international forest convention in the legal and political literature, but rather spurred the call for a reform and the strengthening of the principles of international—environmental—law.¹⁰

The discussion concerning the failure of and the options for an international forest convention became more diverse and multi-layered from the late 1990s onwards. With the increasing knowledge about ecosystem services and functions, their related—monetary—values, as well as about the current status of forests and their ability to provide for these services and functions, the debate shifted towards recognizing the fragmentation of forest related processes and instruments as a major cause for the failure to establish a stand-alone international forest convention.¹¹

Hence, two stages of literature on forests in international law and politics may be distinguished. In the first stage, the studies conducted in international law and international relations do not challenge the *need* for an international forest convention as such, despite the awareness of the failing pursuits to codify such a

⁴ Tarasofsky (1996).

⁵ Cf. Tarasofsky (1996), pp. 687 *et seq.*

⁶ United Nations Framework Convention on Climate Change, New York, 9 May 1992. UNTS, Vol. 1771, p. 107.

⁷ Convention on Biological Diversity, Rio de Janeiro, 5 June 1992. UNTS, Vol. 1760, p. 79; Khalastchi and Mackenzie (1999); The negotiation history of the CBD is not presented here. For detailed information see for example Bodansky (1995); Glowka (1994); de Klemm (1993); Bowman and Redgwell (1996).

⁸ See for example VanderZwaag and MacKinley (1996), pp. 32 *et seqq.*

⁹ See Hönerbach (1996).

¹⁰ Brunnée and Nolkaemper (1996).

¹¹ See in particular Tarasofsky (1999); Mackenzie (2012); van Asselt (2012); Rayner et al. (2010); Rosendal (2001); Dimitrov (2005); Humphreys (2005).

convention. These studies consist of the assessment of the determining parameters that led to the failure of a forest convention in Rio in 1992 and search for means to overcome these factors within the framework of an international convention.¹²

The second stage of studies on forests in international law and politics is concerned with the *feasibility* to conclude an international forest convention in consideration of the difficulty concerning the fragmentation of international law and politics. The complexity of finding an instrument to govern international environmental concerns, as well as the effectiveness of legal approaches to creating such an instrument, take centre stage in the international academic debate. Regime and governance terminology take over in the discussions on international forest regulation—not only in international relations studies but also in international legal literature.¹³ These studies largely express a certain degree of frustration with the previous—legal—approaches to international forest regulation and recommend governance options in this regard.¹⁴

Ultimately, the previous studies on forests—particularly in international law—have more or less been concerned with the advantages and disadvantages of an international forest convention, respectively a legal approach, only.¹⁵ An international forest convention is either perceived as a means to overcome the fragmented structure of international forest regulation as it exists today, or the fragmentation of international law is utilized as a counter-argument against an international forest convention. However, little attention has been paid to the question *to what extent* the fragmentation of international law affects the need for an international forest convention.¹⁶

The book at hand retraces the evolution of what has been termed the “international forest regime complex”,¹⁷ thus, offers clues to the status of forests in international law and ultimately, attempts to give an answer to the question: “*Is there really a need for an international forest convention?*”

For that purpose, Chap. 2 commences by making a case for the general *need* for forest regulation and the need for *international* forest regulation in particular. *Firstly*, the patterns of international forest utilization, as they have changed throughout history is summarized. *Secondly*, and based upon the historical context, the significance of forests in general and for human well-being in particular is presented. *Thirdly*, the analysis addresses the concepts of “deforestation” and “forest degradation” as threats not only to forests as such but also to human well-being.

¹² See particularly the two comparably more extensive works on the issue of forests from Krohn (2002) and Schulte zu Sodingen (2002).

¹³ For an overview see Giessen (2013).

¹⁴ See for example van Asselt (2012), opting for “autonomous interplay management”, referring to Oberthür (2009).

¹⁵ See the considerations made by Mackenzie (2012) or Humphreys (2005); Krohn (2002); Schulte zu Sodingen (2002).

¹⁶ See for a methodological chart to establish the need for a convention Bass and Thomson (1997), p. 13.

¹⁷ Rayner et al. (2010).

In the following, Chap. 3 introduces the international political processes on forests that have been initiated in the spirit to provide for a comprehensive international regulation of forests. The first part looks to the evolution of the topic of forests on the international agenda, from the first appearance up until today. Subsequently, special attention is given to the “tangible” outcomes of these processes. Therefore, the second part of Chap. 3 focusses on institutional results of international forest negotiations: the United Nations Forum on Forests (UNFF). These elaborations shed light on the development of the UNFF with respect to its predecessors—the Intergovernmental Panel on Forest (IPF) and the Intergovernmental Forum on Forests (IFF), its mandate, objectives and purpose, as well as its institutional structure, functions and topics. The third part of Chap. 3 surveys the most significant textual instrument that resulted from forest deliberations so far: the Forest Principles,¹⁸ Chapter 11 on “Combatting Deforestation”¹⁹ and the Non-Legally Binding Instrument on All Types of Forests (NLBI).²⁰

While Chap. 3 elaborates on instruments that were created *a priori* to apply to forests but have, to date, not obtained a transformation into law, Chap. 4 embraces international treaties that have not been created to apply directly to forests, but which may be interpreted—*ex post*—to capture forests within their scope and have a bearing on the international regulation of forests. Thus, Chap. 4 considers the status of forests within three—respectively six—thematic contexts that have been regulated by one or more international treaties, that is trade, traditional nature conservation, and the Rio-context, which may be subdivided into the thematic contexts of biodiversity, climate change and desertification.

The trade complex explores:

- the Convention on International Trade in Endangered Species of Wild Fauna and Flora, also known as the Washington Convention (CITES),²¹
- the International Tropical Timber Agreements (ITTA 1983, 1994 and 2006),²² and

¹⁸ Report of the UN Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992. Annex III: Non-Legally Binding Authoritative Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of all Types of Forests, UN Doc. A/CONF.151/26 (Vol. III), 14 August 1992.

¹⁹ Report of the UN Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992. Annex II: Agenda 21, UN Doc. A/CONF.151/26 (Vol. II), 13 August 1992.

²⁰ United Nations General Assembly, 62nd session, Agenda item 54, Resolution adopted by the General Assembly 62/98 Non-legally binding instrument on all types of forests, 31 January 2008, UN Doc. A/RES/62/98.

²¹ Convention on international trade in endangered species of wild fauna and flora, Geneva, 1 July 1975, UNTS, Vol. 993, p. 243.

²² International Tropical Timber Agreement 1983, Geneva, 18 November 1983. UNTS, Vol. 1393, p. 67; International Tropical Timber Agreement, 1994 (adopted Geneva, 26 January 1994, entered into force provisionally on 1 January 1997, in accordance with article 41(3)), 1955 UNTS 81; International Tropical Timber Agreement, 2006 (adopted Geneva, 27 January 2006, entered into force 7 December 2011), UN Doc. TD/TIMBER.3/12.

- the international law of the World Trade Organization (WTO) (especially the General Agreement on Tariffs and Trade 1994 (GATT 1994)).²³

The traditional nature conservation complex explores:

- the World Heritage Convention (WHC),²⁴ and
- the Convention on Wetlands of International Importance, especially as Waterfowl Habitat (Ramsar Convention).²⁵

Finally, the Rio-complex examines:

- the CBD and its accompanying protocols,
- the UNFCCC and the Kyoto Protocol,²⁶ and
- the United Nations Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa (UNCCD).²⁷

Regarding the need for an international regulation of forests as established in Chap. 2 on the one hand and the existing aggregate of instruments analyzed in Chaps. 3 and 4 on the other hand, leads back to the initial question: “*Is there really a need for an international forest convention?*” To attempt to answer to this question, Chap. 5 *firstly*, addresses the need of a *new*, self-contained international convention. Therefore, the first part establishes an ideal for international forest regulation. The second part of Chap. 5 then weighs the *status quo* of international forest regulation as it has been described in Chaps. 3 and 4 against the ideal criteria for international forest regulation previously established. In recognition of the fact that actually all substantial elements necessary for an international forest regulation are already provided for by international law, as well as the international political forest processes, but recognizing furthermore that this aggregate of instruments is severely fragmented, Chap. 5 *secondly*, examines if an international forest convention is actually *feasible* with regard to the fragmentation of international law. It is established that the fragmentation of international law, in general, and the fragmentation of international forest instruments in particular, together with the lack of tools to overcome this fragmented character, virtually precludes an international forest convention in the traditional shape of an international treaty. Therefore, Chap. 5 *finally*, puts forward the concept of an international cooperation convention

²³ General Agreement on Tariffs and Trade 1994, UNTS, Vol. 1867, p. 187.

²⁴ Convention for the protection of the world cultural and natural heritage, Paris, 16 November 1972, UNTS, Vol. 1037, p. 151.

²⁵ Convention on Wetlands of International Importance especially as Waterfowl Habitat. Ramsar, 2 February 1971, UNTS, Vol. 996, p. 245.

²⁶ Kyoto Protocol to the United Nations Framework Convention on Climate Change, Kyoto, 11 December 1997, UNTS, Vol. 2303, p. 148.

²⁷ United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, Paris, 14 October 1994, UNTS, Vol. 1954, p. 3.

on forests so as to overcome the issue of fragmentation and to make effective use of the existing substance on international forest regulation.

Finally, Chap. 6 summarizes the overall conclusions and puts forth an outlook in regard to the solution proposed.

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