

New Treaty In the Making

Covenant on Environment and Development

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Few people in America have seen *Agenda 21*. Even fewer have read it. It is a 288-page document, consisting of 40 chapters replete with "recommendations" that affect virtually every aspect of human life. Taken together, the recommendations, when fully implemented, constitute what is called "sustainable development." *Agenda 21* is the Action Plan adopted at UNCED -- the United Nations Conference on Environment and Development -- in Rio de Janeiro in 1992. The United States was one of 179 nations that signed the document. It is a "soft-law document," meaning that it is not legally binding, and therefore, Congress has no reason to review or approve its content. Nevertheless, the recommendations contained in *Agenda 21* are being implemented through two separate, but coordinated, initiatives: the President's Council on Sustainable Development (PCSD), and the International Council for Local Environmental Initiatives (ICLEI). Implementation is occurring through the promulgation of rules by federal agencies, and through the development of plans for "sustainable communities" at the local level. Recommendations from *Agenda 21* are being implemented without the benefit of public debate by elected officials. Though many communities do not recognize it as such, a well-coordinated national effort is underway to transform America to conform to the principles set forth in *Agenda 21*.

Although *Agenda 21* is a soft-law document, it was, from the start, intended to be the precursor of an all-encompassing UN Treaty. The most recent iteration of that treaty has now been obtained and reviewed. It is called, in its present form, "Draft International Covenant on Environment and Development." It is organized into 11 parts, containing a total of 72 Articles. It will convert the "soft-law" recommendations of *Agenda 21*, into legally binding "hard" international law.

Before examining the document itself, it is helpful to realize that the procedure for making international law has evolved since 1948 and is now recognized by the international community as the norm. The introduction to the Draft Covenant says:

"The progression of legal principles from recommendatory 'soft' to legally clear 'hard' is well known in international law. For example, the 1948 Universal Declaration of Human Rights, a 'soft law' instrument, was the precursor to the two 1966 UN Covenants on Human Rights."

Similarly, the Vienna Convention on Ozone Depleting Substances was adopted and ratified as a treaty which required only that nations "monitor" substances thought to be ozone-depleting. The Conference of the Parties, then adopted the Montreal Protocol which made the treaty legally binding. The same process is being used to convert the "voluntary" Framework Convention on Climate Change into a legally binding "hard law" document through the Kyoto Protocol. The Covenant on Environment and Development is following the same path.

The first call for an international treaty on environment and development came from the 1983 World Commission on Environment and Development, also known as the "Brundtland Commission." Their final report, published in 1987, entitled *Our Common Future*, recommended that the United Nations prepare

"a new and legally-binding universal Convention [which] should consolidate existing and establish new legal principles, and set out the associated rights and responsibilities of States individually and collectively for securing environmental protection and sustainable development to the year 2000 and beyond."

The International Union for the Conservation of Nature (IUCN) assembled a working group under its Commission on Environmental Law (CEL), under the chairmanship of Dr. Wolfgang E. Burhenne, in

November, 1989. They produced a draft text containing 88 provisions. A second meeting of the IUCN group met in March 1991, under the chairmanship of Dr. Parvez Hassan. The Draft Covenant was translated into six official languages recognized by the UN and provided to PrepComm Working Group III, then preparing for UNCED in Rio. The evolving Covenant then became the basis for the development of *Agenda 21*.

From the start, *Agenda 21* was intended to be a "soft law" document. Therefore, its ideas are presented in the form of recommendations with no discussion at all of compliance and enforcement. The Draft Covenant, however, does address those issues. A third meeting of the IUCN group was held shortly after UNCED to incorporate ideas presented in Rio into the Covenant. Two more meetings occurred, in April and September 1993. Both the Chairs of the IUCN's Ethics Commission and the IUCN's Species Survival Commission were invited to participate. The drafting committee met again in April, and September, 1994. While the IUCN is clearly the driving force behind the document, other organizations that participated in the development of the Covenant included the International Council of Environmental Law (ICEL); and the United Nations Environmental Programme's Environmental Law and Institutions Programme Activity Center (UNEP/ELIPAC).

The current Draft Covenant was completed March, 1995, in Bonn, Germany.

Like all recent UN Treaties, the language is somewhat vague and seeks to establish principles which may be interpreted in the future by the treaty's Conference of the Parties. Part I, Article 1 sets forth the Covenant's objective:

"The objective of this Covenant is to achieve environmental conservation and sustainable development by establishing integrated rights and obligations."

The casual reader might miss the import of this Article: "...by establishing integrated rights and obligations." This Article clearly illustrates the difference between the UN's concept of governance and America's concept of governance. America recognizes that humans have certain "inalienable" rights, among which is the right to create a government controlled by the people who are governed through representatives who are elected by the people who are governed. Inalienable rights are limited; obligations are accepted in America only with the consent of the people who are governed. The People who are governed retain the right to cast off any limitation on their rights or any obligation they may have previously accepted, simply by electing a new batch of representatives.

The Covenant, on the other hand, assumes that "rights" are granted by government, and that people to whom rights are granted "owe" certain obligations to government as may be prescribed by government. This concept of governance is the prevailing view held by most of the world. The American view is beyond the comprehension of most of the world's peoples. Even in nations that are described as "social democracies," it is assumed that government is the source of human rights. This is an exceedingly important principle of governance that America has failed to advance in the international community. In fact, the UN's concept of governance is eroding the traditional American view of governance every time America embraces a UN treaty. The President's Council on Sustainable Development, too, is operating on the UN principle, by-passing Congress and other elected officials, as it implements the recommendations of *Agenda 21*.

Part II of the Covenant includes Articles 2 through 10 which set forth the primary principles on which the Covenant is based. Most of the principles are at odds with traditional American values. For example, Article 2 declares that:

"Nature as a whole warrants respect; every form of life is unique and is to be safeguarded independent of its value to humanity."

This principle replaces the *anthropocentric* world view with a *biocentric* world view. Historically, Americans have believed that human life is the supreme value aside from the creator of all life; that human beings are at the top of the food chain. Americans have believed that human beings are creation's crowning jewel, that, ultimately, all species (natural resources) are available for human use. The biocentric world view holds that humans have no value greater than any other species and that all species -- including humans -- have equal rights. This biocentric view has been officially adopted by the U.S. Department of Interior, which, in its Ecosystem Management Policy, states that "in all ecosystem management activity, human beings shall be considered as a biological resource."

The "Precautionary Principle" is codified in Article 7. The same idea is expressed in Principle 15 of *Agenda 21*. It is the idea that policy action should not wait on scientific justification if "government" decides that a "threat" to the environment exists. Article 8 (Principle 3 in *Agenda 21*) declares that the "right" to development is accompanied by the "obligation" to meet environmental and "equity" needs -- as determined by non-elected government policy makers. Article 10 writes into international law "The elimination of unsustainable patterns of production and consumption..." again, as determined by non-elected government policy makers. Maurice Strong, Secretary-General of UNCED, and now, Executive Coordinator of UN Reform, declared in Rio that single family homes, air conditioning, and automobiles -- are not sustainable.

Part III sets forth the general obligations. Article 11 declares that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to utilize their resources...." This article clearly establishes the United Nations Charter and the "principles of international law" as superior to national sovereignty. Moreover, the Article also sets forth specific "obligations" which include the obligation to "protect and preserve the environment."

Article 12 describes the obligations of individuals: "All persons have a duty to protect and preserve the environment." Article 13 requires "Parties shall pursue sustainable development policies aimed at the eradication of poverty...[and] the conservation of biological diversity."

Part IV (Articles 16 through 22) says States "shall restrict human activities which modify, or are likely to modify..." stratospheric ozone, global climate, the soil, water, natural systems, biological diversity, and cultural and natural heritage. Part V, in three Articles, deals with measures to prevent environmental harm, pollution, waste generation, and the introduction of "alien" organisms.

Part VI deals with global issues. Article 27 focuses on "demographic" policies. Each state Party is required to "provide to their populations full information on the options concerning family planning." Article 28 requires "strategies to reduce or eliminate unsustainable patterns of consumption." Article 29 requires the eradication of poverty and "food security." Article 30 requires pricing of raw materials and commodities to "reflect the full direct and indirect social and environmental costs of their extraction, production, transport, marketing, and disposal."

Responsibility and Liability

The Covenant is quite comprehensive. It writes into "hard" international law virtually all of the recommendations of *Agenda 21*, and many new ideas. Part IX deals with "Responsibility and Liability." The following articles speak for themselves.

Article 47 - State Responsibility

"Each State Party is responsible under international law for the breach of its obligations under this Covenant or of other rules of international law concerning the environment."

Article 48 - State Liability

"Each State Party is liable for significant harm to the environment of other States or of areas beyond the limits of national jurisdiction, as well as for injury to persons resulting therefrom, caused by acts or omissions of its organs or by activities under its jurisdiction or control."

Article 49 - Cessation, Restitution and Compensation

"Each State Party shall cease activities causing significant harm to the environment.... Where that is not possible, the State Party of the origin of the harm shall provide compensation or other remedy for the harm."

Article 50 - Consequences of Failure to Prevent Harm

"Each State Party may be held responsible for significant harm to the environment resulting from its failure to carry out the obligations of prevention contained in this Covenant, in respect to its activities or those of its nationals."

Article 52 - Civil Remedies

"Parties shall ensure the availability of effective civil remedies that provide for cessation of harmful activities as well as for compensation to victims of environmental harm irrespective of the nationality or the domicile of the victims."

Article 53 - Recourse under Domestic Law and Non-Discrimination

"Each State Party of origin shall ensure that any person in another State Party who is adversely affected by transboundary environmental harm has the right of access to administrative and judicial procedures equal to that afforded nationals or residents of the State Party of origin in cases of domestic environmental harm."

Article 54 - Sovereign Immunity

"Parties may not claim sovereign immunity in respect of proceedings instituted under this Covenant."

Article 55 - Beyond National Jurisdiction

"The provisions of Articles 47 to 54 may be invoked by any affected person for harm to the environment of areas beyond national jurisdiction."

Disputes arising from the Covenant are to be settled either by an arbitral tribunal, the Permanent Court of Arbitration, the International Court of Justice, and the International Tribunal for the Law of the Sea. As has become the custom of UN Treaties, Article 69 provides that "No reservations may be made to this Covenant."

This is the UN Treaty that will move the world into the clutches of global governance. All the other "soft law" documents and specific purpose treaties are simply steps toward global governance. The Covenant on Environment and Development clearly identifies the destination to which all the other documents are leading. Our State Department is fully aware of this Covenant, and the other activities of the IUCN which has developed this Covenant. In fact, the U.S. State Department contributes more than \$1 million per year to the IUCN, a non-

governmental organization (NGO), that coordinates the activity of more than 700 other NGOs toward the development and implementation of global governance.

It is not yet known when the UN intends to roll-out this Covenant for public consideration. The Millennium celebration planned for the year 2000, during which the first meeting of the new "Assembly of the People" will meet, could be the occasion. The Assembly of the People will consist of selected representatives from NGOs that are "accredited" by the United Nations. Global governance is not an event that will occur on a day certain in the future. It is a process that has been underway for several years and will become a fact before most Americans realize that it is a threat.

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