

A N N E X

S P E C I F I C C O M M E N T S

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FOREWORD

- The Foreword is well drafted, but should make clear at the outset that the Covenant is intended not only to codify but also progressively develop both customary and conventional international environmental law (a point which might even be added to Objective: Article I);
- as now drafted, the underlying reasons cited for the Covenant are somewhat discursive and overlapping, albeit elegantly worded;
- the comments should highlight (and mention earlier) the importance of transforming non binding principles selected from a variety of sources into legally binding obligations enshrined in a multilateral framework ("umbrella") convention;
- similarly, the comments should stress the need to consolidate (in a single multilateral 'framework' convention) not only soft-law principles but pre-existing binding rules of both customary and conventional international environmental law;
- if it is considered that there is a promotional and educational purpose to be served in addition to the intrinsic importance of codifying and progressively developing international environmental law this should be so stated;
- the ambitious and far-reaching nature of the exercise should also be emphasized, and not left to page (vii).

SUBSTANTIVE CONTENT OF ARTICLES

RESPONSIBILITY AND LIABILITY

- the amendments to some articles in Part IX are noted and not accepted.

COMMENTARY

Art. 1: Objective

- it is late to suggest substantive amendments, but as worded, the objective seems to focus on the need for integrated rights and obligations (an over arching principle) without stressing the need for "legally binding" obligations and corresponding rights; the Covenant is intended to be a legal instrument; the word "establishing" does not reflect this.

Art. 2: Respect for all Life Forms

- the statement of the top of page 27 is somewhat unclear and might benefit from a reformulation;
- the next paragraph does not indicate whether the "individuals" referred to are human or fish or insects;
- the third paragraph should read "perceived to be" immediately useful, etc.

Art. 3: Common Concern

- the term "Common Concern" is postulated in footnote 14 as a stronger and more comprehensive concept than that of the "Common Heritage of Mankind", when the reverse is the case;
- the Commentary suggests that the common heritage concept is virtually dead, whereas governments have made clear that they continue to support it;
- the Commentary should indicate that the term "common concern" was developed to avoid the more controversial term "common heritage" but should also explain that this is now history;

- it is too late to consider fundamental amendments to Article 3, such as replacing "common concern" with "common heritage";
- the assertion that the common heritage concept is devoid of conservation elements should be deleted, on the basis of the provisions of the UN Law of the Sea Convention (on the production ceiling and on the environment).

Art. 4: Interdependent Values

- even as a principle, the "right to life" should not be postulated as received customary law, but relatively minor drafting changes (in footnote 28) are all that are required.

Art. 5: Inter-Generational Equity

- the major importance of this principle should not be undermined by over-stating its legal status since, unfortunately, it cannot yet be asserted as a rule of received customary international law; thus even as a principle it may constitute progressive development rather than codification;
- assuming that the Commentary is intended primarily as an interpretation tool, this principle warrants very careful treatment, and references to UN Covenants should be differentiated from Guidelines (as in footnotes 32 and 34);
- if the Conventions referred in footnote 36 are correctly cited, some textual examples would be useful;
- the closing comment on the implementation of this Article is well founded, but it might be more clearly expressed.

Art. 6: Prevention

- the Commentary seems to set up minimum standards and best available technology as alternatives to this principle, but these approaches are just as much reflections of it;
- it should be noted that the reference in footnote 44 to the Trail Smelter case should read "serious consequence";
- the Commentary on this principle is otherwise well drafted.

Art. 7: Precautionary Principle

- the Commentary on this important principle is well formulated;
- the Commentary comes close to postulating risk rather than damage as the criterion for liability, but does not overstep the line;
- it should be noted that the Stockholm Principle 21 (founded on the Trail Smelter Case) is widely regarded as the basis for almost all subsequent environmental legal instruments.

Art. 8: Development

- this issue is a delicate one, and the Commentary is well formulated, avoiding the implication that this important principle is already accepted as a rule of customary or conventional international law.

Art. 9: Eradication of Poverty

- as is the case with Art. 8, the Commentary is objective, focussing on the status of the principle as it is, rather than as one would wish it to be;
- a reference to the Preamble, Purposes and Principle of the UN Charter might also be appropriate.

Art. 10: Consumption and Demography

- no comment

General Obligations

Art. 11

- the text of the Article remains acceptable in spite of its deviation, (as agreed) from Stockholm Principle 21 and the Rio Declaration;
- footnote 72 might usefully refer to the Trail Smelter and Corfu Channel and Lac Lanoux cases and Principle 21 of the Stockholm

Declaration and Principle 7 of the Rio Declaration; the Gut Dam arbitration might also warrant inclusion in the footnote;

- the wording of the Resolution 2996 states "no resolution adopted at the 27 th session of the General Assembly can affect principles 21 and 22 of the Declaration of the United Nations Conference on the Human Environment";
- footnote 73 should be toned down and (after checking the texts of the resolutions) the phrase "as representing the law" might warrant deletion, as the language of the Resolution was carefully chosen so as to be neutral on the status of the Principle, (its main purpose being to offset the watering down, at Brazilian insistence, of the duty to consult);
- The Commentary on par (a) should cite Resolution 3171 (28 UNGA) as the most important resolutions on "Permanent Sovereignty Over Natural Resources", (earlier resolutions going back as far as 1952, declaring such sovereignty to be inherent in their sovereignty and... in accordance with the purposes and Principles of the United Nations") UNGA resolution 626, 7 UNGA;
- footnote 78 should include a reference to Article 234 of UNCLOS (1982) on Ice-covered areas, which specifically recognizes the right of coastal states to adopt and enforce "regulations for the prevention, reduction and control of marine pollution";
- footnote 79 is puzzling, and should probably be deleted, since it may be criticized as equating the Charter right of self-defence to the right of self help or self protection under customary law;
- footnote 83 seems somewhat didactic (and unnecessary);
- the Commentary on par 6 does not refer to the Trail Smelter case, although the case is commonly cited as the leading authority for the "pollution-pays" principle;
- the Commentary on par 6 and footnotes 87 and 88 should be re formulated so as to be less dogmatic, didactic and potentially controversial.

Art. 12: Persons

- the Commentary on paragraph 1 may overstate the legal status of the obligation when it asserts "It articulates a norm of international law", and is thus likely to create an unnecessarily controversial reaction; similarly with the phrase "they are guaranteed here"; a preferable approach would be to expand the Commentary and the footnotes on the many precedents, (clearly differentiating between Conventions and Declarations);
- because of the innovative and far-reaching nature of par 2, some reference to the application and implementation of the provision would seem appropriate, to head off assertions that the charters of the Covenant are unaware of the difficulties entailed (i.e. the "real world");
- the commentary at the top of page 46 on par 2 consists of assertions which might be considered as didactic, much like excerpts from a lecture, whereas the same points could be made equally strongly in other less dogmatic language;
- the commentary on paragraph 3 is well formulated, but should, perhaps, include some recognition of the administrative logistical and financial difficulties entailed;
- the commentary on paragraph 4 should make clear whether the paragraph is intended to have application nationally or internationally or both, and the extent to which it is regarded as innovative.

Art. 13: Environment and Development

- footnote 104 might also cite a number of the provisions of UNCLOS as generally supportive although more concerned with sustainability than development; eg Articles 56, 61, 62; see also Article 66 (3), 69 (4) and 117; see in particular Article 119 (1)(a), and 140, 144 and 145, as well as Articles 150 and 151; see also Articles 202 and 203.

Art. 14: Transfer of Environmental Harm

- the Commentary reference on page 50 to Article 195 of UNCLOS might also refer to less immediately relevant Articles 207, 208, 209, 210, 211, and, most importantly, 212.

Art. 15: Emergencies

- the difficulties encountered at the Stockholm Conference over the duty to consult or notify (former principle 20) in non-emergency situations should not be ignored; thus the statement at the top of page 53 that " Notification is an obligation rooted in customary international law" may be an over-statement, unless coupled with some reference to the related resolutions 2995(XVII) and 2996(XVII), in the hope of laying to rest the long-standing controversy.

Art. 16: Stratosphere

- either the Commentary or the footnotes should note the relevance of draft article 11(I)(b);
- footnote 134 might usefully point out that there is no definitive generally defined boundary between the atmosphere (subject to national sovereignty) and outer space (not subject to claims of sovereignty); this would obviate the need to invoke the term "Common Concern", (the moreso since draft Article 11 of the Covenant covers both areas within and beyond national jurisdiction, a point which should be noted in this part of the Commentary).

Art. 17: Climate Change

- the present status of the Climate Change Convention should be noted;
- some reference to the Covenant as an "umbrella treaty" might be useful;
- references to the precedents from the Stockholm Conference, including recommendation # 70, might be useful.

Art. 18: Soil

- the Commentary is well formulated.

Art. 19: Water

- footnote 164 is rather puzzling;
- a footnote reference to Article 207 of UNCLOS might be useful.

Art. 20: Natural Systems

- footnote 173 is an excellent example of the kind of note which might be used for other innovative obligations;
- the Commentary on page 62 is unduly didactic (and not altogether convincing on the qualitative -quantitative distinction);
- for a direct and intended linkage between fresh water, sea water, and living resources (including forests) article 66 of UNCLOS (1982) might be cited as a useful precedent, and could be cross referenced in footnotes 181 and 182; references to UNCLOS article 207 and 212 might also be useful as related precedents.

Art. 21: Biological Diversity

- no comment on this well formulated Commentary.

Art. 22: Cultural and Natural Heritage

- no comment

Art. 23: Identification

- no comment

Art. 24: Pollution

- the reference to UNCLOS should embrace all of Part XII of UNCLOS, with particular reference to Articles 194 (1) and 14, etc;
- the Commentary might better read "It reflects conventional and customary international law"; the Commentary is otherwise well formulated.

Art. 25: Waste

- the Commentary and the footnotes might usefully cite the Oslo and London Dumping Conventions, as well as Articles 210 of UNCLOS;
- the Basel Convention would seem to warrant more attention as a precedent than a brief footnote reference in spite of the criticisms levelled at it.

Art. 26: Aliens

- the Commentary seems to be well formulated;
- on a small point, Article 196 of UNCLOS does not refer to "marine organisms" but to "species, alien or new".

Art. 27: Demographic Policies

- no comment

Art. 28: Consumption Patterns

- no comment

Art. 29: Eradication of Poverty

- no comments beyond those made on draft Article 9.

Art. 30: Trade and Environment

- in light of the major importance of this provision it is suggested that the language of the Commentary be softened, so as to avoid incurring strong resistance to the Covenant from influential quarters, without altering the substance of those assertions which can be documented; terms such as "dominated" and "inciting" and "exacerbating" should be deleted.

Art. 31: Economic Activities

- the Commentary avoids polemics and is formulated in objective language.

Art. 32: Military Activities

- a reference to Stockholm recommendation 70 might be useful;
- the Commentary reads more like a dissertation or an article for a learned journal than a commentary, and might benefit from some abbreviation, but it seems to be well founded.

Art. 33: Transboundary Effects

- on a relatively minor point, the quotation from the Trail Smelter case (in my references) should read "of serious consequence";
- the Commentary statement at the top of page 96 does not seem to take into account Stockholm Principle 21, which did not refer to areas of "Common Concern to Humanity"; thus while the term now has a certain status, the legal concept which it reflects preceded it, and the status of the rule of customary law based on the Trail Smelter case ought not to be linked to the Common Concern concept, which may limit it;
- the reference to "a fundamental element of international law" should, perhaps, be characterized as conventional, unless it is considered that this element is now a rule of customary law.

Art. 34: Transboundary Resources

- there should be at least a footnote reference to Article 63 (Straddling stocks) and Article 64 (highly migratory species) of UNCLOS (1982).

Articles 35, 36, 37, 38, 39 and 40

- no comment

Art. 41: Development and Transfer of Technology

- reference should be made to the numerous relevant articles of UNCLOS (1982).

Articles 42, 43, 44, 45 and 46

- no comment

Art. 47: Responsibility

- the Commentary is exceedingly brief, but perhaps this is wise; it should be noted however that state responsibility (unlike liability) pre-supposes the breach of a legal obligation.

Art. 48: Liability

- the Commentary on this difficult and delicate issue is not well formulated;

- it is questionable whether the discussion of "risk" is helpful to the understanding of the article, since the article postulates liability from the fact of significant harm, and does not address the issue of risk; thus the three sentences beginning "in other words" should be deleted entirely, leaving discussion of risk to the Principles on Prevention and Precaution;

Art. 49: Cessation, Restriction and Compensation

-no comment

Art. 50: Consequences of Failure to Prevent Harm

- the text of this Article has been altered from that agreed to at the last (New York) drafting session, (when the Article was numbered 49) with the result that in its present form it is controversial in legal doctrine as well as inconsistent with the express provisions of Article 48;

- the text of this Article is not consistent with Article 48, since it restricts liability to cases of failure to carry out the obligations of prevention, whereas Article 48 is not limited in this fashion; thus liability is equated to state responsibility.

- there may be state responsibility for failure to carry out the obligations of prevention, and the conflict between Articles 48

and 50 may arise from including both responsibility and liability within article 50; indeed, the phrase "responsible or liable" is used;

- as now drafted, Article 48 provides for liability for acts not prohibited by international law (or the Covenant) but Article 50 postulates the necessity of a breach of an obligation of prevention in order to attract liability;

- the Commentary on Article 48 (as distinct from the actual text of the Article) introduces the element of risk, and the text of Article 50 appears to make both responsibility and liability dependant upon proof of non prevention of damage the risk which should have been foreseen;

- the solution is to delete the words "of prevention" from Article 50.

Articles 51, 52, 53, 54 and 55

- no comment

Art. 56: Other Treaties

- this previously accepted Article does not create problems, but neither does it resolve any;

- a preferable approach to the problem of other treaties dealing with the subject-matter of the Covenant is to utilize the concept reflected in Article 18 of the Law of Treaties Convention, and include an obligation not to "defeat the object and purpose" of any treaty relating to any of the subject-matter of the Covenant, but it is recognized that this approach was proposed and not accepted and that Article 56, must remain as is.

Articles 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, and 72

- no comment