Improving Environmental Governance through Soft Law: Lessons Learned from the Bali Declaration on Forest Law and Governance in Asia

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INTERNATIONAL ENVIRONMENTAL LAW AND GLOBAL ENVIRONMENTAL MANAGEMENT

Many scholars, practitioners, and civil society actors mark 1972, the year of the United Nations Stockholm Conference on the Human Environment (also the year of the creation of the United Nations Environment Program) as the starting point for global action on the environment. In 1972 the environment and its condition was placed on the global center stage, in many ways for the first time. Environmental decisions occur in many contexts, from personal choices over consumption patterns to national laws enacted to regulate pollution and trade to international governance mechanisms over fishing rights, ozone layer depletion, and transboundary pollution. International institutions, governance frameworks, and treaties have become increasingly important and commonplace to address environmental challenges, many of which do not respect political boundaries.

In recent years international environmental treaties have proliferated. This can be attributed to a combination of increased levels of environmental degradation, greater global political and social environmental awareness, increased information flow about and publicity surrounding environmental threats, and the growing influence of civil society processes. Despite this, human activity over the last 50 years has been highly destructive, and current global environmental conditions are dire. Much of this can be blamed on the failure of governance.

The wide array of actors who develop and implement environmental treaties include national government leaders and ministers, private sector interests, scientific associations, and non-governmental interests and associations, as well as such multilateral agencies as the United Nations Environmental Program (UNEP), the United Nations Development Program (UNDP), and the World Bank (Susskind 1994). These actors meet on a regular basis to discuss ways of designing, managing, and implementing international environmental agreements ranging from transboundary air pollution to waste management to tropical forest management.

The majority of these discussions and subsequent agreement arrangements are guided by standards and procedures that have evolved over several years under the auspices of the United Nations SYSTEM. Many international environmental agreements are focused on commitments that signatory countries are bound to observe and respect. Formal international treaties, whether a convention, convention protocol, or protocol, spell out the specific and necessary obligations of signatory parties. These mechanisms outline binding responsibilities and requirements that clearly outline states obligations.
However, Susskind (1994) points out that international environmental agreements and processes "are also shaped, to a lesser extent, by a body of international law — mostly what is called 'soft law' — that reflects commonly accepted norms." Scholars and practitioners rightly note that the non-binding mechanisms of soft law can be extraordinarily influential within international environmental arenas and should not be discounted simply because they are not considered to be "formal," "binding," or "legal" in the strictest sense. International organizations can influence environmental politics and associated mechanisms through soft law processes such as codes of conduct, declarations of principle, regional or global action plans, or other agreements "that create new norms and expectations without the binding status of treaties" (Porter, Brown et al. 2000). These non-binding processes can encourage and stimulate innovative approaches to manage the natural environment in ways that might not otherwise have been possible using traditional negotiation methods. Despite this, a soft law approach can be problematic because involved parties may adopt soft law practices because they are unwilling to follow a binding process, and this can lead to poor environmental outcomes (Porter, Brown et al. 2000).

The focus of this paper is to review, through a critical case study analysis of the recent Bali Declaration on Forest Law Enforcement and Governance in Asia, some of the key components of why environmental soft law can be more effective than legally binding formal treaties and also to propose ways to strengthen environmental governance in general.

ENVIRONMENTAL SOFT LAW

What is Soft Law?

Soft law is any guideline or recommendation that is not considered to be legally binding and depends entirely on voluntary compliance. Legal scholars often describe it as a type of political or moral obligation (With 2003). Examples of legally binding mechanisms, or "hard law," would include treaties, binding acts of international organizations, or judgments of courts or tribunals. These components of international law consist of rules that oblige states and members of the international community in their relations (Sands 1994). Soft law, however, can stand alone or act to support binding obligations. Some of the most important and historic examples of environmental soft law are the 1972 Declaration of Principles of the 1972 Stockholm Conference, the 1982 World Charter for Nature, and the 1992 Rio Declaration (Sands 1994). The largest most recent example is the 2002 Johannesburg Summit on Sustainable Development that sought to develop a plan for the further implementation of sustainable development policies and programs worldwide after Rio.

Soft law is "more dynamic and democratic than traditional lawmaking, embracing a broader range of actors (including scientific organizations, academic specialists, NGOs and industry) and providing a more direct link with the larger society" (Hunter, Salzman et al. 2002). Soft law is either "not law" or "not law yet." It is considered to be a critical innovation in international law that is more malleable than hard or binding processes (Hunter, Salzman et al. 2002). Even though soft law consists of instruments that are not binding, they are nevertheless declaratory of aspirational norms of behavior.

How Does Soft Law Work?

There are no prescribed processes for designing and/or implementing environmental soft law; there are no set or agreed-upon strategies. Soft law can be constructed either by weakening existing legally binding procedures or by building new processes from the ground up that do not become legally binding. Soft law as a normative process has been in existence for more than 30 years (Dupuy 1991). Most soft laws are promulgated by international institutions such as UNEP and have become more widespread since 1972. These institutions design guidelines and recommendations to promote and establish a common understanding over a particular issue. Dupuy asserts that soft law is designed to create and delineate goals to be achieved in the future rather than actual duties, programs rather than prescriptions, guidelines rather than strict obligations. The "softness" of the instrument does not necessarily have to correspond to the "softness" of its contents. The content of an environmental soft law measure can include any aspect, but the most important aspect is that the instrument is not legally restrictive. Despite this, parties can still approach the negotiation of soft law instruments with the same care as if they were formal treaty provisions.

THE ROLE OF NON-BINDING SOFT LAW IN THE INTERNATIONAL ENVIRONMENTAL ARENA

Why is Soft Law Utilized Rather than Hard Law?

Juxtaposed against soft law is hard law. Hard law refers to legally binding obligations that are precise; however, the distinction between the two is not precise. By implementing hard law, parties can "reduce transaction costs, strengthen the credibility of their commitments, expand their available political strategies, and resolve problems of incomplete contracting" (Abbott and Snidal 2000). Yet hard laws can also entail a number of limitations, particularly when they are promulgated in treaty format. There is a patchwork of global treaties ranging from biological diversity to Antarctica with little commonality. There are no mechanisms to bind multilateral environmental treaties together in any formal sense or to develop common approaches (UNDP, UNEP et al. 2003). Most international environmental treaties have not arisen from holistic views of the environment nor have they attempted to coordinate their efforts to address the relationships among inter-related environmental issues. Some specific challenges associated with hard law binding treaties are described below.

Slow negotiation and ratification: International negotiating processes must accommodate the differing views of as many as 190 governments. As a result, they are often excruciatingly slow, often with a decade passing between the time the international community begins to mobilize and the time a final treaty is signed. Even then, the treaty does not immediately enter into force because it can take years to be ratified by some minimum number of countries (UNDP, UNEP et al. 2003).

Compromising toward the lowest common denominator: Treaties are forged by consensus, so some compromises are to be expected. However, there is often a pronounced tendency toward lowest common denominator bargaining, where ambitious goals, mandated targets, and firm timelines are either removed or diluted. Consensus bargaining gives nations who want to preserve the status quo great leverage in treaty negotiations and later conferences of the parties, particularly if their cooperation is crucial to achieving the goals of the agreement. Such strategies weaken treaties to achieve greater participation, but risk forging an agreement that can't meet its environmental objectives.
Lack of monitoring for compliance or performance. A high percentage of treaties do not insist that nations monitor their compliance in any systematic way or attempt to measure the impact of their actions.

Soft law is often utilized, particularly in the human rights and environmental sectors, because of its numerous benefits and associated flexibility. Soft law approaches are less difficult and time-consuming than formal legal treaties, and they engage non-state actors such as members of civil society. By working with these non-traditional actors, who are not official representatives of the state, action plans can be made more creative, greater trust can be built, and ultimately consensus can be created among the different concerned parties. Soft law approaches help create awareness and over time can lead to formal treaties (UNDP, UNEP et al. 2003). Moreover, and arguably most importantly, soft law can bring to the discussion table state actors and associated official constituents who might otherwise not participate because they feel threatened about losing control or rights. Soft law agreements can also be made with parties that other parties to the agreement are not willing to recognize, and agreements can be made with parties that do not have the power to conclude treaties under international law (Hillenberg 1999). Non-binding norms and procedures are increasingly attractive to all parties for these reasons.

Given the growth and evolution of soft law mechanisms, non-binding norms have complex and potentially large impacts in the development of international law (Shelton 2003). Of particular salience is the issue of compliance where an increasing number of state and non-state actors are choosing non-binding soft law mechanisms over binding normative instruments and the question of what impact this is having on their behavior.

Challenges Associated with Soft Law

Although there are many advantages associated with environmental soft law practices, there are challenges too. Perhaps the biggest challenge relates to issues of compliance. Given that soft law is by design not hard, it does not require formal compliance because it is not legally binding. Soft law can be enforced through moral persuasion, with the threat of political consequences for "non-delivery" or even through fear of being shamed by other nations or non-state actors. In some circumstances there might even be coercion, such as the blocking of future loans, by international actors. Nonetheless, a soft law process does not require compliance where legalization is used to enforce commitments.

CASE STUDY: THE BACI DECLARATION

Given the importance of environmental soft law mechanisms and potential outcomes, I have selected a case study through which to examine some of the benefits and constraints associated with non-binding actions. This recent initiative on forest law enforcement and governance in Asia offers a valuable opportunity for analysis. It was selected because it is one of the newest international environmental non-binding processes. In addition it is interesting for the following reasons:

Institutional setting: Soft law has been adopted by a variety of parties including national governments, in collaboration with international bodies, regional organizations and non-state groups.

Regional clustering: The case study focuses on a single region. Regional mechanisms, particularly in the environmental sector where there can be significant diversity from place to place, tend to work better than global mechanisms.

Generality and specificity: Some of the norms are very general, while others are detailed and specific. Compliance is often better when specific goals are set rather than general or vague norms.

Background to Forest Law and Governance in Asia

Large-scale illegal logging and forest extraction poses a significant threat to the integrity of forest ecosystems throughout the world and can undermine ongoing processes of sustainable development. Illegal logging has global social, ecological, and economic implications at all levels, from local communities that are directly dependent on trees and forests for their livelihood to national governments who utilize forest areas for economic purposes. Without active concerted effort on the part of the international community, national governments, non-governmental organizations, and local communities, sustainable forest management will not be achieved.

After the Earth Summit in 1992, it became clear that solutions to forest degradation in developing countries were likely to be more political than technical. While technical solutions were generally available for many of the forestry development and conservation problems, the lack of effective political action has been primarily due to the failure of political systems to mobilize consensus for reform.

Illegal Logging in Asia

It cannot be denied that in terms of current rates of global deforestation and degradation, the spotlight is squarely on Southeast Asia. Although only five percent of the world's forests are located here, almost 25 percent of the global forests lost in the last decade were in this region (FAO 2001). As is the case elsewhere in the world, but even more so in East Asia, forests are subject to non-sustainable forest management, conversion to monoculture plantations, fires, small-scale agricultural encroachment, infrastructure development, mining, wildlife poaching, and illegal logging. The root causes of illegal logging in this region are deep, complex, and extremely varied.

To tackle this alarming scenario head-on, a groundbreaking initiative developed by the Association of Southeast Asian Nations (ASEAN) brought together Ministers from East Asian countries, Europe, and North America in September 2001, concluding a series of pre-ministerial technical meetings during the same year. They reached consensus on the urgent need to combat illegal logging and forest crimes in the region through strengthened national and regional efforts. Broad definitions of the issues involved, including illegal logging, arson, and wildlife were also discussed and agreed upon. Recognition of the different responsibilities of producer and consumer countries in combating these issues called for a set of actions to be undertaken and reported on regularly. The Bali Declaration emerged as an outcome of this historic meeting.
A Brief History of the FLEG Initiative

In May 1998 the G-8 group of industrialized nations launched an Action Program on Forests giving high priority to the problem of illegal logging and with a focus on efforts to complement actions and international and regional processes. The G-8 Action Program motivated a partnership between the World Bank, the United Kingdom’s Department for International Development, and the U.S. Department of State on forest law enforcement for East Asia, which led to the Forest Law Enforcement and Governance (FLEG) Conference. (Since the East Asia FLEG negotiations and subsequent Bali Declaration, there has been an African FLEG and there have been discussions about negotiating a Russia FLEG in the future.)

The FLEG Conference in 2001 was the culmination of a series of earlier consultations, conferences, and national initiatives convened in East Asia that have focused on combating the threat posed to forests worldwide from illegal logging, associated illegal trade, wildlife poaching, and corruption. These include two meetings organized by the World Bank: a Regional Symposium on Strengthening Cooperation for Forestry Law Enforcement in the Mekong Basin Countries, which was held in Phnom Penh in May 1999, and a “Control of Illegal Logging in East Asia” conference that was convened in Jakarta, Indonesia in August 2000 by the World Bank/World Wildlife Fund Alliance. A key conclusion drawn from both of these meetings was acknowledgement of the need to act at national and regional levels to secure political commitment at the highest level in all countries.

In April 2001, a preparatory meeting for the FLEG conference was held in Jakarta. Senior government officials from nine East Asian countries attended the meeting and reached agreement on several principles. They were:

- the control of illegal logging and other forest crimes is primarily a national obligation, with recognition that it is a problem that faces all countries;
- regional cooperation has potential value for addressing some problems of illegal logging and forest crimes; and
- establishing a ministerial conference and crafting a regional ministerial declaration would be useful.

(For a more detailed summary of FLEG, refer to Sustainable Developments, 2001. Vol. 60:1, Number 1, 15 September 2001 at www.isis.ca/linkages/sd/sdfile/)

The Bali Declaration:

The Bali Declaration represents a dramatic break from all previous global discussions on sustainable forest management, as government leaders frankly addressed the sensitive issue of criminal activity contributing to forest degradation and loss (East Asia and Pacific Forest Law Enforcement and Governance Proceedings, Draft 2 2003). (See copy of Bali Declaration in Appendix 1.) Without ignoring several other important challenges facing the forest sector, the declaration is singular in recognizing the need to strengthen forest law enforcement and gain the commitment of regional leaders. It further identifies a comprehensive set of actions for implementation, 50 at the national level and 20 at the regional level. (See copy of FLEG Action Plan in Appendix 2.)

The declaration mandates that it is essential for the countries involved "to give full effect to the intentions of the declaration and to proceed with urgency to explore timely implementation of significant indicative actions developed by technical experts at the Bali meeting." This requires the establishment of a “regional task force on forest law enforcement and governance to advance the objectives of the declaration.”

In May 2002, a preliminary meeting was called at the behest of the Government of Indonesia. The regional Task Force and Advisory Group was established at this meeting to address issues around the scope of the regional Task Force and the operational modalities involved. The need to advance the objectives of the Bali Declaration through dialogue was reiterated, as was the pressing requirement to translate the objectives into actions of consequence.

The first-ever working meeting of the FLEG Task Force and Advisory Group was held in Jakarta, Indonesia, in January 2003. Attended by decision-makers representing countries and organizations actively involved in furthering the FLEG initiative, there were 70 participants in all. These included 23 members of the Advisory Group, drawn from NGOs and the private sector; 38 government representatives comprising the Task Force from 11 countries including Cambodia, China, Indonesia, Japan, Lao PDR, New Zealand, Papua New Guinea, Philippines, Thailand, the United Kingdom, and Vietnam; and 10 observers from international non-governmental organizations.

This meeting marked a series of firsts. Participants exchanged information, brainstormed, deliberated, and worked together to produce detailed action plans for first actions to be undertaken by the regional Task Force. These would culminate in the first steps taken toward actualizing the ambitious intentions to curb illegal logging set forth in the Bali Declaration.

The meeting was co-hosted by the World Bank and the Government of Indonesia, facilitated by the World Bank Institute and the World Bank East Asia and Pacific Regional Office. Financial support was provided by the United Kingdom and the United States.

LESSONS LEARNED FROM THE BALI DECLARATION

The following are the key lessons learned from the East Asia Forest Law Enforcement and Governance case study and associated rationale for promoting environmental soft law approaches. These lessons can be applied in other environmental situations and are not specific to forestry. However, many of the lessons discussed here should be considered preliminary given that the East Asia FLEG is a recent declaration and there has not been a significant amount of time for the stated actions and agreements to be implemented.

Thinking Ahead

National governments appeared to have chosen soft law approaches over hard law approaches despite the possibility of non-compliance, either because of domestic political opposition to hard law, lack of ability or capacity to comply, uncertainty about whether compliance can be measured, or disagreement with aspects of the proposed norm. When states do not feel they can comply with a norm, they are largely unwilling to put that norm in a binding instrument (Shelton 2003). In the case of forest law and governance in East Asia, many states, particularly Cambodia and Indonesia, have experienced significant acts of forest crime. The "who" and "how" may be somewhat less relevant in this case than
whether the state can enforce compliance to stop the illegal forest activities. Given the complex root causes involved, states in the East Asia FLEG have adopted soft rather than hard law norms and instruments to avoid from the outset the risk of lack of compliance. However, over time as the parties begin to change national laws, customs, procedures, or monitoring practices they may agree to engage in more formal hard law agreements once they believe they will be able to comply. The key lesson here is that if the involved states cannot comply, then they likely will not participate in any formal hard law process. In a non-binding or soft form, states have greater flexibility and will be more inclined to participate.

The Carrot Approach

Individuals involved in soft law processes have stated that without a soft law approach parties can risk getting nothing if there is a strong push for hard law binding mechanisms (Vidar 2003, van Jallie 2003). Soft law instruments may be intended to induce states to participate or to pressure non-consenting states to conform. Given the sensitive nature of illegal forest activity, many states may not enter into any agreements if they are not at least legally bound to conform. Until recently in many countries, the discussions related to forest crimes were limited to non-state actors and academics. However, with the advent of non-legal approaches and “carrots,” such as grace periods for specific actions or other incentives, nations and key state actors will become increasingly willing to participate. In the case of the East Asia FLEG one of the key objectives was just to share information, learn among each other and network. Although detailed action plans were devised, these were not legally binding in any sense. By developing reporting mechanisms and promoting research on the causes and sources of illegal forestry activity, it is no way held states accountable, but it can further the pursuit of management solutions.

Moral Persuasion

In ongoing collaborative processes, whether local, national, regional, or international, it is now recognized that not all relations need to be governed by law or other formal arrangements, but some may be left to etiquette, social discourse, or informal commitments. Compliance is demanded with all agreed norms, but law is reserved for the serious or fundamental rules where its formality and the fact that it is binding are important (Sand 1990; Dupuy 1991; Sands 1994; Shelton 2003). Soft law also may be emerging due to a growing strength and maturity of the international system. In the case of the East Asia FLEG, it was stimulated by the G-8 and the World Bank. These international institutions increasingly recognize that there are other avenues beyond formal, less flexible arrangements to gain desired outcomes. Nevertheless, soft law is quite persuasive, as it represents the international consensus about the issue at hand and recommendations are thus quite authoritative.

Root Cause Identification

Binding norms may be inappropriate when the issue or the effective response is not yet clearly identified, due to scientific uncertainty or other causes, but when there is an urgent requirement to take some action. It has been widely documented that illegal forest activities are pronounced in many parts of the world and the need to address them has been agreed upon by most parties (FAO 2002). In the case of forest law and enforcement, the causes are extraordinarily complex, ranging from national military exploitation to unregulated private sector activity to corrupt national governments. A single approach, therefore, will be ineffectual, and legally binding norms at this time may not be appropriate, although this may allow for foot-dragging by states that may continue to argue over an extended period of time that further research will be necessary. (This has often been the tactic of choice utilized by the U. S. during climate change negotiations.)

Diverse Legal Systems

In addition, from a regional or international perspective, binding norms can further complicate matters because diverse national legal systems often preclude legally binding norms. “Soft law may be increasingly utilized because it responds to the needs of the new international system. In national legal systems, law-creating methods have always varied, from constitution-writing to legislation, executive decrees, administrative regulation, and private contract, as well as common law” (Shelton 2003). Within the East Asia FLEG process, the issue of diverse national legal systems was explicitly addressed. One of the recommendations of the FLEG Advisory Group was to develop definitions of legal and illegal for each country and address the contradictions, although this particular issue was not ranked as a priority.

Inclusiveness

Soft law allows for more active and engaged participation of non-state actors. The governance of global government, politics, and the economy is no longer shaped by national governments or businesses alone. Gradually over the last few decades, the role of non-state actors has become increasingly dominant and they routinely participate in decision-making over all aspects of society’s development. Where states once created and applied international norms through processes that lacked transparency, participation, and accountability, non-state actors have now become a significant source of power alongside state control. Non-state actors can monitor states’ activities, publicize environmental monitoring, and press or even shame their respective governments to cooperate. The growing influence of these actors has changed the dynamics of governance today, lending a formidable voice to individuals, interest groups, and communities of all types.

These groups and their interests are collectively known as civil society. Soft law permits civil society a role that is possible only rarely in traditional law-making processes. The East Asia FLEG initiative actively promoted the role and engagement of civil society within negotiations. There were 10 international civil society actors involved directly as observers in the January 2003 discussions, and, amazingly, all 23 members of the Advisory Group were non-governmental. This will ultimately lead to stronger and more effective environmental outcomes because of the checks and balances the non-governmental Advisory Group will play in monitoring the work of the governmental Task Force. Many of the countries included in the East Asia FLEG such as Cambodia, China, Laos, and Viet Nam have weak civil society communities. Their engagement and participation in the East Asia FLEG process, however, is a testament to the many opportunities available for this sector to share in the management and governance of environmental resources with their respective states. Some question whether national governments may eventually become more receptive to the influence and scrutiny of nationally based civil society actors rather than choose to be subject to real or perceived losses of sovereignty under legally binding agreements.
**Timing**

The Bali Declaration process unfolded in a short period of time compared to other international environmental agreements. It took only a short four-and-a-half years for the process, from the time it was first proposed by the G-8 (May 1998) to the time the declaration was agreed upon during an ASEAN meeting (September 2001) to the establishment of the first Regional Task Force and Advisory Group (May 2002) to the first working meeting of the FLEG Task Force and Advisory Group (January 2003). The quick agreement that lead to the Bali Declaration was possible because soft law generally can be adopted more rapidly because it is non-binding. This is particularly important given that most environmental problems are extremely severe and often demand rapid solutions. However, the current treaty system frequently does not allow for this to occur. The advantage of soft law processes is that their flexibility extends to implementation and compliance where the dynamic interaction of the various actors can play a crucial role. Soft law may thus substitute for hard law when no agreement on hard law can be achieved or when recourse to the hard law form would be ineffective. It may be that the increasing number of states participating in negotiations could cause a likely decrease in the number of hard law agreements in the global setting. Furthermore, a soft law agreement can also be quickly amended or replaced if it fails to meet current challenges or if circumstances change.

**Creativity**

Soft law processes can stimulate creative solutions to complex problems because of their non-binding nature. The FLEG process is attempting to address the extraordinarily contentious issue of illegal forest activities and the mechanisms needed to address them. This process has engaged not only national governments, some of which are not democratic or readily open to external influences, but also a multitude of other actors. The East Asia FLEG could have attempted to address this issue through a binding compliance-based approach, but that could have led to the lowest common denominator result, which is often ineffectual.

**To Comply or Not to Comply**

Although it is too soon to determine any reduction in illegal forest activities based on the FLEG process, the “take-away point” is that in many ways it was remarkable that the states involved made the agreements they did given the complex and sensitive nature of forest crimes. Ultimately, although there was no explicit “stick” involved, member states of the Bali Declaration accepted the norms outlined in the declaration as they saw it in their self-interest. Because this is such a sensitive issue, this is an excellent example of how a soft law process can engage state actors. It is very likely that states, at least in the short term, will be unable to reduce the incidence of illegal logging. Through a non-binding process, however, they have acknowledged the problem and are taking initial steps to actively address it. A forced resolution process would have gone unsigned and ultimately would have led the international community nowhere.

**STRENGTHENING ENVIRONMENTAL GOVERNANCE OPTIONS THROUGH SOFT LAW APPROACHES**

The East Asia FLEG process shows that there is a growing international effort to tackle the complexity of environmental governance. International multilateral agencies, international non-governmental organizations, local communities, as well as numerous national governments, including both developed and developing nations, have all sounded the warning that more needs to be done faster to combat environmental degradation. As environmental management challenges continue to increase in scope and complexity, whether related to global forest management regimes, scarcity over fresh water rights, or access to agricultural land, the international community must recognize that unless innovative new management approaches are adopted, humanity and its natural environment face increasingly dire consequences. Rather than proceeding with only legally binding international treaties, environmental actors have begun to give more credence to the apparent value and opportunities of environmental soft law mechanisms.

Given the inherent difficulties of obtaining a binding hard-law environmental treaty, especially in the realm of forests (Porter, Brown et al. 2000), soft law has in many ways become a more attractive and even feasible mechanism to protect and conserve natural resources. However, how can international environmental soft law be strengthened to make it more effective, not only for the natural environment, but for the states that use it? The East Asia FLEG process will require further analysis after more time has elapsed and the soft law mechanisms have had an opportunity to function. This analysis should also examine the other regional FLEG processes in Africa, Europe, and in other future potential regions such as Russia.

Soft law is a sign and product of multilateral and international cooperation. It compels the international community to think about how soft-law mechanisms can enhance improved environmental outcomes. The East Asia FLEG process, although still in its infancy, may be one such mechanism to address and negotiate the difficulty of finding global solutions to intricate problems. As Shelton (2000) argues, “the growing complexity of the international legal system is reflected in the increasing variety of forms of commitment adopted to regulate state and non-state behavior with regard to an ever-growing number of transnational problems.” Although non binding forms of agreement may, in the short term, reduce options for enforcement, this does not mean that parties do not respect the expectations or norms held within non-binding approaches.

Soft law can be extraordinarily influential within international environmental arenas and should not be discounted simply because it is not formal or binding. Soft law can be used to build clustered alliances, expand the role of and engage non-state actors in the negotiating process to improve environmental outcomes, engage states that might not have participated at all due to actual or perceived risk of non-compliance; and, eventually, assist nation states to move toward a formal environmental agreement if necessary. Ultimately soft law will play an increasingly important and varied role in international and regional environmental negotiations.
REFERENCES
Wirth, David A.; Professor of Law, Boston College. December 5, 2003. Personal Communication.

APPENDIX 1: FOREST LAW ENFORCEMENT AND GOVERNANCE, EAST ASIA MINISTERIAL CONFERENCE
Bali, Indonesia
11-13 September 2001
Ministerial Declaration
Countries from the East Asian and other regions participating in this Ministerial Conference:
Understanding that forest ecosystems support human, animal and plant life, and provide humanity with a rich endowment of natural, renewable resources;
Deeply concerned with the serious global threat posed to this endowment by negative effects on the rule of law by violations of forest law and forest crime, in particular illegal logging and associated illegal trade;
Recognizing that illegal logging and associated illegal trade directly threaten ecosystems and biodiversity in forests throughout Asia and the rest of our world;
Also recognizing the resulting serious economic and social damage upon our nations, particularly on local communities, the poor and the disadvantaged;
Further recognizing that the problem has many complex social, economic, cultural and political causes;
Convinced of the urgent need for, and importance of good governance, to, a lasting solution to the problem of forest crime;
Recognizing that all countries, exporting and importing, have a role and responsibility in combating forest crime, in particular the elimination of illegal logging and associated illegal trade;
Emphasizing the urgent need for effective cooperation to address these problems simultaneously at the national and sub-national, regional and international levels;
Declare that we will:
Take immediate action to intensify national efforts, and to strengthen bilateral, regional and multilateral collaboration to address violations of forest law and forest crime, in particular illegal logging, associated illegal trade and corruption, and their negative effects on the rule of law;
Develop mechanisms for effective exchange of experience and information;
Undertake actions, including cooperation among the law enforcement authorities within and among countries, to prevent the movement of illegal timber;
Explore ways in which the export and import of illegally harvested timber can be eliminated, including the possibility of a prior notification system for commercially traded timber;
Help raise awareness, through the media and other means, of forest crimes and the threats which forest destruction poses to our future environmental, economic and social wellbeing;
Improve forest-related governance in our countries in order to enforce forest law, inter alia to better enforce property rights and promote the independence of the judiciary;
Involve stakeholders, including local communities, in decision-making in the forestry sector, thereby promoting transparency, reducing the potential for corruption, ensuring greater equity, and minimizing the undue influence of privileged groups;

Improve economic opportunities for those relying on forest resources to reduce the incentives for illegal logging and indiscriminate forest conversion, in order to contribute to sustainable forest management;

Review existing domestic forest policy frameworks and institute appropriate policy reforms, including those relating to granting and monitoring concessions, subsidies, and excess processing capacity, to prevent illegal practices;

Give priority to the most vulnerable transboundary areas, which require coordinated and responsible action;

Develop and expand at all appropriate levels work on monitoring and assessment of forest resources;

Undertake the demarcation, accurate and timely mapping, and precise allocation of forest areas, and make this information available to the public;

Strengthen the capacity within and among governments, private sector and civil society to prevent, detect and suppress forest crime.

Further, in order to give full effect to the intentions of this Declaration, and to proceed with urgency to explore timely implementation of significant indicative actions developed by technical experts at this meeting, we:

Undertake to create a regional task force on forest law enforcement and governance to advance the objectives of this Declaration;

Invite the representatives at this conference from NGOs, industry, civil society and other relevant stakeholders to consider forming an advisory group to the regional taskforce;

Decide to meet again at the Ministerial level in 2003 to review progress on first actions to implement these commitments, in cooperation with relevant international partners;

Request the ASEAN and APEC countries participating in this Conference to inform the next ASEAN and APEC Summits of the outcome of this Ministerial Conference and to invite their support;

Pledge to work to see that the issue of forest crime is given significant attention in future international fora, including by the World Summit on Sustainable Development (WSSD) and the United Nations Forum on Forests, and by the member organizations of the Collaborative Partnership on Forests;

Request the G-8 countries and other donors to consider further how they can join in the fight against forest crime, including through capacity building efforts;

Encourage other regions to consider creating similar regional initiatives to combat forest crime.

Bali, Indonesia, 13 September 2001

APPENDIX 2: ANNEX I

DRAFT
FOREST LAW ENFORCEMENT AND GOVERNANCE
EAST ASIA MINISTERIAL CONFERENCE, BALI, INDONESIA

From 11 To 13 September 2001

Annex to the Ministerial Declaration
Indicative List of Actions for the Implementation of the declaration

I. Actions at National Level

Political

- High-level expression of political will across sectors

Legislative/Judicial

- Modify and streamline laws and regulations
- Determine law enforcement priorities
- Develop swift prosecution, judgments and enforcement
- Strengthen penalties and sanctions against illegal activities
- Rewards for responsible behaviour/motivation
- Recognized complaints mechanisms w/ protection for claimants and due process
- Independent monitoring (e.g. single organization, cooperative model, etc.)
- Integration of customary law into formal law
- Capacity building for legislative, executive and judicial institutions at the local level, including the integration of customary institutions

Decentralization

- Clarify roles, responsibilities, and authorities between different levels of government, private sector, civil society
- Improve coherence between different laws
- Improve communication between national/local levels to prevent/detect crime
- Prosecution and enforcement should remain with competent and capable authorities
- Systems that encourage responsible behaviour and deter criminal/corrupt behavior (e.g. salaries, codes of conduct, morale building)
- Analysis of rationalization of multiple/conflicting formal and customary norms and laws

Institution and capacity building

- Education of judicial and law enforcement personnel re forest crimes
• Improve capacity of forest managers
• Support interagency cooperation in formulation of coherent policy and procedures
• Technology
  • Remote sensing, Geographic Information Systems (GIS)
  • Cheap log tracking
  • Complete chain of custody audit and negotiation systems
  • Resource use planning, warning, monitoring, inspection
• Knowledge, Experience, Skills
  • Awareness raising and training
  • Local innovations appropriate to circumstances
  • Novel detection and enforcement methods
  • Intelligence gathering and analysis
• Rights, Roles, Responsibilities, Rules
  • Codes of conduct
  • Due diligence re financing, investment
• Capacity building for legislative, executive and judicial institutions at the local level including the integration of customary institutions
• Research (for additional details see Section II Regional and Inter-regional Actions)
• Concession Policy

Concession Allocation
• Develop/implement transparent and participatory approach to concession allocation
• Develop leasing/contractual opportunities for village/individual households to manage forest resources
• Develop mechanisms for resolving conflicting/overlapping property rights

Concession Management
• Clear recognition of property rights within approved management plans, including clear identification and agreement of boundaries and demarcation of concession areas, available to all parties
• Appropriate contractual periods, monitored against performance
• Raise awareness about community based forest management
• Institute independent auditing for compliance with terms of concession agreements

• Protect and develop forest-based livelihood opportunities within concession areas for local communities
• Build protection for forest-based livelihoods into concession contracts

Conservation and Protected Areas
• Environmental education
• Involve local authorities in developing conservation programs that benefit constituents/local communities (e.g. water, tourism)
• Public Awareness, Transparency, and Participation
• Consistent provision of accurate, timely information to monitoring organizations
• Increase public awareness of forest crimes
• Increase public awareness of opportunities for purchasing forest products from sustainable and legal sources
• Provide alternative livelihood opportunities for communities (e.g. poachers to tourist guides/park rangers)
• Registry of business/family interests in timber industry
• Publication of government budgets, resources, staffing levels and programs on forest law enforcement
• Publication of data on forest crimes, including success rates on detection, interdiction, prosecution and conviction

Bilateral Actions
• Transboundary cooperation for protected areas
• Voluntary agreements for combating trade in illegal timber and forest products

II. Regional and Inter-regional Actions

Information/expertise sharing
• Exchange of in-country experts on forest crime, forest law enforcement (law, comparative assessment on actions)
• Implementation of comparable systems of criteria and indicators
• Comparable timber tracking mechanisms and complete chain of custody audit
  • Registration of origin and destination (e.g. forest stand to mill)
• Development of regional network of monitoring systems, including forest crime monitoring

Trade/Customs
• Harmonized customs commodity codes
• Protocols for sharing of export/import data
• Complete chain of custody audit and negotiation systems
• Initiative for improved and timely trade statistics
• Prior notification between importing and exporting countries

**Bilateral Actions**

• Voluntary bilateral agreements to cooperate on issues of combating illegal logging and trade (involving a full range of relevant agencies/institutions, e.g. customs, police, marine, trade)
• Regain consumer confidence in tropical timber as a commodity
• Promote the use of certification schemes that are accessible and cost-effective for smaller forest enterprises (e.g. group certification schemes)

**Research**

• A research agenda for individual and cooperative work on illegal logging, associated illegal trade and corruption in the forest sector
• Systematic comparative analysis of patterns of regulatory systems and extra-sectoral links
• Cooperative work on trade statistics and its relation to legal and illegal patterns of movements of forest products
• Investment context for and links to illegal and corrupt actions
• Survey patterns in forest crime and related corruption
• Development of appropriate monitoring tools and their application, policy utilization
• Decentralization and patterns related to local government
• Private Sector, communities, NGOs and relation to governments