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EXECUTIVE SUMMARY

Assessment of possible relations or implications of LBA Content Options 2 and 3 on selected international forest related agreements and on the EU (EC) competence

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Faculty of Law with Northern Institute for Environmental and Minority Law (NIEM)
Sébastien Duyck, Timo Koivurova and Kai Kokko

INTRODUCTION

This draft executive summary presents the main findings and recommendations from the study that the authors are preparing for the MCPFE secretariat. The options for the possible legally binding agreement (LBA) on forests that are referred to in this draft executive summary are the ones contained in tables 3 and 4 (pp. 10.14) of the Background paper 1 "Developing Options for a Legally Binding Agreement on Forests in Europe; Draft of the Facilitators and the Friends of the Facilitators" (2nd meeting of the MCPFE WG, 19-20 May, 2009 Oslo, Norway). The results of the study will be presented in the third meeting of the WG in Rome, Italy (on 2 September 2009).

INTERNATIONAL LAW PERSPECTIVE

GENERAL CONSIDERATIONS

The possible European Legally Binding Agreement (LBA) on forests would be an international written agreement among states and the EC participating in the MCPFE. As a written agreement (many times called an international treaty) between sovereign states and the EC it is governed by international law, in particular the customary law of treaties as mostly codified by the 1969 Vienna Convention on the Law of Treaties. If an international soft-law process, such as the MCPFE, is translated into an international treaty, there are several considerations that one needs to take into account.

Even though customary law of treaties includes provisions on how to conclude an international treaty, how to interpret a treaty, what are the consequences for breaching it, etc., it is important to note that it mainly contains rules that function as fall-back rules, that is, if the states do not insert an explicit provision to e.g. define what is the territorial scope of the treaty, then it will be governed by the customary law of treaties.

Recommendation: The MCPFE members should include all the provisions that they consider necessary explicitly to the body of the treaty. These are identified in this section. The MCPFE members should also pay due attention to the below-mentioned consequences of choosing the treaty approach.

Another important consideration is that during the possible treaty negotiations, the MCPFE states and the EC would need to insert a specific provision to guarantee that regional economic integration organizations (REIOs, in practice this provision would apply only to the EC) can participate in the agreement; otherwise they cannot. If there is no separate provision on this, only states can be parties to an international agreement, including the possible LBA on forests. Many times the other treaty parties require that if a treaty is negotiated both by the EC and its Member States (mixed treaty), the EC makes a declaration clarifying the respective competences of the EC and its Member States. The joint membership of the EC and its Member States would also need to be taken into account in a provision defining the voting rules. It is also possible to include a disconnection clause to the treaty in order to reduce the risk of conflict with European law in the implementation of the agreement.

MCPFE members should also be aware that concluding a treaty may change the way the MCPFE co-operation is done. First, since European LBA on forests will likely be submitted to ratification in

each signatory state, and there will likely be a required number of participants for the treaty to enter into force, it may take some time for the treaty to enter into force. Given the long time-frame that international negotiations typically take, one likely scenario would be that negotiations over the possible LBA on forests would be conducted under the auspices of the MCPFE as it currently functions. In this scenario, MCPFE would continue as it has to date, and the need to define its relationship to a possible LBA on forests would arise, if ever, only until the agreement would be concluded or it would enter into force. If the European LBA on forests would be concluded, and in particular if it entered into force, it may happen that some states become parties to the treaty at differing times, and some parties choose to stay out of altogether. This would at least fragment the treaty regime for years to come, some being parties, some signatories and some MCPFE members opting not to be parties at all.

Yet, all this is very much dependent on the content and institutional structure opted for the possible LBA on forests. If it were adopted as a framework treaty, containing initially very general obligations that the MCPFE states have already committed themselves to within the MCPFE process, the risk of fragmentation is marginal. There is nothing in international law, in particular in the law of treaties that would prevent the MCPFE from having a smooth transition from political soft-law co-operation to the one founded on a legally binding agreement. In a similar vein, the law of treaties would enable the MCPFE co-operation to continue as it has to date, with similar institutional structure, rules on participation, etc. However, if the possible negotiations would conclude more ambitious content for an agreement, the risk of fragmentation would be real.

Recommendation: if the MCPFE members should decide that negotiations on LBA on forests will commence, the following process would be one good option for maintaining the integrity of the MCPFE regime and at the same time allow a smooth transition to a legally binding agreement on forests in Europe.

1. Negotiations should be conducted under the auspices of the MCPFE, while the MCPFE process would function as it has to date.
2. Negotiations would have as their aim a framework agreement, containing only broad obligations that can already be found from the MCPFE core commitments. Possibility for developing the LBA on forests would include the possibility for adopting protocols at some later point in time, if parties so decide. Otherwise, the soft-law development of the regime would take place as it has to date with ministerial declarations and guidelines. Institutional structure of the MCPFE and its rules on participation would be maintained as they now are.
3. If the negotiations prove successful, and the framework agreement is concluded, it will first need to be signed. The agreement, as almost all international treaties, would contain a threshold number of parties that need to ratify the LBA on forests before it enters into force. This number can be set high in order to secure that most of the current members will become parties to an LBA on forests.
4. MCPFE would continue to function as it has to date until the LBA on forests would enter into force. If there were MCPFE members who would not have yet ratified the agreement, they could still participate in the work of the LBA on forests. As signatories, they could participate in most of the functional activities of the "new" MCPFE with legal foundation if the parties to the LBA agreement would not object to that. They would likely not be able to participate in actual decision-making, but the importance of this issue would also depend on decision-making powers the MCPFE institutions would be accorded via the LBA on forests.

In addition to the use of protocols, MCPFE members can also rely – if they so desire - on the use of annexes for more flexible content elements of the possible LBA. Annexes are commonly included

as part of an international agreement, and they thereby become binding when the treaty enters into force. The use of annexes – in many international treaties - allows for the inclusion of specific elements in the legally binding regime while offering at the same time the possibility for flexible adjustments or amendment procedures. Such an approach is particularly relevant with respect to the indicative dynamic element of the possible LBA on forests in Europe.

SPECIFIC CONSIDERATIONS

The content options 2 (a and b) and 3 (a and b) (Background paper 1, 2nd meeting of the MCPFE WG, 19-20 May, 2009 Oslo, tables 3 and 4) contain generally worded obligations, the exact content of which is difficult to determine with precision. For this reason, it is impossible to state with accuracy whether the existing international treaties contain provisions, which are in conflict with some of the provisions outlined in the two content options. It has also been pointed in the report that international law does not contain clear enough conflict rules that can tell us which treaties or their provisions override other treaties.

Therefore, the main emphasis in the report has been to identify normative processes that overlap in content with the suggested content options for an LBA on forests. (The term "overlap" is used here as a neutral term to describe rules and provisions that addresses similar issue-areas, having no negative (duplication of effort) or positive (synergies) connotations). This type of study corresponds with the reality of modern-day treaty-making since most of the relevant treaties studied in this report can be aptly described as regimes: complexes of principles, rules and decision-making procedures that are constantly evolving in their normative content. Another characteristic of such regimes is that even though they normally are created via an international treaty, their normative development is steered via both hard and soft-law.

There are many international treaties that contain relevant normative guidance from the viewpoint of the two content options. These include global treaties, such as the United Nations Convention on Combating Desertification and the Ramsar Convention on Wetlands; and regional ones, such as the Council of Europe's European Soil Charter and the UNECE Convention on the Protection and Use of Transboundary Watercourses and International Lakes. In addition, there are two important sub-regional treaties that include overlapping content with the envisaged content options for an LBA on forests in Europe, the Alpine Convention and the Carpathian Convention.

This information is useful for the reason that if negotiations over an LBA on forests are commenced, the states and the EC should create links with these treaties and processes in order to create synergies from the early on in the negotiations. Given the generality of the two content options, it is very unlikely that any conflicts would arise in terms of the treaties under this category, since the overall goals are fairly similar and synergies thus easy to create and sustain.

Recommendation: It would be advisable for the possible European LBA on forests to create linkages to these other regimes from the very beginning of its operation. This can be done in many ways, e.g. mandating the plenary body to adopt decisions on institutional co-operation. Yet, since the secretariat is normally the body charged with such co-operation, it might even be possible to insert a provision, which would require the secretariat to establish from the start institutional co-operation with other regime's secretariats.

The two clearly most relevant international treaty regimes from the perspective of the European LBA are the biological diversity and climate change regimes, a fact that manifests itself in the content options 2 and 3. Both are global, dynamic and broad regimes that must be taken into

account when thinking over the possibility of an LBA on forests in Europe. Since they and especially the climate change regime are evolving at such a fast speed, it is difficult to tell exactly what they require at any given point in time. Yet, there are two important questions that need to be addressed in the context of the possible European LBA on forests and its relationship to these global treaties.

The only explicit conflict provision having legal consequences is contained in the Convention on Biological Diversity. Article 22 of the Convention provides:

> The provisions of this Convention shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, **except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity**(emphasis ours).

As is clear from the wording of this conflict clause, if the application or implementation of an international treaty would cause – or would threat to cause - a serious damage to biological diversity, this treaty would be in conflict with the Biological Diversity Convention. Since the content options of an LBA are fairly general and overall aim to promote biological diversity goals (biological diversity is understood as part of Sustainable Forest Management, Helsinki Resolution 1), there seems to exist no such conflict between the possible LBA and the Biodiversity Convention.

However, if the content options 2 and 3 are studied as a whole, it is clear that both contain objectives aiming to enhance forest biodiversity and adapt to and mitigate climate change. If the European LBA would be concluded, and would steer its normative activities more towards mitigating climate change (see e.g. strict commitment in content option 2 “Each party would commit to ensure that forest will be a net sink”; “Each party will commit to develop and implement targets on land use change”), this might in a longer run even seriously damage, or threaten to damage, biological diversity.

Climate change mitigation activities can influence biological diversity in a damaging manner (e.g. mono-plantations that sequester carbon faster but lessen biodiversity or the production of “biofuels” as highlighted in the draft findings of the Ad Hoc Technical Expert Group on Biodiversity and Climate Change established by a subsidiary body of the Convention on Biological Diversity). This is a relevant consideration, given that the climate change regime is getting stronger by the day, and corresponding mitigation measures are becoming more radical, also in relation to the use of sinks. However, at least an empirical case study in Finland gave support on the economically viable integration of both the biodiversity safeguarding and carbon sequestration in forest management. Thus even win-win situations might be achievable in particular situations. Eventually, the suitable balance between the regimes is the matter of forest management practice but due attention can beforehand be paid to the conventional limits of the balancing in practice at the level of the possible European LBA.

Recommendation: it would be important to make it clear in the preamble to the European LBA on forests the regime aims to conduct climate change mitigation and adaptation in a way that biodiversity goals are not threatened. It may even be advisable to insert a following kind of provision – in particular in regard to the mitigation objectives of the LBA - into the final provisions of the possible LBA: “the Parties shall implement this agreement in conformity with their obligations and commitments under the Convention on Biological Diversity”.

As is well-known, there are no international treaties focusing solely on forests and their management. The attempts under the auspices of the United Nations have lead to two non-legally binding instruments on forests. In addition, there is a recent initiative by Canada to commence negotiations over a global forestry convention with like-minded countries. The 2007 NLBI (later only NLBI) and the European LBA content options are in synchrony with each other since the content options for the European LBA on forests implement regionally the global soft-law regulation contained in NLBI. This would be the case even if NLBI was legally binding. More challenging is the Canadian initiative and its relationship with the content options for European LBA on forests. The Canadian initiative is very ambitious in content and would exceed the requirements of content options for an LBA on Europe. If that initiative was to be negotiated into an international global treaty, the European LBA would have to be upgraded (if both are considered in their current content). However, it seems unlikely that the Canadian initiative with its present content would become a global treaty on forests (currently postponed). This was proven by the attempt to create an international treaty under the auspices of the UNFF, which ended up being an international soft-law document. This was the outcome, even though the NLBI is far less ambitious in content than the Canadian initiative. The treaty option will be studied anew under the UN auspices as late as 2015 ("the way forward for the international arrangement on forests" is included in the UNFF Multi-year programme of work for the UNFF eleventh session).

Recommendation: the possible European LBA on forests should be linked from the very beginning to the larger international forests policy-making bodies - especially that of the UNFF. This linkage can be created in the same manner than outlined in the first recommendation, namely, the secretariat mandated and obligated to establish such links from the very beginning.

Measures to combat illegal logging have been taken in various regions of the world, one of these means being non-discriminatory trade measures to prohibit import or export of timber and wood products derived from illegal logging. This has also been taken up in content option 3 (fourth indicative objective: "to enhance law enforcement on production and trade of forest products; strengthening the governance of the forestry sector", in particular "Parties shall also develop and implement non-discriminatory trade measures, consistent with their international obligations, to prohibit the import or export of timber and wood products derived from illegal logging"), in the possible European LBA on forests. For the possible European LBA on forests, these sorts of measures must be evaluated from the global and European viewpoint.

Since the MCPFE process involves also other European countries than EU (EC) Member States, these kinds of trade measures would need to be taken between the possible contracting parties to the European LBA. On the other hand, as one of the members of the MCPFE, the EC, has already taken legislative measures to create licensing system with voluntary agreements between third states. Hence, the EC lays down additional requirements for timber exported from the countries participating in the voluntary partnership agreements with its licensing system. This system seems to correspond with EC's trade law obligations, given that it has established agreements with exporting countries voluntarily consenting to the system. Both the NLBI (and the Canadian initiative) and the International Tropical Timber Agreement (where many of the MCPFE members are parties) endorse trade related measures to combat illegal logging, showing that also globally such a system is in development. In addition, the Forest Law Enforcement and Governance (FLEG) initiatives around the world studied in this report show the increasing importance of taking measures against illegal logging.

The situation may become more complicated within the MCPFE region, given that the EC is promoting such a system unilaterally and, at least up till now, has not concluded voluntary

agreements with those MCPFE members that are not EU's Member. At the very least, it can be said that the issue may complicate negotiations over an LBA on forests in Europe. On the other hand, it is also the case that the pan-European region (together with North American and North Asian countries) is part of the ENA-FLEG co-operation, which has also addressed trade in timber and wood products originating from illegal logging, although in mitigated terms as compared to the content option 3 (as highlighted in the fourth indicative objective reproduced above) of the possible LBA on forests in Europe. The ministerial declaration of ENA FLEG endorses in general level the need to combat illegal logging and associated trade whereas the content option 3 requires contracting states to develop and implement non-discriminatory trade measures to prohibit the import or export of timber and wood products derived from illegal logging. The latter moves clearly beyond the commitment expressed in ENA FLEG and may also signal that some of the MCPFE countries are not yet ready to undertake such commitments.

Recommendation: it would seem advisable for the possible European LBA on forests to start out with general endorsement of trade related measures aiming to curtail illegal logging, if the goal is to involve all the MCPFE members.

EUROPEAN LAW PERSPECTIVE:

As stated by the European Court of Justice: "The choice of the appropriate legal basis has constitutional significance". The EC has competence – including external competence – only on the basis of provisions provided in primary treaties. There are many international treaties, which are clearly falling under one or the other competence area. Yet, there are also treaties where there is considerable uncertainty over whether it falls under one, two or several EC competences.

The first thing to answer is whether the EC has competence at all with respect to content options for possible LBA on forests in Europe. Given that the tentative name for the agreement is legally binding agreement on forests in Europe, the first thing that comes to mind is that the EC has no explicit competence in forestry policy, presumption being that the Member States have competence in this issue-area. Yet, the EC has adopted the Forestry Strategy to guide forest management in the Member States and enacted secondary regulation that is relevant to the forestry. These measures and acts have been mandated by various EC Treaty competences.

As identified in this report, there are several provisions in the founding treaties, which explicitly provide the EC with external competences (environment, common commercial policy, etc.). Furthermore, the EC is also empowered to exercise implicit external competence when it has already done this internally in a particular policy field or the EC can exercise external powers necessary to reach the objectives of the EC treaty even where it has not yet implemented internal measures.

The ECJ has in its case-law provided criteria as to how to analyse what legal basis should be used for deciding EC's external competence to enter into international agreements in complex cases:

1. The choice of the legal basis must be based on objective factors that are amenable to judicial review, in particular the aim and the content of the measure.
2. If the agreement pursues a two-fold purpose, one of which is predominant, then the measure must be founded on a single legal basis.
3. Exceptionally, if the act is identified as simultaneously pursuing a number of objectives or has several components that are indissociably linked, without one being secondary and indirect in relation to the other, such an act will be founded on the corresponding legal

bases. In other words, if the treaty contains no predominant purpose, the EU competence to enter such a treaty will need to be founded on several competences.

4. In order to determine the predominant purpose(s) in a treaty, one would need to consider the will of the parties, the title of the treaty, main objective(s) identified in a treaty as well as mechanisms to reach the objectives of the treaty.

It can reasonably be argued that the envisaged content options 2 and 3 outline models for treaties that manifest complexity and thus need to be analysed carefully.

Even though the content options 2 and 3 emphasise environmental perspective, they also clearly include elements from other policy-areas. Therefore, it seems justified to consider that the possible LBA on forests does not relate to only one specific competence, but several. Consequently, the reasoning by the ECJ as to how to determine the relationship between different competences becomes relevant. We have identified the three following possible scenarios as to how the EC could exercise its external competence in relation to the possible LBA on forests in Europe:

1. First, as noted above, both content options manifest a strong emphasis on strengthening the implementation of the environmental elements of forest management. Hence, as indicated by the ECJ (if the agreement pursues a two-fold purpose, one of which is predominant, then the measure must be founded on a single legal basis), the EC could conclude the possible LBA on forests in Europe on the basis of Article 174 (environmental competence), given that it can be seen as the predominant purpose of the forestry agreement.

2. Secondly, in view of the importance of economic and socio-cultural pillars of sustainable forest management in the content options and the MCPFE content in general, it can also be argued that the competence of the EC to conclude a possible LBA on forests in Europe would need to be based on several competences. As studied in this report, there are various EC competences that accord it external powers in the environmental, economic and socio-cultural pillar. Integration of social, economic and environmental policies is one of the main principles of sustainable development. In its ruling concerning the Rotterdam Convention, the ECJ stated that the reference to the principle of sustainable development in the preamble of the convention demonstrates that neither the economic nor environmental elements of the convention could be deemed to be secondary or indirect; therefore, the conclusion of the convention by the EC must in this case be based on a dual legal basis. If we consider the strong emphasis on the references to sustainable development and the existence of the three pillars in the content options, the conclusion by the EC of an LBA on forests in Europe would thus need to be based on several legal bases.

3. Third and exclusively related to the content option 3, it can be argued that the LBA would contain sufficient elements related to other policy areas in order to claim that there are several predominant purposes in the forestry agreement. According to our opinion, content option 3 includes reasonably enough elements (related to i.a. FLEGT) for perceiving that it includes two predominant purposes, namely environment and common commercial policy. In this case, the EC would need to use both legal bases for concluding the agreement.

In its ruling on the Rotterdam Convention, the ECJ explicitly dismissed the relevance over how legal basis was established for prior international treaties displaying similar characteristics. According to the Court, the identification of an appropriate legal basis for a Community measure should be determined with regards to its own aim and content. This recent case seems to indicate that the ECJ is increasingly willing to determine the appropriate legal basis for the EC to participate

in an international agreement on the basis of the treaty's own special characteristics, making it more difficult to know beforehand which legal basis should be used in cases where the treaty exhibits complex objectives.

There are thus no easy solutions to finding a clear legal basis for the possible European LBA on forests. Even though we have identified three possible options for this choice of legal basis, it is also the case that the ECJ seems to indicate that it evaluates each choice of competence over participating in an international treaty on the basis of the treaty's own special character. Moreover, the choice of legal basis for a possible European LBA on forests is made more difficult by the fact that the specific content of the treaty is still to be developed. Yet, it does seem possible to provide some cautious guidance by making different presumptions as to which direction the European LBA on forests could be developed:

1. If the environmental elements of the content option 2 are further made stronger, and the other elements are left out, an argument can be made that the LBA on forests could be based on environmental competence, as identified in the first scenario highlighted in this section.
2. If the environment and FLEGT issues are developed as two pillars of the LBA on forests in Europe, one can argue that both are equally predominant (as in the Cartagena ruling), and legal basis could be based on environment and common commercial policy.
3. If both content options are developed as they now are, they include so many policy areas that it is difficult to avoid the conclusion that they would need to be based on several competences.

As argued above, the ECJ has laid vast importance – even of constitutional significance – on determining the correct legal basis for the conclusion of an international agreement. Indeed, the choice of legal basis determines the conditions for the EC to participate in an international agreement. An important character of this participation consists in the possibility for the EC to exercise either exclusive or shared competences. In the former case, the EC will implement the agreement to the exclusion of its member states. In the latter case, the EC and its Member States participate jointly to the agreement and therefore share responsibilities in terms of the implementation of the provisions of the treaty. In such a case, the agreement will be considered a mixed treaty, resulting in that additional issues over the sharing of competence between the Member States and the EC will need to be resolved. These include the involvement of Member states and the EC in the decision making processes, or the legal consequences of this joint participation towards third parties. Some of these many times difficult issues can be resolved by including a specific provision in the text of the agreement, for instance the so-called disconnection as identified above.

Finally, the choice of legal basis within the EC to conclude an international agreement has important consequences for the implementation of the treaty obligations by the EC. The founding treaties provide different procedures for the adoption of internal legislative measures, both in terms of decision-making rules and of the involvement of various institutions. The EC does not necessarily implement its international treaty obligations via the enactment of only one single implementation act but it often integrates the implementation of these obligations through secondary legislation. In the case of an international agreement such as the possible European LBA on forests, implementation might indeed take the form of adopting several legislative acts. These legislative acts might be adopted under different competences of the EC and their adoption would need to comply with the procedures provided in the founding treaties.