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**FOURTH IUCN
ACADEMY OF ENVIRONMENTAL LAW
WORLDWIDE COLLOQUIUM:
IMPLEMENTING
ENVIRONMENTAL LEGISLATION:
THE CRITICAL ROLE OF
ENFORCEMENT AND COMPLIANCE**

**Mining and the World Heritage Convention:
Democratic Legitimacy and
Treaty Compliance**

NATASHA AFFOLDER*

SYNOPSIS

International treaties and the institutions which administer them are increasingly the subjects of democratic scrutiny. In recent disputes surrounding mining projects in and around World Heritage Sites, the legitimacy of the World Heritage Convention regime has been attacked for a host of democratic failings. These accusations of “democratic deficits” originate from both opponents and supporters of the Convention regime. They challenge the compatibility of international processes with national law and institutions, raise questions of accountability and transparency, and revisit tensions between state sovereignty and common heritage. To foster compliance with the World Heritage Convention, we

* Assistant Professor of Law, University of British Columbia Faculty of Law. This paper is a revised and expanded version of comments presented at a Joint Symposium of the American Society of International Law, Canadian Council of International Law, Australia New Zealand Society of International Law and Japanese Society of International Law in Wellington, New Zealand (June 27-28, 2006). I thank the symposium participants, and in particular José Alvarez and Donald Rothwell, for their insightful comments. I appreciate the excellent research assistance of Laura Track, Stephanie Case and Agnes Von Dem Hagen.

need to boldly engage with and address these democratic critiques.

I. INTRODUCTION

The World Heritage Convention ("Convention") was adopted by the General Conference of the United Nations Education, Scientific, and Cultural Organization ("UNESCO") in 1972 to protect internationally outstanding national and cultural heritage from a variety of threats—many of which not only persist, but have intensified to date. In recent clashes surrounding mining projects on the borders of World Heritage Sites in Canada, Australia and the United States, the Convention has been transformed from a fairly innocuous and unknown international treaty to an instrument of "foreign domination"¹ and "a new model of "U.N. Take-over."² Controversies over World Heritage Site listing and danger listing processes, and the unclear consequences of site nomination for surrounding natural resource industry projects, have resulted in particularly venomous attacks on an international regime created to preserve natural and cultural areas of "outstanding universal value."³ "World Heritage," reported a biologist after visiting the contested Daintree Rainforest World Heritage Site, should be "uttered with a disgusted, bitter expression, as though the person had just tasted something awful and needed to spit."⁴

Interest in the "democratic deficits" of international environmental law is emerging from a range of scholars, judges, activists, and commentators of diverse perspectives. Although the Convention has attracted little scholarly analysis, it is not immune to challenges from both popular and academic sources in this wave of heightened scrutiny of international processes and institutions. In 1999, Daniel Bodansky warned that the perception that "the international environmental process is insufficiently democratic" would grow to pose an increasingly significant challenge for inter-

1. Amy Ridenour, *Keep the Statute of Liberty Free: An Argument for Congressional Oversight of U.N. Land Designations in the U.S.*, NAT'L POL'Y ANALYSIS, July 2002, <http://www.nationalcenter.org/NPA419.html>.

2. Kim A. O'Connell, *Groups Foster Alarm About U.N. Park Takeover*, NAT'L PARKS, July-Aug. 1996, at 26, 26.

3. See United Nations Educational, Scientific and Cultural Organization Convention Concerning the Protection of the World Cultural and Natural Heritage, pmbl., Nov. 16, 1972, 27 U.S.T. 37 [hereinafter Convention].

4. William Laurance, *Confrontation in the Outback: A Tropical Biologist's Tale*, CHRON. OF HIGHER EDUC., Sept. 8, 2000, at B12.

national environmental law.⁵ It has. For example, in the conflicts surrounding the New World Mine near Yellowstone National Park, the Jabiluka Mine near Kakadu National Park, and the Cheviot Mine near Jasper National Park mining interests have been pitted against World Heritage protection in the United States, Australia, and Canada. These disputes evidence the extent to which perceptions of democratic illegitimacy can threaten to undermine a regime created to hold states accountable for the protection of heritage of “outstanding universal value” within their borders.

One step towards improving treaty compliance comes from identifying, understanding, and disaggregating the threats to such compliance.⁶ Accusations of democratic illegitimacy pose one potent (yet rarely identified) threat to compliance with the international norms articulated in the World Heritage Convention. These challenges have not been balanced by articulations of the democratic strengths of the Convention regime. Indeed, these democratic complaints may appear to be re-tooled versions of earlier attacks on the Convention once framed as objections based on sovereignty. Accusations of democratic flaws have a particular potency that, if left unchecked, will only intensify the challenge of fostering compliance with international environmental law.

II. BACKGROUND: THE WORLD HERITAGE CONVENTION AND A TALE OF THREE MINES

A. The World Heritage Convention

The Convention for the Protection of the World Cultural and Natural Heritage (“World Heritage Convention” or “Convention”) came into force in 1975 and has been ratified by 183 countries.⁷ The Convention is marked by an unresolved tension between state sovereignty and the recognition that certain structures, sites, and areas constitute the heritage not just of individual nations, but of humankind. The Convention reaffirms the international interest

5. Daniel Bodansky, *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law?* 93 AM. J. INT’L L. 596, 596 (1999).

6. I admit some difficulty in using the term “compliance” here. Compliance reflects the degree of conformity between a state’s behavior and a treaty’s explicit rules. The Convention lacks such definite and precise rules governing mining and World Heritage. Its broadly stated obligations allow states to justify a range of conduct as compatible with the Convention.

7. This total reflects the number of States Parties as of October 26, 2006. See States Parties - UNESCO World Heritage Centre, <http://whc.unesco.org/en/states-parties> (last visited Mar 26, 2007).

in the protection of these sites.⁸ At the same time, the Convention also explicitly articulates respect for the “sovereignty of the States on whose territory the cultural and natural heritage . . . is situated” and operates “without prejudice to property rights provided by national legislation.”⁹

Much of the normative content of the current World Heritage regime is contained in the *Operational Guidelines*, which are created and frequently revised by the World Heritage Committee (“Committee”).¹⁰ As well as updating the *Operational Guidelines*, the Committee performs the gatekeeper functions of deciding which nominated sites will be included on the World Heritage List,¹¹ will be on the List of World Heritage in Danger (“Danger List”),¹² or should be removed from either list. The Committee is comprised of twenty-one elected States Parties and is assisted in its work by both a Bureau and by its advisory bodies, the World Conservation Union (“IUCN”), the International Council on Mon-

8. Robert L. Meyer, *Travaux Préparatoires for the UNESCO World Heritage Convention*, 2 EARTH L.J. 45, 45-46 (1976).

9. Convention, *supra* note 3, art. 6, ¶ 1. The full text of Article 6, paragraph 1 of the Convention illustrates this tension between sovereignty and communal obligation:

Whilst fully respecting the sovereignty of the States on whose territory the cultural and natural heritage mentioned in Articles 1 and 2 is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

Id. The conflicting mandates to respect national sovereignty and to recognize communal obligations based on a collective interest are repeated in paragraph 15 of UNESCO’s *Operational Guidelines*, which was created to implement the Convention: “While fully respecting the sovereignty of the States on whose territory the cultural and natural heritage is situated, States Parties to the Convention recognize the collective interest of the international community to cooperate in the protection of this heritage.” U.N. Educ., Scientific & Cultural Org. [UNESCO], Intergovernmental Comm. for the Prot. of the World Cultural & Natural Heritage, *Operational Guidelines for the Implementation of the World Heritage Convention*, ¶ 15, U.N. Doc. WHC. 05/2 (Feb. 2, 2005), available at <http://whc.unesco.org/archive/opguide05-en.pdf> [hereinafter *Operational Guidelines*].

10. See OPERATIONAL GUIDELINES, *supra* note 9.

11. Convention, *supra* note 3, art. 11, ¶ 2. As of May 15, 2006, there were 830 properties included on the World Heritage List. United Nations Educational, Scientific and Cultural Organization, World Heritage Centre, World Heritage List, <http://whc.unesco.org/en/list/> (last visited Feb. 25, 2007). This represents 644 cultural, 162 natural and 24 mixed properties in 138 States Parties. *Id.*

12. Convention, *supra* note 3, art. 11, ¶ 4. The Danger List contains those sites for which “major operations are necessary and for which assistance has been requested. . . .” *Id.*

uments and Sites ("ICOMOS") and the International Centre for Conservation in Rome ("ICCROM").¹³

B. A Tale of Three Mines

1. The Jabiluka Mine, Kakadu National Park, Australia

Kakadu National Park is listed on the World Heritage List for both its natural and cultural heritage properties.¹⁴ When the park was nominated for inclusion on the World Heritage List, the property containing the Jabiluka mine was specifically excluded from the nomination, as was property containing two pre-existing mines, resulting in three "holes" in the Site.¹⁵ The mine site thus occupied property just outside the boundaries of the Park in what could technically be designated a buffer zone. Scientists and conservation groups notified the World Heritage Committee in 1997 and 1998 that proposals to mine the Jabiluka deposit posed a threat to the integrity of Kakadu.¹⁶

To investigate the threats the mine posed to the cultural and natural heritage of Kakadu, the Committee decided in June, 1998, to send a mission of experts to Kakadu. The team was led by the chairperson of the World Heritage Committee, Professor Francesco Francioni, and included representatives from the scientific advisory agencies, the IUCN and ICOMOS.¹⁷ After consultation with a wide range of stakeholders including different levels of government, aboriginal groups, and conservation organizations, the team expressed "grave concern" about the threat of the mining project to the World Heritage Site.¹⁸

13. *Id.* art. 8.

14. United Nations Educational, Scientific and Cultural Organization, World Heritage, Kakadu National Park, <http://whc.unesco.org/en/list/147> (last visited Feb. 9, 2007).

15. Graeme Aplin, *Kakadu National Park World Heritage Site: Deconstructing the Debate, 1997-2003*, 42 AUSTRALIAN GEOGRAPHICAL STUD. 152 (2004).

16. U.N. Educ., Scientific & Cultural Org. [UNESCO], Bureau of the World Heritage Comm., *Reports on the State of Conservation of Specific Properties Inscribed on the World Heritage List*, at 3-4, U.N. Doc. WHC.97/CONF.207/2 (Sept. 30, 1997), available at <http://whc.unesco.org/archive/1997/whc-97-conf207-2e.pdf>; see also The Wilderness Society, *Kakadu: World Heritage in Danger—Submission to World Heritage Committee* (Oct. 31, 1998), <http://www.wilderness.org.au/campaigns/northernaustralia/kakadu/jabwhsub2>.

17. S. Javed Maswood, *Kakadu and the Politics of World Heritage Listing* 54 AUSTRALIAN J. INT'L AFF. 357, 357 (2000).

18. Aplin, *supra* note 15, at 162.

An extraordinary session of the World Heritage Committee was convened specifically to decide whether to add Kakadu National Park to the Danger List in 1999.¹⁹ All three advisory bodies to the Committee (IUCN, ICOMOS, and ICCROM) favoured such a danger listing and supported the view of the mission that mining adjacent to the park should not proceed.²⁰ The Australian government opposed listing Kakadu on the Danger List and undertook extensive lobbying of the Committee to prevent such a listing.²¹ Ultimately, the Committee decided not to inscribe the park on the Danger List despite the earlier recommendations of the mission and its advisory bodies.²² With respect to the cultural values of the park, the Committee urged the Australian government to consult with the Mirrar traditional owners (who had appealed for Committee intervention).²³ In 2004, the Committee applauded the news that the mining company Energy Resources of Australia had committed that no mining would take place at Jabiluka without the agreement of the Mirrar people.²⁴

2. The New World Mine, Yellowstone National Park, USA

Yellowstone National Park, the world's first national park, was inscribed on the Danger List in 1995 as a result of number of threats to the park, including the New World mine.²⁵ Proposals for the development of this gold and copper mine three miles outside the park boundary were brought to the attention of the Committee by the Delegate of the United States.²⁶ The Commit-

19. Catherine Redgwell, *The International Law of Public Participation: Protected Areas, Endangered Species, and Biological Diversity*, in HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES 187, 199 (Donald N. Zillman, Alastair R. Lucas, & George (Rock) Pring eds., 2002).

20. *Id.* at 199-200.

21. *Id.*

22. *Id.* at 200.

23. *Id.* at 200-01.

24. U.N. Educ., Scientific & Cultural Org. [UNESCO], World Heritage Comm., *Decisions Adopted at the 28th Session of the World Heritage Committee*, at 92, U.N. Doc. WHC-04/28.COM/26 (Oct. 29, 2004), available at <http://whc.unesco.org/archive/2004/whc04-28com-26e.pdf>.

25. Daniel L. Gebert, *Sovereignty Under the World Heritage Convention: A Questionable Basis for Limiting Federal Land Designation Pursuant to International Agreements*, 7 S. CAL. INTERDISC. L.J. 427, 427-28 (1998). Other threats to the park included tourism and related infrastructure developments and potential threats from nearby hydrothermal exploitation of oil and gas deposits. *See id.* at 428.

26. U.N. Educ., Scientific & Cultural Org. [UNESCO], Bureau of the World Heritage Comm., 18th Sess., July 4-9, 1994, *Report of the Rapporteur*, at 16, U.N. Doc.

tee also received detailed documentation on the situation from fourteen North American conservation organizations.²⁷ Unlike the situation at Kakadu, the request for a mission to Yellowstone came from the National Park Service and the Assistant Secretary of Fish and Wildlife and was supported by the Observer from the United States.²⁸ The mission was carried out in September 1995 (before the domestic environmental impact process was completed) and discussed at the Committee's Nineteenth Extraordinary Session, which was held in December 1995.²⁹

In its decision to place Yellowstone National Park on the Danger List, the Committee noted:

[W]hether the State Party should grant a permit to the mining company or not is entirely a domestic decision of the State Party. It was further stated that there is no wording in the Convention or the Operational Guidelines which could lead to an interference in sovereignty. It was also noted that even if the State Party did not request action, the Committee still had an independent responsibility to take action based on the information it had gathered.³⁰

The threat the mine posed to the park was eventually eliminated when the Clinton administration negotiated a land swap, allowing the federal government to acquire Crown Butte's interests in the mine.³¹ In 2003, the World Heritage Committee removed Yellowstone National Park from the Danger List.³² However, the legacy of this example of the handing over of control "of public lands to foreign entities" remains powerful.³³ The inac-

WHC-94/CONF.001/10 (Aug. 19, 1994), available at <http://whc.unesco.org/archive/1994/whc-94-conf001-10e.pdf>.

27. U.N. Educ., Scientific & Cultural Org. [UNESCO], Bureau of the World Heritage Comm., 19th Sess., July 3-8, 1995, *Report of the Rapporteur*, at 23, U.N. Doc. WHC-95/CONF.201/12 (July 31, 1995), available at <http://whc.unesco.org/archive/1995/whc-95-conf201-12e.pdf>.

28. *See id.*

29. U.N. Educ., Scientific & Cultural Org. [UNESCO], Bureau of the World Heritage Comm., 19th Extraordinary Sess., Berlin, F.R.G., Dec. 4-9, 1995, *Report of the Bureau*, at 20-21, U.N. Doc. WHC-95/CONF.203/4 (Jan. 31, 1996), available at <http://whc.unesco.org/archive/repbu95b.htm>.

30. *Id.* at 21,

31. Gebert, *supra* note 25, at 428.

32. *See* U.N. Educ., Scientific & Cultural Org. [UNESCO], World Heritage Comm., *Decisions Adopted by the 27th Session of the World Heritage Committee in 2003*, U.N. Doc. WHC-03/27.COM/24 (Dec. 10, 2003), available at <http://whc.unesco.org/archive/decrec03.htm>.

33. Gebert, *supra* note 25, at 429.

curate but potent image of the U.N.'s "black helicopters" flying over and policing American lands spawned by the Committee's mission to Yellowstone poses a real threat to the popular legitimacy of the Convention.³⁴

3. The Cheviot Mine, Jasper National Park, Canada

Like the New World and Jabiluka mines, the Cheviot mine was proposed not within the Jasper National Park boundary, but a few kilometres outside the park. Challenge to the Alberta government's approval of the mine came from local and national conservation groups who warned that permitting a mine on the border of Jasper National Park would amount to a breach of Canada's obligations under the Convention.³⁵ Parks Canada representatives had similarly testified before the Cheviot mine environmental review panel that the mine could jeopardize Canada's ability to meet its international obligations under the Convention.³⁶ The potential threat to the National Park posed by the mine was brought to the attention of the Committee by the IUCN in 1997.³⁷

In March 1998, the director of the Committee requested that Canada's ambassador to UNESCO arrange for Canada to consult with Alberta about reconsidering its Cheviot mine approval.³⁸ Political responses to this "international pressure" varied from reas-

34. See *id.* at 429-30.

35. See Dennis Hryciuk, *Mine Foes Vow to Fight Back; Environmentalists Eye International Focus to Protest Cheviot*, EDMONTON J., June 19, 1997, at B5; Ed Struzik, *Sierra Club Opposes Cheviot Mine Project*, EDMONTON J., Sept. 10, 1997, at B5; *Stop the Cheviot Mine!: Legal Action Launched Over Proposed Cheviot Mine*, WILD LANDS ADVOC., Dec. 1997, available at <http://www.ualberta.ca/ERSC/cheviot/chevlegal97.htm>.

36. See Making Mountain Park a Reality: Cheviot Mine, http://www.cpaws-edmonton.org/cheviot/index_html?main_page_name=home_reference#AhotSpotofBiologicalDiversity (last visited Feb. 26, 2007). Jasper National Park forms part of the Canadian Rocky Mountains Park World Heritage Site. *Id.*

37. See U.N. Educ., Scientific & Cultural Org. [UNESCO], Bureau of the World Heritage Comm., 25th Extraordinary Sess., Naples, Italy, Nov. 28-29, 1997, *Reports on the State of Conservation of Specific Properties Inscribed on the World Heritage List*, at 6, U.N. Doc. WHC-97/CONF.207/2 (Sep. 30, 1997), available at <http://whc.unesco.org/archive/1997/whc-97-conf207-2e.pdf>.

38. See U.N. Educ., Scientific & Cultural Org. [UNESCO], Bureau of the World Heritage Comm., 25th Extraordinary Sess., Naples, Italy, Nov. 28-29, 1997, *Report of the Rapporteur*, at 5, U.N. Doc. WHC-97/CONF.207/5, available at <http://whc.unesco.org/archive/1997/whc-97-conf207-5e.pdf>; U.N. Educ., Scientific & Cultural Org. [UNESCO], World Heritage Comm., 21st Sess., Naples, Italy, Dec. 1-6, 1997, *Report*, at 21, U.N. Doc. WHC-97/CONF.208/17 (Feb. 27, 1998), available at <http://whc.unesco.org/archive/1997/whc-97-conf208-17e.pdf>.

surance on the federal level that Ottawa was taking the UNESCO request seriously³⁹ to outrage on the provincial level, expressed by the Albertan Environment Minister Ty Lund in the media: "It really bothers me when people from some other part of the world start telling the people of Alberta how to operate in the Province of Alberta."⁴⁰ Danger listing of Jasper National Park as a result of an approval of the Cheviot Mine did not occur, but the issue continues to be monitored by the Committee.⁴¹

III. WHAT IS THE DEMOCRACY PROBLEM IN THE WORLD HERITAGE CONVENTION?⁴²

In controversies over the Cheviot mine, the New World mine, and the Jabiluka mine, a host of democratic flaws of the Convention regime are identified. In part, they reflect the "paranoid lather"⁴³ into which talk show hosts whipped their listeners during heated debates, and are based on misunderstandings of the operation of the Convention:

What do the Statue of Liberty, Independence Hall, Jefferson's Monticello and Yellowstone National Park all have in common?

Each of these national treasures is now regulated according to the dictates of foreign bureaucrats rather than according to the will of the American people.

. . . .

[Site designations can be made] unilaterally without congressional approval.

39. Ed Struzik, *Feds to Co-operate with U.N. Request for Data on Project*, EDMONTON J., March 20, 1998, at A6 (response of Andy Mitchell).

40. See Les Sillars, *This Land is Their Land: UNESCO asks Ottawa to Revoke Approval of Alberta's Cheviot Mine*, B.C. REP., April 6, 1998, at 22.

41. In its 2006 session, the Committee requested that Canada ensure that "adverse impacts of the operation of the Cheviot Mine on the integrity of the property are minimized and mitigated." U.N. Educ., Scientific & Cultural Org. [UNESCO], World Heritage Comm., *Decisions Adopted at the 30th Session of the World Heritage Committee*, at 66, U.N. Doc. WHC-06/30.COM/19 (Aug. 23, 2006), available at <http://whc.unesco.org/archive/2006/whc06-30com-19e.pdf>.

42. With apologies to Kal Raustiala, who asks "What is the Democracy Problem in International Law?" in Kal Raustiala, *Sovereignty and Multilateralism*, 1 CHI. J. INT'L L. 401, 409 (2000).

43. Jonathan B. Tourtellot, *U.S. Wary of World-Heritage Status*, *Travel Editor Says*, NAT'L GEOGRAPHIC NEWS, Oct. 10, 2003, http://news.nationalgeographic.com/news/2003/10/1010_031010_worldheritage.html.

Under the terms of the World Heritage Treaty, the president doesn't need to consult anyone before placing U.S. territory under the thumb of the United Nations.⁴⁴

UNESCO is portrayed as an "organization of the United Nations that is anti-American, anti-Constitution and bent on one world government" and which "claims control" over more than a dozen U.S. World Heritage Sites.⁴⁵

While it may be tempting to dismiss such criticisms outright as inaccurate and overstated, these criticisms expose wider concerns about the democratic credentials of international environmental law-making processes. Simply put, they raise questions about the representative and accountable nature of decision-making and whether such decision-making should proceed at the local, rather than the international, level. While climate change, ozone depletion, and the law of the sea may be accepted as environmental concerns appropriate for international regulation, decision-making surrounding land use, heritage protection, and natural resource extraction are more fiercely guarded as issues of local governance. Democracy problems are both real and imagined. The imagined problems are no less significant than the real ones as they represent threats to the popular legitimacy of the Convention that may be as significant as any threats to its normative legitimacy.⁴⁶

A. Misunderstanding World Heritage Processes

In attacks on the democratic credentials of the Convention mounted in the course of disputes over mining, a wide variety of (often conflicting) criticisms emerge. The most frequent misunderstandings of the Convention surround the question of who nominates a site for inclusion on the World Heritage List and the legal consequences of World Heritage Site listing. World Heritage Site nominations are portrayed in the media and in political debates as entirely U.N.-initiated exercises. The critical role of the

44. Elizabeth McGeehan, *U.S. Sovereignty Violated by Allowing U.N. to Control U.S. Historic Sites*, Knight Ridder/Trib. News Service, June 30, 1999.

45. Richard J. Rees, *Stay out of UNESCO*, MANSFIELD NEWS J., Dec. 18, 1993, at 4a.

46. See Bodansky's discussion of popular and normative legitimacy in *The Legitimacy of International Governance: A Coming Challenge for International Environmental Law*. See Bodansky, *supra* note 5, at 601 ("Authority has *popular legitimacy* if the subjects to whom it is addressed accept it as justified On the other hand, 'legitimacy' can also have a normative meaning, referring to whether a claim of authority is well founded—whether it is justified in some objective sense.").

state in site nominations is ignored.⁴⁷ Despite frequent attempts to clarify this misunderstanding, it is frequently repeated.⁴⁸ The consequences of World Heritage listing are similarly misunderstood with rumours circulating that “listing results in the state’s loss of legal title to the area inscribed on the List.”⁴⁹

These misunderstandings are not unique to any one country and permeate conflicts in Australia, Canada, and the United States. An Australian legislative inquiry identified conflict associated with World Heritage Sites in Australia as emanating “from the confusion within the Australian polity about the nature of the Convention, how properties are listed and the nature of the management regimes entailed.”⁵⁰ The authors of a study examining World Heritage designations in the United States similarly concluded that “the majority of the population in the USA is ignorant and confused by the Convention.”⁵¹ Comparable observations are made with respect to designations in Canada.⁵²

Such misunderstandings are well illustrated by the frenzy which surrounded the New World mine project. The role of the U.S. government was ignored by critics characterizing the inscription of Yellowstone on the Danger List as the result of unwelcome collaborations of environmental advocacy groups and the U.N.: “It is astonishing that a group of extreme environmentalists can invite in a few folks from the United Nations to circumvent laws

47. Article 3 of the Convention states that it is for each State Party to identify the potential World Heritage Site within its territory. Convention, *supra* note 3, art. 3. Article 11, paragraph 3 requires state consent for inclusion of a property in the World Heritage List. *Id.* art. 11, ¶ 3.

48. In *Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt*, a tribunal of the International Centre for Settlement of Investment Disputes (“ICSID”) attempted to clarify this misunderstanding, noting that the “choice of sites to be protected is not imposed externally, but results instead from the State’s own voluntary nomination.” *S. Pac. Props. (Middle E.) Ltd. v. Arab Republic of Egypt*, 3 ICSID (W. Bank) 189, 225 (1993), reprinted in 32 I.L.M. 933, 966 (1993).

49. Trudie-Ann Atherton & Trevor C. Atherton, *The Power and the Glory: National Sovereignty and the World Heritage Convention*, 69 AUSTRALIAN L.J. 631, 648 (1995).

50. Tony Corbett & Marcus B. Lane, *World Heritage in Australia: An Uncertain Future*, AUSTRALIAN PARKS & RECREATION, Spring 2006, at 39, 39.

51. Kevin Williams, *The Meanings and Effectiveness of World Heritage Designation in the USA*, 7 CURRENT ISSUES IN TOURISM 412, 414 (2004).

52. Heritage Resources Centre, *Toward Greater Understanding and Use of the World Heritage Convention, Proceedings from a Canadian Seminar on the World Heritage Convention* (1993) (edited by J.G. Nelson & E.A. Alder).

that Americans and Montanans have worked hard for and lent their voices to.”⁵³

It is not possible, however, to attribute all the rancour expressed to confusion and misunderstandings. For some, the very concept of World Heritage or common heritage is objectionable. Any international level of governance for issues affecting local land use will be regarded with suspicion and hostility.⁵⁴

B. Failed Participatory Processes at the National Level Undermine International Processes

A significant source of criticism in the mining disputes discussed here resides in expressions of surprise that World Heritage designations have domestic consequences for mining projects proposed adjacent to these sites. This surprise is significant, as it reveals the lack of clarity with respect to the legal status of resource extraction in and around World Heritage Sites. Commentators thus express shock both that mining may be illegal in or around World Heritage Sites and, conversely, that it may not be. The lack of clarity governing the status of mining in and around protected areas creates uncertainty and dissatisfaction for a wide range of stakeholders. If mining activities are found to be incompatible with World Heritage Site status, then the processes by which such sites were initially proposed come under scrutiny and are often found lacking in terms of democratic process.

Part of the mismatch between the processes of site nomination and contemporary expectations of community residents, conservation groups, and mining companies is a result of an evolution of participatory norms in natural resource decision-making.⁵⁵ The Convention is fairly antiquated as an international environmental law instrument, and it predates many of the advances in participatory processes articulated in more recent instruments such

53. Todd Wilkinson, *Global Warning*, NAT'L PARKS, Mar.-Apr. 1996, at 34, 38 (quoting Montana Senator Conrad Burns); see also O'Connell, *supra* note 2.

54. See Edith Brown Weiss, *The Rise or the Fall of International Law?*, 69 *FORDHAM L. REV.* 345, 360 (2000) (“Highly educated and mobile transnational elites may feel comfortable with decision-making at the international level, but this may evoke a visceral reaction from local communities who may be hostile to international institutions.”).

55. For an excellent discussion of this evolution, see generally *HUMAN RIGHTS IN NATURAL RESOURCE DEVELOPMENT: PUBLIC PARTICIPATION IN THE SUSTAINABLE DEVELOPMENT OF MINING AND ENERGY RESOURCES* (Donald N. Zillman, Alastair R. Lucas, & George (Rock) Pring eds., 2002)

as the Aarhus Convention.⁵⁶ Criticisms of the Convention are often not about any procedural defect at the international level but rather articulate frustration with closed, non-participatory processes for site nomination at the national level. The failure of national governments to adequately consult stakeholders—including sub-federal units in federal states, community interests, mining interests, and affected indigenous peoples—in nominating sites significantly undermines the Convention.

1. Australia

The World Heritage Convention has received more popular judicial and political attention in Australia than in any other country. Legally, the Convention has been the subject of significant litigation before both the High Court and the Federal Court and has occupied a central role in the development of Australian constitutional law.⁵⁷ The Convention has mobilized public opinion, both for and against, particular site nominations and projects and has even ignited debate in several federal election campaigns.⁵⁸

The nomination of the Daintree Rainforest in Queensland in 1987 and the Tasmanian Dam and Tasmanian Wilderness have been among the most contentious site nominations in Australia and reveal the extent to which conflicts arise in the absence of collaboration between different levels of government and stakeholders.⁵⁹ The nomination of the Daintree Rainforest by the Commonwealth government unleashed a “heritage war” between the Queensland and Commonwealth governments that was fought out in the Australian courts.⁶⁰

An analysis of the public comment made to an inquiry initiated in 1995 by the House of Representatives Standing Committee

56. The World Heritage Convention predates the Aarhus Convention by over 25 years. See United Nations Economic Commission for Europe Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, June 25, 1998, 38 I.L.M. 517 (entered into force Oct. 30, 2001).

57. See Ben Boer & Graeme Wiffen, *HERITAGE LAW IN AUSTRALIA* 63-89 (2006).

58. *Id.* The Tasmanian Dam and Tasmanian Wilderness listing became a federal election issue in the 1983 federal election with the Commonwealth government enacting the World Heritage Properties Conservation Act of 1983 to specifically implement the Convention. *Id.* at 64.

59. See generally Donald R. Rothwell & Ben Boer, *The Influence of International Environmental Law on Australian Courts*, 7 REV. EUROPEAN COMMUNITY & INT'L ENVTL. L. 31 (1998).

60. For a discussion of this litigation and the Australian High Court's affirmation of the Commonwealth government's role in giving effect to the Convention, see *id.*

on Environment, Recreation and the Arts ("HORSCERA") on the Management of Australian World Heritage Areas reveals the common perception that the nomination process proceeds absent consultation with affected parties:

With regard to consultation, an almost unanimous concern of resident communities and State and local government authorities was the absence of consultation during the nomination process. One local resident said of the Willandra Lakes nomination: "we learnt of the Willandra nomination via the newspapers, no notification, no consultation . . . just bang, you're nominated."⁶¹

Flawed consultation processes intensify suspicion toward the concept of World Heritage as an effective conservation or land management tool.⁶² They prevent opportunities to dispel rumours and misunderstandings surrounding the processes and implications of a site designation.

Recent Australian legislation, the Environment Protection and Biodiversity Conservation Act 1999, requires the Australian Government, prior to submitting a nominated property to the Committee for inclusion on the World Heritage List, to use "its best endeavours to reach agreement" with any person who owns or occupies such property and with the government of the State or Territory where the property is located.⁶³ This act also expressly provides that a failure to comply with these requirements "does not affect the submission of a property to the World Heritage Committee for inclusion in the World Heritage List or the status of a property as a declared World Heritage property."⁶⁴ It further requires public notice to be given when nominations are submitted to the World Heritage Committee, when the boundaries of the property are changed, or when the property is added or removed from the World Heritage List.⁶⁵

2. The United States

The United States was an early instigator of the World Heritage concept in the 1970s but is now the source of some of the most

61. Corbett & Lane, *supra* note 50, at 41.

62. *Id.*

63. Environment Protection and Biodiversity Conservation Act 1999, § 314(1), (2) (Austl.).

64. *Id.* § 314(3).

65. *Id.* § 315(1).

vocal attacks on the Convention. A powerful source of criticism of the Convention stems from the absence of a congressional role in the processes for site nomination and maintenance decisions.⁶⁶ Members of the U.S. Congress introduced the American Land Sovereignty Protection Act as a legislative response to this democratic accountability gap.⁶⁷ This legislation is intended to give Congress a central role in the designation process by allowing Congress to control the designation of sites.⁶⁸ This act has been introduced into both the House of Representatives and the Senate a number of times but has yet to be enacted into law.⁶⁹ Analysis of the submissions made in debates surrounding this act reveals the fears and misunderstandings informing the debate. Congressman Don Young of Alaska criticized use of the Convention, commenting that "if the U.N. is allowed to gain control of the world's natural resources, it can control the nation's economy and therefore its people."⁷⁰ At a legislative hearing on the act, U.S. Representative Tim Hutchinson from Arkansas said,

Arkansans feel just as strongly about the issue of American sovereignty. They're offended when American troops are placed under foreign command. They're outraged when American soldiers are forced to wear United Nations uniforms or face a dishonorable discharge. And they're incensed when American land is designated an international reserve and subjected to international restrictions.⁷¹

U.S. Representative Helen Chenoweth of Idaho commented that the Bill was an important piece of legislation given the need to address the "UN's insatiable appetite to interfere with U.S. land management policy."⁷²

The United States' participation in the Convention is provided for by the National Historic Preservation Act Amendments

66. Matthew Machado, *Mounting Opposition to Biosphere Reserves and World Heritage Sites in the United States Sparked by Claims of Interference with National Sovereignty*, 1997 COLO. J. INT'L ENVTL. L. Y.B. 120, 124-26 (1997).

67. See *id.* at 120, 126-29; American Land Sovereignty Protection Act of 1996, H.R. 3752, 104th Cong. § 2 (2d Sess. 1996).

68. H.R. 3752 § 3. The Act also gives Congress control over designating land as a Biosphere Reserve under UNESCO's Man and Biosphere Program. *Id.* § 4.

69. See Machado, *supra* note 66, at 127.

70. *Sovereignty Over Public Lands: Hearing on H.R. 3752 Before the H. Comm. on Resources*, 104th Cong., 7-8 (1996) (press materials submitted by the Honorable Helen Chenoweth).

71. *Id.* at 3.

72. *Id.* at 6.

of 1980⁷³ and regulations.⁷⁴ This legislation requires notification of the relevant committees of the House and Senate of all pending proposals when the Department of the Interior decides to nominate a property.⁷⁵ It also requires written consent of every property owner before that owner's property can be nominated.⁷⁶ Silence or opposition from one owner could therefore prevent a nomination from being made.⁷⁷

Apart from criticisms arising from ideological opposition to the Convention, challenges are also the product of misunderstandings arising from the fact that the most recent U.S. Tentative List (called the Indicative Inventory of 1982)⁷⁸ is extremely dated and has not been updated to reflect developments in the *Operational Guidelines*.⁷⁹ The U.S. Park Service acknowledges the absence of consultation that marked the creation of the 1982 list:

Before including sites in the Inventory, neither in 1982 nor since did the National Park Service consult property owners or other stakeholders, such as State and local governments, to the extent that would be deemed appropriate today. In any case, after a quarter-century, a full review of owner interest is merited before including or retaining sites on a new Tentative List.⁸⁰

The Office of International Affairs of the U.S. Park Service is currently cooperating with the George Wright Society to prepare a new U.S. Tentative List of nominated sites. The Park Service states that this list is being prepared with the involvement of property owners and other stakeholders.⁸¹

73. National Historic Preservation Act, 16 U.S.C. §§ 470a-1, a-2 (2000).

74. 36 C.F.R. §§73.1-73.17 (2006).

75. 16 U.S.C. § 470a-1(b).

76. *Id.* § 470a-1(c).

77. *See* 36 C.F.R. § 73.7(b)(2)(iii).

78. *See generally* United States Department of the Interior, National Park Service, Office of International Affairs, FAQ for U.S. World Heritage Tentative List Project, <http://www.nps.gov/oia/topics/worldheritage/faqtentativelist.htm> (last visited Feb. 28, 2007).

79. Williams, *supra* note 57, at 414.

80. *See generally* United States Department of the Interior, National Park Service, Office of International Affairs, FAQ for U.S. World Heritage Tentative List Project, <http://www.nps.gov/oia/topics/worldheritage/faqtentativelist.htm> (last visited Feb. 28, 2007).

81. United States Department of the Interior, National Parks Service, Office of International Affairs, U.S. World Heritage Tentative List Project, <http://www.nps.gov/oia/topics/worldheritage/tentativelist.htm> (last visited Feb. 28, 2007).

3. Canada

World Heritage has a low profile in Canada although nominations have, on occasion, attracted strong criticism—particularly for their failure to consult affected interests. The nomination of the Tatshenshini-Alsek region in northern British Columbia attracted criticism because of the lack of consultation of First Nations and of potentially affected mining interests. In federal parliament, a request was made to withdraw the nomination in 1994 as “undemocratic and unsupported” since the nomination was carried out “with absolutely no public discussion, input or support.”⁸² Local First Nations reported that they had not been told about the World Heritage designation plan before it was announced.⁸³ Facing significant opposition to the nomination based on the lack of First Nations consultation, Prime Minister Campbell reversed the nomination decision and instructed Canada’s representative on the Committee to request a deferment of the application.⁸⁴

The Tatshenshini-Alsek is not the only Canadian nomination where a failure to consult Aboriginal peoples has been asserted. The Council of Yukon Indians expressed concern that it was not made aware of the nomination and designation of Kluane National Park Reserve and that such designation might negatively impact their land claims within the reserve’s boundaries.⁸⁵ Local First Nations similarly expressed concern about the nomination of Wood Buffalo National Park and the implications the nomination would have for the traditional hunting and fishing grounds in the area.⁸⁶ These failures have largely been admitted by the Canadian government.⁸⁷

82. House of Commons Deb. 8995 (Dec. 13, 1994) (statement of Mr. Mike Scott, Skeena, Ref.), available at www.parl.gc.ca/35/1/parlbus/chambus/house/debates/143_94-12-13/143SM1E.html.

83. See e.g., Jamie Lamb, *NDP Tat Move Would’ve Taken Bite Out of Land that Feeds Us*, THE VANCOUVER SUN, Oct. 29, 1993, at A3.

84. *Id.*

85. Nancy Elliot, *Origins, Impact and Future of World Heritage in Canada* (June 1995) (unpublished M.A. thesis, Trent University) (on file with Pace Environmental Law Review).

86. *Id.* at 93-94.

87. Tom McMillan, then-Minister of the Environment, recognized the lack of consultation with local First Nations concerning the Wood Buffalo National Park nomination in a 1985 letter to the Fort Smith Joint Leadership Group:

I regret that you were not informed that the park was to be nominated as a World Heritage Site. . . . It is a very distinctive honour, but it gives no legal authority to UNESCO. . . . Please be assured that Wood Buffalo’s

Parks Canada occupies the lead role in selecting Canadian sites and defining processes of nomination and has recently compiled an updated list of nominated sites, the 2004 Tentative List.⁸⁸ In compiling this revised list, Parks Canada claimed "stakeholder support was a key consideration."⁸⁹ The Tentative List revisions included two phases of consultation, including discussions with representatives of all provincial and territorial governments, selected Aboriginal organizations, national stakeholder groups, municipal governments, and other stakeholders near whose communities the sites were located.⁹⁰ Admitting the lack of consultation in the past, Parks Canada acknowledges:

Before 1990, the inscription process was viewed as the work of experts and it was considered sufficient to have the support of the relevant provincial government. Since 1990, nominations have engaged the public to a much greater extent. In some cases, the nomination process has been initiated by provincial or local authorities. . . . In all cases, support for the nomination from local communities and appropriate Aboriginal groups is required before a nomination is put forward.⁹¹

There are some indications that the Canadian government has made efforts to increase local involvement. In 2001, local citizens, themselves, nominated the Town of Lunenburg in Nova Scotia for World Heritage designation with the support of the federal government.⁹²

The governmental agencies responsible for World Heritage Site nominations in Canada, the United States, and Australia have all made recent commitments to involving stakeholders in nomination decisions and consulting with local communities and

new status will not reduce your harvesting, hunting, trapping or fishing rights.

Elliot, *supra* note 85, at 94.

88. While Parks Canada has been responsible for suggesting many of the sites for nomination, provincial officials suggest that the idea of nominating Dinosaur Provincial Park and Head-Smashed-In Buffalo Jump originated at the provincial level. See Elliot, *supra* note 85, at 81-89.

89. Parks Canada, Updating Canada's Tentative List, http://www.pc.gc.ca/progs/spm-whs/page7_e.asp (last visited Oct. 31, 2006).

90. Parks Canada, Periodic Report on the Application of the World Heritage Convention, § I.2(b), (Dec. 2004), http://www.pc.gc.ca/docs/pm-wh/rspm-whsr/index_e.asp.

91. *Id.* § I.2(c).

92. See STANDING COMM. ON CANADIAN HERITAGE, EVIDENCE, at 1108 (May 17, 2001) (statement of Hon. Sheila Copps, Minister of Canadian Heritage) available at <http://www.parl.gc.ca/cmte/CommitteePublication.aspx?SourceId=55038>.

affected peoples. This commitment was made in Parks Service communications in Canada and the United States. In Australia, it is contained in legislation, although this legislation specifies that failure to follow such requirement does not invalidate the nomination. These developments follow 1999 revisions to the *Operational Guidelines*, expressing that participation of local people, various levels of government, and non-governmental organizations ("NGOs") in the nomination process is essential.⁹³ As there are no stated consequences for a failure to adopt such participatory approaches, states are left to define their own standards of acceptable consultation and participation in site nomination processes.

IV. CONCERNS ABOUT THE EVOLVING NATURE OF THE TREATY REGIME

A. Departures from Interstate Consensus

Concern about democratic accountability at the international level traces to the power of the autonomous World Heritage Committee and the fact that much of the normative content of the World Heritage regime is articulated in the *Operational Guidelines* rather than in the Convention itself. Professor Francesco Francioni, a former chairman of the World Heritage Committee, confirms this development:

The principle of evolutive interpretation, which means identifying the meaning of a treaty provision not in light of the original intent and circumstances existing at the time of its adoption, but in light of the legal and social context at present, has found a remarkable application in the evolving body of the Operational Guidelines, periodically reviewed by the Committee and by innovative forms of treaty implementation, a notable example of which is the introduction in 1995 of the notion of systematic monitoring through periodic reporting based on an expansive reading of Article 29 [of the Convention].⁹⁴

International environmental treaties are not expected to be static. However, the development of norms requires some consensual basis to be regarded as legitimate. This is usually achieved

93. *Operational Guidelines*, *supra* note 9, ¶ 123.

94. Francesco Francioni, Professor, University of Siena, The International Framework of Legal Instruments, in UNESCO World Heritage Centre Workshop, Siena, Nov. 11-12, 2002, *The Legal Tools for World Heritage Conservation: Abstracts*, 4, available at <http://www.iucn.org/themes/law/pdfdocuments/Siena%20Abstracts.pdf>.

by the parties themselves "breathing new life" into agreements.⁹⁵ In other words, such "autonomous institutional arrangements" usually involve some informal meetings of States Parties to modify convention regimes.⁹⁶

In contrast, the Committee produces new rules and obligations through amending the *Operational Guidelines*, a process that requires the agreement of a two-thirds majority of its membership (which consists of 21 of the 182 States Parties).⁹⁷ States Parties may thus strenuously object to Committee decisions without withdrawing from the Convention. "Exits" from international regimes are rare.⁹⁸

The evolution of treaties to create new rules and obligations reveals why popular remedies to the democratic deficits in international law, such as greater parliamentary involvement in treaty-making, only address the issue of democracy to a limited extent and at a single point in time. Parliaments and other domestic constituents may well support the original treaty text, but this does not signify acceptance of the obligations which thereafter evolve from the original text.

By ratifying the Convention, States Parties give general consent to a rule-making regime that empowers the Committee to update the *Operational Guidelines*.⁹⁹ This general consent is distinct from any specific consent over individual decisions.¹⁰⁰ The evolution of norms beyond the obligations consented to in the 1972 Convention is visible in a range of areas that impact mining and World Heritage Sites, including the power of the Committee to add properties to the Danger List without specific state consent, the articulation of buffer zones around sites, and the articulation of rules governing mining in and around sites. Discomfort with

95. Weiss, *supra* note 54, at 352 ("International agreements need to be viewed as living agreements, into which parties continuously breathe life and to which they give new directions by acting as informal legislatures.").

96. See Robin R. Churchill & Geir Ulfstein, *Autonomous Institutional Arrangements in Multilateral Environmental Agreements: A Little-Noticed Phenomenon in International Law*, 94 AM. J. INT'L L. 623, 625-28 (2000).

97. Convention, *supra* note 3, at art. 13(8).

98. See José E. Alvarez, *Centennial Essay: In Honor of the 100th Anniversary of the AJIL and the ASIL: International Organizations: Then and Now*, 100 AM. J. INT'L L. 324, 343 (2006).

99. See Convention, *supra* note 3, at arts. 8-14.

100. Bodansky suggests that "few existing international environmental obligations are the product of general consent." Bodansky, *supra* note 5, at 604. Obligations created through mechanisms such as the *Operational Guidelines* are thus somewhat of a rarity.

the evolution of treaty norms with respect to World Heritage is framed as a failure of democratic accountability as developments occur without specific state consent. In the context of mining near World Heritage Sites, a fear is expressed that the “dynamic evolution of treaty texts” will lead from a focus on “national sovereignty over resource allocation decisions to more stringent regulation, and even outright ban on such resource activities.”¹⁰¹

1. State Party Consent for the Inscription of a Property on the Danger List

The purpose of the Danger List is to alert the international community to threats to World Heritage Sites. According to the Convention website, however, inclusion on the Danger List, “should . . . not be considered as a sanction, but as a system established to respond to specific conservation needs in an efficient manner.”¹⁰² Despite this characterization, the Danger List is typically regarded as a form of “name and shame,”¹⁰³ and some countries have loudly objected to potential danger-listing of their World Heritage Sites. Even the act of having Kakadu considered for the Danger List was characterized as a “slap on the wrist for Australia.”¹⁰⁴

As a result of poor drafting, ambiguity has surrounded the question of whether a state must consent to having a property within its territory added to the Danger List. The drafting history of the Convention reveals that danger-listing should generally follow the request of a Member State and “must not lead to any kind of interference in the domestic affairs of the State or to any form of internationalization.”¹⁰⁵ The *Operational Guidelines* set out the criteria for inscribing a site on the Danger List and require that information regarding a potential threat to a Site be verified with the State Party concerned and that comments from the State Party be invited.¹⁰⁶ This guidance, however, also contains the

101. Redgwell, *supra* note 19, at 198 (citing the “classic example” of the evolution of the 1946 International Convention on the Regulation of Whaling “without recourse to formal treaty amendment procedures”).

102. World Heritage Centre, The List of World Heritage in Danger, <http://www.whc.unesco.org/pg.cfm?cid=158> (last visited Nov. 7, 2006).

103. Redgwell, *supra* note 19, at 195.

104. Aplin, *supra* note 15, at 163.

105. U.N. Educ., Scientific, & Cultural Org. [UNESCO], *Meeting of Experts to Establish an International System for the Protection of Monuments, Groups of Buildings and Sites of Universal Interest: Final Report*, ¶ 72, U.N. Doc. SHC/MD/4 (Nov. 10, 1969), available at <http://whc.unesco.org/archive/1969/shc-md-4e.pdf>.

106. *Operational Guidelines*, *supra* note 9, ¶¶ 174-84.

qualifying phrase “as far as possible,” which leaves room for the World Heritage Committee to act in more of a unilateral fashion.¹⁰⁷

The Kakadu controversy coupled with threats to other World Heritage Sites, including the Kathmandu Valley in Nepal, has forced the Committee to clarify whether state consent is required before a World Heritage Site can be added to the Danger List. In an Extraordinary Session meeting in 2003, the Committee voted to reject Australia’s proposed amendment to the *Operational Guidelines* that would give member states veto power over including a World Heritage Site within its territory on the Danger List.¹⁰⁸

This clarification may be perceived as an evolution in the powers of the World Heritage Committee and is not one with which all States Parties agree.¹⁰⁹ While the IUCN provides a cogent legal analysis articulating why the Committee has the power to place properties on the Danger List without State Party consent,¹¹⁰ the drafting history of the Convention reveals ambiguity on this point and provides evidence that this may not have been the intention of the Convention drafters.¹¹¹ The IUCN legal analysis distinguishes between “ordinary circumstances” where the in-

107. *Id.* at ¶ 183.

108. The Committee instead maintained the existing procedures for inscription on the Danger List. U.N. Educ., Scientific, & Cultural Org. [UNESCO], World Heritage Comm., *Decisions Adopted by the World Heritage Committee at its 6th Extraordinary Session*, U.N. Doc. WHC-03/6 EXT.COM/8 (May 27, 2003), available at <http://whc.unesco.org/archive/whc03-6extcom-conf08e.pdf>.

109. The United States, for example, continues to take the position that state consent is required before a site can be added to the List of World Heritage in Danger. See Position of the United States of America on Climate Change with Respect to the World Heritage Convention and World Heritage Sites, <http://www.elaw.org/assets/world/u.s.climate.US%20position%20paper.doc> (last visited Dec. 19, 2006).

110. See IUCN – The World Conservation Union, *Draft Operational Guidelines, An Analysis of the Legal Issues: Responding to the 2nd Draft Operational Guidelines and Issues Raised During the Drafting Group of October 2001*, at 4-9 (May 14, 2002), available at <http://www.iucn.org/themes/wcpa/pubs/pdfs/heritage/IUCNLEGALANALYSIS14thMay2002.pdf>.

111. See U.N. Educ., Scientific, & Cultural Org. [UNESCO], *Draft Report: Special Committee of Government Experts to Prepare a Draft Convention and a Draft Recommendation to Member States Concerning the Protection of Monuments, Groups of Buildings and Sites*, ¶ 27, U.N. Doc. SHC.72/CONF.37/19 (1972), available at <http://whc.unesco.org/archive/1972/shc-72-conf37-19e.pdf> (“These two lists are to be regularly kept up to date and distributed, and international assistance is to be used for property appearing in either one of these lists or in both of them. *The inclusion of a property in these lists requires the consent of the State Party concerned.* Although a request by the latter will be necessary before a property may be included in the ‘List of World Heritage in Danger’, the Committee will be able to include a property in the

scription of a property on the Danger List presupposes a "request for assistance" and cases of "urgent need" where the Committee is empowered under Section 4 of Article 11 of the Convention to inscribe a property on the Danger List absent a request for assistance, request for inscription, or the consent of the State Party.¹¹² Thus, in a departure from the traditional practice of not placing a site on the Danger List unless the State Party had first made such a request, the Committee added the old city of Dubrovnik to the Danger List without waiting first for a request for assistance.¹¹³

2. Buffer Zones

Buffer zones provide a further example of an obligation that is not in the Convention but was introduced through the *Operational Guidelines*.¹¹⁴ The concept of a buffer zone reflects the principle that "World Heritage sites should be surrounded by concentric regions of graduated restrictiveness to provide a margin of safety around the sites themselves."¹¹⁵ The *Operational Guidelines* require the creation of adequate buffer zones "[w]herever necessary for the proper conservation of the property."¹¹⁶ If buffer zones are not included in a nomination, the burden is on the State Party to explain why they are not required.¹¹⁷

'World Heritage List' without the State concerned having requested it, but on condition that it consents." (emphasis added)).

112. U.N. Educ., Scientific, & Cultural Org. [UNESCO], World Heritage Comm., *Item 4 of the Provision Agenda: Policy/Legal Issues Concerning Inscription of Properties on the List of World Heritage in Danger and the Potential Deletion of Properties from the World Heritage List*, ¶ 24, U.N. Doc. WHC-03/6 Ext.Com/INF.4A (Dec. 3, 2002) [hereinafter *Policy/Legal Issues Report*]. Article 11(4) of the Convention provides that "[t]he Committee may at any time, in case of urgent need, make a new entry in the List of World Heritage in Danger and publicize such entry immediately." Convention, *supra* note 3, art. 11(4).

113. Dubrovnik was threatened by the armed conflict erupting over the breakup of the former Yugoslavia. For other examples of Committee practice of inscription of threatened properties on the Danger List without a request for assistance, see *Policy/Legal Issues Report*, *supra* note 112, at ¶¶ 62-64.

114. A buffer zone is defined as "an area surrounding the nominated property which has complementary legal and/or customary restrictions placed on its use and development to give an added layer of protection to the property." *Operational Guidelines*, *supra* note 9, ¶ 104. The same paragraph provides in vague language that "the area constituting the buffer zone should be determined in each case through appropriate mechanisms." *Id.*

115. John Charles Kunich, *Losing Nemo: The Mass Extinction Now Threatening the World's Ocean Hotspots*, 30 COLUM. J. ENVTL. L. 1, 69-70 (2005).

116. *Operational Guidelines*, *supra* note 9, ¶ 103.

117. *Id.* ¶ 106

Buffer zones, as the Yellowstone controversy illustrates, are contentious and the subject of democratic concern—particularly given their potential to encroach on the property rights of private landowners. Prior to the danger listing of Yellowstone National Park in 1995, President Clinton issued an order that effectively created buffer zones around this national park.¹¹⁸ This order “led to allegations that the World Heritage Convention had played a significant role in land management decisions concerning federal lands, thereby impinging on U.S. sovereignty.”¹¹⁹

The buffer zone requirements currently articulated in the *Operational Guidelines* do not appear to be rigorously enforced. Many sites added to the list do not include buffer zones. The practice of failing to respect this provision of the *Operational Guidelines* and of nominating sites without buffer zones reflects the lack of state consensus underlying this requirement.

3. Mining and World Heritage: The Locus of Decision-making

There is no express prohibition on all mining within World Heritage Sites in the text of the Convention nor is it clear that such a sweeping prohibition could be implied from the Convention text. It may be that certain mining activities either in or near World Heritage Sites would lead to a breach of the Convention.

The World Heritage Committee has taken some steps to address the uncertainty and lack of clarity with respect to mining and World Heritage Sites. Much of the work in this area has been done by the IUCN, which advises the Committee on issues affecting natural heritage. In 2000, the IUCN’s World Conservation Congress adopted Recommendation 2.82 (the Amman Recommendation), which declared that mining should be “prohibited by law” in four categories of protected areas.¹²⁰ The *Position Statement on Mining and Associated Activities in Relation to Protected Areas*, on

118. Machado, *supra* note 66, at 124.

119. *Id.*

120. IUCN World Conservation Congress, *Protection and Conservation of Biological Diversity of Protected Areas from the Negative Impacts of Mining and Exploration*, Recommendation 2.82 (Oct. 4-11, 2000), available at <http://www.iucn.org/amman/content/resolutions/rec82.pdf>. The recommendation was adopted by a show of hands, with the delegation from the United States voting against the recommendation and making a formal Statement for the Record outlining its opposition based on the premise that “[m]ining policy is an internal matter for sovereign states.” IUCN – The World Conservation Union, World Conservation Congress, Amman, Jordan, Oct. 4-11, 2000, *Proceedings*, 29 (2001), available at http://app.iucn.org/congress/general/aman_resolutions/Proceedings-ENG.pdf.

which the Amman Recommendation was based, was submitted as a working document to the World Heritage Committee.¹²¹ This submission fostered much debate within the Committee.¹²² The Delegate of Canada articulated support for the adoption of this document.¹²³ The United States, however, required reassurance that the document was “for information purposes only.”¹²⁴ And the official record duly noted that the *Position Statement* was “not recommended for adoption by the Committee.”¹²⁵

Following recommendations of the Committee, a Technical Workshop on World Heritage and Mining took place in Gland, Switzerland in 2000, with the IUCN, UNESCO, the Committee, and the International Council of Metals and Environment (representing the mining industry) as participants. The Workshop’s report¹²⁶ was discussed at the twenty-fourth session of the Committee,¹²⁷ and a Working Group on World Heritage and Mining was created at the Committee’s request. As a follow-up to the Committee’s recommendations, a workshop on “No Go Areas” was hosted by the World Resources Institute and Placer Dome in 2001.

The absence of clear national or international rules clarifying the relationship between mining and World Heritage Sites has led to initiatives emerging outside governmental or intergovernmental processes. One such process resulted in the August 2003 No Go Pledge, in which a number of the world’s largest mining companies participated. Fifteen corporate members of the International Council on Mining & Metals (“ICMM”) committed to not explore nor mine in World Heritage properties and to take steps to

121. IUCN World Comm’n on Protected Areas, *Position Statement on Mining and Associated Activities in Relation to Protected Areas* (Apr. 1999), available at <http://www.iucn.org/themes/wcpa/pubs/pdfs/miningposition99.pdf>.

122. See U.N. Educ., Scientific, & Cultural Org., World Heritage Comm., 23rd Sess., Marrakesh, Morocco, Nov. 29 - Dec. 4, 1993, *Report*, X.53-54, U.N. Doc. WHC-99/CONF.209/22 (Mar. 2, 2000), available at <http://whc.unesco.org/archive/1999/whc-99-conf209-22e.pdf>.

123. *Id.*

124. *Id.*

125. *Id.*

126. Technical Workshop on World Heritage and Mining, Gland, Switz., Sept. 21-23, 2000, *Workshop Report* (June 2001), available at http://www.iucn.org/themes/wcpa/pubs/pdfs/Heritage_Mining.pdf.

127. U.N. Educ., Scientific, & Cultural Org., Bureau of the World Heritage Comm., *Information Document: Report of the Technical Workshop on “World Heritage and Mining,”* U.N. Doc. No. WHC-2000/CONF.203/INF.7 (Oct. 12, 2000), available at <http://whc.unesco.org/archive/2000/whc-00-conf203-inf7e.pdf>; U.N. Educ., Scientific, & Cultural Org., World Heritage Comm., 24th Sess., Cairns, Austl., Nov. 27-Dec. 2, 2000, *Report*, U.N. Doc. WHC-2000/CONF.204/21 (Feb. 16, 2001), available at <http://whc.unesco.org/archive/2000/whc-00-conf204-21e.pdf>.

ensure that “existing operations in World Heritage properties as well as existing and future operations adjacent to World Heritage properties are not incompatible with the outstanding universal value for which these properties are listed, and do not put the integrity of these properties at risk.”¹²⁸

The No Go Pledge was the product of the ICMM’s effort, and not a collaborative or multi-stakeholder initiative. It was, however, motivated by earlier dialogues with the IUCN surrounding the issue of mining and World Heritage Sites and by fear, on the part of the mining industry, that in the wake of the Amman Resolution and controversy over projects such as the Jabiluka mine, reputational risk might get out of hand.

The 2003 No Go Pledge was copied by the Royal Dutch/Shell Group on August 27, 2003 with “a commitment not to explore for or develop oil and gas resources within natural World Heritage Sites.”¹²⁹ Goldman Sachs made a similar pledge on December 20, 2005 committing itself to “not knowingly finance extractive projects or commercial logging in World Heritage sites.”¹³⁰

These private initiatives to define global rules surrounding natural resource extraction and World Heritage Sites are increasingly common given the current favour for “deregulatory” initiatives at the international level. They form part of a growing number of attempts to enunciate international standards or rules outside a framework of intergovernmental agreement.¹³¹ These processes are not intended to be open, inclusive, or democratic. Their emergence should highlight some of the democracy-enhanc-

128. Int’l Council on Mining & Metals, *Position Statement: Mining and Protected Areas* (Aug. 20, 2003), available at <http://www.icmm.com/publications/758ICMMPos.StatementonMiningandProtectedAreas.pdf>.

129. SIR PHILLIP WATTS, ROYAL DUTCH/ SHELL GROUP, *WORKING TOGETHER FOR BIODIVERSITY* (Aug. 27, 2003), available at http://www.shell.com/static/media-en/downloads/speeches/pbw_bio_27082003.pdf

130. UNESCO World Heritage Centre, *Goldman Sachs Declares World Heritage Sites “Off Limits”* (Dec. 20, 2005), <http://whc.unesco.org/en/news/216> (emphasis omitted) (quoting Goldman Sachs Environmental Policy Framework, http://www2.goldmansachs.com/out_firm/our_culture/corporate_citizenship/environmental_policy_framework/docs/EnvironmentalPolicyFramework.pdf (last visited Nov. 22, 2006)).

131. Other recent global initiatives to define acceptable standards for natural resource extraction projects largely outside the scope of intergovernmental processes include the Equator Principles for project finance, and the Mining, Minerals and Sustainable Development (“MMSD”) Initiative. For an examination of the World Bank’s Social and Environmental Guidelines as an emerging source of “global rules” for corporations, public, and private financial institutions as well as governments and export credit agencies, see Natasha Affolder, *Cached not Cash: A Different Sort of World Bank Borrowing*, 14 MICH. ST. J. INT’L L. (2006).

ing qualities of existing intergovernmental environmental regimes.

V. PARTICIPATION AND TRANSPARENCY IN DECISION-MAKING

A final aspect of the democracy problem in the Convention concerns problems of participation and transparency in decision-making. This includes concerns about the composition of the Committee, access to information, and participation in decision-making on the part of interested organizations and individuals. On its face, the Convention does not appear open to participants other than States Parties and the Convention's advisory bodies nor transparent in terms of its decision-making. However, such a formalistic critique of the treaty is misleading.

While the Convention does not formally provide for the public dissemination of its decisions, information about the workings of the Committee including reports of the meetings of States Parties and Committee deliberations are publicly available on UNESCO's comprehensive website. The Committee—and its advisory bodies—are also frequently provided with information from a range of NGOs. NGOs occupy the crucial role of “watch-dog,” alerting the Committee about threats to sites and the inadequacy of protection measures.¹³² While only States Party representatives may submit nominations for World Heritage Sites, requests for danger listing can come from any source—in fact, the Committee has relied on NGO submissions in a number of danger listing decisions.¹³³ NGOs, in joint initiatives with academic institutions, have been

132. The IUCN maintains ongoing correspondence with NGOs, park managers, and research organizations with respect to individual sites. Examples of such correspondence for the year 2002 include correspondence from WWF Australia on the Great Barrier Reef, the Canadian Parks and Wilderness Society on Nahanni National Park, Flora and Fauna International on Mount Nimba Strict Nature Reserve in Guinea/ Côte d'Ivoire, the Charles Darwin Research Station on the Galapagos, Ecuador, SOSNA (a Slovak environmental NGO) on the Caves of the Aggtelek Karst and Slovak Karst in Hungary/ Slovakia, and the Dian Fossey Gorilla Fund on Virunga National Park, Democratic Republic of Congo. IUCN – The World Conservation Union, *IUCN Report on the State of Conservation of Natural and Mixed Sites Inscribed on the World Heritage List* (Apr. 25, 2002), available at <http://www.iucn.org/themes/wcpa/pubs/pdfs/heritage/socreports/SOC25%20April2002.pdf>.

133. Conservation groups provided information to the Committee on the threats posed by mining in both the New World Mine and Jabiluka mine debates.

particularly active in compiling petitions for danger-listing of sites as a result of the threats posed by climate change.¹³⁴

Active involvement of NGOs in the Convention can be viewed either as a sign of the democratic health of the regime¹³⁵ or, conversely, as an indicator of its anti-democratic nature, revealing the extent to which interest groups dominate global institutions.¹³⁶ The Convention provides that NGO's "with similar objectives" to the IUCN, ICOMOS and ICCROM may "attend the meetings of the Committee in an advisory capacity."¹³⁷ The Guidelines make no provision for other non-States Party actors such as mining companies or sub-federal actors (such as provinces or states). The Committee was thus unsure how it should react to a Queensland delegation that, in 1988, arrived in Paris to formally object to the Queensland Rainforest World Heritage Site listing. Ultimately, at the suggestion of the Canadian delegate, the Queensland contingent was allowed to attend the meeting and the Queensland Environment Minister was allowed to speak.¹³⁸ Similarly, mining companies have not been welcomed into Committee meetings, although they have been permitted to provide the Committee with written submissions.

A. The Committee

The twenty-one member elected Committee does not attract the allegations of domination by a small group of nations or lack of representation of developing countries that undermines other in-

134. See, e.g., ERICA THORSON ET AL., INT'L ENVTL. LAW PROJECT, LEWIS & CLARK LAW SCHOOL, PETITION TO THE WORLD HERITAGE COMMITTEE REQUESTING INCLUSION OF WATERTON-GLACIER INTERNATIONAL PEACE PARK ON THE LIST OF WORLD HERITAGE IN DANGER AS A RESULT OF CLIMATE CHANGE AND FOR PROTECTIVE MEASURES AND ACTIONS (2006), available at <http://law.lclark.edu/org/ielp/glacierpetition.html>; SYDNEY CENTRE FOR INT'L AND GLOBAL LAW, UNIV. OF SYDNEY, GLOBAL CLIMATE CHANGE AND THE GREAT BARRIER REEF: AUSTRALIA'S OBLIGATIONS UNDER THE WORLD HERITAGE CONVENTION (2004), available at http://www.law.usyd.edu.au/scigl/SCIGLFinalReport21_09_04.pdf.

135. See Raustiala, *supra* note 42, at 415 ("Broadening the scope of popular and interest-group participation in international law-making is, in my view, not anti-democratic but pro-democratic.").

136. See Jeremy Rabkin, *International Law vs. the American Constitution—Something's Got to Give*, NAT'L INT., Spring 1999, at ¶ 39 ("Actual governments can be awkward for UN agencies. It is usually much easier to deal with constituencies that do not themselves have to pay UN bills or submit to UN directives. NGOs—a sort of phantom citizenry—are the perfect partners for the phantom authority exercised by UN agencies.").

137. Convention, *supra* note 3, at art. 8(3).

138. Thomas H. Edmonds, *The Queensland Rainforest and Wetlands Conflict: Australia's External Affairs Power*, 20 ENVTL. L. 387, 411 (1990).

ternational organizations such as the Security Council or World Trade Organization ("WTO"). Since the Committee was created, Brazil, Egypt, Mexico, Lebanon, and Senegal have collectively served on the Committee for a total of eighty-seven years (fifteen mandates); comparatively, the UN Security Council's "Big Five" (China, France, the United Kingdom, the United States, and the Russian Federation) have collectively served for only sixty years (nine mandates).¹³⁹ Calls for new procedures such as quotas to ensure better regional representation are still voiced, although to date they have been resisted by the Committee.¹⁴⁰

While the Committee has included a diversity of States Parties in its membership, problems of balance in terms of the current World Heritage List remain. Of the 812 properties included on the World Heritage List as of May 2006, 628 are cultural sites, and only 160 are sites of natural heritage.¹⁴¹ The Committee has also noted the lack of protected sites in developing countries: "It is generally recognized that the cultural properties inscribed on the World Heritage List do not truly reflect the cultural and geographical diversity of human achievement."¹⁴² In response to these imbalances, the Committee has adopted a global strategy to achieve the goal of establishing a "representative, balanced and credible World Heritage List."¹⁴³ The Committee has also revised the *Operational Guidelines* to limit the number of nominations from countries with sites already on the list and to request that States Parties "consider whether their heritage is already well represented on the List and if so to slow down their rate of submission of further nominations."¹⁴⁴

139. This information is taken from U.N. Educ., Scientific, & Cultural Org., *Item 9 of the Provisional Agenda: Elections to the World Heritage Committee*, WHC-03/14.GA/INF.9B (July 9, 2003), available at <http://whc.unesco.org/archive/2003/whc03-14ga-inf09be.pdf>.

140. The Committee has rejected as "rigid" and unsuitable suggestions that it should consider establishing new procedures for elections such as regional quotas to ensure effective representation of regions and cultures. U.N. Educ., Scientific, & Cultural Org., *Equitable Representation of Different Regions and Cultures of the World*, 1-3, U.N. Doc. CC-90/CONF.004/INF.4 (Nov. 9, 1990), available at <http://whc.unesco.org/archive/1990/cc-90-conf004-inf4e.pdf>.

141. The other 24 are mixed properties. WORLD HERITAGE CENTRE, *supra* note 11.

142. Int'l Council on Monuments & Sites, *Proposals for Achieving a More Representative Sample of Cultural Heritage on the World Heritage List* (Dec. 1997), available at <http://whc.unesco.org/wg-replist/icomos-imbalance.htm>.

143. *Operational Guidelines*, *supra* note 9, ¶ 54.

144. *Id.* ¶ 59.

B. Expert Decision-making

Expert decision-making and participatory processes traditionally rely on conflicting bases of legitimacy.¹⁴⁵ Of these two bases of legitimacy, the World Heritage regime relies most strongly on appeals to expertise. The expertise of the Committee and its advisory bodies are invoked to buttress individual decisions and make them appear less political, more objective, and more palatable. This invites the claim that:

scientific objectivity has facilitated regime maintenance [in the case of the Committee]. . . . Despite a lack of formal enforcement powers, the [World Heritage Committee] has been able to rely on objective and neutral scientific evidence to avoid the politicisation of decision-making processes and to enhance compliance. It has even been successful in persuading state parties to review and rescind decisions that could otherwise damage important heritage-listed sites.¹⁴⁶

Such claims obfuscate the inescapable reality that many issues the Committee decides, such as the threats posed by mines situated in and around World Heritage Sites, involve not only technical questions, but also questions of values. An approach where primacy is given to science is not always followed.¹⁴⁷ Scientific findings are contested,¹⁴⁸ and the credibility of scientific "experts" attacked.¹⁴⁹ Finally, invoking "expertise" can also undermine democratic participation, at both the national and international levels.

The involvement of "experts" in the decision-making process means as soon as an issue is institutionally construed as demanding expertise (e.g. the identification of world heritage values), the scope for legitimate participation is markedly diminished. "Only those larger environmental groups with scientific and technical

145. Bodansky, *supra* note 5, at 620 ("Expert decision making stands in sharp contrast to public participation.").

146. Maswood, *supra* note 17, at 357.

147. Consider the decision of the Committee not to add Kakadu to the Danger List despite the recommendations of the Committee's "expert" advisory bodies.

148. The scientific findings relied on by the expert bodies questioned the science behind the Australian government's Environmental Impact Study (EIS). See Maswood, *supra* note 17, at 364.

149. Australian Federal Environment Minister Robert Hill attacked the credibility and independence of the IUCN and ICOMOS following their Mission to Kakadu. See Sophie Boukhari, *The Kakadu Affair Shakes the Heritage World*, UNESCO COURIER, October 1999, at 12, available at <http://unesdoc.unesco.org/images/0011/001174/117419e.pdf>.

information/resources (e.g. the Australian Conservation Foundation), are in a position to challenge or question the credibility of government decisions.”¹⁵⁰

The relationship between protected areas and natural resource extraction is deeply value-laden and is an issue on which domestic consensus is difficult to forge.¹⁵¹ Many resource-rich countries like Canada and Australia have complicated and unresolved legal regimes governing mining in and around protected areas.¹⁵² Whether mining should be allowed in and around World Heritage Sites is not a question that science on its own can answer. Thus, expertise alone is unlikely to provide a sufficient basis for legitimizing international rules on mining and World Heritage Sites.

VI. CONCLUSION: DEMOCRATIC LEGITIMACY AND THE THREATS TO COMPLIANCE

Why is it that the democracy-enhancing qualities of international environmental treaties are so infrequently discussed? Are democratic deficits so much more pervasive, or just more interesting? Peter Sand reminds us that the “essence of environmental public trusteeship, as embodied in the [World Heritage] Convention, is the democratic *accountability* of states for their management of trust resources in the interest of the beneficiaries—the world’s ‘peoples’.”¹⁵³ The Convention thus holds States Parties responsible for the protection of World Heritage Sites situated within their borders. It does so by listening to the concerns of non-state and sub-state interests and by raising issues that states may prefer to suppress.

In the context of disputes between mining and World Heritage Site protection, compliance with the objectives of the Convention will be fostered by two developments: (1) the clear

150. Benjamin J. Richardson, *A Study of Australian Practice Pursuant to the World Heritage Convention*, 20 ENVTL. POL’Y & L. 143, 150 (1990).

151. Witness the heated debates over oil drilling in the Arctic National Wildlife Refuge.

152. In both countries jurisdictions alternatively ban mining in parks, allow pre-existing mining rights in parks, allow new mining rights to be created, and/or permit exploration. For the Australian regime, see BOER & WIFFEN, *supra* note 57, at 234. For Canada, see DAVID R. BOYD, UNNATURAL LAW 172 (2003).

153. Peter H. Sand, *Global Environmental Change and the Nation State: Sovereignty Bounded?*, in MULTILEVEL GOVERNANCE OF GLOBAL ENVIRONMENTAL CHANGE: PERSPECTIVES FROM SCIENCE, SOCIOLOGY AND THE LAW 519, 537 (Gerd Winter ed., 2006).

articulation of rules surrounding world heritage and mining; and (2) the dispelling of myths and misunderstandings surrounding the processes of World Heritage Site listing and danger-listing. Additionally, further research is needed assessing the effectiveness of the existing mechanisms for promoting compliance with the Convention, particularly the institution of the Danger List. This research should ask whether the Danger List is an effective model for other environmental law treaties.¹⁵⁴

Measuring compliance requires assessing the conformity between a state's behaviour and a treaty's explicit rules. One of the greatest challenges for assessing compliance with the World Heritage Convention remains the vagueness surrounding expressed obligations in the treaty. This vagueness reflects the unresolved balancing of communal obligations and state sovereignty and the sacrificing of precision to secure universal acceptance.

The Convention faces serious challenges in the coming years. Increasing population, demand for natural resources, and other development pressures will create inevitable conflict with a regime designed to conserve areas of outstanding natural and cultural heritage. Accusations of democratic illegitimacy pose less obvious—but nonetheless significant—threats to the future effectiveness of the Convention.

154. The author is currently completing an in-depth review of Danger Listings and threatened Danger Listings in an attempt to answer this question.